

CIVIL LITIGATION IN COMPARATIVE CONTEXT

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2012 Supplement

Preface

In the five years since *Civil Litigation in Comparative Context* was published there have of course been changes in the law and scholarship. Moreover, new translations of some of the material have become available. We are therefore pleased to make this Supplement available to interested students and teachers. We acknowledge with many thanks the research and editorial assistance of Giacomo Pailli, Florence University, Reebaa Assy, Haifa University School of Law, Hiroshi Tega, Tokyo Metropolitan University, and Kazu Higashiu, Judge of the District Court, Japan. Our thanks also to Professor Remo Caponi of the University of Florence Faculty of Law for his helpful up-date on recent changes in procedural law in Italy. His detailed report is reproduced in its entirety in the Appendix. We further acknowledge the helpful research assistance of Justyna Sobczyk and Times Wang. We are also grateful to Louis Higgins of the West Publishing Company for supporting this project and for making it available without charge.

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Chapter 1. An Introduction and Overview

I. Introduction

B. Categorizing the World's Legal Systems and Their Procedures

- p. 3-4: The continued division of the world's procedural systems into the classic common law/civil law divide is explored and debated in *Common Law, Civil Law and the Future of Categories*, Walker and Chase, eds. (LexisNexis 2010)(hereafter "Walker and Chase"), an edited compilation of papers presented at a conference held in Toronto in 2009. See Chapter 12, this Supplement, *infra*.
- p. 3, footnote 8: The Schlesinger casebook is now in its 7th edition. See "Ugo A. Mattei, Teemu Ruskola, Antonio Gidi (eds.), *Schlesinger's Comparative Law: cases, text and materials* 177-279 (7th ed. 2009)."

II. An Overview of Different Procedural Systems

A. The Civil Law System

p. 6:

In France, the power of the *Conseil constitutionnel*, is no longer restricted to considering the constitutionality of statutes prior to their promulgation. On the transition of the *Conseil* from political to jurisdictional, see *infra* Ch. 3, Sec. V, note to p. 152.

- p. 7, Add to FN 17: Ernesto Lupo, *Relazione sull'anno giudiziario 2010*, available at <http://www.cassazioneitaliana.it> (last visited, March 9, 2011); for France see *Annuaire Statistique de la Justice*, available <http://www.justice.gouv.fr/> (last visited, March 9, 2011).

p. 8, The Nouveau Code de Procedure Civile is now referred to as the Code de Procedure Civile. The abbreviation is accordingly CPC, not NCP.

p. 11, footnote 33: Note that the Cadiet/Jeuland book is now in a sixth edition as of 2009.

p. 13, first full para.: Note that after a 2009 reform Italy also offers coercive measures.

p. 13, footnote 42: Add Remo Caponi, Italian Civil Justice Reform 2009, *Zeitschrift fuer Zivilprozess International* 14 (2009) (journal hereafter referred to as “ZZPInt”).

B. The Common Law System – England

p. 20-21: Mid-range cases for fast tracking purposes now include those up to £25,000.

C. The Common Law System – the United States

p. 25, footnote 53: The Silberman book is now in its 3d edition: See pp.1-12 (3d ed. 2009).

III. Other Systems: An Apologia

p. 50: To the list of resources, add Carl F. Minzner, China’s Turn Against Law, 59 *Amer. J. Comp. Law* 935 (2011)(describes de-emphasis of court adjudication in China); Symposium, Law Religion and Secularism, 52 *Amer. J. Comparative Law* Vol. 4 (Fall 2004), (includes articles on Islamic law, Afghanistan, Nigeria, and India). Informative descriptions of several legal traditions not treated in this work may be found in *The Cambridge Companion to Comparative Law* (Bussani and Mattei, eds. 2012). Included are chapters titled The East Asian Legal Tradition, The Jewish Legal Tradition, The Islamic Legal Tradition, The Sub-Saharan Legal Tradition, and the Latin-American and Caribbean Legal Traditions.

Chapter 2 The Structure of the Legal Profession

p. 52, 1st para., 9th line:

substitute “(art. 43)” with “(art. 49 TFEU¹)”

substitute “(art. 49)” with “(art. 56 TFEU)”

IV. The Structure of the Legal Profession in the Civil Law

p. 52, FN 2: The Civil Law Tradition, is now in a new edition, John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, (3rd ed. 2007).

III. The Legal Profession vs. the Legal Professions

p. 61, add to the first paragraph:

Editor's Note: In recent years, several traditional restrictions on the exercise of the legal profession have been attenuated if not eliminated. Among them, the prohibition or limitation of partnership, in favor of the constitution of larger law offices.

IV. The Structure of the Legal Profession

Germany

p. 65, Insert the following Editor's Note to the subsection on *Education and Training*:

Editor's Note: The current minimum duration of German legal education is 4 years. See Stefan Koriath, *Legal Education in Germany Today*, 24 *Wis. Int'l L. J.* 85, 91 (2006).

p. 72, Insert the following Editor's Note to the subsection on the *The Federal Attorneys Law and the Code of Ethics*:

Editor's Note: The German Federal Bar Association last amended *BORA* on 15 June 2009. The current text is available in English at <http://www.brak.de/seiten/06.php> (under the link "Rule of Professional Practice" – Site last visited February 8, 2011).

p. 73, FN 3: Add the following to FN 3:

Following the decision of the Constitutional Court, the Bundestsag passed a new statute [BGBl 2008, I s. 1000 (Nr. 23)], entered into force on 1 July 2008, regulating the admissibility of conditional fee agreements. In particular, it is now possible to enter in such an agreement when the client would not otherwise have sufficient economic means to bring the action. See Matthias Kilian, *Das Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren*, NJW 27/2008, at 1905-10.

France

pp. 74-75: substitute for arts. 64 and 65 of French Constitution the following text, available at the website of the Conseil Constitutionnel. Translation available at <http://www.conseil-constitutionnel.fr/> (last visited February 5, 2011).

Constitution of the Republic of France

Article 64

The President of the Republic shall be the guarantor of the independence of the Judicial Authority.

He shall be assisted by the High Council of the Judiciary.

An Institutional Act shall determine the status of members of the Judiciary. Judges shall be irremovable from office.

Article 65

The High Council of the Judiciary shall consist of a section with jurisdiction over judges and a section with jurisdiction over public prosecutors.

The section with jurisdiction over judges shall be presided over by the Chief President of the *Cour de cassation*. It shall comprise, in addition, five judges and one public prosecutor, one *Conseiller d'État* appointed by the *Conseil d'État* and one barrister, as well as six qualified, prominent citizens who are not members of Parliament, of the Judiciary or of administration. The President of the Republic, the President of the National Assembly and the President of the Senate shall each appoint two qualified, prominent citizens. The procedure provided for in the last paragraph of article 13 shall be applied to the appointments of the qualified, prominent citizens. The appointments made by the President of each House of Parliament shall be submitted for consultation only to the relevant standing committee in that House.

The section with jurisdiction over public prosecutors shall be presided over by the Chief Public Prosecutor at the *Cour de Cassation*. It shall comprise, in addition, five public prosecutors and one judge, as well as the *Conseiller d'État* and the barrister, together with the six qualified, prominent citizens referred to in the second paragraph.

The section of the High Council of the Judiciary with jurisdiction over judges shall make recommendations for the appointment of judges to the *Cour de cassation*, the Chief Presidents of Courts of Appeal and the Presidents of the *Tribunaux de grande instance*. Other judges shall be appointed after consultation with this section.

The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on the appointment of public prosecutors.

The section of the High Council of the Judiciary with jurisdiction over judges shall act as disciplinary tribunal for judges. When acting in such capacity, in addition to the members mentioned in the second paragraph, it shall comprise the judge belonging to the section with jurisdiction over public prosecutors.

The section of the High Council of the Judiciary with jurisdiction over public prosecutors shall give its opinion on disciplinary measures regarding public prosecutors. When acting in such

capacity, it shall comprise, in addition to the members mentioned in paragraph three, the public prosecutor belonging to the section with jurisdiction over judges.

The High Council of the Judiciary shall meet in plenary section to reply to the requests for opinions made by the President of the Republic in application of article 64. It shall also express its opinion in plenary section, on questions concerning the deontology of judges or on any question concerning the operation of justice, which is referred to it by the Minister of Justice. The plenary section comprises three of the five judges mentioned in the second paragraph, three of the five prosecutors mentioned in the third paragraph as well as the *Conseiller d'État*, the barrister and the six qualified, prominent citizens referred to in the second paragraph. It is presided over by the Chief President of the *Cour de cassation* who may be substituted by the Chief Public Prosecutor of this court.

The Minister of Justice may participate in all the sittings of the sections of the High Council of the Judiciary except those concerning disciplinary matters.

According to the conditions determined by an Institutional Act, a referral may be made to the High Council of the Judiciary by a person subject to trial.

The Institutional Act shall determine the manner in which this article is to be implemented.

p. 76: There is a new edition of the Elliot/Vernon book. The new edition is: Catherine Elliott / Eric Jeanpierre / Catherine Vernon, French Legal System, (2nd ed. 2006).

p. 79, insert this Editor's Note to the subsection on *Avocats*:

Editor's Note: On December 21, 2010, the French National Assembly passed a bill submitted by the Council of Ministers on June 3, 2009 "portant réforme de la représentation devant les Cours d'appel" (concerning the reform of representation before the Courts of appeal). The law is scheduled to come into effect on January 1, 2012, when the *avoués* will become automatically *avocats*, and will be admitted to plead before the courts of appeal as such. On December 23, sixty senators challenged the constitutionality of the law before the Conseil Constitutionnel. The Conseil, in its decision n° 2010-624DC of January 20, 2011, declared some limited provisions of the statute unconstitutional. On January 25, 2011 Parliament enacted a new Law n. 2011-94, which, as stated above, merged the profession of *avoués* into that of *avocats* in 2012.

p. 82, insert to the subsection *Avocats aux conseils*:

Editor's Note: The current number of *avocats aux conseils* is now 91. See, Catherine Elliott / Eric Jeanpierre / Catherine Vernon, *French Legal System*, 246 (2nd ed. 2006).

Italy

p. 84, second para. from the bottom, last two lines: substitute “eight years” with “twelve years” and “one year” with “five years”.

p. 85, add to subsection 1 of the Note on the Italian Legal Profession:

The statute referred to in the final paragraph of this subsection has not been implemented.

p. 86, first full para.:

Editor's Note: the current number of *notari* has grown to about 6,000.

p. 86, add to Note 3, The Italian Judiciary in Transition:

The Law n. 111 of 2007 has limited the access to the national examination. The degree in law is still a requisite, but it is not sufficient anymore. Candidates are required to show a higher qualification such as a diploma from a special two-year postgraduate specialized school, a Ph.D. in law or the admission to the Bar as a lawyer. The minimum apprentice period has been reduced to eighteen months.

p. 87, Add to the last full para.:

The Law n. 111 of 2007, modifies some of the aspects touched upon by the law of 2005 and provides also for the institution of the Superior School of the Judiciary that will be in charge of the initial and continuing legal education of judges. The school, however, has not yet been implemented as of 2012.

Japan

p. 89, add, following the Hasebe excerpt:

Note: Following the post-War legislation which created the system of assistant judgeship of a limited competence, an amendment allowed “selected” assistant judges of 5 years or longer experience to act as full-fledged judges. The legislation was intended to be temporary to cope with the shortage of judges in the post-War period, but the system is still maintained today and almost all assistant judges are so selected. Because the judicial role of assistant judges within five years is limited, they are given various opportunities outside of judiciary, such as working in a law firm or administrative agency, studying abroad, etc. for general training purposes.

p. 93-4, insert this Editor’s Note:

P. 93-94

The “Note on Developments in Japan” is supplemented with more recent statistics:

Recent NLE statistics of applicants and their success rate added:

Year	Applicants	Passers	Success Rate
2008	21,994	144	0.7% (old exam)
	7,842	2,065	26.3% (new exam)
	Total	2,209	
2009	18,611	92	0.5% (old exam)
	9,734	2,043	21.0% (new exam)
	Total	2,135	
2010	16,088	59	0.4% (old exam)
	11,127	2,074	18.6% (new exam)
	Total	2,133	
2011		6	(old exam)
	11,891	2,063	17.3% (new exam)
	Total	2,069	
2012	11,265	2,102	18.7% (new exam)

The chart on page 94 is updated as follows:

Year	Total	Judges	Prosecutors	Bar	Others*
2007	2,376(568)	115(35)		87(26)	1,254(291) 21(8)
2008	2,340(619)	99(36)	93(32)		2,026(527) 122(24)
2009	2,346(635)	106(34)		78(31)	1,978(523) 184(47)
2010	2,144(563)	102(32)		70(22)	1,714(443) 258(66)

2011 2,152(597) 102(34) 71(24) 1,515(418) 464(121)

See generally, Jeffrey S. Lubbers, Japan's Legal Education Reforms from an American Law Professor's Perspective, Washington College of Law American University, February 2010, available at <http://ssrn.com/abstract=1552094>, at 12 and n.64. On the Japanese reforms of legal education, see also Shigenori Matsui, Turbulence Ahead: the Future of Law Schools in Japan, 62 J. of Legal Educ. 3 (2012).

England

pp. 95-96, Insert the following to the Note on Developments in England:

A new Legal Service Act was passed in 2007, and effective as of October 2011, aimed at liberalizing and regulating legal services in England and Wales in order to promote competition, provide a new system to deal with legal services' consumers' complaints, and allow the creation of "mixed law firms" (*Alternative Business Structures*) between solicitors and other professionals, under certain limits.

Chapter 3 Organization of the Courts

II. Civil Law Systems

Germany

p. 116, add to the section on the German judiciary:

*Note*²

The total number of judges in Germany on December 31st, 2008, was 20,101, of whom roughly one third (7,195) were women. The number of public prosecutors was 5,122, of whom 1,982 were women. The same year, 454,892 new cases were lodged in the Labor Courts, 127,735 in the Administrative Courts and 2.2 million in the courts of general civil jurisdiction (1,835,106 million before Local Courts; 366,267 before State District Courts). In turn, in the courts of appeal 53,477 appeals were filed from State District Courts and 24,672 appeals regarding Local Courts judgments in family cases.

As of 2010, the number of judges sitting on the Federal Supreme Court was 127, distributed among 12 civil senates, 5 criminal senates, 8 specialized senates, and 1 senate created in 2009 to support the civil senates in dealing with the recent flow of cases concerning patent revocation. In 2009, out of a total number of 5,152 civil appeals, the Supreme Court received 3,192 and decided 3,149 appeals on a point of law or on a refusal to grant a leave to appeal by a lower court. Only 736 of these appeals were decided with a judgment of the Court. Lastly, due to a transitory regulation meant to end in December 31, 2011, currently an appeal against a refusal by a lower court to grant a leave to appeal is admissible only if the value of the dispute exceeds 20,000 euros.

France

pp. 116-119: substitute the for excerpt by John Bell Bell this text by Loïc Cadiet:

Loïc Cadiet, Introduction to French Civil Justice System and Civil Procedural Law, 28 *Ritsumeikan Law Review*, 331, 332-38 (2011)

As the law both of civil justice and of the civil trial, private judicial law is built upon a court system characterized by the very French principle of the ‘dualism’ of court hierarchies. The organization of courts in France resembles in effect a diptych with, on the one side, the so-called judicial courts, organized hierarchically under the

² For the following figures see The Federal Court of Justice, available in English on the *Bundesgerichtshof* website, <http://www.bundesgerichtshof.de> (Site last visited February 12, 2011); and the statistics of the Federal Ministry of Justice at <http://www.bmj.bund.de/> (in German; site last visited February 12, 2011).

authority of the highest judicial court, or *Cour de Cassation*, and, on the other, the administrative courts, organized under the authority of the highest administrative Court, or *Conseil d'Etat*. At the beginning of the French Revolution, a law of 16-24 August 1790 had separated judicial and administrative functions by insulating the administration from supervision by the judicial courts and subjecting it instead to a specific control exercised by the Administration itself. In the event of a dispute with the Administration, a citizen could only file an appeal with the immediate supervisor of the decision maker (a so-called 'hierarchical appeal') and, eventually, with the competent Minister who was thus both judge and party. This system is said to be based on the theory of 'administrator-judge.' However, it was not until the establishment of the *Conseil d'Etat* and of the Councils of Prefectures (*Conseils de préfecture*) in 1800, and then the law of 24 May 1872, that the dualism of the French court system really took shape. This law recognized in effect the *Conseil d'Etat's* autonomous judicial authority, and thus marked a transition from a 'retained' to a 'delegated' justice, in which the last word was no longer left to the executive branch. Remarkably, the same law created a *Tribunal des conflits*, in charge of settling disputes that could arise between the two hierarchies of courts but which is not a supreme court. The Conflicts Tribunal is composed of equal numbers of members of the *Cour de Cassation* and of the *Conseil d'Etat*. There thus exist in France two orders of usual courts - judicial courts and administrative courts - though the former, it should be noted, dispense both criminal and civil justice.

Does this mean that the dual court system is here to stay? Only time will tell, but the principle of dualism is in fact subject to recurring and even growing criticisms. It is a source of practical complexity for the general public, whether due to the uncertainty or incoherence in the jurisdictional demarcation between the two categories of courts or the contradictions in case law that can result. While specialized judges may always be needed within the administration, the administration does not need its 'own' judge, since the right of access to a judge should not necessarily differ according to the nature of the dispute at hand. Even so, the judicial and administrative courts are increasingly subject to common rules of both constitutional and international origin, especially the right to a fair trial. These rules are proving to be important factors of homogenization in the sources of private and administrative law.

1. The Composition of Courts

1.1. A Single Judge or a Panel of Judges? For many, French law embodies the principle of collegiality. A decision can only be rendered if a certain number of judges, generally three, were present at the hearings and participated in the deliberation. The advantages of such a system are several. First of all, collegiality helps ensure impartiality and a high quality of justice. Deliberation by a panel normally permits digging deeper into difficulties, encourages reflection, and helps

overcome prejudices and biases. Collegiality also supports judicial independence, since judicial responsibility is shared under conditions of the utmost secrecy. This is also why French law is so attached to the anonymity of the collegial judgment and to the prohibition on the kind of dissenting opinions that are allowed in other systems, notably the common law. Judges are thus indirectly protected against threats, grudges and reprisals. Yet, the opposite single-judge system is not without merit. The single judge surely cultivates in magistrates a sense of personal responsibility, while concentrating judicial activity reduces the operating costs of the judicial apparatus, which is decidedly in the public interest.

This quite pragmatic consideration helps explain the current growth in single-judge panels. It is true that court organization in France has always known both single judge as well as multi-judge panels. Some examples of single-judge courts go far back, including the judge for summary interlocutory proceedings (*juge des référés*), the bankruptcy judge (*juge-commissaire en matière commerciale*), the former justice of the peace (*juge de paix*), and the district court (*tribunal d'instance*). But use of the single-judge panel has undeniably expanded in recent years. The rise is observable in civil matters, as shown by the creation of the juvenile judge (*juge des enfants*) in 1945, the expropriation judge (*juge de l'expropriation*) in 1958, the guardianship judge (*juge des tutelles*) in 1964, the judge in charge of enforcement of judgments (*juge de l'exécution*) in the period from 1972 to 1991, the family judge (*juge aux affaires familiales*) in 1993, and the proximity court (*juridiction de proximité*) in 2003, not to mention the increased authority of chief judges, and in particular the president of the principal court of first instance (*tribunal de grande instance*). Notably, judges sitting as single judges are, with very rare exceptions, professional judges * * *

2. Specialization of Courts

2.1. Courts of First Instance. Within the regular judiciary there coexist both civil and criminal courts, which are not examined here.

The organization of the civil courts is relatively simple. At the first instance, the main civil court (*tribunal de grande instance* to be compared with *High Court* or *Landgericht*) is the pivot, stemming from the fact that it is a court of ordinary and general jurisdiction, which has exclusive jurisdiction over a great many matters, including personal status, real estate disputes and enforcement of judgments. Its territorial scope of jurisdiction is the French department (*département*). But departments may have several *tribunaux de grande instance*, depending on the size of the population, the volume of judicial activity, and the communications network. There are 163 *tribunaux de grande instance* in all (for 100 *départements*). Alongside

these courts may be found courts of special jurisdiction that hear only those matters specifically determined by statute.

Another first instance court is the district court (*tribunal d'instance*, to be compared with *County Courts* or *Amtsgericht*), which is the successor to the former justices of the peace and is competent to hear small civil claims (such as disputes with neighbours, lease cases, and litigation over debts of less than 10 000 €). As a rule, the territorial jurisdiction of the district court extends over several cantons, or districts, which are the territorial subdivisions of the *départements*. Usually the district court takes the *arrondissement*, comprising several districts, as its territorial reference (each *département* has several *arrondissements*). District courts number 305. Since the law of 9 September 2002, there have also existed judges for very small civil claims (*juridictions de proximité*) who are in charge of controversies in an amount of less than 4,000 €. These 305 courts also have jurisdiction over injunctions to pay (*injonction de payer*, to be compared with *mahnverfahren*) or to perform up (*injonction de faire*) to the same monetary amount. The proximity court is in theory a full-fledged court. But, if it finds itself faced with a 'serious legal difficulty relating to the application of a rule of law or the construction of a contract binding the parties,' it may refer the case to the district judge to act on its behalf, as if it itself were the proximity judge itself (CPC, art. 847-4).

The commercial courts (*tribunaux de commerce*) are the oldest courts in the French judicial organization, dating back to the end of the Middle Ages. Today they number 135. A specifically French institution, the commercial court is a collegial court composed exclusively of merchants elected by their peers. (There was, however, a proposal, since abandoned, to convert it into a 'mixed' court, composed both of merchants and professional judges). The commercial court has jurisdiction over commercial cases, broadly defined as disputes between merchants, but also disputes over commercial acts (such as bills of exchange), even if they are not the act of a merchant, and over controversies involving commercial corporations, as well as bankruptcy proceedings involving commercial and craft enterprises.

The labour court (*conseil de prud'hommes*), whose origin dates back to the beginning of the 19th Century, resolves individual disputes arising out of an employment or apprenticeship contract. It first attempts conciliation, but if conciliation cannot be achieved, the dispute will be resolved by a judgment. There are today 210 labour courts. Members of the labour court are elected, with an even number of judges. Half the members represent employers, and half represent employees.

Two other courts of specialized jurisdiction, both staffed entirely by ordinary citizens (and known as *juridictions échevinales*), were created in the middle of the 20th Century. These are (i) the social security courts (*tribunaux des affaires de sécurité*

sociale), numbering 116, and having jurisdiction over disputes involving social security, such as participation in a social security plan and payments of contributions and benefits, and (ii) the mixed courts for rural leases (*tribunaux paritaires des baux ruraux*), numbering 305, and, as their name suggests, having jurisdiction over cases involving rural leases among landowners and farmers.

2.2. Courts of Appeal. The right of appeal had very early beginnings, but its rationale has varied over time. Under the *Ancien Régime*, before the French Revolution (1789), the appeal was essentially a response to preoccupations of a political nature. Due to the variety in levels of courts (royal, feudal, and ecclesiastical), a judicial decision could be subject to a multitude of successive appeals designed to gradually bring cases within the immediate sphere of the royal power.

The appeal thus served a political purpose, as an instrument for the consolidation of royal power against both the aristocracy and the Church. The belief in separation of powers, coupled with a desire to deny any political role to judges, led the revolutionary Parliament to disavow any such political rationale in favor of technical considerations. The appeal thus came to represent a guarantee of good justice, and for that it would be sufficient that the case be tried twice. The appeal permitted reformation or nullification of the judgment against which it was brought. And so it was usually brought before a court higher than the court of first instance, namely the Court of Appeal.

In civil matters, every litigant has the right to a second level of review of a case if he fails at the first level. It really is a second level, both because it is the last level and because one can access it only after the first proceeding has been exhausted. But even this principle is not absolute. Frequently, access to this second level is unavailable. A litigant may, under certain conditions, renounce the appeal. Statute may also bar access to this second level of review due to the small amount in controversy (4000 €) or due to the particular nature of the litigation (e.g., election disputes). In principle, appeal is brought before one of the 35 Courts of Appeal, constituting the courts of ordinary and general jurisdiction at the second level of review. It is only in rare situations that the appeal is brought before another tribunal, such as the national disabilities court (*Cour nationale de l'incapacité*) for technical litigation in the field of social security.

2.3. The Cour de Cassation. The principle of the so-called ‘*double level of litigation*’ entitles the litigant to have the case tried, in law and in fact, a second time. However, a further mean of recourse to France’s highest court in civil, commercial and criminal matters (*Cour de Cassation*) guarantees the litigant the right in any event to have the decision that was rendered by the lower courts examined for conformity with the rules of French law and, in an appropriate case, annulled.

Recourse to the *Cour de Cassation* (*le pourvoi en cassation*) is in principle extraordinary, in the sense that it is available only in cases specified by statute. When so authorized, the *Cour de Cassation* censures non-compliance with law of judgments rendered by trial courts, whether at the first level or on appeal. The *Cour de Cassation*, established by the Senate- Consult in 28 Floreal Year XII (1804), is the only court at its level, much as is the *Conseil d'Etat* within the hierarchy of administrative courts. Located in Paris, it is composed of high-ranking professional magistrates at the peak of their careers.

Due to the distinction between fact and law, recourse to the *Cour de Cassation* does not represent a third level of judicial review. A judge of the law only, the *Cour de Cassation* may only verify the correctness of the lower court's construction of the rule of law and of its application to the facts found by the lower court, facts that the *Cour de Cassation* has no authority to review as such. Its role is limited to ruling on the legality of the challenged judgment and not on the merits of the case. It is often said that it is not the dispute as such that is submitted to it, and that its role is therefore not to re-examine the case as would a court of appeal, but only the final decision rendered by the court below. As a result, if the recourse to the *Cour de Cassation* is justified, this court may not, in principle, substitute its decision for that of the trial judges. It may only set aside, or quash the challenged judgment and remand the case to a lower court, which will decide the case anew. The *Cour de Cassation* is not a supreme court in the American sense.

In addition to performing this judicial function in cases submitted to it, the *Cour de Cassation* plays a broader role. Its rulings are meant to '*be authoritative*' (or, in French language, *faire jurisprudence*), that is to say, serve as a point of reference for all courts. This is not to say that they are binding, in the manner of a precedent as in common law systems, or in the manner of the '*law-making rulings*' (*arrêts de règlement*) known under the *Ancien Régime* in pre-Revolutionary France. If they are authoritative, it is '*by authority of their reason*' and not '*by reason of their authority*'. Ensuring the uniform interpretation of the law is also one of the *Cour de Cassation*'s prime missions. This is a mission necessitated by the principle of the equality of citizens before the law.

p. 122 , Add the following Notes after the above quoted passage:

Editor's Note: The recent constitutional amendment No. 2008-724 of July 23, 2008, has conferred to the *Cour de cassation* and to the *Conseil d'État* the task of filtering questions of constitutionality that are raised by judges of lower courts before submitting them to the *Conseil constitutionnel*.

*Note*³

As of 2009 there were 305 Tribunaux d'instance that decided a total of 636,253 civil cases (of which 77,782 en référé) and 179 Tribunaux de grande instance that decided 934,479 (of which 117,190 en référé). In commercial matters, 135 Tribunaux du commerce decided 206,264 cases (of which 31,707 en référé), while in labor matters 210 Conseil de prud'hommes 192,411 (of which 52,214 en référé). In other areas, 115 Tribunaux des affaires de sécurité sociale rendered 98,964 decisions and 156 Tribunaux pour enfants 324,727. On the upper level, 35 Cours d'appel rendered 229,323 and 104,456 decisions in civil and criminal matters respectively. Lastly, the Cour de Cassation decided 20,402 civil and 8,192 criminal cases.

In the administrative jurisdiction, 42 Tribunaux administratifs have decided 184,623 cases, 8 Cours administratives d'appel 28,202 cases and the Conseil d'État 9,986 cases. As of 2010, 45 new cases were lodged before the Tribunal des Conflits, while the number of decisions was 49.

Italy

p. 123, add to Note 3:

An attempt to establish a sort of filter has been made with the Law No. 69 of June 18, 2009, which introduced a new art. 360-bis in the Italian Code of Civil Procedure, meant to reduce the workload of the *Corte di Cassazione*. This article provides for two “new” grounds upon which the Court can reject petitions to review: the appealed decision conforms with a principle previously enunciated by the *Corte* and no argument to confirm or amend that principle is given in the petition; or the breach of due process claimed in the petition is manifestly groundless. However, these new “filters” are seen as a mere repetition of other existing grounds and deemed to be quite ineffective in respect of the enormous docket of the Court.⁴ This shows, once more, the difficulty to address the issue of filters before the Italian Supreme Court short of a constitutional amendment.

p. 124, Add to paragraph 4 of the Note on Italy:

³ The following figures can be found in the report *Les chiffres clés de la Justice 2010*, available in French on the website of the Ministère de la Justice et des Libertés, <http://www.justice.gouv.fr> (last visited February 12, 2011). For the Tribunal des Conflits see *Rapports du Tribunal des Conflits*, available on the website of the Conseil d'État at <http://www.conseil-etat.fr/cde/fr/rapport-du-tribunal-des-conflits/> (In French; last visited February 12, 2010).

⁴ See Remo Caponi, *Italian Civil Justice Reform 2009*, ZZPInt 14 (2009), 150, who argues that “[the] Law 69 of 2009 leaves essentially unchanged the regulation of the review proceeding before the Court of Cassation as well as the problems related to it”.

5. The total number of Italian judges in 2011 was 8,908 out of an authorized number of 10,151.⁵ This means that there are 1,272 vacancies not covered. Roughly half of this nine thousand, which also includes 2,095 prosecutors, are women. This, along with a chronic lack of financial resources and of administrative personnel (with a vacancy rate around 13%), contributes to explain the average length of trials in Italy (1,576 days). There were only 2,526 justices of the peace currently in office out of the 4,700 authorized judgeships. The justices of the peace disposed of 1,742,492 proceedings in judicial year 2009/10 while 1,754,081 new claims were filed. As for the *tribunal*, 2,779,243 civil claims were filed and 2,802,621 cases were decided. The Courts of Appeal had 171,638 new claims and decided 152,650 cases. The Corte di Cassazione decided 28,963 civil cases, but 30,382 new appeals were lodged. It is noteworthy that 97,653 civil cases are currently pending before the Corte.

JAPAN

p. 124, add to the Note:

The jurisdictional limit of the summary court was raised from 90,000 yen to 140,000 yen (US \$ 16,000) in 2003.

ENGLAND

p. 131, add to Note 1:

The new Supreme Court of the United Kingdom is the appellate court of last resort for all civil cases and for criminal cases from England, Northern Ireland, and Wales. It commenced operation on October 1, 2009, when the then current Lords of Appeal left the Palace of Westminster and took office as “Justices of the Supreme Court” in the new court house located in Middlesex Guildhall, marking from a formal point of view, the separation of the judiciary from the legislative power. The jurisdiction of the new Court is similar to that of its predecessor, and the Court still does not enjoy the power of constitutional review of the acts of the Parliament. It has, though, inherited the jurisdiction over devolution matters from the Privy Council. When there is a vacancy on the Court, the new Justice is

⁵ The numbers of judges in Italy, constantly updating, can be found on the web site of the Consiglio Superiore della Magistratura at <http://www.csm.it> (last visited February 18, 2011). The figures relating to the number of decisions, as well as information on the average length of trials, can be found in the relation of the First President of the Corte di Cassazione, released for the opening of the judicial year 2011, and in the attached statistics available at <http://www.cortedicassazione.it> last visited February 18, 2011).

appointed by Her Majesty, pursuant to a process set out in the Constitutional Reform Act 2005, who also appoints one of the Justices as President and one as Deputy-President of the Court. See www.supremecourt.gov.uk (last visited November 6, 2012)

p. 132, add to the Note on England:

In 2009, the 216 County Courts rendered 937,258 judgments in non-family matters. In the Chancery division of the High Court, composed of 18 High Court judges plus the Head, the Chancellor of the High Court, 49,501 cases were filed. A total of 18,583 new claims were filed with the Queen's Bench Division, composed of 69 judges and a President. The Court of Appeal is composed of the Lord Chief Justice, the Master of the Rolls and other 37 Lords Justices. The President of the Family division and the Vice-Chancellor participate on a part-time basis. A total of 1,275 appeals in civil matters were brought before the Court, which disposed of 1,139 (hearing 504 of these). Finally, the Supreme Court in 2009 decided 64 cases.⁶

A substantial reform was introduced by the Tribunals, Courts and Enforcement Act of 2007. This act has created what can be called the English system of administrative courts. The first interesting aspect is the rationalization of the tribunals, many of which have been merged together in a two-layer system, with mixed professional composition and jurisdiction over the entire United Kingdom. At the lower level there is the First-tier Tribunal, at the higher the Upper-tier Tribunal, whose status is equal to that of the High Court. Secondly, the entire system is overseen by a Senior President of Tribunals nominated by the Lord Chancellor, and by the Administrative Justice and Tribunals Council. Both ensure the respect of the principles of accessibility, efficiency, professional competence, and fairness. The mechanism of appeal is quite complex. On the one side, both Tribunals have the power to review their own decisions, even by their own motion. On the other side, the statute provides that the decisions of the Lower Tribunal can be reviewed, with permission, by the Upper Tribunal, and that the decisions of this Tribunal can be appealed, again with permission, to the Court of Appeals. Lastly, the Act provides for the independence of these Tribunals, separating them from the respective agencies. This represent an important step, sought since the 1950s and finally accomplished.

⁶ See the statistics on the website of the Ministry of Justice, available at <http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm> (last visited February 13, 2011). The statistics on the Supreme Court represents the aggregation of the cases decided by the House of Lords and the new Supreme Court in the whole 2009.

IV. Constitutional Courts

Germany

p. 141-43: substitute for the translation of German Basic Law's provisions (art. 93-94) with the following, which is the text posted by the Bundestag on its website.

Fundamental Law (Grundgesetz) of the Federal Republic of Germany⁷

Article 92 – [Court Organization]

The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the *Laender*.

Article 93 – [Jurisdiction of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body;
2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or *Land* law with this Basic Law, or the compatibility of *Land* law with other federal law, on application of the Federal Government, of a *Land* government, or of one fourth of the Members of the *Bundestag*;
- 2a. in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on application of the *Bundesrat* or of the government or legislature of a *Land*;
3. in the event of disagreements concerning the rights and duties of the Federation and the *Laender*, especially in the execution of federal law by the *Laender* and in the exercise of federal oversight;
4. on other disputes involving public law between the Federation and the *Laender*, between different *Laender*, or within a *Land*, unless there is recourse to another court;
- 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;

⁷ Translation available at Bundestag's website - <https://www.btg-bestellservice.de/pdf/80201000.pdf> (Site last visited February 5, 2011)

- 4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a *Land* law, however, only if the law cannot be challenged in the constitutional court of the *Land*;
5. in the other instances provided for in this Basic Law.

* * *

(2) The Federal Constitutional Court shall also rule on such other matters as shall be assigned to it by a federal law.

Article 94 – [Composition of the Federal Constitutional Court]

(1) The Federal Constitutional Court shall consist of federal judges and other members. Half the members of the Federal Constitutional Court shall be elected by the *Bundestag* and half by the *Bundesrat*. They may not be members of the *Bundestag*, of the *Bundesrat*, of the Federal Government, or of any of the corresponding bodies of a *Land*.

(2) The organization and procedure of the Federal Constitutional Court shall be regulated by a federal law, which shall specify in which instances its decisions shall have the force of law. The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed, and may provide for a separate proceeding to determine whether the complaint will be accepted for decision.

France

pp. 147-150, substitute the following text of articles 34, 37, 56-63 of the French Constitution (available at the website of the Conseil Constitutionnel) for the translation that appears in the text:

Constitution of the Republic of France⁸

Title V – ON RELATIONS BETWEEN PARLIAMENT AND THE GOVERNMENT

Article 34

Statutes shall determine the rules concerning:

⁸ This version includes the modification recently inserted by the Constitutional amendment No. 2008-724 of July 23, 2008. Translation available at <http://www.conseil-constitutionnel.fr/> (Site last visited February 5, 2011)

- civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties; freedom, pluralism and the independence of the media; the obligations imposed for the purposes of national defence upon the person and property of citizens;
- nationality, the status and capacity of persons, matrimonial property systems, inheritance and gifts;
- the determination of serious crimes and other major offences and the penalties they carry; criminal procedure; amnesty; the setting up of new categories of courts and the status of members of the Judiciary;
- the base, rates and methods of collection of all types of taxes; the issuing of currency.

Statutes shall also determine the rules governing:

- the system for electing members of the Houses of Parliament, local assemblies and the representative bodies for French nationals living abroad, as well as the conditions for holding elective offices and positions for the members of the deliberative assemblies of the territorial communities;
- the setting up of categories of public legal entities;
- the fundamental guarantees granted to civil servants and members of the Armed Forces;
- nationalisation of companies and the transfer of ownership of companies from the public to the private sector.

Statutes shall also lay down the basic principles of:

- the general organisation of national defence;
- the self-government of territorial communities, their powers and revenue;
- education;
- the preservation of the environment;
- systems of ownership, property rights and civil and commercial obligations;
- Employment law, Trade Union law and Social Security.

Finance Acts shall determine the revenue and expenditure of the State in the conditions and with the reservations provided for by an Institutional Act.

Social Security Financing Acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an Institutional Act.

Programming Acts shall determine the objectives of the action of the State.

The multiannual guidelines for public finances shall be established by Programming Acts. They shall be part of the objective of balanced accounts for public administrations.

The provisions of this article may be further specified and completed by an Institutional Act.

* * *

Article 37

Matters other than those coming under the scope of statute law shall be matters for regulation.

Provisions of statutory origin enacted in such matters may be amended by decree issued after consultation with the *Conseil d'État*. Any such provisions passed after the coming into force of the Constitution shall be amended by decree only if the Constitutional Council has found that they are matters for regulation as defined in the foregoing paragraph.

* * *

Title VII – THE CONSTITUTIONAL COUNCIL

Article 56

The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years. One third of the membership of the Constitutional Council shall be renewed every three years. Three of its members shall be appointed by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate. The procedure provided for in the last paragraph of article 13 shall be applied to these appointments. The appointments made by the President of each House shall be submitted for consultation only to the relevant standing committee in that House.

In addition to the nine members provided for above, former Presidents of the Republic shall be *ex officio* life members of the Constitutional Council.

The President shall be appointed by the President of the Republic. He shall have a casting vote in the event of a tie.

Article 57

The office of member of the Constitutional Council shall be incompatible with that of Minister or Member of the Houses of Parliament. Other incompatibilities shall be determined by an Institutional Act.

Article 58

The Constitutional Council shall ensure the proper conduct of the election of the President of the Republic.

It shall examine complaints and shall proclaim the results of the vote.

Article 59

The Constitutional Council shall rule on the proper conduct of the election of Members of the National Assembly and Senators in disputed cases.

Article 60

The Constitutional Council shall ensure the proper conduct of referendum proceedings as provided for in articles 11 and 89 and in Title XV and shall proclaim the results of the referendum.

Article 61

Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution.

To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators.

In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days.

In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation.

Article 61-1

If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, which shall rule within a determined period.

An Institutional Act shall determine the conditions for the application of the present article.

Article 62

A provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

No appeal shall lie from the decisions of the Constitutional Council. They shall be binding on public authorities and on all administrative authorities and all courts.

Article 63

An Institutional Act shall determine the rules of organization and operation of the Constitutional Council, the procedure to be followed before it and, in particular, the time limits allotted for referring disputes to it.

p. 152, add, after the note by Cappelletti:

A Note on the Conseil Constitutionnel

The constitutional amendment No. 2008-724 of July 23, 2008 completed the transition of the review performed by the *Conseil* from political to jurisdictional, as referred by Cappelletti in the above article. The amendment has introduced a new system of judicial review of constitutionality. Questions raised by lower courts are filtered by the *Cour de Cassation* or by the *Conseil d'État* (as the case may be) before being, possibly, transmitted to the *Conseil Constitutionnel*. The decision of the *Conseil* is final and has the effect of repealing the targeted provisions. The *Conseil*, alike the German *Bundesverfassungsgerichts*, has been granted the power to delay the effects of a repeal to a later date, in order to allow Parliament to enact the appropriate corrective measures. The relevant Constitutional articles can also be consulted at <http://www.assemblee-nationale.fr/english/8ab.asp>. See also Fabbrini, Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional review, in 9 German Law Journal No. 10 (October 2008) available at <http://www.germanlawjournal.com>, esp. pp. 1304-07

V. Supra-National Courts

p. 152-53, add to the run over paragraph:

Art. 234 of the Treaty on the European Union was superseded by art. 267 of the Treaty on the Functioning of the European Union, as enacted pursuant to the

“Treaty of Lisbon” in force since December 1, 2009. The “European Court of Justice” was renamed the “Court of Justice of the European Union” by the Treaty of Lisbon).

p. 153, bottom, insert this para.:

The European Union, pursuant to Article 218 of the Treaty on the Functioning of the European Union, is expected to sign the European Convention on Human Rights. When that will happen, the Court of Justice and the General Court will be bound by the text of the Convention and by the interpretations given by the European Court of Human Rights. See also, *infra* at p. 154-55.

Chapter 4 Initiating a Law Suit, Defining the Issues, Gathering the Evidence

II. Initiating Proceedings

The United States

p. 169, The Friedenthal et al Civil Procedure book is now in a 10th edition, (2009)

p. 170, substitute Rule 4 with following text

Rule 4. Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents*. A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff’s attorney or — if unrepresented — of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint

(F) be signed by the clerk; and

(G) bear the court’s seal.

(2) *Amendments*. The court may permit a summons to be amended.

(b) **ISSUANCE.** On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.

(c) **SERVICE.**

- (1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.
- (2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint.
- (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

Japan

p. 172-173

Add, after the Kojima excerpt:

Note: Arts.17-32, adopted in 2000 are intended for the protection of crime victims and allow a victim to file a tort claim in the criminal case against the tortfeasor-defendant. The victim can obtain quick relief by taking advantage of the evidence produced by the prosecution. If objected by the defendant, however, the case evolves into a formal civil litigation.

III. Notification of Proceedings

England

p. 175, substitute the following for the 2006 version of the Civil Procedure Rules found in the text:

CPR 7.5 – Service of a claim form

(1) Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular

method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form.

Method of service	Step required
First class post, document exchange or other service which provides for delivery on the next business day	Posting, leaving with, delivering to or collection by the relevant service provider
Delivery of the document to or leaving it at the relevant place	Delivering to or leaving the document at the relevant place
Personal service under rule 6.5	Completing the relevant step required by rule 6.5(3)
Fax	Completing the transmission of the fax
Other electronic method	Sending the e-mail or other electronic transmission

(2) Where the claim form is to be served out of the jurisdiction, the claim form must be served in accordance with Section IV of Part 6 within 6 months of the date of issue.

CPR 7.6 – Extension of time for serving a claim form

(1) The claimant may apply for an order extending the period for compliance with rule 7.5.

(2) The general rule is that an application to extend the time for compliance with rule 7.5 must be made –

(a) within the period specified by rule 7.5; or

(b) where an order has been made under this rule, within the period for service specified by that order.

(3) If the claimant applies for an order to extend the time for compliance after the end of the period specified by rule 7.5 or by an order made under this rule, the court may make such an order only if –

(a) the court has failed to serve the claim form; or

(b) the claimant has taken all reasonable steps to comply with rule 7.5 but has been unable to do so; and

(c) in either case, the claimant has acted promptly in making the application.

* * *

CPR 6.3 – Methods of service

(1) A claim form may be served by any of the following methods –

(a) personal service in accordance with rule 6.5;

(b) first class post * * *

(c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10;

(d) fax or other means of electronic communication in accordance with Practice Direction 6A; or

(e) any method authorised by the court under rule 6.15.

* * *

The United States

p. 178, substitute the previous version of F.R.C.P. with the following:

Federal Rule of Civil Procedure Rule 4 Summons

* * *

(d) WAIVING SERVICE

(1) *Requesting a Waiver.* An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. * * *

(2) *Failure to Waive.* If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A)the expenses later incurred in making service; and

(B)the reasonable expenses, including attorney’s fees, of any motion required to collect those service expenses.

* * *

(5) *Jurisdiction and Venue Not Waived.* Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) SERVING AND INDIVIDUAL WITHIN A JUDICIAL DISTRICT OF THE UNITED STATES. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A)delivering a copy of the summons and of the complaint to the individual personally;

(B)leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C)delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

IV. Identifying the Issues

The United States

p. 188, add the following note and case prior to the *Swierkiewicz* case:

The U.S. Supreme Court ratcheted up the pleading burden of plaintiffs in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Departing from the long-standing interpretation of Federal Rule 8(a) under which the complaint need only give the defendant “notice” of the nature of the claim and the alleged facts, those cases require the plaintiff to plead facts that make the underlying claim “plausible.” In this light compare *Ashcroft*, excerpted in the Appendix with *Swierkiewicz*, p. 189 of the text.

p. 192-95, substitute the prior version of Federal Rules 8, 11 and 12 with the following text:

Rule 8. General Rules of Pleading

- (a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
 - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
 - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
- (b) DEFENSES; ADMISSIONS AND DENIALS.
- (1) *In General*. In responding to a pleading, a party must:
 - (A) state in short and plain terms its defenses to each claim asserted against it; and
 - (B) admit or deny the allegations asserted against it by an opposing party.
 - (2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.
 - (3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.
 - (4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.
 - (5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.
 - (6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.
- (c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation*. If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense*. A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

- (a) SIGNATURE. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is unrepresented. * * * Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. * * *
- (b) REPRESENTATIONS TO THE COURT. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
 - (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
 - (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
 - (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
- (c) SANCTIONS.
- (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.
 - (2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may

award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

- (3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).
- (4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.
- (5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:
 - (A) against a represented party for violating Rule 11(b)(2); or
 - (B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.
- (6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) **INAPPLICABILITY TO DISCOVERY.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) **TIME TO SERVE A RESPONSIVE PLEADING.**

- (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer: * * *

(b) **HOW TO PRESENT DEFENSES.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19. * * *

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

* * *

(i) **HEARING BEFORE TRIAL.** If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Italy

p. 204, add to the Taruffo note ending on p. 204:

Editor’s Note: It is now possible for the parties amend their claims, present defenses and ask the judge to be allowed to serve third parties from the first hearing, pursuant to art. 183 Code of Civil Procedure.

In another attempt to reduce the workload of the courts, Parliament passed the Law 69 of 200, introducing, for a large number of civil claims, a mandatory mediation to be effected before the beginning of the proceeding. The same law has also introduced a form of summary proceeding meant to deal with simple cases quicker and with less formality. On the reform of 2009, see Remo Caponi, Italian Civil Justice Reform 2009, ZZPInt 14 (2009).

France

p. 204-07, substitute the following for the Cadiet excerpt beginning at 204 (it is a more current description):

Loïc Cadiet, Introduction to French Civil Justice System and Civil Procedural Law, 28 *Ritsumeikan Law Review*, 331, 355–58 (2011)

2. The Normal Process of a Civil Trial

2.1. Initiation of the Case

In principle, the initiative in bringing a case belongs to the parties, and cases begun on the judge's own initiative are rare. Every case presupposes an initial claim, which, according to the Code, starts the case. This does not necessarily mean that the claim will always be brought to the judge. How the case comes before the court follows different procedure depending on whether the initial claim takes the form of a summons (*assignation*) or a joint petition (*requête conjointe*), on the one hand, or a petition (*requête*), declaration (*déclaration*), or voluntary appearance (*présentation volontaire*) of the parties, on the other.

A summons (*assignation*) is an official form executed by a bailiff, by which the plaintiff summons his opponent to appear before the judge. The joint application (*requête conjointe*) is an official form through which both parties submit their respective allegations, the points about which they disagree, and their respective claims. Designed as an 'amicable substitute' for a summons, the joint petition is an innovation of the New Code of Civil Procedure. It is rarely used because it presupposes a minimum of agreement between the parties, which is often lacking in adversarial procedures. In any case, the signing of a joint petition or service of a complaint does not amount to a submission of the case to the judge. Submission requires accomplishing an additional formality, which entails recording the case on the court's docket (*le rôle*). This formality, known as *l'enrôlement de l'affaire*, consists of delivering the joint petition or a copy of the complaint to the court clerk's office. In some cases, the law imposes a time limit for this recording (*e.g.*, ... four months in the *tribunal de grande instance*), non-compliance with which results in the complaint being null and void, and deprived of any effect.

The complaint and its submission to the judge constitute one and the same operation in those cases where initiation of the case requires the court's intervention. This is the situation with the voluntary appearance of the parties before the judge. Before the *tribunal d'instance* and the *tribunal de commerce*, submission to the judge occurs when the parties sign the report recording such voluntary appearance. Before the *conseil des prud'hommes*, mere appearance suffices. The bureau of conciliation (*bureau de conciliation*), which intervenes first to attempt to find an amicable solution to the controversy, may hear the parties at once and try to conciliate them, which is very rare in practice because, given the great number of applications, cases are spread out over time and the parties have to be convened by the clerk's office.

The same goes for the petition (*requête*) or the declaration (*déclaration*) filed by a party with the clerk's office of the competent court. This brings the matter before the court, regardless of the form of the declarations, whether written or oral; it cannot be done by telephone, facsimile or electronic mail, except in some circumstances.

For each case recorded, the clerk establishes a procedural dossier. Such a dossier becomes, in a sense, the official memory and witness of the trial. It is the dossier that will be relied upon in the case of a procedural dispute or an appeal. It is particularly important in oral proceedings in which there is in principle no writing. Everything must therefore be recorded in the dossier.

2.2. The Investigation of the Case

The investigation of the case is a major step in the civil trial, since it is the occasion on which the procedural formalities whose purpose is to prepare the case for trial and judgment are accomplished.

On one hand, the procedure does not follow the same rules in all courts. The Code provides rules peculiar to each court. For some courts, a special procedure for readying the case for judgment is set up and entrusted to a judge designated for that purpose (*juge de la mise en état* before the *Tribunal de grande instance*, *conseiller de la mise en état* before the Court of Appeal, who are case management judge). This is so before the *tribunal de grande instance* and the Court of Appeal, both of which follow written procedures. In other courts, the case is readied at trial. This is generally the case when proceedings are oral, such as before the *tribunal de commerce*, the *tribunal d'instance* and the *conseil de prud'hommes*. There thus may often be successive hearings, the case being sent from one hearing to another, until it is in a position to be adjudicated.

Practices tend, however, to converge, with the course of proceedings really depending on the degree of complexity of the case or the extent of its preparation at the moment when the proceedings began. There thus exist, including in the *tribunal de grande instance*, so-called 'short circuits' (*circuits courts*), which are a sort of 'fast-track' procedure, in which the case is directly sent to trial. Conversely, it occurs quite often, mostly in commercial matters, that cases are subject to a preliminary preparation. In the *tribunal de commerce*, this is done by the reporting judge (*juge rapporteur*), and in the *conseil des prud'hommes* by a judge known as the *conseiller rapporteur*.

On the other hand, and regardless of the court, the investigation always has the same purpose, namely putting the case in a state to be adjudicated. It is usually during the investigation that the parties set out the subject matter of the dispute in their respective briefs. Above all, it is then that the parties will exchange allegations and evidence on which they rest their case, and inform the judge of them.

The rules relating to the admissibility of evidence are common to all the courts. Essentially, evidence may be established in two ways: either through documents or

through investigative measures. Documents refer to evidentiary items that pre-exist the judicial intervention (such as letters exchanged between the parties and contractual documents). Investigative measures presuppose that there has been recourse to a judge. There is a hierarchy among these different evidentiary methods that must be complied with. An investigative measure should be ordered about an event only if the party alleging it does not have sufficient documents to prove it. The investigatory measure should therefore in principle be a subsidiary instrument. The use of the conditional tense suggests that the reality is different. Investigative measures are easily ordered and, most often, they take the form of an expert opinion (*expertise*), which is not really consistent with the spirit of the new Code because it is a source of delay and expense. This observation is most apt in relation to the *tribunal de grande instance* and the *tribunal de commerce*, and less so as to other courts, particularly the *conseil des prud'hommes*, which deals with a very heavy case load, while ordering few investigative measures.

2.3. Debates at Trial

Unlike the investigation of the case, debates at trial are characterized by their oral and public nature.

The oral nature of debates is a feature common to all civil courts, even those, like the *tribunal de grande instance*, in which the investigative procedure is in writing. Although the *Cour de Cassation* also recognizes the right of the parties to an oral hearing, the practices there, as well as the governing legislation, minimize the importance of oral debate, which after all is not a prerequisite of an adversarial proceeding. In practice, pleadings tend to lose *their* importance before the civil courts. The oral presentations are often brief and spontaneous. They are typically responsive to the judge's questions and sometimes drastically displaced by the practice of submitting written briefs. The merger of the professions of *avocat* and *avoué* in the courts of first instance in 1971, the lengthening of the period of investigation of the case, court congestion, and the level of attorneys' fees all help explain this development, a development in which the *avocats*, reluctantly or otherwise, are accomplices.

The principle of the publicity of debates calls for no particular observations. As an aspect of the right to a fair trial, within the meaning of Article 6, par.1, of the European Human Rights Convention, the principle of publicity may be set aside only in cases provided for by statute. Thus, it does not work in voluntary proceedings (*matière gracieuse*) as well as in matters involving the legal status and the legal capacity of persons, such as divorce. As a rule, debates take place before the panel of judges that will later be called upon to deliberate and adjudicate. However, for reasons again of economy of time, the law provides that in certain courts, debates shall take place before a single judge, provided two conditions are met. First, the parties must agree on this, and, second, the judge supervising the debates must

prepare a report to the other members of the court so that the ruling that results conforms to the requirements of a collective decision (*principe de collégialité*). This same procedure may be used before the *tribunal de commerce*, the *tribunal de grande instance* and even the Court of Appeal. Nobody of course can verify the reality of the collective deliberation. Practice, therefore, suggests that the scenario of single judges is very often used.

The president of the court, who is in charge of policing the trial, moderates debates. Assisting him is the clerk (*greffier*) who keeps the trial registry (and for this reason may also be called the '*plumitif*', after the word plume for 'pen'). The registry records the events occurring at trial. The public prosecutor (*ministère public*) must be present in cases where he represents others, where his presence is required by statute and, of course, where he acts as the principal party, as in criminal prosecutions. During the trial, there is an established order of interventions, in this sequence: plaintiff, defendant and, when applicable, possible intervening parties and the prosecutor acting as a third party or *partie jointe* (i.e., when he merely states his objective opinion on how the law should be applied). The chairman and the judges may always allow counsel for the parties to speak again to provide the legal or actual explanations that they deem necessary or to clarify what may still be unclear to the court.

The president of the court declares the closing of debates as soon as the court considers itself sufficiently informed. To such closing, the law itself also attaches a certain number of effects. Notably, parties may no longer present any further submissions in support of their claims and, subject to the sanction of nullity of the judgment, the judge may not base his decision on observations or documents produced by the parties during deliberations. By way of exception, parties may be permitted to submit written observations (*notes en délibéré*) in support of their positions during the judges' deliberations, either to respond to arguments put forward by the prosecutor when he spoke last as a third party or when the president so requests so that the parties can clarify their positions. Consistent with the adversarial principle, such submissions must be communicated to the other party, who then has an opportunity to respond to them in like form. In no case, however, may these submissions change the elements of the case or be likened to conclusions. On the other hand, it is possible that the information contained in these notes will lead the president of the court to reopen the debates. Once debated, or re-debated, the case is sent for deliberation.

V. Learning the Facts - Discovery

England

p. 211, CPR 32.8: the rule reproduced is actually CPR 31.8.

The United States

p. 216-222: substitute FRCP 26 as amended:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(1) *Initial Disclosures.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

- (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
- (ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
- (iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and
- (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

* * *

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness — separately identifying those the party expects to present and those it may call if the need arises;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
- (iii) an identification of each document or other exhibit, including summaries of other evidence — separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made — except for one under Federal Rule of Evidence 402 or 403 — is waived unless excused by the court for good cause.

- (4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(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 nonprivileged 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).

(2) *Limitations on Frequency and Extent.*

- (A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

- (B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

- (C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

- (i) a written statement that the person has signed or otherwise adopted or approved; or
- (ii) a contemporaneous stenographic, mechanical, electrical, or other recording — or a transcription of it — that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at

trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

- (i) as provided in Rule 35(b); or
- (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
- (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(a) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

- (E) designating the persons who may be present while the discovery is conducted;
 - (F) requiring that a deposition be sealed and opened only on court order;
 - (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
 - (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.
- (2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

* * *

(g) *Signing Disclosures and Discovery Requests, Responses, and Objections.*

- (1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
- (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
 - (B) with respect to a discovery request, response, or objection, it is:
 - (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
 - (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
 - (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

* * *

Germany

p. 226, substitute the following for the earlier version of the respective sections of the German Civil Procedure Code [Translation in Stefan Ruetzel, Gerhard Wegen, Stephan Wilske, Commercial Dispute Resolution in Germany (2005)].:

§ 383. Refusal to testify for personal reasons.

(1) The following persons shall be entitled to refuse to testify:

1. the person engaged to be married to a party or the person with whom the party has entered a promise to establish a registered partnership.
2. the spouse of a party, even if the marriage no longer subsists;
2. the registered partner of a party, even if such registered partnership no longer subsists;
3. those persons who are or were related to a party by blood or by marriage in direct line or, in collateral line, are or were related to a party by blood to the third degree or by marriage to the second degree.
4. clergymen with respect to matters entrusted to them in the exercise of their pastoral duties;
5. persons who participate or participated in the preparation, production or distribution of periodicals or broadcasts in their professional capacity concerning the person of the author, contributor or source of information with regard to contributions and documents, as well as concerning information provided to the m with regard to their activities, insofar as these are contributions, document and information for the editorial part;
6. persons to whom matters are entrusted by virtue of their office, profession or trade, which matters are to be kept secret due to their nature or by law, with respect to the facts to which the duty of secrecy pertains.

(2) The persons indicated in nos. 1-3 above shall be informed of their right to refuse to testify before their testimony is taken.

(3) The taking of testimony of persons in nos. 4-6 above shall, also if the giving of testimony is not refused, not be directed to facts with regard to which it is apparent that testimony cannot be given without violation of the duty of secrecy.

§ 384. Refusal to testify for factual reasons.

A witness may refuse to testify:

1. with regard to questions the answering of which would result for the witness, or a person related to him in one of the manners indicated in § 383 nos. 1-3, in a direct pecuniary loss;
2. with regard to questions the answering of which would disgrace the witness or a person related to him in one of the manners indicated in § 383 nos. 1-3, or would involve the risk of prosecution for a crime or an administrative offence;
3. with regard to questions which the witness could not answer without disclosing an art or trade secret.

Chapter 5 Resolving the Case in the First Instance Court: the Trial and Analogous Processes

II. The Structure of the First Instance Proceeding

p. 251, Insert this note after the conclusion of the Andrews excerpt:

* Editor's note: for a recent assessment of the English system of civil justice, see I. Levi and A. Zuckerman, *Report on the State of Civil Justice in England*, 1 Int'l J. Proc. L. 71 (2011).

p. 253, top: substitute the existing German provisions with the following:

§ 272. Determination of procedure. (1) As a rule, the legal dispute shall be dealt with in a comprehensively prepared session for the oral hearing (main hearing).

(2) The presiding judge shall either fix an early date for an oral first hearing (§275) or order a written preliminary proceeding (§276).

(3) The conciliation hearing and the oral hearing shall be held as soon as possible.

§ 273. Preparation of the session for hearing. (1) The court shall arrange for the required preparatory measures in a timely manner.

(2) For the preparation of each session, the presiding judge or a member of the court hearing the case designated by him may, in particular:

1. order the parties to supplement or clarify their preparatory written pleadings, in particular, set a time limit for the clarification of certain points requiring clarification;

* * *

§ 275. Early first hearing. (1) For the purpose of preparing the early first oral hearing, the presiding judge or a member of the court hearing the case designated by him may fix a time for the defendant to file a written statement of defense. Otherwise, the defendant shall be requested to inform the court, without delay and in a written pleading prepared by the attorney to be appointed, of any means or defense which will be presented * * *.

(2) If the proceedings are not concluded in the early first oral hearing, the court shall issue any orders, which are still required for the preparation of the main hearing.

* * *

§ 278. Amicable settlement of the dispute; conciliation hearing; settlement.

(1) The court shall be concerned at every stage of the proceedings that an amicable settlement of the legal dispute or of individual points of controversy be reached.

(2) For the purpose of reaching an amicable settlement of the legal dispute, the oral hearing shall be preceded by a conciliation hearing, unless an attempt has already taken place before an out-of-court conciliation board or the conciliation hearing appears evidently to have no prospect of success. In the conciliation hearing, the court shall discuss the state of facts and of the matter in dispute with the parties, by assessing at its discretion all circumstances, and pose questions to the parties if necessary. * * *

(3) The appearance of the parties shall be ordered for the conciliation hearing * * *.

(4) If both parties fail to appear at the conciliation hearing, the court shall order suspension of the proceedings.

* * *

§ 279. Oral hearing. (1) If a party fails to appear at the conciliation hearing or if the conciliation hearing is unsuccessful, the oral hearing (early first hearing or main hearing) shall be held immediately thereafter. Otherwise, a date for an oral hearing shall be fixed.

(2) In the main hearing, when the subject matter remains disputed, the hearing shall be immediately followed by the taking of evidence.

(3) Following the taking of evidence, the court shall discuss with the parties again the state of the facts and the proceedings and, if possible at this stage, the result of the taking of evidence.

§ 310 Time of pronouncement of the judgment

(1) The judgment shall be pronounced either in the session during which the oral hearing is closed or at a session to be determined immediately. ...*

* Translation in Stefan Ruetzel, Gerhard Wegen, Stephan Wilske, Commercial Dispute Resolution in Germany (2005).

III. The Role of the Judge and Attorney at the Hearing

p. 258, Add the following to the Note:

The 2004 special procedure for corporate cases was so heavily criticized that the Italian Parliament chose to abrogate it after only five years with the L. 69 of June 18th, 2009. See Remo Caponi, Italian Civil Justice Reform 2009, ZZPInt 14 (2009), 153-54. In any case, it is noteworthy that Italian judges are in general far from “managerial” in their handling of cases.

A recent and possibly important reform of the Italian Code of Civil Procedure provides for a long advocated rationalization and simplification of the numerous forms of proceedings, which have piled up through the years. The Legislative Decree n. 150 of September 1st, 2011, effective as of October 6th, 2011, provides that the present 33 forms of procedure are reduced to three. From now on, the procedural forms which will have to be followed are the ordinary proceedings, the procedure for labor disputes (see the excerpt from Taruffo in Sec. III infra Chap. 6) or a summary proceedings introduced by the L. 69 of June 18th, 2009 (see Note *id.*). See Remo Caponi, Italian Civil Justice Reform 2009, ZZPInt 14 (2009), 153-54.

V. Decision Makers

p. 269, Add, following the Chase excerpt:

The number of civil cases resolved by a trial, as opposed to settlement, discontinuance, or pretrial motions, has consistently declined during the past decades. This phenomenon is especially striking in the federal courts but has occurred in most state courts as well. According to Professor Marc Galanter, “The portion of federal cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002 ... More startling was the 60 percent decline in the absolute number of trial since the mid-1980s ... trials are declining not only in relation to cases in the courts but to the size of the population and the size of the economy.” Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *J. of Empirical Studies* 459, 459-60 (2004). Galanter argues that the decline is due to a number of factors, particularly the large number of settlements, a reluctance to commence or pursue cases because litigation costs and risks, diversion to alternative dispute resolution processes, and the expansion of “managerial judging”. *Id.*, pp. 515-22.

The role of jury trials (as opposed to bench trials, i.e., those tried by the judge without a jury) has been more complex. Jury trials also decreased substantially percentage-wise, from 5.5% of all federal civil dispositions in 1962 to 1.2% in 2002. However, jury trials have increased as a percentage of those cases that did go to trial, from 48% of all federal trials in 1962 to 65% in 2002. *Id.*, pp. 462-63 Table 1.

Chapter 6 Short-Cuts to Judgment and Provisional Remedies

III. Shortcuts to Judgment

Italy

p. 284, After the Layton excerpt, insert the following text:

Note

It should be noted that the Italian L. 69 of June 18th, 2009 has introduced a new summary proceedings named “*procedimento sommario di cognizione*”, art. 702-*bis* of the Italian Code of civil procedure. This *procedimento* is a shorter version of the ordinary proceedings designed to “deal with ‘simple cases’ in a more flexible and speedy way”. See Remo Caponi, *Italian Civil Justice Reform 2009*, ZZPInt 14 (2009), 146-47. As we have already mentioned (see *supra* Note in Sec. III, Chap. 5) the *procedimento sommario* has become one of the three procedural forms now available in Italy.

The United States

p. 286-87: substitute FRCP 56 with the following text, as amended through 2010:

Rule 56. Summary Judgment

- (a) **Motion for Summary Judgment or Partial Summary Judgment.** A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
- (b) **Time to File a Motion.** Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.
- (c) **Procedures.**
- (1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
 - (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
- (2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.
- (3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.
- (4) ***Affidavits or Declarations.*** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.
- (d) **When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
- (1) defer considering the motion or deny it;
 - (2) allow time to obtain affidavits or declarations or to take discovery; or

- (3) issue any other appropriate order.
- (e) **Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may:
- (1) give an opportunity to properly support or address the fact;
 - (2) consider the fact undisputed for purposes of the motion;
 - (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
 - (4) issue any other appropriate order.
- (f) **Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:
- (1) grant summary judgment for a nonmovant;
 - (2) grant the motion on grounds not raised by a party; or
 - (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.
- (g) **Failing to Grant All the Requested Relief.** If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.
- (h) **Affidavit or Declaration Submitted in Bad Faith.** If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney’s fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

p. 287: insert new Note following amended Federal Rule 56:

Note

Federal Rule 56 was amended effective December 1, 2010 to change the procedures for litigating motions for summary judgment but not the standard for granting the motion. The amendment reinstates use of the word “shall,” as appeared in the rule prior to 2007, opting against use of the words “should,” “must,” or “may,” when referring to the court’s authority to grant summary judgment “if the movant shows that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law.” For a discussion of the 2010 amendment by two distinguished federal judges, see Lee M. Rosenthal, *The Summary Judgment Changes that Weren’t*, 43 Loy. U. Chi. L.J. 471 (2012); Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 Okla. City. U.L. Rev. 231 (2011).

p. 288: insert new Note following the Miller excerpt:

Note

Professor Miller predicted that the Supreme Court’s trilogy of decisions pertaining to Rule 56 would increase the incidence of cases terminated before trial through this form of summary procedure. These three cases are: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Under the trilogy, district courts, in deciding the Rule 56 motion, are expected to apply a burden-shifting regime and to apply the evidentiary standard that would govern at trial; in Professor Miller’s view, the Court’s approach tilts in favor of defendants seeking to dismiss an action before trial. Studies by the Federal Judicial Center suggest that favorable grants of summary judgment motions have not increased significantly since the trilogy. Moreover, an empirical study of 2010 appellate decisions pertaining to Rule 56 found that half of the appellate courts did not even cite to *Celotex*. See Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado about Very Little*, 43 Loy. U. Chi. L.J. 561 & n. 2 (2012) (citing Federal Judicial Center studies, including Joe Cecil & George Cort, Fed. Judicial Ctr., Report on **Summary Judgment** Practice Across Districts with Variations in Local Rules 1-2 (2008). However, it bears noting that the incidence of motions for summary judgment have remained at a historic high – nineteen percent – since 1988, two years after the trilogy’s decision – and the Federal Judicial Center states that this trend “would be unexpected by many legal commentators.” Joe S. Cecil et al., A Quarter-Century of **Summary Judgment** Practice in Six Federal District Courts, 4 J. Empirical Legal Stud. 861, 882 (2007). In addition, the impact of changes in summary judgment practice must be considered in the light of the Court’s tightening up of pleading standards, as discussed at p. 188, supra. See Suja A. Thomas, *Keynote: Before and After the Summary Judgment Trilogy*, 43 Loy. U. Chi. L.J. 499 (2012); see also Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 Lewis & Clark L. Rev. 15 (2010). It would seem that the trends foretold by Professor Miller, involving greater dismissal of actions before trial, are in fact occurring, but at the motion to dismiss stage of the litigation and before discovery is allowed to take place. See Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L.J. 119 (2011).

Italy

p. 290-91, Replace the passage from “European Commission, European Judicial Network” with the following excerpt from Nicolò Trocker and Marco De Cristofaro (eds.), *Civil Justice in Italy* (2010), 20-21:

The *giudice di pace* (Justice of the Peace) may be seen as the expression of a deeply rooted trend common to other European countries toward attributing to a non-professional judge competence to decide minor cases in order to offer a form of simple and speedy justice for the resolution of small claims.

* * * Justices of the Peace are selected mainly on the basis of their institutional knowledge of the law. They are required to be law graduates, at least thirty years old, and normally admitted to the bar. They are appointed by the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*) for a term of four years, renewable only once. Their remuneration is linked to productivity; it is calculated on the basis of hearings, orders and judgments. The Justices of the Peace are non-professional or “honorary judge”, only in the sense of not being part of a career profession of judges; in that they are not holding their posts for life. Their position is not compatible with any private or public employment. Justices of the Peace who are practicing attorneys cannot appear before the office of which they must discharge their judicial function.

The civil jurisdiction of the *giudici di pace* extends to controversies over movables with a value up to 5,000 Euros, as well as controversies for the recovery of damages arising from the road traffic or watercraft up to the amount of 20,000 Euros. The *giudici di pace* also have limited subject matter jurisdiction over neighborhood related controversies, including cases of nuisance * * *.

The procedure before the justice of the peace is not as informal as one might expect. They must apply the Code of Civil Procedure and other procedural laws applicable to the proceedings before them. Parties are required to be assisted by a lawyer if the amount of controversy exceeds the relatively small sum of 520 Euros.

Their judgments may be appealed to the *Tribunale*. * * *

A *giudice di pace* may also be asked to mediate disputes that he or she would not be competent to adjudicate. In practice, this broad extrajudicial conciliatory function is rarely invoked.

A total of 399.000 civil cases were brought before the Justices of the Peace in 2007 and roughly the same number of cases – i.e. 396,000 – were adjudicated by the Justices in the same year. The average duration of the proceedings has somewhat increased during the last five years, moving from 372 days in 2004 to 445 days in 2006 and 460 days in 2007.

The United States

p. 293, erratum: co-author’s name is Monica Herr

p. 294, second full para: After “lowest dollar limit (\$1000)” insert the following footnote:
Virginia’s limit has been raised to \$5,000.00, *see*
www.courts.state.va.us/resources/small_claims_court_procedures.pdf (last visited
August 5, 2011).

V. Provisional Remedies

p. 307: remove the entire 3rd para of Layton citation as it is outdated.

p. 308, middle of page, insert the following note to the end of the second full paragraph:

* Editor’s note: Pursuant to the Italian L. n. 80 of May 14th, 2005 proceedings initiated under art. 700 CPC are no longer “anticipatory”, because it has dispensed with the requirement that the parties commence an action on the merits following the grant of the remedy. This means that a decision rendered by the judge in such an urgent procedure can become the final ruling on the parties’ claims.

The United States

p. 314: Substitute for FRCP 64 following, as amended:

Rule 64. Seizing a Person or Property

(a) Remedies Under State Law — In General.

At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) Specific Kinds of Remedies.

The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;

- sequestration; and
- other corresponding or equivalent remedies.

p. 315: delete the excerpt from Wright, Miller & Kane, and substitute Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, and Richard L. Marcus, 11A Fed. Prac. & Proc. § 2931 (2d ed. Dec. 2012) (footnotes omitted), to be followed by the new Note:

[Rule 64](#) has been amended only once since its adoption and that was in connection with the general restyling of the federal civil rules. No substantive change was made. [Rule 64](#) authorizes the use of provisional remedies at the commencement and during the course of an action. These remedies provide for seizure of a person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action. What these remedies are, and the circumstances under which they are available, is determined by the law of the state in which the district court is held, subject to any applicable statute of the United States and to constitutional limitations. Although the statute from which [Rule 64](#) was derived was limited to “common-law causes,” the rule applies generally to “an action” and it has been held that this “must be interpreted to mean any and all actions, common-law and statutory”

Note

[Rule 64](#) addresses the availability of provisional remedies prior to the entry of a final judgment. The scope and terms of state provisional remedies are subject to the requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution as interpreted by the Supreme Court of the United States. See *Connecticut v. Doehr*, 501 U.S. 1(1991). Under the prevailing test of constitutionality, the Court assesses and balances three factors:

first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, * * * principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Id. at 11. The availability of provisional relief also may be subject to federal statutory requirements. See, e.g., 28 U.S.C. § 1609 (rules for attachment of foreign state’s property in the United States).

Rule 64 was amended in 2007 to remove language stating that the Federal Rules govern an action in which relief is sought under the rule: The language was considered to be redundant in the light of existing rules stating that they apply to all civil actions and to all actions removed to federal court. See Federal Rule 1 (Rules apply to “all civil actions”); Federal Rule 81(c)(1) (Rules apply to all removed actions). Separate Federal Rules address procedures for postjudgment

enforcement. See, e.g., Federal Rule 69 (Execution); Federal Rule 70 (Enforcing a Judgment for a Specific Act).

p. 314-15: substitute FRCP 65 with the following text as amended in 2007 and 2009:

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.

- (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.
- (2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.

- (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
 - (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
 - (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

* * *

- (c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

* * *

Chapter 7 Appeal

II. European Appellate Systems in General

p. 336, insert the following note to the last paragraph:

* Editor's note: Pursuant to the Spanish Real Decreto n. 1417 of December 17th, 2001, Anexo I, the recourse to the Supreme Court is limited to controversies above € 150,000.00.

III. England

p. 344: Sub-paragraph 4 of Sec.52.3 has been amended to read as follows:

(4) Subject to paragraph (4A), where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing.

(4A) Where the Court of Appeal refuses permission to appeal without a hearing, it may, if it considers that the application is totally without merit, make an order that the person seeking permission may not request the decision to be reconsidered at a hearing.

(4B) Rule 3.3(5) will not apply to an order that the person seeking permission may not request the decision to be reconsidered at a hearing made under paragraph (4A).

IV. The United States

p. 351, substitute FRCP 61 and FRCP 62 (as amended) with the following text:

Rule 61. Harmless Error.

Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Rule 62. Stay of Proceedings to Enforce a Judgment

* * *

(c) **Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or

other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

- (1) by that court sitting in open session; or
- (2) by the assent of all its judges, as evidenced by their signatures.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

* * *

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

- (1) to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or
- (2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

Germany

p. 357-60: substitute German Code provisions with the following:

§ 511. Admissibility of the first appeal.

- (1) A first appeal may be lodged against the final judgments pronounced in the first instance.
- (2) The first appeal shall only be admissible, if
 1. the value of the subject matter of the appeal exceeds six hundred Euro or
 2. the court of the first instance has, in its judgment, granted leave to the first appeal.
- (3) The appellant shall credibly substantiate the value pursuant to sub-section (2) no. 1; the appellant shall not be allowed to give an affidavit.
- (4) The court of first instance shall grant leave to the first appeal, if

1. the case is of fundamental significance or a decisions by the court of first appeal is required in order to further develop the law or to maintain the consistency of court rulings and
2. the party is adversely affected by the judgment by no more than six hundred Euro.

The court of first appeal shall be bound by the granting of leave to the first appeal.

§ 513. Grounds for first appeal.

- (1) A first appeal may only be lodged on the ground that the decision is based on a violation of law (§ 546) or that facts on which the decision must be based pursuant to § 529 justify a different decision.
- (2) The first appeal cannot be lodged on the ground hat the court of the first instance had wrongly presumed that it has jurisdiction.

§ 520. Statement of grounds for first appeal.

- (1) The appellant must provide grounds for the first appeal.
- (2) The time limit allowed for providing the grounds for the first appeal shall be two months; it shall commence upon the service of the judgment in its full version, however, at the latest upon the expiration of five months after its pronouncement. The time limit may be extended by the presiding judge upon motion, if the opponent consents thereto. Without such consent, the time limit may be extended by up to one month if it is the presiding judge's independent conviction that the proceedings will not be delayed by such extension or if the appellant presents material grounds.
- (3) Unless the ground for the first appeal are already contained in the statement of first appeal, they shall be filed with the court of first appeal by way of a written pleading. The statement of grounds for first appeal must contain:
 1. the declaration to what extent the judgment is being appealed and what modifications of the judgment are being applied for (motions of first appeal);
 2. the description of the circumstances from which the violation of the law and its relevance to the appealed decision follows;

3. the description of specific indications which give rise to doubts as to the accuracy or completeness of the factual findings in the contested judgment and, therefore, require a new ascertainment of facts;
4. the description of the new means of attack and defense and the facts based on which the new means of attack and defense must be admitted pursuant to § 531(2).

(4) The statement of grounds for first appeal shall further contain:

1. the statement of the value of the subject matter of the appeal not consisting of a certain amount of money, if the admissibility of the appeal depends on such value:
2. a statement as to whether reasons exist which exclude the matter being decided by a single judge.

(5) The general provisions regarding the preparatory written pleadings shall also be applied to the statement of grounds for first appeal.

§ 522 Examination of admissibility of appeal; rejection order.

(1) The court of first appeal shall examine *ex officio* whether the first appeal as such is admissible and whether it was lodged in the form and time limit, as provided by law, and whether it is well-founded. If the appeal lacks any of these requirements, it shall be dismissed as inadmissible. This decision may be issued by way of court order. The order shall be subject to a miscellaneous appeal on a point of law.

(2) The court of first appeal shall promptly reject the first appeal by an order upon unanimous decision, if it is convinced that

1. the first appeal has no prospect of success,
2. the matter does not have any fundamental significance,
3. the further development of the law or the maintenance of consistency of court rulings does not require a decision of the court of first appeal.

* * *

§ 529. Scope of review by the court of first appeal.

(1) The court of first appeal shall base its hearing and decision on the following:

1. the factual findings by the court of first instance, unless specific indications give rise to doubts as to the accuracy or completeness of the findings which were of relevance to the decision and a new ascertainment of facts is, therefore, required;
 2. new facts, insofar as the taking into account of these facts is admissible.
- (2) The judgment under appeal shall only be reviewed with regard to procedural defect which need not be taken into account *ex officio*, if such defect has been asserted pursuant to § 520(3). Otherwise, the court of first appeal shall not be bound by the asserted grounds for first appeal.

§ 531. Rejected and newly presented means of attack and defense.

- (1) Means of attack and defense which were rightly rejected in the first instance shall remain excluded.
- (2) New means of attack and defense shall only be admitted if
 1. they relate to an aspect which was clearly overlooked or regarded as irrelevant by the court of the first instance;
 2. they were not asserted in the first instance due to a procedural defect or
 3. were not asserted in the first instance without this being due to a negligence of the party.

The court of first appeal may demand the credible substantiation of the facts from which the admissibility of the new means of attack or defense ensues.

§ 542. Admissibility of second appeal.

- (1) The second appeal shall be available against the final judgments pronounced by the instance of first appeal subject to the following provisions.
- (2) The second appeal shall not be admissible against judgments by which a decision was issued concerning the issuance, modification or cancellation of an attachment order or a preliminary injunction. The same shall apply to judgments concerning the premature putting of a party into possession of an object in expropriation proceedings or in replotting procedures.

§ 543. Second appeal subject to being allowed.

- (1) The second appeal shall only be admissible if

1. the court of first appeal in its judgment or
2. the court of second appeal, upon miscellaneous appeal against the refusal of the court of first appeal to grant leave to second appeal,

has granted leave to second appeal.

(2) Leave to second appeal shall be granted if

1. the case is of fundamental significance or
2. the further development of the law or the maintenance of consistency in court ruling requires a decision by the court of second appeal.

The court of second appeal shall be bound by the leave to second appeal granted by the court of first appeal.

§ 545. Grounds for second appeal.

- (1) The second appeal may only be based on the ground that the decision is based on a violation of [the law].
- (2) The second appeal may not be based on the ground that the court of first instance incorrectly assumed or denied that it was the court of jurisdiction.

VI. France

p. 360-62: Substitute the following for the Layton excerpt:

Loïc Cadiet, Introduction to French Civil Justice System and Civil Procedural Law, 28 *Ritsumeikan Law Review*, 331 (2011) 360-61

4.1. Ordinary Means of Review

In France, the general rule is that there must be on any subject matter of litigation a system of channels of appeals that is widely enough open to permit a dissatisfied litigant to have the case re-adjudicated by another court. From that perspective, French law is more protective than the European Convention of Human Rights requires, since it does not impose any such guarantee in civil matters. Precedents of the European Court of Human Rights are limited to requiring that any appeals procedures made available by national law comply with the rules of due process.

The appeal (*appel*) is the ordinary channel of review, reflecting the rule of ‘two-levels’ of jurisdiction. Appeal is normally available to any litigant who has not obtained satisfaction from the lower court judge’s decision, except of course in cases

where a statute disallows it, for example, due to the small monetary value of the interests at stake. (This is generally where the amount in controversy is less than 4 000 €.) The availability of appeal as a matter of right of course explains the high level of frequency with which that channel is used, resulting in a congestion of the courts of appeal. (State budgets are inadequate to ensure the review of cases within a desirable time frame). The Court of Appeal examines *de novo*, in fact and in law, the aspects of the judgment criticized by the parties. Its judgment, being of the same nature as the decision rendered in the first instance, is subject to the same legal regime just mentioned, both as to the ‘release’ of the judge and the *res judicata* effect of the judgment.

All other channels of appeal are exceptional in character. The motion to set aside a default judgment (or *opposition*) enables a party who did not appear in the first instance to ask that the case be re-examined by the same judge who issued his ruling in the party’s absence. But the notion of default is so strictly defined that this channel of appeal has become marginal.

4.2. Extraordinary Means of Review

After the appeal, the most frequently used channel of review is the petition to the *Cour de Cassation* (*pourvoi en cassation*). It is necessary to remind that the function of the *Cour de Cassation* is to review, at a party’s request, compliance of the challenged decision with the rules of law. (Generally, the challenged judgment will be a judgment of the Court of Appeal, but it may also be a first-level judgment not susceptible to appeal). By not re-examining questions of fact and by not, in theory, substituting its decision for the one submitted to it, the *Cour de Cassation* does not operate as a third-level court. It only overrules or quashes decisions that are legally erroneous. In so doing, it puts forward constructions of legal rules that will enjoy strong authority as precedents. Despite the specificity of this function, which in some European countries gives rise to only several dozen rulings each year, the French *Cour de Cassation* hears thousands. In practice, the *Cour de Cassation* has been largely diverted from its true function by affording, if not a third level of jurisdiction, at least, a third opportunity to win a case - - an opportunity of which it is quite natural for litigants to take advantage. A good portion of the recent history of the *pourvoi en cassation* is a history of attempts to contain this flow. The latest to date is the establishment of a procedure for rejecting petitions as inadmissible (*non-admissible*) or not raising a serious ground of appeal.

An appeal for reconsideration (*recours en révision*) is designed to reopen rulings obtained through fraud that caused the judge to commit a judicial error based on erroneous findings of facts. Finally, an opposition by a third party (*tierce opposition*) offers third parties a means of escaping the adverse consequences that

could result for them from a judgment to which they were not parties, but that harms their interests. A successful opposition will result in the judgment being declared unenforceable as against them.

VIII. Italy

p. 368: Insert the following note to the end of Chapter 7:

Note

The Italian Legislator has tried to introduce a mechanism of filters for the recourse to the Supreme Court in the new art. 360-*bis* CPC, introduced with the L. n. 69 of June 18th, 2009. The statute in question allows the Court of Cassation to dispose of cases peremptorily, when the challenged decision has decided the issue of law consistently with the jurisprudence of the Court, and the exam of the grounds of the appeal do not offer elements to confirm or amend the same opinion. Although it is still too early to tell how significant the change will be, it does not seem likely that the new law is going to solve the problem of the workload of the court. For a critical appraisal, see Remo Caponi, Italian Civil Justice Reform 2009, ZZPInt 14 (2009), 150. For a more optimistic view, see Marco De Cristofaro & Nicolò Trocker eds., Civil Justice in Italy (2010), 248-50.

Chapter 8 Aggregation of Parties, Claims, and Actions

III. Permissive Joinder of Claims and Parties

Germany

p. 375: substitute the following for Sections 59-62 of the German Code of Civil Procedure [Translation in Stefan Ruetzel, Gerhard Wegen, Stephan Wilske, Commercial Dispute Resolution in Germany (2005)]

§ 59. Joinder of parties in case of jointly held rights or identical ground.

Several persons may jointly sue or be sued as joint parties if they have jointly held rights and duties to the subject matter of the legal dispute or if their rights or obligation arise from the same factual and legal ground.

§ 60. Joinder of parties in case of identical claims.

Several persons may also jointly sue or be sued as joint parties if claims or obligations of the same kind and arising from a substantially identical factual and legal ground form the subject matter of the legal dispute.

§ 61. Effect of joinder parties.

Unless otherwise determined by the provision of the civil law or this Code, joint parties shall stand as individuals *vis-à-vis* the opponent in such a manner that the acts of one joint party do not affect the other joint party either to its advantage or to its disadvantage.

§ 62. Necessary joinder of parties.

- (f) If the disputed legal relationship can only be determined uniformly *vis-à-vis* all joint parties or if the joinder of parties is necessary for any other reason, it shall be deemed, if only some of the joint parties fail to appear at a hearing or to observe a time limit, that such defaulting joint parties were represented by the non-defaulting joint parties.
- (g) The joint parties who failed to appear or to observe a time limit shall also be included in the subsequent proceedings.

The United States

p. 377-78: substitute FRCP 18 and 20 with the following, as amended:

Rule 18. Joinder of Claims

(a) **In General.** A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.

(b) **Joinder of Contingent Claims.** A party may join two claims even though one of them is contingent on the disposition of the other; but the court may grant relief only in accordance with the parties' relative substantive rights. In particular, a plaintiff may state a claim for money and a claim to set aside a conveyance that is fraudulent as to that plaintiff, without first obtaining a judgment for the money.

Rule 20. Permissive Joinder of Parties

(a) **Persons Who May Join or Be Joined.**

(1) **Plaintiffs.** Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders — including an order for separate trials — to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

IV. Mandatory Joinder of Claims and Parties

The United States

p. 384-85: substitute FRCP 19 with the following current version:

Rule 19. Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23.

p. 389, substitute FRCP 14 with the following amended version:

Rule 14. Third-Party Practice

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 14 days after serving its original answer.

* * *

(b) When a Plaintiff May Bring in a Third Party. When a claim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.

(c) Admiralty or Maritime Claim.

(1) Scope of Impleader. If a plaintiff asserts an admiralty or maritime claim * * *, the defendant or a person who asserts a right * * * may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences.

VI. Collective or Representative Actions

The United States

p. 396-400, substitute for FRCP 23 the following amended version:

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney’s Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

* * *

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

p. 404, insert new Note:

Note

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court of the United States decertified a nationwide class of 1.5 million female employees alleging gender discrimination under federal law and seeking injunctive and declaratory relief, punitive damages, and backpay. The Court held that plaintiffs had failed to identify a common question as required under Federal Rule 23(a)(2) for class certification. The Court clarified that a common question exists under the rule only when there is a “common contention * * * capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.” *Id.* at 2551. At least one commentator has suggested that the decision “may signal a turn toward closer scrutiny of whether a common question exists.” See Steven S. Gensler, 1 *Federal Rules of Civil Procedure, Rules and Commentary* Rule 23 (March 2012). To what extent will this standard address the concerns expressed by Professor Silberman, in the article excerpted on pages 400-04, about “complications” arising from nationwide class actions?

Italy

p. 405, add, following the excerpt from Cappalli and Consolo:

Note

A new damages class action reserved to consumers has been introduced in Italy by art. 140-bis of the Consumer Code of 2005, as amended by the law n. 99 of July 23rd, 2009. Arts. 139 and 140 of the same Code provided for an injunctive group action to be brought by selected consumers' associations. Art. 140-bis grants standing to sue to individual consumers adequately representing the class; other individuals who wish to avail themselves of the class action must 'opt in', otherwise they may bring their individual suits; the action can be brought only before certain courts of first instance of general jurisdiction (art. 140-bis, no. 4); the class action will have to be 'certified' by the court in a preliminary hearing; the effects of the judgment do not extend beyond the members of the class. For a positive appraisal of the new provision, see Caponi, 'Italian Civil Justice Reform 2009', (2009) 14 ZZPInt, pp. 154-158. However, the observations made by Cappalli and Consolo 20 years ago still describe rather accurately the "obstacles" that the new mechanism is encountering.

The European Union

pp. 406-08: substitute for Directive 98/27/EC of the European Union the following current Directive:

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version)

Whereas:

(1) Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests has been substantially amended several times. In the interests of clarity and rationality the said Directive should be codified.

* * *

(3) Current mechanisms available for ensuring compliance with those Directives, both at national and at [European] Community level, do not always allow infringements harmful to the collective interests of consumers to be terminated in good time. Collective interests means interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. This is without prejudice to individual actions brought by individuals who have been harmed by an infringement.

* * *

Article 1

Scope

1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction referred to in Article 2 aimed at the protection of the collective interests of consumers included in the Directives listed in Annex I, with a view to ensuring the smooth functioning of the internal market.
2. For the purposes of this Directive, an infringement means any act contrary to the Directives listed in Annex I as transposed into the internal legal order of the Member States which harms the collective interests referred to in paragraph 1.

Article 2

Actions for an injunction

1. Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities within the meaning of Article 3 seeking:
 - (a) an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement;
 - (b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement;
 - (c) in so far as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.
2. This Directive shall be without prejudice to the rules of private international law with respect to the applicable law, that is, normally, either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.

Article 3

Entities qualified to bring an action

For the purposes of this Directive, a "qualified entity" means any body or organisation which, being properly constituted according to the law of a Member State, has a legitimate interest in ensuring that the provisions referred to in Article 1 are complied with, in particular:

(a) one or more independent public bodies, specifically responsible for protecting the interests referred to in Article 1, in Member States in which such bodies exist; and/or

(b) organisations whose purpose is to protect the interests referred to in Article 1, in accordance with the criteria laid down by the national law.

* * *

Article 7

Provisions for wider action

This Directive shall not prevent Member States from adopting or maintaining in force provisions designed to grant qualified entities and any other person concerned more extensive rights to bring action at national level.

p. 410, add, following the excerpt from the Hodges article:

Note

The European Union is considering two important projects regarding collective actions. The first is a device to allow collective redress measures for consumers. So far the only means available is of injunctive nature, while the new procedure would allow collective claims for damages. The second would allow private antitrust actions for damages to be brought in the form of a collective action. Both projects are still in the consultation step of the procedures, where the Commission of the European Union gathers information and opinions from the Member States and other entities.

For a recent analysis of collective actions in Europe, see Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems* (2008).

Germany

p. 413, footnote 16: substitute the following current version:

16. The materials provided are available at http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/KapMuG_english.pdf (last

visited August 16, 2011). Article 9 of the act contains a sunset provision according to which the act would have originally expired on October 31, 2010. The limited duration was meant to allow five years to evaluate the usefulness of the new procedure. The sunset date was extended by BGBl 2010, I s. 977 (Nr. 39) to October 31, 2012.

Italy

p. 420-21, add, following the Dreyfuss excerpt:

Remo Caponi, Italian Civil Justice Reform 2009, ZZPInt 14 (2009), 154-58

14. 'New' class action

Article 49, Law no. 99, of 23rd July 2009, on development and internationalisation of enterprises * * * inspires the new version of Art. 140-*bis*, Consumer Code, in force since 1st January 2010. This appears as a reasonable improvement of the previous version.

The 'collective action for damages' is renamed as 'class action'. Actually, it might have been appropriate perhaps to keep the old name, which belongs to the Italian and European terminological tradition ('collective redress action') and better capture the nature of the action. In fact, the context in which it is introduced is different from the American style class action, which thrives not so much from the sophisticated regulation of Rule 23 of the Federal Rules of Civil Procedure, but rather from the way of thinking of lawyers and judges who apply them, as well as norms governing the funding of litigation costs ('contingency fees'). Instead, in the Italian legal system any provision aimed at facilitating the funding of collective actions for damages is missing.

The matter of costs and professional fees is fully subject to the general rules, which since 2006 no longer ban agreements on contingency fees, i.e. allow the lawyer to negotiate with the client a fee commensurate with the result of the dispute.

* * *

The new instrument applies to cases of 'multi-offensive torts' (*illeciti plurioffensivi*) until now included in the regulation of joinder of parties:

- (a) the contractual rights of a number of consumers and users who find themselves in the same situation in relation to the same company, including the rights relating to contracts concluded in accordance with Article 1341 and 1342 of the Civil Code (general contract terms, forms);
- (b) identical rights due to final consumers of a product in relation to its manufacturer, even in the absence of a direct contractual relationship;

- (c) 'identical' rights to compensation for damages due to consumers and users and deriving from unfair commercial practices or anti-competitive behaviour.

The regulation grants standing to sue through class action to the single component of the class. This outcome marks the difference between the protection of homogeneous individual rights, which are the only ones explicitly dealt with by Art. 140-*bis*, and the protection of a supraindividual interest, understood as the interest of several people towards a good that has (also, or better, only) a dimension which is not susceptible of exclusive ownership and enjoyment.

Consumers and users who wish to avail of the protection under Art. 140-*bis* 'can join the class action'. Hence, the Italian system expresses its preference for the system in which the injured party must act if he wants to be included among the recipients of the result of the final judgment ('opt-in') * * *. The person who did not join the lawsuit cannot take advantage of the effects of the favourable decision. The adhesion contract is then the document by which consumers or users may assert the decision granting the application against the company. The other side of the coin is the preclusion of any individual restitutory or remedial action based on the same title. as well as the subjection to the effects of the judgment rejecting the application.

The admissibility of the class action is subjected to a summary preliminary review, which culminates with a negative decision when the application is manifestly ungrounded, when there is a conflict of interest, when the court does not recognise the identity of the individual rights to be protected or when the claimant seems unable to adequately protect the interest of the class.

If the action is declared admissible, the Court sets the terms and methods of the most appropriate form of public notice of the action, so that those belonging to the class can join promptly. the court also 'determines the course of the procedure thereby ensuring, in accordance with the right to be heard, the fair, effective and prompt handling of the trial. In the same or subsequent order, which can be modified or revoked at any time, the court shall prescribe measures aimed at preventing undue repetitions or complications in the presentation of evidence or arguments; it burdens the parties with the form of notification which it considers necessary to protect the members; it regulates the evidentiary stage in the manner that it deems most appropriate and instructs any other procedural matter'.

Two possible alternatives of the content of the final decision are envisaged:

- (a) a content of coercive relief, which will apply in all cases where the decision on liability of the defendant automatically leads to the determination of the amount to be recovered, or

(b) a content of declaration limited to the company's liability, where exceptionally there may be a need for an individualised decision that shall be advanced not in the collective process, but in a subsequent proceedings limited to the *quantum* or instead subject to inter-individual or collective negotiations.

* * *

The law provides a *spatium deliberandi* in favour of the company. The decision becomes enforceable only after six months of its publication. Payments of amounts due which are done during this period are exempt from any increase. The aim is obviously to encourage voluntary compliance with the decision.

The individual action of those who do not opt in the collective action is admissible (even if the latter does not conclude with a ruling on the merits), but it is not possible to bring further class actions on the same acts and against the same company after the deadline for joining assigned by the court in the decision on admissibility.

* * *

In addition to providing individual relief to the injured parties, the new instrument also provides – as a second feature – a deterrent to the commission of harmful illegal acts against a relatively broad range of consumers.

* * *

In this sense, the Italian civil process (like that of other European countries that have introduced collective redress actions) is enriched with a new function, traditionally entrusted to the state and the public administration in continental Europe: the function of regulation and control of social and economic behaviour that impact not so much on the interests of an isolated individual, but on the interests of a community.

Japan

Add, following the Hattori excerpt:

In 2008, Japan expanded the range of consumer organization injunction suit under the Consumer Contract Law to the suits under the Act against Unjustifiable Premiums and Misleading Representations and the Act on Specified Commercial Transactions (effective in 2009).

Article 12 of the Consumer Contract Law provides that eligible organization (prescribed in Article 2(4) of this Act) may demand injunction against a business operator when the business operator conducts to many unspecified consumers certain kinds of acts in soliciting execution of a consumer contract. Such acts include false representation as to an important matter.

This amendment enabled eligible organization to demand injunction against a business operator when the business operator makes representation to many unspecified consumers by which the substance or the trade terms of goods or services are misunderstood to be much better than the actual one or than those of other business operators (the Article 10 of the Act against Unjustifiable Premiums and Misleading Representations). This amendment also enabled eligible organizations to demand an injunction against a seller or a service provider when the seller or the service provider conducts to many unspecified persons certain kinds of acts in relation to door-to-door sales (the Article 58-4 of the Act on Specified Commercial Transactions). Such acts include misrepresentation of the quality of the goods or the content of the services. Articles 58-5 through 58-9 of this Act prescribes injunction with respect to mail order sales, telemarketing and other kinds of transactions.

p. 430, insert excerpt: Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1 (2009) (footnotes generally omitted):

*** [F]ar from maintaining or increasing their divergence from U.S. practices, European nations in recent years have come to embrace civil procedure reforms to authorize aggregate litigation. By “aggregate litigation,” I refer, in the manner of the American Law Institute (“ALI”) project on the subject, to litigation that undertakes some manner of unified resolution with regard to related civil claims held by multiple persons. [FN8] The term embraces procedures in the nature of representative litigation, such as class actions. In representative litigation, the vast majority of persons whose claims are to be resolved are not formal parties to the action but, rather, are represented by someone (or, perhaps, some organization) similarly situated. But “aggregate litigation” also embraces procedures for unified resolution of multiple, related lawsuits, each nominally brought by a different person with formal party status.

Looking across the European landscape, one can situate within the broad rubric of “aggregate litigation” such differing procedures as Dutch collective settlement actions, English group litigation orders, German model cases in securities litigation, and Italian class actions, among other procedures. Additional moves in the offing suggest a similar openness to possible reforms in the direction of more rather than less aggregate litigation. These include major studies by the European Commission of new measures for aggregate redress in antitrust and consumer litigation and by the Civil Justice Council of England and Wales on reform of collective redress.

The embrace of aggregate litigation in Europe in widely varying forms makes the U.S.-style class action less exceptional within the Western world. * * *

One must take care not to overstate the positive point, however. European receptiveness to new procedures for aggregate litigation, in one form or another, stops markedly short of full-fledged embrace for U.S.-style class actions, much less related features of litigation finance. Even while counseling in favor of greater receptiveness for aggregate litigation as a vehicle for

consumer redress, leaders of the European Union (“EU”) hasten to underscore their disinclination to import the “litigation culture” of the United States. * * * As a result, the law is unlikely to see anything like a trans-Atlantic convergence toward the specifics of U.S.-style class actions along the lines of what some prominent scholars have envisioned (controversially) as convergence toward U.S.-style corporate governance centered on shareholder primacy.

[T]he structural dynamics of aggregate litigation across the Atlantic will tend to recreate, to a considerable degree, the difficulties seen in recent decades in the context of nationwide class action litigation within the United States. The nationalization of commerce in the United States during the twentieth century led to aggregate litigation of a commensurately national scope. What followed were efforts on the part of courts in one state to resolve on a class-wide basis the claims of persons dispersed throughout the nation. The goal was to expand the scope of aggregation in procedural terms to match the scope of the underlying disputed activity, rather than the jurisdictional sovereignty of the forum. At its extreme, this process of “regulatory mismatch” between the forum for aggregate litigation and its potential preclusive scope was no accident. Rather, class counsel would select the state-court forum for such a class action precisely for its anomalous features—paradigmatically, for its perceived proclivity to certify a nationwide class action that the vast majority of other courts in the United States would not certify. ***

Now, consider the economy of the twenty-first century, a time when the scope of commerce is no longer national but increasingly global. Then, add to the picture different procedural regimes for aggregation in different courts that are the creatures not of the various states within the United States but, rather, of the nation-states of the West. When coupled with this diversity of approaches to aggregate litigation, the globalization of commerce has a considerable tendency to invite a replication of regulatory mismatches—now, with international proportions. Courts in one nation-state will seek to resolve claims on the part of persons in others—perhaps, even worldwide—In keeping with the scope of the disputed conduct. This structural dynamic, not so much the marked differences in the particulars of aggregate litigation procedure, represents the real story of convergence today.

True enough, U.S.-style class actions are likely to remain exceptional from a trans-Atlantic perspective. But the U.S. experience with regulatory mismatches between state authority and the scope of attempted claims resolution on an aggregate basis is likely to become increasingly unexceptional at the level of nation-states global governance in civil justice, though conceivably of a less transparent sort.***

1. Comparative Procedure

*** The term “aggregate litigation” creates a big tent, within which one may place both representative litigation for claimants as a collective group and consolidated litigation whereby each claimant's suit has a nominally separate existence. The term likewise embraces both kinds of default rules—opt-in or opt-out—that a given procedural system might use to ascertain who

is encompassed in an aggregate proceeding. In addition, the term carves out aggregation from the array of surrounding rules and practices—those concerning permissible means of litigation finance, rules for fee allocation, and latitude available for discovery, among other topics—that stand to affect dramatically the real-world impact of any manner of aggregate procedure. Still, the new configuration of the forest today is striking, for all the remaining variations in the trees. There simply is a less dramatic difference in aggregate litigation across the Atlantic today than in times past, as the following table reflects:

Table of Recent European Developments in Aggregate Litigation (alphabetical by nation)

Development	Enactment	Characteristics
Denmark: “Danish Class Action Act” ^[FN60]	2007	<p>Class certification requires, inter alia, common claims, procedural superiority, adequate notice and representation</p> <p>Class representatives may be individual plaintiffs, public bodies, or private associations</p> <p>Opt-in or opt-out procedure, at judge's discretion</p> <p>Opt-out proceedings appropriate if unmarketable claims</p> <p>Only public bodies may serve as class representatives in opt-out proceedings</p> <p>Class members may be required to provide security for opposing parties' costs</p>
England & Wales: “Group Litigation Order” ^[FN68]	1999	<p>Private claims that “give rise to common or related issues of fact or law” managed together in same court</p> <p>Not representative litigation, but may employ test cases and lead solicitors</p> <p>Initiated by parties or court</p> <p>Opt-in procedure</p>

		<p>Loser pays</p> <p>No formal judicial oversight of settlements</p>
Finland: “Group Actions” ^[FN76]	2007	<p>Applies only to consumer cases</p> <p>Government-funded</p> <p>“Consumer Ombudsman” is only party permitted to bring claims</p> <p>Opt-in procedure</p>
France: “Actions Taken in a Collective Interest” ^[FN81]	Mid-1990s	<p>Authorized associations may bring actions “in the collective interest” in such areas as consumer contracts, health care, environmental protection, and financial investment</p>
France: “Joint Representative Actions” ^[FN84]	1992	<p>Authorized associations may sue for damages on behalf of consumers or investors with injuries of “common origin”</p> <p>Action may be brought only if two or more individuals authorize an association to sue in their name</p> <p>Applicable in such areas as product liability and antitrust</p> <p>Opt-in procedure</p>
Germany: “Capital Markets Test Case Act” ^[FN90]	2005	<p>Common issues of law or fact tried in model proceeding</p> <p>Applies to claims for damages arising from “false, misleading, or omitted” financial information</p> <p>Opt-in procedure</p> <p>Acts only on existing claims</p>

		<p>Damages determined for each individual case, drawing upon model decision</p> <p>Settlement requires consent of all claimants</p>
Italy: “Class Action Law” ^[FN98]	2007	<p>Grants qualified organizations authority to sue in such areas as tort, antitrust, and unfair trade</p> <p>Parties select “conciliation committee” consisting of one attorney selected by plaintiff organization, one selected by defendant, and one selected by the chief judge</p>
The Netherlands: “Collective Settlement of Mass Damages Claims” ^[FN102]	2005	<p>Allows representative organizations to obtain binding settlements in, for example, securities litigation</p> <p>Opt-out procedure</p>
Norway: “Mediation and Civil Procedure Act” ^[FN106]	2008	<p>Class certification requires, inter alia, common issues of law or fact, procedural superiority, and adequate representation</p> <p>May be initiated by individual plaintiffs, authorized public bodies, or qualified private organization</p> <p>Opt-in or opt-out procedure, at judge's discretion</p> <p>Opt-out proceedings appropriate if unmarketable claim</p>
Sweden: “Swedish Group Proceedings Act” ^[FN112]	2002	<p>Allows for class actions in such areas as consumer and environmental law . [Now allowed in most types of case. Opt-in required – Eds.]</p> <p>Provides for damages and injunctive relief</p> <p>Opt-in procedure</p> <p>Prerequisites for class treatment include common questions of fact and procedural superiority</p>

[FN 8] See Principles of the Law of Aggregate Litig. § 1.02 cmt. a (Council Draft No. 2, at 12, Nov. 18, 2008) (“All aggregate proceedings combine claims or defenses by many persons for unified resolution, which may be by trial or settlement.”). ***

[FN60]. See Erik Werlauff, *Class Actions in Denmark--from 2008 2* (2007), http://www.law.stanford.edu/display/images/dynamic/events_media/Demark_Legislation.pdf (citing Administration of Justice Act § 254 ***).

[FN68]. *Civil Procedure Rules, 1998*, pt. 19, § III (U.K.); Hodges, *Reform*, supra note 13, at 295-97; Christopher Hodges, *Global Class Actions Project Country Report: England and Wales 3* (2007), http://www.law.stanford.edu/display/images/dynamic/events_media/England_Legislation.pdf ***.

[FN76]. See [Christopher Hodges, *The Reform of Class and Representative Actions in European Legal Systems 285-90* (2008)], (translating Ryhmäkannelaki 444/2007 [Act on Class Actions]); see also Mikko Valimäki, *Introducing Class Actions in Finland - An Example of Lawmaking Without Economic Analysis 1* (Working Paper Series, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1261623.

[FN81]. See Veronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation, Protocol for National Reporters, France 5, 7* (2007), http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf (citing Article L. 421 of the Consumer Code; Article L. 1114-2 of the Public Health Code; Article L. 142-2 of the Environmental Code). For English translations of these Code provisions, see Hodges, *** [supra note 76], at 251-53.

[FN84]. See *** [Magnier, supra note 81], at 8 (citing Article L. 422-1 of the Consumer Code; Article 452-2, al. 1 of the Monetary and Financial Code).

[FN90]. *Kapitalanleger-Musterverfahrensgesetz [Act on the Initiation of Model Case Proceedings in Respect of Investors in the Capital Markets]*, *Fed. Law Gazette (Germany)*, Aug. 19, 2005, at 2437, translated at <http://www.bmj.bund.de/kapmug> ***; Dietmar Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation - Germany 7* (2007), http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf ***.

[FN98]. *Codice del consumo [C. consumo] art. 140*, translated at *Mass Tort Litigation Blog*, http://lawprofessors.typepad.com/mass_tort_litigation/2008/01/italys-new-clas.html (Jan. 11, 2008).

[FN102]. See [Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, *Prac. Litigator*, July 2007], at 28 (citing BW arts. 3:305a, 305B).

[FN106]. Camilla Bernt-Hamre, *Class Actions, Group Litigation & Other Forms of Collective*

Litigation in the Norwegian Courts 2, 4 (2007), http://www.law.stanford.edu/display/images/dynasmic/events_media/Norway_National_Report.pdf (citing LOV-2005-06-17-90, Act Relating to Mediation and Procedure in Civil Disputes, 17 June 2005 no. 90); Harbour & Shelley, *supra* note *** [102], at 27.

[FN112]. See Hodges, *Reform*, *supra* note *** [76], at 263-75 (translating SFS 2002:599 [Group Proceedings Act]).

The United States

p. 430-31: substitute FRCP 42 with the following current version:

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

p. 434, insert : For a recent analysis of the consolidation activity of the Multidistrict Litigation Panel discussed in Professor Resnik's article, see Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 Tul. L. Rev. 2245 (2008).

Chapter 9 Finality and Preclusion

p. 436, footnote 4, substitute for the cited link:

<http://www.ila-hq.org/download.cfm/docid/446043C4-9770-434D-AD7DD42F7E8E81C6>
(last visited August 16, 2011)

p. 457, footnote 29: the Field, Kaplan, and Clermont casebook is now in its 10th edition (2011).

Chapter 10 Enforcement of Judgments

The United States

p. 474, substitute FRCP 69 with the following amended version:

Rule 69. Execution

(a) In General.

(1) Money Judgment; Applicable Procedure. A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) Obtaining Discovery. In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person — including the judgment debtor — as provided in these rules or by the procedure of the state where the court is located.

* * *

p. 494, substitute FRCP 64 and 70 with the following text:

Rule 64 Seizure of Person or Property

(a) Remedies Under State Law — In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) **Specific Kinds of Remedies.** The remedies available under this rule include the following — however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

Rule 70 Enforcing a Judgment for a Specific Act

(a) **Party's Failure to Act; Ordering Another to Act.** If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done — at the disobedient party's expense — by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) **Vesting Title.** If the real or personal property is within the district, the court — instead of ordering a conveyance — may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) **Obtaining a Writ of Attachment or Sequestration.** On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) **Obtaining a Writ of Execution or Assistance.** On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) **Holding in Contempt.** The court may also hold the disobedient party in contempt.

p. 502-03, substitute FRCP 62 with the following current version:

Rule 62 Stay of Proceedings to Enforce a Judgment

(a) **Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.** Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry.

But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

- (1) an interlocutory or final judgment in an action for an injunction or a receivership; or
- (2) a judgment or order that directs an accounting in an action for patent infringement.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

- (1) under Rule 50, for judgment as a matter of law;
- (2) under Rule 52(b), to amend the findings or for additional findings;
- (3) under Rule 59, for a new trial or to alter or amend a judgment; or
- (4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. * * *

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.

(f) Stay in Favor of a Judgment Debtor Under State Law. If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Chapter 11 Transnational Litigation

The European Union

p. 512, add to the Note ending on p. 512:

The Regulation 44/2001 is currently under review. After several consultations, the Commission of the European Union has published a proposal of reform of the Regulation, which aims at extending the European rules in order to encompass also the relations between Member States and Third States. The proposal is currently before the European Parliament, where the rapporteur has severely criticized and downsized the breadth of the reform proposal. The work is still in progress, and there are no clear indications of future developments.

Japan

p. 517, add, following the Notes and Comments:

In 2010, the Japanese Code of Civil Procedure was amended to include a series of express provisions for the Japanese judicial jurisdiction in international litigation. The legislation basically incorporated the preexisting case law founded by the Supreme Court in *Malaysian Airline* decision (see above). However, some important questions concerning the treatment of joint claims, the effect and limits of jurisdictional agreements, and “special circumstances” for rejection of jurisdiction, are resolved specifically as follows (translation provided by Prof. Hiroshi Tega and Judge Kazuyuki Higashi):

Article 3-2

With respect to an action against a person, a court shall have jurisdiction in cases where he/she has domicile in Japan, he/she has residence in Japan if he/she has no domicile in

Japan or his/her domicile is unknown, or he/she had domicile in Japan before the filing of an action (excluding cases where he/she had domicile in a foreign state after he/she had last domicile in Japan) if he/she has no residence or his/her residence is unknown.

(2) Notwithstanding the provision of the preceding Paragraph, a court shall have jurisdiction with respect to an action against an ambassador, minister and any other Japanese national in a foreign state who enjoys immunity from the jurisdiction of the state.

(3) With respect to an action against a judicial person or any other association or foundation, a court shall have jurisdiction in cases where it has principal office or business office in Japan, or its representative or any other principal person in charge of its business has his/her domicile in Japan if it has no business office or other office in Japan or the location of the office is unknown.

(Jurisdiction over Action on Contracts, etc.)

Article 3-3

Actions listed in the following Items may be filed with Japanese courts in cases specified in the respective Items:

(i) An action seeking performance of an obligation of a contract, an action relating to management without mandate conducted with respect to an obligation of a contract or unjust enrichment arising from such obligation, an action for damages arising from default of an obligation of a contract, or any other actions relating to an obligation of a contract: where the place of performance of the obligation prescribed in the contract is in Japan or the place of performance of the obligation is in Japan according to the laws of the place chosen by the contract

(ii) An action to claim payment of money for a bill or note or a check: where the place of payment of the bill or note or the check is in Japan

(iii) An action on a property right: where the location of the subject matter of the claim is in Japan, or the location of any seizable property of the defendant is in Japan (excluding cases where the value of that property is extremely low) if that action is seeking payment of money

(iv) An action against a person who has a business office or other office, which relates to the business conducted at such business office or other office: where the location of the business office or other office in question is in Japan

(v) An action against a person who operates business in Japan (including a foreign company (which means the foreign company prescribed in the Item (ii) of the Article 2 of the Companies Act (Act No. 86 of 2005)) which continues transactions in Japan): where the action relates to the business conducted by the person in Japan

(vi) An action based on a ship claim or any other claim secured by a ship: where the location of the ship is in Japan

Jurisdiction over Joint Claims

Article 3-6

In cases where two or more claims are to be made by a single action, if Japanese courts have jurisdiction over one of those claims and have no jurisdiction over the other claims, such action may be filed with Japanese courts only when said one claim and the other claims are closely connected; provided, however, that with regard to an action brought by two or more persons or an action brought against two or more persons, this shall apply only in the case specified in the first sentence of Article 38.

Note: See page 376 for the text of Art. 38.

Agreement on Jurisdiction

Article 3-7

- (1) The parties may designate by an agreement the courts of states with which the parties may file an action.

(5) With regard to an agreement set forth in the Paragraph (1) subject of which is a future dispute relating to a consumer contract, the agreement shall be effective only in the following cases:

(i) Where the agreement is such that the parties may file an action in the state where the consumer had domicile at the time of the execution of the consumer agreement (in cases where the agreement is such that the parties may file an action only in said state, it shall be deemed that the agreement shall not preclude the parties from filing an action with states other than said state, except in the following case); or

(ii) Where the consumer filed an action in the courts of the state designated in the agreement or the consumer invoked the agreement in cases where the business operator filed an action in Japanese courts or courts of foreign state.

(6) With regard to an agreement set forth in the Paragraph (1) subject of which is a future dispute relating to an individual labor relations civil dispute, the agreement shall be effective only in the following cases:

(i) Where the agreement is such that the parties may file an action in the state in which the place of the provision of labor at the time of the termination of the labor contract was located, if the agreement was made at the time of such termination (in cases where the agreement is such that the parties may file an action only in said state, it shall be deemed that the agreement shall not preclude the parties from filing an action in states other than said state, except in the following case); or

(ii) Where the worker filed an action in the courts of the state designated in the agreement or the worker invoked the agreement in cases where the employer filed an action in Japanese courts or the courts of foreign state.

(Jurisdiction by Appearance)

Article 3-8

If a defendant, without filing a defense of lack of jurisdiction of Japanese courts, has presented oral arguments on the merits or made statements in preparatory proceedings, a court shall have jurisdiction.

Dismissal of Action based on Special Circumstances

Article 3-9

Even when Japanese courts have jurisdiction over an action (excluding cases where the action is filed based upon an agreement which designates only Japanese courts as courts in which the parties may file an action), a court may refuse to exercise jurisdiction on the whole or part of the action, if it finds special circumstances where proceedings and judgments by Japanese courts harm the fairness between the parties or prevent realization of appropriate and prompt proceedings, while taking into consideration the nature of the case, the burden of the defendant, the location of evidence and any other circumstances.

The Japanese legislature also laid down a statutory rule on the exercise of Japanese judicial jurisdiction over a sovereign foreign state by the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc., of 2009 (English translation available in <http://www.japaneselawtranslation.go.jp/law/detail/?id=1948&vm=04&re=01&new=1>). This statute also incorporated the previous case law and its characteristic provisions are:

Article 4

A Foreign State, etc., except as otherwise provided by this Act, shall be immune from jurisdiction (meaning the civil jurisdiction of Japan; the same shall apply hereinafter).

Article 8

(1) A Foreign State, etc. shall not be immune from jurisdiction with respect to Judicial Proceedings regarding commercial transactions (meaning contracts or transactions relating to the civil or commercial buying and selling of commodities, procurement of services, lending of money, or other matters (excluding labor contracts.); the same shall apply in the following paragraph and Article 16) between said Foreign State, etc. and a citizen of a State other than said Foreign State, etc. (for those other than a State, the State to which they belong, hereinafter the same shall apply in this paragraph) or a judicial person or any other entity established based on the laws and regulations of the State or the State, etc. which belongs to the State.

(2) The provision of the preceding paragraph shall not apply in the cases listed below;

(i) Cases of commercial transactions between said Foreign State, etc. and a State, etc. other than said Foreign State, etc.;

(ii) Cases in which parties to said commercial transactions have expressly agreed otherwise.

England

p. 517-18, substitute the following for CPR 6.20:

Service of the claim form where the permission of the court is required

Rule 6.36

In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply.

Practice Direction 6B – para. 3.1

The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –

General Grounds

- (1) A claim is made for a remedy against a person domiciled within the jurisdiction.
- (2) A claim is made for an injunction(GL) ordering the defendant to do or refrain from doing an act within the jurisdiction.
- (3) A claim is made against a person (“the defendant”) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
 - (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
 - (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
- (4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.

Claims for interim remedies

- (5) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982.

Claims in relation to contracts

- (6) A claim is made in respect of a contract where the contract –
- (a) was made within the jurisdiction;
 - (b) was made by or through an agent trading or residing within the jurisdiction;
 - (c) is governed by English law; or
 - (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
- (7) A claim is made in respect of a breach of contract committed within the jurisdiction.
- (8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).

Claims in tort

- (9) A claim is made in tort where
- (a) damage was sustained within the jurisdiction; or
 - (b) the damage sustained resulted from an act committed within the jurisdiction.

Enforcement

- (10) A claim is made to enforce any judgment or arbitral award.

Claims about property within the jurisdiction

- (11) The whole subject matter of a claim relates to property located within the jurisdiction.

* * *

p. 519, 3rd line from the top: substitute “6.20” with “6.36”

p. 519, 4th line from the top: substitute “r. 6.20” with “Rule 6.36”

p. 522, first full para., 4th line” substitute “6.20” with “6.36”

The United States

p. 521-22:

The Supreme Court has in two recent cases found that particular state attempts to exercise personal jurisdiction over non-U.S. entities violated the Due Process Clause of the 14th

Amendment. The holdings thus restrict the reach of state court jurisdiction going forward. On June 27, 2011 the Supreme Court announced two decisions striking down state court rulings because they violated the constitutional limits governing the exercise of jurisdiction over foreign entities: *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), in which the Court held that North Carolina had contravened the rules cabining “general” jurisdiction, and *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), in which the same fate befell New Jersey’s attempt to rely on “specific” jurisdiction. **[Edited versions of the two cases are appended to this Supplement.]** The two cases are significant not only because they reversed the state courts but also because twenty-five years had passed since the Court had last decided a personal jurisdiction case, leaving contemporary state courts to interpret increasingly obsolete doctrine when dealing with relevant constitutional challenges.

Goodyear, the United States Supreme Court’s 2011 general jurisdiction case, arose out of a bus accident in France in which two teenage boys were killed. The boys’ parents alleged a defective tire, manufactured in Turkey by a foreign subsidiary of the Goodyear Tire and Rubber Company (Goodyear USA), had caused the accident. 131 S. Ct. at 2850. They sued Goodyear USA and three foreign subsidiaries in a North Carolina state court. *Id.* Goodyear USA did not contest jurisdiction, but its subsidiaries did. *Id.* The accident did not occur in North Carolina, nor was the tire manufactured or sold there (rather, all events relating to the suit occurred overseas), so North Carolina did not have specific jurisdiction to hear the case; the North Carolina courts, however, had ruled that the subsidiaries were subject to general jurisdiction in the state. *Id.* at 1851. Through a distribution network, thousands of tires manufactured by these companies had ended up in North Carolina, and the North Carolina Court of Appeals had upheld the finding of general jurisdiction on a stream-of-commerce theory—finding that these companies had “placed their tires ‘in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.’” *Id.* at 2852 (quoting *Brown v. Meter*, 681 S.E.2d 382, 394 (N.C. 2009)). Reversing, the Supreme Court held that North Carolina lacked general jurisdiction over the three foreign companies. *Id.* at 1851. In the Opinion the Court suggested that a state could properly exercise jurisdiction over a foreign corporation only if that state was the corporate “home” but left open the question of how such a relationship could be established. Must the corporation be incorporated in the forum state, or is it enough to show that it has a substantial facility in the state? We must await further instruction from the Court.

Nicastro, the case dealing with “specific jurisdiction,” arose out of a workplace injury in New Jersey. The plaintiff, Nicastro, was operating a three-ton metal shearing machine as part of his employment in the scrap-metal industry, when the machine severed four fingers on his right hand. *Id.* He sued the manufacturer, J. McIntyre Machinery, Ltd. (McIntyre), incorporated and operated in England, in a New Jersey state court. McIntyre had an agreement with an Ohio-based company to act as its “exclusive distributor for the entire United States.” *Id.* at 2796 (Ginsburg, J., dissenting). McIntyre itself sold no products within the United States except to this distributor. McIntyre representatives regularly attended scrap-metal conventions in the United States alongside its distributor to advertise its machines. McIntyre representatives, often including McIntyre’s president, in fact attended every Institute of Scrap Metal Industries convention, “the world’s largest scrap metal recycling industry trade show,” between 1990 and

2005, in cities including New Orleans, Las Vegas, Orlando, San Antonio, and San Francisco. *Id.* at 2795–96 (Ginsburg, J. dissenting). The plaintiff’s employer purchased the shearing machine after learning of it at one of these conventions. *Id.* at 2795. However, McIntyre representatives never attended a convention in New Jersey. *Id.* at 2786 (Kennedy, J., plurality opinion). At most, four McIntyre machines, and possibly only the single machine that had caused the plaintiff’s injury, ended up in New Jersey. *Id.*

The Supreme Court of New Jersey had held McIntyre subject to specific jurisdiction on a pure stream-of-commerce theory, holding that “New Jersey’s courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer ‘knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.’” *Id.* at 1785 (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d 575, 591–92, 201 N.J. 48, 76–77 (2010)). The United States Supreme Court reversed, finding New Jersey’s exercise of jurisdiction improper. But the Justices could not agree on how to approach this case. Instead, the case gave rise to three different opinions: a plurality opinion written by Justice Kennedy and joined by the Chief Justice and Justices Scalia and Thomas, *see id.* at 2785, a concurring opinion by Justice Breyer and joined by Justice Alito, *see id.* at 2791, and a dissent written by Justice Ginsburg and joined by Justices Sotomayor and Kagan, *see id.* at 2794. Because of the divided Court, with no Opinion gaining a majority, it is unclear whether the “stream-of-commerce” approach is now absolutely invalid, as the plurality would have it, or allowed under certain circumstances as Justice Breyer apparently concluded, or generally valid, as the dissenters would have it. It is clear, however, that state court power over foreign manufacturers has been reduced.

p. 528, add to the first full paragraph:

As of 2011, United States and the European Union have both signed but not yet ratified the Convention. Mexico acceded the Convention in 2007. See <http://www.hcch.net> for information on the Hague conventions (Site last visited, April 9th, 2011).

Chapter 12 Harmonization of Civil Procedure: Prospects and Perils

II. Is Harmonization Desirable?

Add to Note 1 on p. 568: There has been a good deal of interest in the ALI-UNIDROIT Principles of Transnational Civil Procedure. The Principles have been published in translation in many languages, including Spanish, Russian, Persian (in Iran and Afghanistan), Chinese, Japanese, German, and Turkish. *See* 34 ALI Reporter, vol. 4, p.3 (2012). Professor Hazard, one of the Reporters of the Principles, notes that the proposed Rules that accompany the Principles had not been adopted in any jurisdiction as of October, 2012 but have apparently been used as a model by some international arbitral tribunals.

IV. Current TrendsThe phenomenon of harmonization is explored in depth in *Common Law, Civil Law and the Future of Categories*, Walker and Chase, eds. (2010)(hereafter “Walker and Chase”), an edited compilation of papers presented at a conference held in Toronto in 2009.

Scholars from all over the world assembled to examine the question whether the traditional categories of civil law and common law were still useful in the age of “globalization” in which many nations had adopted procedural reforms inspired by examples from abroad. The “end of categories” - or at least of the traditional civil law/common law trope - was suggested not, as one might have expected by an erasure of that boundary (though some evidence emerged to support that view), but by growing differences among national systems that one might have thought were firmly in one camp or the other. One might almost speak of the process as “convergence by divergence” when a procedural rule leaves its original family members behind and borrows from distant cousins or simply finds a new way of proceeding.

England is an instructive example. Although England was the source of all common law systems its own procedural rules have over time moved away from the classic common law model. In the early twentieth century the civil jury began to atrophy and it is today available only in cases involving a few specific torts, such as defamation. Other changes were effected by the 1998 adoption of the new procedural code, the Civil Procedure Rules. As Lord Harry Woolf, the primary architect of the CPR, puts it English procedure has met the civil law system “in mid-Channel.” Walker and Chase p. ix. Professor Andrews agrees and claims that “English civil procedure appears to occupy a mid-range position between the distinctly robust American system and the court-oriented systems of the civilian tradition.” Andrews, *English Civil Justice in the Age of Convergence* in Walker and Chase pp. 97, 98. He notes that while the CPR allows for some pretrial disclosure the rules are more restrictive than those of the U.S. system. The managerial powers accorded to the English judges appear greater than those contemplated by typical U.S. rules but more limited than those exercised in most civil law courts, *id.*, 103-4. Too, English courts are now encouraged (but not required) to use a single expert jointly agreed to as opposed to the American-style party appointed dueling expert witnesses. The latter, however, remains an option in England as well. One rule that seems unique to the English CPR is the abolition of all appeals as of right: No appeal may be taken without the permission of either the trial judge or the appellate court, *id.* 106.

England’s reforms are but an example of “Channel crossing” changes. Other countries, of both the civilian and common law traditions have also adopted processes new to their traditions. Consider the growth of devices that allow parties to obtain documents from their adversaries, as described by Professors Varano and Trocker, at pp. 237-239 of *Civil Litigation*. They point out that “[W]hen we deal with such techniques of discovery, allegedly typical of the common law procedural models, we cannot conclude the comparison by saying that the civil law countries do not have any discovery” p. 239 and they note that the availability of documents and the means for obtaining them differ from country to country.

Other developments in the civil law world that are redolent of common law are the use of “concentrated” hearings in Germany, Spain, and elsewhere that look increasingly like the continuous common law trial, with each taking distinctive forms. A final example of convergence as divergence are the various forms of aggregate litigation designed to deal with

social and economic realities of the modern “mass production” world. While the U.S. and Canada share the model of a vigorous class action in which one or more parties can represent the interests of hundreds or thousands of claimants, all of whom will be bound by the final judgment, other nations from various systems have adapted their processes to suit their own goals with little worry about whether they are using common or civil law principles. For examples, see, in addition to the discussion in *Civil Litigation*, pp. 390-434, Janet Walker, Introduction: Who’s Afraid of U.S. – style Class Actions? and accompanying papers in *Civil Procedure in Cross-Cultural Dialogue: Eurasia Context*, pp. 413-448 (describing and analyzing aggregate litigation processes in various countries).

Certainly, not even that most “exceptional” of procedural systems has in some areas come to look more like the civil law process. Professors Dodson and Klebba identify two ways in which the U.S. has become more “continental.” They first refer to the “momentous transformation in federal civil pleading standards” effected by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and argue that “[T]his transformation shifts U.S. [federal] pleading from its traditional notice-based regime to a fact-based system looking beyond notice and toward the merits of a claim.” See Scott Dodson and James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 *Boston College Int’l & Comp. L. Rev.* 1, 7 (2011). In both of the cited cases the Court held that the actions should be dismissed because the allegations were not “plausible.” Dodson and Klebba point out that the United States “appears to be shifting ... toward a fact-based model more akin to the pleading standards in the rest of the world” giving Germany, Japan and England as examples. Second, Dodson and Klebba argue that the role of the U.S. federal judges has become more managerial and less willing to allow party control of the process, i.e., more like a traditional civil law judge. One may also point to the 2000 amendments to Federal Rule 26 (a) that require each party to provide to its adversary copies of documents and names of witnesses the party will use in support of its claim or defense, as a matter of course, early in the litigation.. The rule had traditionally required such production only upon demand by the adversary. Thus, the U.S. practice is more like that of Germany and other nations in which documents must be provided with the pleadings.

Does all of this Channel crossing leave us bereft of categories? Several contributors to Walker and Chase, *supra*, wrestled with this question. The debate partly turned on the utility and problematics of categories in the abstract; though often providing useful heuristics, categorization carries with it the threat of self-satisfaction and, for the “other,” dismissal or even demonization. Yet the consensus that emerged was that, as in all fields of knowledge, comparatists need categorization to organize their own thinking if for no other reason. And the common law/civil law divide is so entrenched in our thinking and history that it may be impossible to replace, at this stage anyway. As we have seen, not even the types are as clear as many once supposed. So, while the common law and civil law may retain some hard grain of relevance, it would be fruitful to expand the scope of inquiry to considerations of economic,

social and political divergence to help explain the variations in civil procedure. By this we may be able to make better sense of the enormous diversity of practices that exist today, and that to some extent have always existed.

APPENDIX to the 2012 SUPPLEMENT

Ashcroft v. Iqbal

129 S. Ct. 1937 (2009)

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court . . . affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the

endeavor. By September 18 “the FBI had received more than 96,000 tips or potential leads from the public.” Dept. of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1, 11-12 (Apr. 2003) (hereinafter *OIG Report*).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.* at 1. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be “of ‘high interest’ ” to the investigation. *Id.* at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.* at 112-13.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 490 F.3d 143, 147-148 (2d Cir. 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person “of high interest” to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.* at 148. As the facility’s name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. *Id.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Id.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.* at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 “John Doe” federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners-officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶¶ 10-11.

. . .

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that “the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11.” *Id.* ¶ 47. It further alleges that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was

approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.” Id. ¶ 69. Lastly, the complaint posits that petitioners “each knew of, condoned, and willfully and maliciously agreed to subject” respondent to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” Id. ¶ 96. The pleading names Ashcroft as the “principal architect” of the policy, id. ¶ 10, and identifies Mueller as “instrumental in [its] adoption, promulgation, and implementation.” Id. ¶ 11.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent’s complaint as true, the court held that “it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against” petitioners. Id. (relying on *Conley v. Gibson*, 355 U.S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*’s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals’ opinion discussed at length how to apply this Court’s “standard for assessing the adequacy of pleadings.” 490 F.3d, at 155. It concluded that *Twombly* called for a “flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.” Id. at 157-158. The court found that petitioners’ appeal did not present one of “those contexts” requiring amplification. As a consequence, it held respondent’s pleading adequate to allege petitioners’ personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. Id. at 174.

...

We granted certiorari, 554 U.S. ----, 128 S.Ct. 2931 (2008), and now reverse.

[In Part II of the opinion, the Court concluded that it had subject-matter jurisdiction over the appeal under the collateral-order doctrine. – EDS.]

III

In *Twombly*, *supra*, at 553-554, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

...

In the limited settings where *Bivens* does apply, the implied cause of action is the “federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.” *Hartman*, 547 U.S., at 254, n. 2. Cf. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior. *Iqbal* Brief 46 (“[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of respondeat superior”). See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (finding no vicarious liability for a municipal “person” under 42 U.S.C. § 1983); see also *Dunlop v. Munroe*, 7 Cranch 242, 269 (1812) (a federal official’s liability “will only result from his own neglect in not properly superintending the discharge” of his subordinates’ duties). Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540-541 (1993) (First Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It instead involves a decisionmaker’s undertaking a course of action “‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.” *Id.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of “supervisory liability,” petitioners can be liable for “knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.” *Iqbal* Brief 45-46. That is to say, respondent believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution. We reject this argument. Respondent’s conception of “supervisory liability” is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. ...

IV A.

We turn to respondent’s complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in *Twombly*, 550 U.S. 544, the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” 550 U.S., at 555. Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.” *Id.* at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.* at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’ ” *Id.* at 557.

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation”). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157-58. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U.S.C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct “effected by a contract, combination, or conspiracy,” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants “ha[d] entered into a contract, combination or conspiracy to prevent competitive entry ... and ha[d] agreed not to compete with one another.” 550 U.S., at 551. The complaint also alleged that the defendants’ “parallel course of conduct ... to prevent competition” and inflate prices was indicative of the unlawful agreement alleged. *Id.*

The Court held the plaintiffs’ complaint deficient under Rule 8. In doing so it first noted that the plaintiffs’ assertion of an unlawful agreement was a “legal conclusion” and, as such, was not entitled to the assumption of truth. *Id.* at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the “nub” of the plaintiffs’ complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a “plausible suggestion of conspiracy.” *Id.* at 565-66. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.* at 567. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs’ complaint must be dismissed. *Id.* at 570.

B

Under *Twombly*’s construction of Rule 8, we conclude that respondent’s complaint has not “nudged [his] claims” of invidious discrimination “across the line from conceivable to plausible.” *Id.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners “knew of, condoned, and willfully and maliciously agreed to subject [him]” to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” Complaint ¶ 96. The complaint alleges that Ashcroft was the “principal architect” of this invidious policy, *id.*, ¶ 10, and that Mueller was “instrumental” in adopting and executing it, *id.*, ¶ 11. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a “formulaic recitation of the elements” of a constitutional discrimination claim, 550 U.S., at 555, namely, that petitioners adopted a policy “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Feeney*, 442 U.S., at 279. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly*, *supra*, 550 U.S., at 554-55. To be clear, we do not reject these bald allegations on the ground that they are

unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "contract, combination or conspiracy to prevent competitive entry," *id.* at 551, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." Complaint ¶ 47. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ascroft and Mueller in discussions in the weeks after September 11, 2001." *Id.* ¶ 69. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim-Osama bin Laden-and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, *Twombly*, *supra*, at 567, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶ 69. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of "of high interest" for impermissible

reasons, his only factual allegation against petitioners accuses them of adopting a policy approving “restrictive conditions of confinement” for post-September-11 detainees until they were “‘cleared’ by the FBI.” *Id.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners’ constitutional obligations. He would need to allege more by way of factual content to “nudge[e]” his claim of purposeful discrimination “across the line from conceivable to plausible.” *Twombly*, 550 U.S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, whereas here the complaint alleges discrete wrongs—for instance, beatings-by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners’ part. Despite these distinctions, respondent’s pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of respondeat superior could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent’s complaint against the defendants who are not before us. Respondent’s account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent’s complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1 Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. *Iqbal* Brief 37-38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554. That Rule in turn governs the pleading standard “in all civil actions and proceedings in the United States district courts.” Fed. Rule Civ.

Proc. 1. Our decision in *Twombly* expounded the pleading standard for “all civil actions,” *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U.S., at 555-56, and n. 3.

2 Respondent next implies that our construction of Rule 8 should be tempered where, as here, the Court of Appeals has “instructed the district court to cabin discovery in such a way as to preserve” petitioners’ defense of qualified immunity “as much as possible in anticipation of a summary judgment motion.” *Iqbal* Brief 27. We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process. *Twombly*, *supra*, at 559 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side”).

Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment). There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it [in his concurring opinion below], “a national and international security emergency unprecedented in the history of the American Republic.” 490 F.3d, at 179.

It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3 Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. ... And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

... I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners' concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.

Iqbal claims that on the day he was transferred to the special unit, prison guards, without provocation, "picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room." First Amended Complaint in No. 04-CV-1809 (JG)(JA). He says that after being attacked a second time he sought medical attention but was denied care for two weeks. *Id.* ¶¶ 187-188. According to Iqbal's complaint, [for more than six months while he was held in the Special Housing Unit] prison staff in the special unit subjected him to unjustified strip and body cavity searches, *id.* ¶¶ 136-140, verbally berated him as a "terrorist" and "Muslim killer," *id.* ¶ 87, refused to give him adequate food, *id.* ¶ 91, and

intentionally turned on air conditioning during the winter and heating during the summer, id. ¶ 84. He claims that prison staff interfered with his attempts to pray and engage in religious study, id. ¶¶ 153-154, and with his access to counsel, id. ¶¶ 168, 171.

...

[In their briefing] Ashcroft and Mueller argued that the factual allegations in Iqbal's complaint were insufficient to overcome their claim of qualified immunity; they also contended that they could not be held liable on a theory of constructive notice. ... [T]hey conceded, however, that they would be subject to supervisory liability if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Iqbal argued that the allegations in his complaint were sufficient under Rule 8(a)(2) and *Twombly*, and conceded that as a matter of law he could not recover under a theory of respondeat superior. Thus, the parties agreed as to a proper standard of supervisory liability, and the disputed question was whether Iqbal's complaint satisfied Rule 8(a)(2).

...

Given petitioners' concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Brief for Petitioners 50. Iqbal alleges that after the September 11 attacks the Federal Bureau of Investigation (FBI) "arrested and detained thousands of Arab Muslim men," Complaint ¶ 47, that many of these men were designated by high-ranking FBI officials as being "'of high interest,'" id. ¶¶ 48, 50, and that in many cases, including Iqbal's, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity," id. ¶ 49. The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged," id. ¶ 10, and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged," id. ¶ 11. According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Id. ¶ 96. The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the “plausibility standard” of *Twombly*. They contend that Iqbal’s claims are implausible because such high-ranking officials “tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command.” But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly*, 550 U.S., at 555 (a court must proceed “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)”); *id.* at 556 (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable”). . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel. That is not what we have here.

Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly*’s words, a plaintiff must “allege facts” that, taken as true, are “suggestive of illegal conduct.” 550 U.S., at 564, n. 8. In *Twombly*, we were faced with allegations of a conspiracy to violate § 1 of the Sherman Act through parallel conduct. The difficulty was that the conduct alleged was “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Id.* at 554. . . . Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller’s own admission, are sufficient to make them liable for the illegal action. Iqbal’s complaint therefore contains “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570.

I do not understand the majority to disagree with this understanding of “plausibility” under *Twombly*. Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that “the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11,” Complaint ¶ 47, and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001,” *id.* ¶ 69. I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller “sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity,” *ante*, and that this produced “a disparate, incidental impact on Arab Muslims,” *ante*. And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶ 10 (Ashcroft was the “principal architect” of the discriminatory policy); *id.* ¶ 11 (Mueller was “instrumental” in adopting and executing the discriminatory policy); *id.*, ¶ 96 (Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject” Iqbal to harsh conditions “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest”).

The majority says that these are “bare assertions” that, “much like the pleading of conspiracy in *Twombly*, amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim” and therefore are “not entitled to be assumed true.” *Ante.* The fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI’s International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI’s New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin. See Complaint ¶¶ 47-53. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as “conclusory” are no such thing. ...

I respectfully dissent.

[Justice BREYER, wrote separately in dissent to emphasize that there are appropriate case-management tools in discovery to “diminish the risk of imposing unwarranted burdens upon public officials” who are eligible for qualified immunity.]

Goodyear Dunlop Tires Operations, S.A. v. Brown

___ U.S. ___, 131 S. Ct. 2846 (2011)

Justice GINSBURG announced the judgment of the Court.

This case concerns the jurisdiction of state courts over corporations organized and operating abroad. We address, in particular, this question: Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?

A bus accident outside Paris that took the lives of two 13-year-old boys from North Carolina gave rise to the litigation we here consider. Attributing the accident to a defective tire manufactured in Turkey at the plant of a foreign subsidiary of The Goodyear Tire and Rubber Company (Goodyear USA), the boys' parents commenced an action for damages in a North Carolina state court; they named as defendants Goodyear USA, an Ohio corporation, and three of its subsidiaries, organized and operating, respectively, in Turkey, France, and Luxembourg. Goodyear USA, which had plants in North Carolina and regularly engaged in commercial activity there, did not contest the North Carolina court's jurisdiction over it; Goodyear USA's foreign subsidiaries, however, maintained that North Carolina lacked adjudicatory authority over them.

A state court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the *Fourteenth Amendment's Due Process Clause*. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (assertion of jurisdiction over out-of-state corporation must comply with "'traditional notions of fair play and substantial justice'" (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))). Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984).

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so "continuous and systematic" as to render them essentially at home in the forum State. See *International Shoe*, 326 U.S., at 317. Specific jurisdiction, on the other hand, depends on an "affiliatio[n] between the forum and the underlying controversy," principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); see Brilmayer et al., *A General Look at General Jurisdiction*, 66 *Texas L. Rev.* 723, 782 (1988) (hereinafter Brilmayer). In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of "issues deriving from, or

connected with, the very controversy that establishes jurisdiction.” von Mehren & Trautman 1136.

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. The North Carolina Court of Appeals so acknowledged. *Brown v. Meter*, 199 N. C. App. 50, 57-58, 681 S. E. 2d 382, 388 (2009). Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes. Some of the tires made abroad by Goodyear’s foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through “the stream of commerce”; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations. *Id.*, at 67-68.

A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the “continuous and systematic” affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation’s contacts with the State.

I

On April 18, 2004, a bus destined for Charles de Gaulle Airport overturned on a road outside Paris, France. Passengers on the bus were young soccer players from North Carolina beginning their journey home. Two 13-year-olds, Julian Brown and Matthew Helms, sustained fatal injuries. The boys’ parents, respondents in this Court, filed a suit for wrongful-death damages in the Superior Court of Onslow County, North Carolina, in their capacity as administrators of the boys’ estates. Attributing the accident to a tire that failed when its plies separated, the parents alleged negligence in the “design, construction, testing, and inspection” of the tire.

Goodyear Luxembourg Tires, SA (Goodyear Luxembourg), Goodyear Lastikleri T. A. S. (Goodyear Turkey), and Goodyear Dunlop Tires France, SA (Goodyear France), petitioners here, were named as defendants. Incorporated in Luxembourg, Turkey, and France, respectively, petitioners are indirect subsidiaries of Goodyear USA, an Ohio corporation also named as a defendant in the suit. Petitioners manufacture tires primarily for sale in European and Asian markets. Their tires differ in size and construction from tires ordinarily sold in the United States. They are designed to carry significantly heavier loads, and to serve under road conditions and speed limits in the manufacturers’ primary markets.

In contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts’ personal jurisdiction over it, petitioners are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They

do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers. Even so, a small percentage of petitioners' tires (tens of thousands out of tens of millions manufactured between 2004 and 2007) were distributed within North Carolina by other Goodyear USA affiliates. These tires were typically custom ordered to equip specialized vehicles such as cement mixers, waste haulers, and boat and horse trailers. Petitioners state, and respondents do not here deny, that the type of tire involved in the accident, a Goodyear Regional RHS tire manufactured by Goodyear Turkey, was never distributed in North Carolina.

Petitioners moved to dismiss the claims against them for want of personal jurisdiction. The trial court denied the motion, and the North Carolina Court of Appeals affirmed. Acknowledging that the claims neither “related to, nor . . . ar[o]se from, [petitioners’] contacts with North Carolina,” the Court of Appeals confined its analysis to “general rather than specific jurisdiction,” which the court recognized required a “higher threshold” showing: A defendant must have “continuous and systematic contacts” with the forum. *Id.*, at 58. That threshold was crossed, the court determined, when petitioners placed their tires “in the stream of interstate commerce without any limitation on the extent to which those tires could be sold in North Carolina.” *Id.*, at 67.

Nothing in the record, the court observed, indicated that petitioners “took any affirmative action to cause tires which they had manufactured to be shipped into North Carolina.” *Id.*, at 64. The court found, however, that tires made by petitioners reached North Carolina as a consequence of a “highly-organized distribution process” involving other Goodyear USA subsidiaries. *Id.*, at 67. Petitioners, the court noted, made “no attempt to keep these tires from reaching the North Carolina market.” *Id.*, at 66. Indeed, the very tire involved in the accident, the court observed, conformed to tire standards established by the U.S. Department of Transportation and bore markings required for sale in the United States. *Ibid.*⁹ As further support, the court invoked North Carolina’s “interest in providing a forum in which its citizens are able to seek redress for [their] injuries,” and noted the hardship North Carolina plaintiffs would experience “[were they] required to litigate their claims in France,” a country to which they have no ties. *Id.*, at 68. The North Carolina Supreme Court denied discretionary review.

II

⁹ Such markings do not necessarily show that any of the tires were destined for sale in the United States. To facilitate trade, the Solicitor General explained, the United States encourages other countries to “treat compliance with [Department of Transportation] standards, including through use of DOT markings, as evidence that the products are safely manufactured.” Brief for United States as Amicus Curiae 32.

The *Due Process Clause of the Fourteenth Amendment* sets the outer boundaries of a state tribunal’s authority to proceed against a defendant. *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977). The canonical opinion in this area remains *International Shoe*, 326 U.S. 310, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”...

International Shoe distinguished from cases that fit within the “specific jurisdiction” categories, “instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U.S., at 318. Adjudicatory authority so grounded is today called “general jurisdiction.” *Helicopteros*, 466 U.S., at 414, n. 9. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. See *Brilmayer* 728 (identifying domicile, place of incorporation, and principal place of business as “paradig[m]” bases for the exercise of general jurisdiction)...

In only two decisions postdating *International Shoe*...has this Court considered whether an out-of-state corporate defendant’s in-state contacts were sufficiently “continuous and systematic” to justify the exercise of general jurisdiction over claims unrelated to those contacts: *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) (general jurisdiction appropriately exercised over Philippine corporation sued in Ohio, where the company’s affairs were overseen during World War II); and *Helicopteros*, 466 U.S. 408 (helicopter owned by Colombian corporation crashed in Peru; survivors of U.S. citizens who died in the crash, the Court held, could not maintain wrongful-death actions against the Colombian corporation in Texas, for the corporation’s helicopter purchases and purchase-linked activity in Texas were insufficient to subject it to Texas court’s general jurisdiction).

B

To justify the exercise of general jurisdiction over petitioners, the North Carolina courts relied on the petitioners’ placement of their tires in the “stream of commerce.” See *supra*, at 5. The stream-of-commerce metaphor has been invoked frequently in lower court decisions permitting “jurisdiction in products liability cases in which the product has traveled through an extensive chain of distribution before reaching the ultimate consumer.” 18 W. Fletcher, *Cyclopedia of the Law of Corporations* § 8640.40, p. 133 (rev. ed. 2007). Typically, in such cases, a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately causes harm *inside* the forum. See generally Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 Rev. Litigation 239, 262-268 (1988) (discussing origins and evolution of the stream-of-commerce doctrine).

Many States have enacted long-arm statutes authorizing courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum state. For example, the “Local Injury; Foreign Act” subsection of North Carolina’s long-arm statute authorizes North Carolina courts to exercise personal jurisdiction in “any action claiming injury to person or property within this State arising out of [the defendant’s] act or omission outside this State,” if, “in addition[,] at or about the time of the injury,” “[p]roducts . . . manufactured by the defendant were used or consumed, within this State in the ordinary course of trade.” *N. C. Gen. Stat. Ann. § 1-75.4(4)(b)* (Lexis 2009). . . .

The North Carolina court’s stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer’s products into the forum, we have explained, may bolster an affiliation germane to specific jurisdiction. *See, e.g., World-Wide Volkswagen*, 444 U.S., at 297 (where “the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others” (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant. . . .

A corporation’s “continuous activity of some sorts within a state,” *International Shoe* instructed, “is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.” 326 U.S., at 318. Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains “[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1037 (CA DC 1981).

Sued in Ohio, the defendant in *Perkins* was a Philippine mining corporation that had ceased activities in the Philippines during World War II. To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio: the corporation’s president maintained his office there, kept the company files in that office, and supervised from the Ohio office “the necessarily limited wartime activities of the company.” *Perkins*, 342 U.S., at 447-448. Although the claim-in-suit did not arise in Ohio, this Court ruled that it would not violate due process for Ohio to adjudicate the controversy. *Ibid.*; see *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-780, n. 11(1984) (Ohio’s exercise of general jurisdiction was permissible in *Perkins* because “Ohio was the corporation’s principal, if temporary, place of business”).

We next addressed the exercise of general jurisdiction over an out-of-state corporation over three decades later, in *Helicopteros*. . . .

Helicopteros concluded that “mere purchases [made in the forum State], even if occurring at regular intervals, are not enough to warrant a State’s assertion of [general] jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions.” *Id.*, at 418. We see no reason to differentiate from the ties to Texas held insufficient in *Helicopteros*, the sales of petitioners’ tires sporadically made in North Carolina through intermediaries. Under the sprawling view of general jurisdiction urged by respondents and embraced by the North Carolina Court of Appeals, any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed. But cf. *World-Wide Volkswagen*, 444 U.S., at 296, (every seller of chattels does not, by virtue of the sale, “appoint the chattel his agent for service of process”).

Measured against *Helicopteros* and *Perkins*, North Carolina is not a forum in which it would be permissible to subject petitioners to general jurisdiction. Unlike the defendant in *Perkins*, whose sole wartime business activity was conducted in Ohio, petitioners are in no sense at home in North Carolina. Their attenuated connections to the State...fall far short of the “the continuous and systematic general business contacts” necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State. *Helicopteros*, 466 U.S., at 416...

For the reasons stated, the judgment of the North Carolina Court of Appeals is Reversed.

J. McIntyre Machinery, Ltd. v. Nicastro

___ U.S. ___, 131 S. Ct. 2780 (2011)

Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which the CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join. Whether a person or entity is subject to the jurisdiction of a state court despite not having been present in the State either at the time of suit or at the time of the alleged injury, and despite not having consented to the exercise of jurisdiction, is a question that arises with great frequency in the routine course of litigation. The rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102 (1987).

Here, the Supreme Court of New Jersey, relying in part on *Asahi*, held that New Jersey’s courts can exercise jurisdiction over a foreign manufacturer of a product so long as the manufacturer “knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.” *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N. J. 48, 76, 77, 987 A.2d 575, 591, 592 (2010). Applying that test, the court concluded that a British manufacturer of scrap metal

machines was subject to jurisdiction in New Jersey, even though at no time had it advertised in, sent goods to, or in any relevant sense targeted the State.

That decision cannot be sustained. Although the New Jersey Supreme Court issued an extensive opinion with careful attention to this Court's cases and to its own precedent, the "stream of commerce" metaphor carried the decision far afield. Due process protects the defendant's right not to be coerced except by lawful judicial power. As a general rule, the exercise of judicial power is not lawful unless the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). There may be exceptions, say, for instance, in cases involving an intentional tort. But the general rule is applicable in this products-liability case, and the so-called "stream-of-commerce" doctrine cannot displace it.

I

This case arises from a products-liability suit filed in New Jersey state court. Robert Nicastro seriously injured his hand while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre). The accident occurred in New Jersey, but the machine was manufactured in England, where J. McIntyre is incorporated and operates. The question here is whether the New Jersey courts have jurisdiction over J. McIntyre, notwithstanding the fact that the company at no time either marketed goods in the State or shipped them there. Nicastro was a plaintiff in the New Jersey trial court and is the respondent here; J. McIntyre was a defendant and is now the petitioner.

First, an independent company agreed to sell J. McIntyre's machines in the United States. J. McIntyre itself did not sell its machines to buyers in this country beyond the U.S. distributor, and there is no allegation that the distributor was under J. McIntyre's control.

Second, J. McIntyre officials attended annual conventions for the scrap recycling industry to advertise J. McIntyre's machines alongside the distributor. The conventions took place in various States, but never in New Jersey.

Third, no more than four machines (the record suggests only one, see App. to Pet. for Cert. 130a), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.

In addition to these facts emphasized by petitioner, the New Jersey Supreme Court noted that J. McIntyre held both United States and European patents on its recycling technology. 201 N. J., at 55. It also noted that the U.S. distributor "structured [its] advertising and sales efforts in accordance with" J. McIntyre's "direction and guidance whenever possible," and that "at least some of the machines were sold on consignment to" the distributor. *Id.*, at 55, 56.

In light of these facts, the New Jersey Supreme Court concluded that New Jersey courts could exercise jurisdiction over petitioner without contravention of the *Due Process Clause*. Jurisdiction was proper, in that court's view, because the injury occurred in New Jersey; because petitioner knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states"; and because petitioner failed to "take some reasonable step to prevent the distribution of its products in this State." *Id.*, at 772.

Both the New Jersey Supreme Court's holding and its account of what it called "[t]he stream-of-commerce doctrine of jurisdiction," *id.*, at 80, 987 A. 2d, at 594, were incorrect, however. This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

II

...A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 (1940)). Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law. As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, 357 U.S., at 253, though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws. In products-liability cases like this one, it is the defendant's purposeful availment that makes jurisdiction consistent with "traditional notions of fair play and substantial justice."

A person may submit to a State's authority in a number of ways. There is, of course, explicit consent. *E.g.*, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Presence within a State at the time suit commences through service of process is another example. See *Burnham*, *supra*. Citizenship or domicile -- or, by analogy, incorporation or principal place of business for corporations -- also indicates general submission to a State's powers. *Goodyear Dunlop Tires Operations, S. A. v. Brown*, *post*, p. ___. Each of these examples reveals circumstances, or a course of conduct, from which it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985). These examples support exercise of the general jurisdiction of the State's courts and allow the State to resolve both matters that originate within the State and those based on activities and events elsewhere. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414 (1984). By contrast, those who live or operate

primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.

There is also a more limited form of submission to a State's authority for disputes that "arise out of or are connected with the activities within the state." *International Shoe Co.*, *supra* at 319. Where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Hanson*, *supra*, at 253, it submits to the judicial power of an otherwise foreign sovereign to the extent that power is exercised in connection with the defendant's activities touching on the State. In other words, submission through contact with and activity directed at a sovereign may justify specific jurisdiction "in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, *supra*, at 414, n. 8; see also *Goodyear*, *post*, at 2.

The imprecision arising from *Asahi*, for the most part, results from its statement of the relation between jurisdiction and the "stream of commerce."...This Court has stated that a defendant's placing goods into the stream of commerce "with the expectation that they will be purchased by consumers within the forum State" may indicate purposeful availment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980) (finding that expectation lacking). But that statement does not amend the general rule of personal jurisdiction. It merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum -- itself an unexceptional proposition -- as where manufacturers or distributors "seek to serve" a given State's market. *Id.*, at 295. The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] it-self of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson*, *supra*, at 253; *Insurance Corp.*, *supra*, at 704-705 ("[A]ctions of the defendant may amount to a legal submission to the jurisdiction of the court"). Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

In *Asahi*, an opinion by Justice Brennan for four Justices outlined a different approach. It discarded the central concept of sovereign authority in favor of considerations of fairness and foreseeability. As that concurrence contended, "jurisdiction premised on the placement of a product into the stream of commerce [without more] is consistent with the *Due Process Clause*," for "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." 480 U.S., at 117 (opinion concurring in part and concurring in judgment). It was the premise of the concurring opinion that the defendant's ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.

The standard set forth in Justice Brennan's concurrence was rejected in an opinion written by Justice O'Connor; but the relevant part of that opinion, too, commanded the assent of only four Justices, not a majority of the Court. That opinion stated: "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.*, at 112.

Since *Asahi* was decided, the courts have sought to reconcile the competing opinions. But Justice Brennan's concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

The conclusion that jurisdiction is in the first instance a question of authority rather than fairness explains, for example, why the principal opinion in *Burnham* "conducted no independent inquiry into the desirability or fairness" of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant. 495 U.S., at 621... Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum. That such considerations have not been deemed controlling is instructive. See, e.g., *World-Wide Volkswagen*, *supra*, at 294.

Two principles are implicit in the foregoing. First, personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct...

The second principle is a corollary of the first. Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State. This is consistent with the premises and unique genius of our Constitution. Ours is "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (KENNEDY, J., concurring). For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however. If the defendant is a domestic domiciliary, the courts of its home State are available and can exercise general jurisdiction. And if another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to

unlawful intrusion by other States. Furthermore, foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums.

It must be remembered, however, that although this case and *Asahi* both involve foreign manufacturers, the undesirable consequences of Justice Brennan's approach are no less significant for domestic producers. The owner of a small Florida farm might sell crops to a large nearby distributor, for example, who might then distribute them to grocers across the country. If foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States' courts without ever leaving town. And the issue of foreseeability may itself be contested so that significant expenses are incurred just on the preliminary issue of jurisdiction. Jurisdictional rules should avoid these costs whenever possible.

The conclusion that the authority to subject a defendant to judgment depends on purposeful availment, consistent with Justice O'Connor's opinion in *Asahi*, does not by itself resolve many difficult questions of jurisdiction that will arise in particular cases. The defendant's conduct and the economic realities of the market the defendant seeks to serve will differ across cases, and judicial exposition will, in common-law fashion, clarify the contours of that principle.

III

In this case, petitioner directed marketing and sales efforts at the United States...Here the question concerns the authority of a New Jersey state court to exercise jurisdiction, so it is petitioner's purposeful contacts with New Jersey, not with the United States, that alone are relevant.

Respondent has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey. Recall that respondent's claim of jurisdiction centers on three facts: The distributor agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey. The British manufacturer had no office in New Jersey; it neither paid taxes nor owned property there; and it neither advertised in, nor sent any employees to, the State. Indeed, after discovery the trial court found that the "defendant does not have a single contact with New Jersey short of the machine in question ending up in this state." App. to Pet. for Cert. 130a. These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.

It is notable that the New Jersey Supreme Court appears to agree, for it could "not find that J. McIntyre had a presence or minimum contacts in this State -- in any jurisprudential sense -- that would justify a New Jersey court to exercise jurisdiction in this case." *201 N. J., at 61*. The court nonetheless held that petitioner could be sued in New Jersey based on a "stream-of-commerce theory of jurisdiction." *Ibid.* As discussed, however, the stream-of-commerce metaphor cannot supersede either the mandate of the *Due Process Clause* or the limits on judicial authority that Clause ensures. The New Jersey Supreme Court also cited "significant policy reasons" to justify

its holding, including the State’s “strong interest in protecting its citizens from defective products.” *Id.*, at 75. That interest is doubtless strong, but the Constitution commands restraint before discarding liberty in the name of expediency.

* * *

Due process protects petitioner’s right to be subject only to lawful authority. At no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws. New Jersey is without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process. The contrary judgment of the New Jersey Supreme Court is

Reversed.

Justice BREYER, with whom Justice ALITO joins, concurring in the judgment.

The Supreme Court of New Jersey adopted a broad understanding of the scope of personal jurisdiction based on its view that “[t]he increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade.” *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N. J. 48, 52 (2010). I do not doubt that there have been many recent changes in commerce and communication, many of which are not anticipated by our precedents. But this case does not present any of those issues. So I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences.

In my view, the outcome of this case is determined by our precedents. Based on the facts found by the New Jersey courts, respondent Robert Nicastro failed to meet his burden to demonstrate that it was constitutionally proper to exercise jurisdiction over petitioner J. McIntyre Machinery, Ltd. (British Manufacturer), a British firm that manufactures scrap-metal machines in Great Britain and sells them through an independent distributor in the United States (American Distributor). On that basis, I agree with the plurality that the contrary judgment of the Supreme Court of New Jersey should be reversed.

None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this Court’s previous holdings suggest the contrary. The Court has held that a single sale to a customer who takes an accident-causing product to a different State (where the accident takes place) is not a sufficient basis for asserting jurisdiction. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). And the Court, in separate opinions, has strongly suggested that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place...

Here, the relevant facts found by the New Jersey Supreme Court show no “regular . . . flow” or “regular course” of sales in New Jersey; and there is no “something more,” such as special state-related design, advertising, advice, marketing, or anything else. Mr. Nicaastro, who here bears the burden of proving jurisdiction, has shown no specific effort by the British Manufacturer to sell in New Jersey. He has introduced no list of potential New Jersey customers who might, for example, have regularly attended trade shows. And he has not otherwise shown that the British Manufacturer “purposefully avail[ed] itself of the privilege of conducting activities” within New Jersey, or that it de-livered its goods in the stream of commerce “with the expectation that they will be purchased” by New Jersey users. *World-Wide Volkswagen, supra, at 297-298*...

Accordingly, on the record present here, resolving this case requires no more than adhering to our precedents.

II

I would not go further. Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.

The plurality seems to state strict rules that limit jurisdiction where a defendant does not “inten[d] to submit to the power of a sovereign” and cannot “be said to have targeted the forum.” *Ante*, at 7. But what do those standards mean when a company targets the world by selling products from its Web site? And does it matter if, instead of shipping the products directly, a company consigns the products through an intermediary (say, Amazon.com) who then receives and fulfills the orders? And what if the company markets its products through pop up advertisements that it knows will be viewed in a forum? Those issues have serious commercial consequences but are totally absent in this case.

But though I do not agree with the plurality’s seemingly strict no-jurisdiction rule, I am not persuaded by the absolute approach adopted by the New Jersey Supreme Court and urged by respondent and his *amici*. Under that view, a producer is subject to jurisdiction for a products-liability action so long as it “knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.” *201 N. J., at 76-77*. In the context of this case, I cannot agree.

For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between “the defendant, the *forum*, and the litigation,” it is fair, in light of the defendant’s contacts *with that forum*, to subject the defendant to suit there. *Shaffer v. Heitner, 433 U.S. 186, 204 (1977)*...

For another, I cannot reconcile so automatic a rule with the constitutional demand for “minimum contacts” and “purposeful[ly] avail[ment],” each of which rest upon a particular notion of defendant-focused fairness. *Id., at 291, 297*. A rule like the New Jersey Supreme Court’s would

permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue. What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). I know too little about the range of these or in-between possibilities to abandon in favor of the more absolute rule what has previously been this Court's less absolute approach.

Further, the fact that the defendant is a foreign, rather than a domestic, manufacturer makes the basic fairness of an absolute rule yet more uncertain. I am again less certain than is the New Jersey Supreme Court that the nature of international commerce has changed so significantly as to require a new approach to personal jurisdiction.

It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen, supra, at 297*. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good...

Accordingly, though I agree with the plurality as to the outcome of this case, I concur only in the judgment of that opinion and not its reasoning.

Justice GINSBURG, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

A foreign industrialist seeks to develop a market in the United States for machines it manufactures. It hopes to derive substantial revenue from sales it makes to United States purchasers. Where in the United States buyers reside does not matter to this manufacturer. Its goal is simply to sell as much as it can, wherever it can. It excludes no region or State from the market it wishes to reach. But, all things considered, it prefers to avoid products liability litigation in the United States. To that end, it engages a U.S. distributor to ship its machines

stateside. Has it succeeded in escaping personal jurisdiction in a State where one of its products is sold and causes injury or even death to a local user?

Under this Court's pathmarking precedent in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and subsequent decisions, one would expect the answer to be unequivocally, "No." But instead, six Justices of this Court, in divergent opinions, tell us that the manufacturer has avoided the jurisdiction of our state courts, except perhaps in States where its products are sold in sizeable quantities. Inconceivable as it may have seemed yesterday, the splintered majority today "turn[s] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U. C. Davis L. Rev. 531, 555 (1995).

...Nicastro operated the 640 Shear in the course of his employment at Curcio Scrap Metal (CSM) in Saddle Brook, New Jersey. *Id.*, at 7a, 43a. "New Jersey has long been a hotbed of scrap-metal businesses" See Drake, *The Scrap-Heap Rollup Hits New Jersey*, Business News New Jersey, June 1, 1998, p. 1. In 2008, New Jersey recycling facilities processed 2,013,730 tons of scrap iron, steel, aluminum, and other metals—more than any other State—outpacing Kentucky, its nearest competitor, by nearly 30 percent. Von Haaren, Themelis, & Goldstein, *The State of Garbage in America*, BioCycle, Oct. 2010, p. 19...

McIntyre UK representatives attended every ISRI convention from 1990 through 2005. *Id.*, at 114a–115a. These annual expositions were held in diverse venues across the United States; in addition to Las Vegas, conventions were held 1990–2005 in New Orleans, Orlando, San Antonio, and San Francisco. *Ibid.* McIntyre UK's president, Michael Pownall, regularly attended ISRI conventions. *Ibid.* He attended ISRI's Las Vegas convention the year CSM's owner first learned of, and saw, the 640 Shear. *Id.*, at 78a–79a, 115a. McIntyre UK exhibited its products at ISRI trade shows, the company acknowledged, hoping to reach "anyone interested in the machine from anywhere in the United States." *Id.*, at 161a.

Although McIntyre UK's U.S. sales figures are not in the record, it appears that for several years in the 1990's, earnings from sales of McIntyre UK products in the United States "ha[d] been good" in comparison to "the rest of the world." *Id.*, at 136a (Letter from Sally Johnson, McIntyre UK's Managing Director, to Gary and Mary Gaither, officers of McIntyre UK's exclusive distributor in the United States (Jan. 13, 1999)). In response to interrogatories, McIntyre UK stated that its commissioning engineer had installed the company's equipment in several States—Illinois, Iowa, Kentucky, Virginia, and Washington. *Id.*, at 119a...

In a November 23, 1999 letter to McIntyre America, McIntyre UK's president spoke plainly about the manufacturer's objective in authorizing the exclusive distributorship: "All we wish to do is sell our products in the [United] States—and get paid!" *Id.*, at 134a...Answering

jurisdictional interrogatories, McIntyre UK stated that it had been named as a defendant in lawsuits in Illinois, Kentucky, Massachusetts, and West Virginia. *Id.*, at 98a, 108a. And in correspondence with McIntyre America, McIntyre UK noted that the manufacturer had products liability insurance coverage. *Id.*, at 129a...

In sum, McIntyre UK's regular attendance and exhibitions at ISRI conventions was surely a purposeful step to reach customers for its products "anywhere in the United States." At least as purposeful was McIntyre UK's engagement of McIntyre America as the conduit for sales of McIntyre UK's machines to buyers "throughout the United States." Given McIntyre UK's endeavors to reach and profit from the United States market as a whole, Nicastro's suit, I would hold, has been brought in a forum entirely appropriate for the adjudication of his claim. He alleges that McIntyre UK's shear machine was defectively designed or manufactured and, as a result, caused injury to him at his workplace. The machine arrived in Nicastro's New Jersey workplace not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged.³ On what sensible view of the allocation of adjudicatory authority could the place of Nicastro's injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?

II

A few points on which there should be no genuine debate bear statement at the outset. First, all agree, Mc-Intyre UK surely is not subject to general (all-purpose) jurisdiction in New Jersey courts, for that foreign-country corporation is hardly "at home" in New Jersey. See *Goodyear Dunlop Tires Operations, S. A. v. Brown*, *post*, at 2-3, 9-13. The question, rather, is one of specific jurisdiction, which turns on an "affiliatio[n]" between the forum and the underlying

³ McIntyre UK resisted Nicastro's efforts to determine whether other McIntyre machines had been sold to New Jersey customers. See *id.*, at 100a-101a. McIntyre did allow that McIntyre America "may have resold products it purchased from [McIntyre UK] to a buyer in New Jersey," *id.*, at 117a, but said it kept no record of the ultimate destination of machines it shipped to its distributor, *ibid.* A private investigator engaged by Nicastro found at least one McIntyre UK machine, of unspecified type, in use in New Jersey. *Id.*, at 140a-144a. But McIntyre UK objected that the investigator's report was "unsworn and based upon hearsay." Reply Brief 10. Moreover, McIntyre UK maintained, no evidence showed that the machine the investigator found in New Jersey had been "sold into [that State]." *Ibid.*

controversy.” *Goodyear Dunlop, post*, at 2 (quoting von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1136 (1966) (hereinafter von Mehren & Trautman); internal quotation marks omitted); see also *Goodyear Dunlop, post*, at 7-8.

Second, no issue of the fair and reasonable allocation of adjudicatory authority among States of the United States is present in this case. New Jersey’s exercise of personal jurisdiction over a foreign manufacturer whose dangerous product caused a workplace injury in New Jersey does not tread on the domain, or diminish the sovereignty, of any sister State. Indeed, among States of the United States, the State in which the injury occurred would seem most suitable for litigation of a products liability tort claim. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (if a manufacturer or distributor endeavors to develop a market for a product in several States, it is reasonable “to subject it to suit in one of those States if its allegedly defective [product] has there been the source of injury”); 28 U.S.C. § 1391(a)-(b) (in federal-court suits, whether resting on diversity or federal-question jurisdiction, venue is proper in the judicial district “in which a substantial part of the events or omissions giving rise to the claim occurred”).

Third, the constitutional limits on a state court’s adjudicatory authority derive from considerations of due process, not state sovereignty. As the Court clarified in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982):

“The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* . . . must be seen as ultimately a function of the individual liberty interest preserved by the *Due Process Clause*. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.” *Id.*, at 703, n. 10.

...Finally, in *International Shoe* itself, and decisions thereafter, the Court has made plain that legal fictions, notably “presence” and “implied consent,” should be discarded, for they conceal the actual bases on which jurisdiction rests...

... [T]he plurality's notion that consent is the animating concept draws no support from controlling decisions of this Court. Quite the contrary, the Court has explained, a forum can exercise jurisdiction when its contacts with the controversy are sufficient; invocation of a fictitious consent, the Court has repeatedly said, is unnecessary and unhelpful. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*Due Process Clause* permits "forum . . . to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there"); *McGee v. International Life Ins.Co.*, 355 U.S. 220, 222, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) ("[T]his Court [has] abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [out-of-state] corporations.").⁵

III

This case is illustrative of marketing arrangements for sales in the United States common in today's commercial world. A foreign-country manufacturer engages a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers. The product proves defective and injures a user in the State where the user lives or works. Often, as here, the manufacturer will have liability insurance covering personal injuries caused by its products. See Cupp, *Redesigning Successor Liability*, 1999 U. Ill. L.Rev. 845, 870-871 (noting the ready availability of products liability insurance for manufacturers and citing a study showing, "between 1986 and 1996, [such] insurance cost manufacturers, on average, only sixteen cents for each \$100 of product sales"); App. 129-130.

When industrial accidents happen, a long-arm statute in the State where the injury occurs generally permits assertion of jurisdiction, upon giving proper notice, over the foreign manufacturer...

The modern approach to jurisdiction over corporations and other legal entities, ushered in by

⁵ But see *ante*, at 4-8 (plurality opinion) (maintaining that a forum may be fair and reasonable, based on its links to the episode in suit, yet off limits because the defendant has not submitted to the State's authority). The plurality's notion that jurisdiction over foreign corporations depends upon the defendant's "submission," *ante*, at 6, seems scarcely different from the long-discredited fiction of implied consent. It bears emphasis that a majority of this Court's members do not share the plurality's view.

International Shoe, gave prime place to reason and fairness. Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury?⁹ Do not litigational convenience and choice-of-law considerations¹¹ point in that direction? On what measure of reason and fairness can it be considered undue to require McIntyre UK to defend in New Jersey as an incident of its efforts to develop a market for its industrial machines anywhere and everywhere in the United States?¹² Is not the burden on McIntyre UK to defend in New Jersey fair, *i.e.*, a reasonable cost of transacting business internationally, in comparison to the burden on Nicastro to go to Nottingham, England to gain recompense for an injury he sustained using McIntyre’s product at his workplace in Saddle Brook, New Jersey?

The Court’s judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction “in matters relating to tort . . . in the courts for the place where the harmful event occurred.” Council Reg. 44/2001, Art. 5, 2001 O. J. (L. 12) 4. The European Court of Justice has interpreted this prescription to authorize jurisdiction either where the harmful act occurred or at the place of injury. See *Handelskwekerij G. J. Bier B. V. v. Mines de Potasse d’Alsace S. A.*, 1976 E. C. R. 1735, 1748-1749.

* * *

⁹ The plurality objects to a jurisdictional approach “divorced from traditional practice.” But “the fundamental transformation of our national economy,” this Court has recognized, warrants enlargement of “the permissible scope of state jurisdiction over foreign corporations and other nonresidents.” *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-223 (1957).

¹¹ Historically, “tort cases were governed by the place where the last act giving rise to a claim occurred—that is, the place of injury.” Brilmayer 1291–1292. Even as many jurisdictions have modified the traditional rule of *lex loci delicti*, the location of injury continues to hold sway in choice-of-law analysis in tort cases. See generally Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U.L. Rev. 719 (2009).

¹² The plurality suggests that the *Due Process Clause* might permit a federal district court in New Jersey, sitting in diversity and applying New Jersey law, to adjudicate McIntyre UK’s liability to Nicastro. See *ante*, at 10-11. In other words, McIntyre UK might be compelled to bear the burden of traveling to New Jersey and defending itself there under New Jersey’s products liability law, but would be entitled to federal adjudication of Nicastro’s state-law claim. I see no basis in the *Due Process Clause* for such a curious limitation.

For the reasons stated, I would hold McIntyre UK answerable in New Jersey for the harm Nicastro suffered at his workplace in that State using McIntyre UK's shearing machine. While I dissent from the Court's judgment, I take heart that the plurality opinion does not speak for the Court, for that opinion would take a giant step away from the "notions of fair play and substantial justice" underlying *International Shoe*. 326 U.S., at 316.

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Italian Civil Justice System: Most Significant Innovations in the Last Years (2009-2012)

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VII. “CLASS ACTION” SUITS IN ITALY

I. Introduction

The average length of ordinary civil proceedings in Italy is clearly unreasonable: 353 days before the *giudici di pace* (onorary lay judges in first instance), 470 days before the *Tribunali* (courts in first instance), 1032 days before the *Corti d'appello* (courts in second instance), more than three years before the *Corte di cassazione* (the Supreme Court)¹⁰. The causes of such unreasonable lengths are many. There are too few judges in relation to the number of disputes to resolve. Many judicial districts are too small and should be merged. The judges are not assisted by law clerks in the preparation of their decisions. Judges often do not even have their own room to work. The presidents of the courts are appointed by the Supreme Council of the Judiciary (*Consiglio Superiore della Magistratura*) which often takes no account of their managerial skills. The number of court clerks is insufficient to cover the needs. Finally, e-justice has been improved, but it still remains marginal.

However, in the last years (2009 up to 2012) the Italian civil justice system has undergone some interesting changes, trying to address these problems.

¹⁰ These figures are updated to 2011. For reference see <http://www.cortedicassazione.it>, under “Provvedimenti del Primo Presidente”, “Inaug. Anno giudiziario”.

II. Innovations 2012

Following innovations took place in 2012: (a) 698 courts in first instance (31 *Tribunali* and 667 *giudici di pace*) have been removed¹¹; (b) summary proceedings have been introduced before the courts in second instance, leading to the reject of appeal if there is no “reasonable prospect of success” (new Art. 348-*bis* Code of Civil Procedure)¹²; (c) powers of the Supreme Court to quash a judicial decision for defective reasoning have been limited (new Art. 360, para. 1, no. 5 Code of Civil Procedure); (d) in the framework of the Employment Law Reform, aiming inter alia at liberalizing individual lay-offs for economic reasons, brand-new proceedings for accelerating the dispute resolution on lay-offs have been introduced¹³; (e) as to e-justice, the regulation on judicial communications has been further improved¹⁴.

Because of the limited application experience it is still hard to predict whether these changes will be really successful. For this reason, this paper will foremost focus on the most important innovations already introduced by the reform acts of 2009, 2010 and 2011¹⁵.

III. Mediation

In 2010 the European Directive on mediation has been implemented in Italy¹⁶. All the aspects covered by the Directive are transposed: judicial mediation, enforceability of agreements resulting from mediation, confidentiality, effects of mediation on limitation and prescription periods. The new rules apply not only to cross-border disputes, but also to internal disputes.

¹¹ Law no. 148 of 14th September 2011 and, based on this law, Legislative Decrees no. 155 and 156 of 7th September 2012.

¹² Law no. 134 of 7th August 2012.

¹³ Law no. 92 of 28th June 2012.

¹⁴ Law no. 221 of 17th December 2012.

¹⁵ Law no. 69 of 18th June 2009 and, based on this law, Legislative Decrees no. 28 of 4th March 2010 and no. 150 of 1st September 2011. For a broader analysis of these changes, s. R. Caponi, Italian Civil justice Reform 2009, in ZJP-Int., 14 (2009), p. 143.

¹⁶ Directive 2008/52/EC of the European Parliament and of the Council of 21st May 2008 on certain aspects of mediation in civil and commercial matters, which has been implemented in Italy by the Legislative Decree no. 28 of 4th March 2010.

Before dealing with the major aspects of the new regulation, it is worth making some general remarks.

One should always keep in mind the profound differences between adjudication and out-of-court settlement. This holds true in efficient civil justice systems and even more so in the Italian legal system. We need to take into account the long-term consequences of the birth of the ADR industry in Italy, and the development of a professional class of mediators, not necessarily trained in the law and serving the interests of harmony and non-adversarial social control¹⁷. As D. Hensler put it as to the situation in the United States: “To encourage people to consider alternatives to litigation, in federal and state courts nationwide, judges and mediators are telling claimants that legal norms are antithetical to their interests, that vindicating their legal rights is antithetical to social harmony, that juries are capricious, that judges cannot be relied upon to apply the law properly, and that it is better to seek inner peace than social change”¹⁸. It is not by chance that, according to Mauro Cappelletti, the movement for access to justice is characterised by three “waves”¹⁹. The first wave consists of the development of mechanisms for providing legal aid. The second wave is the movement to grant representation to collective interests and to protect them, through such mechanisms as class actions and granting consumer and environmental associations standing to sue²⁰. Finally, the third wave is driven by the simplification of proceedings and the development of alternative methods of dispute resolution. The distinctive feature of Cappelletti’s approach is that only the harmonic and proportionate combination of the three waves can effectively and efficiently respond to the demand for justice from society. Accordingly, mediation should not be a remedy for the inefficiencies of the public civil justice system, but rather should present an “added value” to courts that work effectively and efficiently.

¹⁷ U. Mattei, Access to Justice. A Renewed Global Issue? In K. Boele-Woelki, S. van Erp (Eds.), General Reports of the XVIIth Congress of the International Academy of Comparative Law, Bruxelles, Utrecht, 2007, p. 383.

¹⁸ D. Hensler, Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System, 108 Penn St. L. Rev. 165, p. 196.

¹⁹ See M. Cappelletti, B. Garth, Access to Justice: The Worldwide Movement to make Rights Effective. A General Report, 1, 1, Milan and Alphenaaandrijn, 1978-79, 3; V. Varano, Presentazione a L'altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato, V. Varano (ed.), Milan, 2007, IX.

²⁰ It is still worth mentioning Marc Galanter’s distinction between individuals, who typically have isolated and infrequent contacts with the judicial system, and organizations with a long-term judicial experience, stressing the advantages of the “repeat players”: M. Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, in Law & Society Review, 9 (1974), p. 95.

For this reason the promotion of mediation should always be accompanied by efforts to improve the efficiency of the civil justice system and not by attempting to limit access to the courts. This point of view suggest identifying the kinds of disputes that would be “better” resolved through informal methods than through legal actions before the courts, such as disputes involving parties who are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a conclusive breakup between the parties. Instead, mediation can broaden the perspective and help maintain future relations between the parties. This is the perspective of situational justice, already adopted *ante litteram* in the Italian Civil Code of 1942: see Art. 1965, para. 2.

Nevertheless mediation has been promoted by the Italian Mediation Act 2010 basically as a means to reduce the courts’ workload. The new Act had provided that mediation had compulsory to be sought prior to the commencement of the proceedings for a significant number of disputes: not only along the perspective of situational justice, but also for disputes involving parties who meet (or better, “collide”) for the first time because of the dispute (for example, in case of damages from car accident). Courts were empowered to enforce this rule by ordering the stay of the proceedings in cases where mediation had not been sought prior to the commencement of the proceedings. However, a recent decision of the Constitutional Court²¹ has declared the new rules unconstitutional, as the Government (enacting them by the Legislative Decree no. 28 of 2010) was not empowered to introduce such a compulsory mediation attempt on the basis of the Parliamentary Law no. 69 of 2009). Although the regulation has been declared incostitutional for “procedural” reasons, the weak reasoning by the Court might be influenced by the strong opposition of the Bar to the compulsory mediation attempt. Most of the italian legal practitioners still work in small (or medium) law firms and they are strong against conditions of competition provided by other professionals in the business of dispute resolution, as it is the case of mediation proceedings. Moreover, many commentators had criticised the provisions requiring mediation to be sought compulsorily. They observed that mediation is possible only if both parties are willing to discuss their dispute, to examine the merits of their position in good faith, and ultimately to consider reaching a compromise solution. However, it is worth mentioning the other side of the coin. Often the parties are not aware of the costs of the process before the courts and of the considerable length of civil proceedings. Moreover, the parties frequently do not even know that there is the possibility of making use of mediation. The provision of mandatory mediation attempt could spread awareness of alternative methods of dispute resolution and thus propel the willingness of the parties to make use of them to solve their disputes.

After the decision by the Constitutional Court mediation proceedings can of course take place on a voluntary basis. During the judicial proceedings the courts can invite parties to pursue

²¹ Corte costituzionale, decision no. 272 of 24th October/6th December 2012.

mediation by referring them to public or private mediation providers. Bar associations may arrange court-annexed-mediation at the courts in first instance. Out-of-court mediation proceedings run by chambers of commerce and other professional associations are also available. During mediation, confidential communications are privileged against compulsory production in judicial proceedings. The legislation provides tax benefits in relation to mediation and conciliation agreements. A rather unsolved problem is the training of professional mediators. The rules currently in force provide that those interested in carrying out this profession should attend training courses of only fifty-hour lessons. It is doubtful that these courses provide adequate preparation.

To sum up, the new rules on mediation are not a panacea for the inefficiency of the Italian civil justice system, but they are certainly a step in the right direction. For this reason, the government should promote mediation not only because it is less expensive than litigation before the courts, but also because of its capacity to help parties expand traditional settlement negotiations and broaden resolution options, often by going beyond the legal issues in controversy.

IV. Summary Proceedings

The Civil Justice Reform Act 2009²² has introduced new summary proceedings named *procedimento sommario di cognizione*²³. It has a broad scope of application: the plaintiff may apply for it in all cases where the *Tribunale* decides in first instance as a single judge. All kinds of actions may be brought before the Court: actions for coercive relief (*azione di condanna*), actions for declaratory judgment (*azione di mero accertamento*), actions to create, modify or extinguish a legal relationship between the parties (*azione costitutiva*). Except for the act instituting the proceedings (*ricorso*), the determination of the date of the hearing and the shorter time limits to appear before the court, the regulation of the introductory stage is based on that of the ordinary proceedings. The *ricorso* must contain the same elements of the *citazione* (the claim form for the ordinary proceedings). This in turn must be served onto the defendant (by the plaintiff) at least forty days before the date fixed for the hearing. The defendant must file his appearance at least ten days before the hearing. Within this time limits the following are subject to preclusion: procedural objections, objections on the merits of the case which may be raised only by the parties, counterclaims and joining of a third party. At the hearing, the court must determine whether to continue to deal with the case according to the summary proceedings or, instead, to transpose it to the ordinary proceedings, if it considers that the arguments presented

²² The already mentioned Law no. 69 of 18th June 2009.

²³ The new proceedings are regulated in the fourth book of the Code of Civil Procedure: Art. 702-bis, -ter, -quarter.

by the parties require a “non-summary” ascertainment²⁴, namely, if the case raises complex issues. If the court continues to handle the case according to the summary proceedings, “after hearing the parties, omitting any formality which is not indispensable for complying with the right of the parties to be heard, it proceeds in the way it deems more proper to accomplish the evidentiary acts which are relevant in relation to the object of the requested decision”²⁵, namely, in relation to the determination of the claim brought before the court. The regulation of the evidentiary stage is not entrusted to the law, but to the discretionary powers of the court, subject to compliance with the constitutional right to be heard. On the merits, the summary proceedings ends with a decision that contains an order granting or denying the relief. If granted, the judgment (when it has content of coercive relief) is provisionally enforceable. If it is not appealed, the judgment becomes *res judicata*. In the appeal proceedings new means of evidence and new documents are admitted only when the Court of Appeal considers them “indispensable” (after the amendment 2012) to decide the case, or when the party proves that he/she could not offer them during the first instance due to a fortuitous event²⁶.

According to the prevailing opinion, despite their name, the new summary proceedings are actually a special full evidentiary process, simplified if compared to the ordinary one, deemed to deal with “simple” disputes. In fact, the “labels” never bind the interpreter in the reconstruction of the content of the norms. Moreover, the Code of Civil Procedure of 1865 labeled as “summary” full evidentiary proceedings which were an alternative to the formal (non-summary) ones. In fact, the history of civil justice shows that the summary proceedings are designed to meet specific needs: namely, procedural economy (in cases where it is likely that the counterparty will not defend his position), the need to proceed with urgency to neutralise a *periculum in mora* (i.e. the danger of suffering a damage unsuitable of adequate compensation), and the aim of preventing the abuse of the right of defence. However, the new summary proceedings do not have these goals. In fact, with regard to their scope and consequently the requirements of the decision granting the application, the new summary proceedings are quite atypical. Their scope cover all the cases brought before the court at first instance as a single judge. As for the type of actions that can be brought before the court, they coincide with the ordinary ones. With regard to the characteristics of the evidentiary activity, the court is called upon to perform *sic et simpliciter* the evidentiary acts relevant to the determination of the right, in accordance with the constitutional right to be heard. In relation to the stability of the final decision, it is *res judicata*. Finally, the Civil Justice Reform Act 2009 had empowered the Government to make use of the new summary proceedings by drafting the legislative decree aimed at rationalising and simplifying civil proceedings. Art. 54, para. 4, Law no. 69 of 2009

²⁴ Art.702-ter, para 3 Code of Civil Procedure.

²⁵ Art. 702-ter, para 5 Code of Civil Procedure.

²⁶ Art. 702-quarter Code of Civil Procedure.

stipulates that the new summary proceedings should apply to “procedures where there is a prevailing disposition towards the simplification of the treatment of the case”.

However, the regulation of the new summary proceedings lends itself to various criticisms. The main critical aspect is the following. The court cannot order the transfer of a dispute from the ordinary proceedings (allegedly initiated by the plaintiff in a simple case) to the summary ones. This rigidity can be explained if one assumes that the ordinary and the summary proceedings “dwell” in completely different worlds. On the contrary the alternative between ordinary proceedings and summary proceedings should be regulated by the law as a choice between two “track”, both of them being full evidentiary proceedings. This problem could be partly solved through agreements between the Bench and the Bar, such as the protocols drafted by the “observatories on civil justice” (*osservatori sulla giustizia civile*). These agreements should have as the main objective the identification of the types of simple disputes that can be dealt with through summary proceedings. This operation should exert a persuasive effect in relation to practitioners, to facilitate the commencement of such disputes through the summary proceedings, and in relation to the judge, to avoid a hasty transfer to the ordinary “track”.

To sum up, the characteristic of the summary proceedings is to be a “legislative cover” doomed to be a receptive model of the best practices, agreed between practitioners and the judiciary. It can fail in many situations, due to the heavy workload of the courts, but perhaps not in all of them. Looking ahead, the best solution is to restructure the ordinary proceedings, by articulating it into two tracks predetermined by the law. The choice between the two tracks - based on the degree of complexity of the dispute - should be entrusted to the judge dealing with the case, in collaboration with the parties.

V. Rationalisation and Simplification of Proceedings

As already mentioned, the Civil Justice Reform Act 2009 has empowered the Government to enact norms aimed at rationalising and simplifying civil proceedings²⁷. Most of civil proceedings should be restructured according to one of the following three models: (a) proceedings for labour disputes, if there are «prevailing features of concentration of the various procedural steps as well as features of proof taking by the court of its own motion»; (b) new summary proceedings, if there is a “prevailing disposition towards the simplification of the treatment of the case”; (c) ordinary proceedings for all other cases. By enacting the Legislative Decree no. 150 of 2011 the Government has implemented this directive.

The purpose of reorganising and rationalising the myriad of special proceedings is certainly to be welcomed. However, the choice between three models is characterised by traits of rigidity,

²⁷ The repeal of the special proceeding for corporate cases (*rito speciale societario*, Legislative Decree no. 5 of 2003) is also stipulated, with the only exception of the special rules relating to arbitration.

accentuated by the impossibility to convert the summary proceedings into the ordinary ones. Moreover, ordinary proceedings and proceedings for labour disputes always apply in the same identical way, regardless of the simplicity or complexity of the dispute that is at stake. Looking ahead, the best solution has been already mentioned at the end of the previous Section IV.

VI. General Norm on Coercive Measures

The Civil Justice Reform Act 2009 has introduced a general system of coercive measures (Art. 614-*bis* Code of Civil Procedure) aimed at ensuring the enforcement of judgments for coercive relief related to obligations to be performed by the debtor in person (i.e. obligations which cannot be performed by a third party: *obblighi infungibili*). In that way a significant gap in the legislation, criticised since the early decades of the 20th century, has been filled. The norm provides that the court may order the obliged party to pay a fine for non-compliance with the court decision, and thus it basically adopts the French model of *astreintes*. However, the new regulation presents a number of drawbacks: (a) the amount of fine shall be determined by the court deciding on the merits; it would have been more appropriate to entrust the execution court with this task, in order to better adapt the amount of fine to the degree of non-fulfilment. (b) Instead of stipulating a general rule that coercive measures may not be imposed to ensure the fulfilment of obligations derived from a work contract (safeguarding the personal freedom), the court is bestowed with an unlimited discretion to rule out coercive measures when “it is manifestly unfair”. (c) the major problem, already solved in France, has not been addressed: whether the fine due as coercive measure should be added to the money compensation for damages. (d) the court decision “constitutes enforceable title” for the payment of the fine due as coercive measure, before non-compliance has occurred.

VII. “Class action” suits in Italy

Class actions are likely to be one of the most topical issues in the field of civil procedure at the present time²⁸. The issue of aggregate litigation provides an overview of the problems facing the dispute resolution methods of civil justice systems of western countries²⁹. The Italian “class

²⁸ To give an example, world congresses and conferences of the International Association of Procedural Law (IAPL) have frequently hosted sessions on class actions in recent years. The I International Conference & XXIII Iberoamerican Symposium on 6-9 June 2012 in Buenos Aires (Argentina) was entirely devoted to Collective Proceedings/Class Actions.

²⁹ The expression “aggregate litigation” is borrowed from the title of the ALI’s project, Principles of the Law of Aggregate Litigation. According to the presentation of the American Law Institute, “The Principles aim to help judges, legislators, and others make aggregation decisions correctly, and to improve the management of cases in which aggregation is allowed. In addition to formal aggregation in litigated settings, such as with class actions, the work addresses a broader array of cases that are bundled together and settled or tried to test the value of related claims”. Reporter: S. Issacharoff, New York University School of Law. Associate Reporters: R.

action” is regulated by Art. 140-*bis*, Consumer Code, in force since 1st January 2010. Of course, the social and cultural context in which this new remedy has been introduced differs profoundly from that of the U.S. class action, which owes its success not only to the sophisticated regulation of Rule 23 of the Federal Rules of Civil Procedure, but also to the attitudes and work practices of the lawyers and judges who apply them and the norms governing the funding of litigation costs (“contingency fees”)³⁰. To understand the scope of application of the Art. 140-*bis* Cons. Code, it is worth recalling that the notion of collective interests can be understood in two main ways³¹. Firstly, as “diffuse” interests without any specific connection to named individuals (one could call them “superindividual” interests), such as an interest in a healthy environment, in fair business practices or in the safe marketing of products. Secondly, as a bundle of individual interests of an identical or equivalent nature (“homogeneous” individual interests), such as interests in monetary compensation for harm caused to a number of consumers by unfair contract terms, unfair business practices, anti-competitive conducts or unsafe products. Diffuse interests are usually brought to court as claim for injunctive relief. Homogeneous individual interests are usually brought to court as claim for monetary compensation. A judicial action may well include both kinds of remedies, such as in the field of consumer protection. In the original version of Art. 140-*bis*, para. 1 Cons. Code “homogeneous individual rights” (of consumers and users) were mentioned as rights protected by the new remedy. Art. 6, para. 1 of the Law no. 27 of 2012 on the “liberalizations” has added: “as well as collective interests”. However, this addition does not significantly extend the scope of application of the class action suit as determined by Art. 140-*bis*, para. 2 Cons. Code. This provision grants protection to: (a) claims relating to contractual rights of a number of consumers and users who find themselves in a “homogeneous” situation *vis-à-vis* the same enterprise, including claims arising out of mass contracts or contracts based on standard terms and conditions; (b) homogeneous claims arising from the purchase of a product, *vis-à-vis* the producer, even when no direct contractual relation between the consumers and the producer exists; (c) homogeneous claims based on unfair business practices or anti-competitive conduct. Moreover, only compensatory relief and not injunctive relief, can be claimed through the class action suit. To sum up, of the two main types of remedy falling within the category of collective redress (injunctive relief, compensatory relief), Art. 140-*bis* Cons. Code only deals with the aggregate claims of monetary compensation in the field of consumer protection.

H. Klonoff, Lewis and Clark Law School; R. A. Nagareda, Vanderbilt University Law School; C. Silver, University of Texas School of Law.

³⁰ On the interplay between cultural context and civil procedure see generally O. Chase, *Law, Culture and Ritual. Disputing Systems in Cross-Cultural Context*, New York – London, 2005.

³¹ See H. Lindblom, National Report Sweden, in A. Pellegrini Grinover, K. Watanabe, L. Mullenix, *Os processos coletivos nos países de civil law e common law*, National Reports, XIII International Congress of Procedural Law, Salvador/Bahia, 16–22 September 2007, São Paulo, 2008, p. 55.

The regulation lacks specific rules aimed at facilitating the financing of collective redress actions. Although funding is a key issue in this matter, the debate on this point is still at an early stage in Italy. Costs and professional fees are fully governed by general rules³². Before dealing with the fundamental features of the Italian class action, a general remark should be made. The protection of ‘homogeneous’ individual rights in civil proceedings necessarily calls for a redefinition of the role of the legal profession. The effectiveness of the judicial remedies aimed at protecting such ‘homogeneous’ individual rights depends not only on the appropriate design of a procedural regime, but also on the organisational skills of those law firms able to extend their practice to this new area of activity. Additionally the ability of the judge to assess, at the admissibility stage of the proceedings, the ‘healthy and robust composition’ of the collective action also plays a central role.

As to the standing, Art. 140-*bis*, para. 1 Cons. Code reads as follows: “Homogeneous individual rights as well as collective interests can also be protected through the class action suit [...]. To that end each class member can claim for ascertaining liabilities, for obtaining monetary compensation for damages suffered and restitutions. He can also bring the class action suit through associations, making them a proxy, or committees, being a member of them”. It goes without saying that this text could be better drafted. First of all, Art. 140-*bis*, para. 1 Cons. Code grants standing to promote a class action suit only to each (allegedly) injured consumer (or user). However, in practice consumer associations play a major role in supporting the initiative of consumers and will retain such a role in the near future. As the first body of cases shows, the consumers (or users) promoting the class actions always are very close to consumer associations. They are often the President, the Secretary General of a consumer association or lawyers very close to a consumer association. Consumers wishing to promote a class action normally confer a proxy status on a closely connected consumer association to act as a representative in the proceedings. They are required neither to assign their individual claim to the association, nor to confer upon the association the power to agree to a settlement of the dispute (nor to confer “substantive” representative powers).

After the class action suit has been brought by filing an application to the court having jurisdiction in the case³³, the ‘certification’ phase takes place. At the first hearing, the court is called upon to decide on the issue of the admissibility of the class action. The elements to be checked by the court are the following: (a) whether the claim is manifestly unfounded; (b)

³² See now Art. 13 of the reform on legal profession, approved by the Parliament on December, 21, 2012. .

³³ For the courts having jurisdiction over class actions suits, s. Art. 140-*bis*, para. 4 Cons. Code. The act instituting the proceedings is a *citazione*, which must be served not only on the defendant, but also on the public prosecutor (*pubblico ministero*), who may intervene in the preliminary phase of the proceedings, until the court decides upon the admissibility of the class action (s. Art. 140-*bis*, para. 4 Cons. Code).

whether there is a conflict of interests between the plaintiff and the class; (c) whether the individual claims are not homogeneous; (d) whether the plaintiff is not in the position to adequately protect the interest of the class. The case is to be dismissed if at least one out of these four elements is found to be present. The initial case law on the admissibility of class actions was very conservative. In the meanwhile, even in Italy, the courts are gradually realizing that “the class action is at any rate something out of the ordinary, an essential new turn in legal events”³⁴.

If the action is declared admissible, the court shall determine the features of the homogeneous individual rights to be adjudicated upon in the class action. It will also set out the terms and conditions of the most appropriate form of public notice of the proceedings, so that the class members can opt-in in a timely fashion and in any case no later than four months from the time the decision of admissibility was given public notice³⁵. The court shall also determine the course of the proceedings thereby ensuring, in accordance with the right to be heard, the fair, effective and prompt handling of the trial. Furthermore the court shall prescribe measures aimed at preventing undue repetitions or complications in taking evidence or bringing arguments. It shall indicate for the parties the form of notice needed to protect the position of the class members. Finally, the court shall regulate the evidentiary stage in the most appropriate way and give instructions on any other procedural issue³⁶. Thus, unlike ordinary proceedings (Art. 163 ff. Code of Civil Procedure), the regulation of the evidentiary stage of the class action proceedings is not entrusted to the law. Rather it is entrusted to the discretionary powers of the court, subject to compliance with the constitutional right to be heard, much like the regulation of the new summary proceeding³⁷.

Consumers wishing to avail of the protection under Art. 140-*bis* Cons. Code can join in the class action through an act called *adesione* (adhesion). Representation by legal counsel is not required in order to join the action. The *adesione* can take place also through telefax or authenticated electronic mail³⁸. Class members joining the action cannot claim before the court on an individual basis, unless the proceedings terminate without decision on the merits or the

³⁴ S.C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, in *Columb. Law Rev.*, 1977, p. 866; N. Trocker, Class actions negli Usa - E in Europa?, *Contratto e impresa - Europa*, 2009, p. 178; R. Caponi, Azione di classe: il punto, la linea e la discontinuità, in *Foro it.*, 2012, V, 149, where it has been advanced the proposal to deal with the uncertainties of the Art. 140-*bis* Cons. Code according to the canon *In dubio pro novitate*.

³⁵ Art. 140-*bis*, para. 7 Cons. Code.

³⁶ Art. 140-*bis*, para. 11 Cons. Code.

³⁷ See above Section IV.

³⁸ Art. 140-*bis*, para. 3, first sentence Cons. Code.

class plaintiff reaches a settlement with the defendant and they do not wish to accept it³⁹. Class members joining the action do not enjoy procedural powers, nor may they appeal the final decision. However, once they have joined, they are bound by the outcome of the proceedings. Thus, according to Art. 140-*bis*, para. 3 Cons. Code it is up to the class member to decide whether to be bound or not by the final decision in the class action proceedings. In other words, an “opt-in” approach has been chosen. According to the Italian regulation, those class members who are unwilling to opt in may bring an individual lawsuit⁴⁰, but they may not intervene in the class action proceedings⁴¹. As in other European countries, the choice between an “opt-in” or an “opt-out” system is the central issue of the Italian discussion on class action suits. There is no need to reassess the pros and cons of the two systems. I would like to make only two remarks. Firstly, I think that opting-out is the most suitable system to achieve the goals of class action suits. Secondly, I do not think that the opt-out system clashes with the constitutional principles of fair trial, at least in the field of small claims, where the disproportion between the legal costs of proceedings and the economic value of the claims acts as a deterrent for individual actions. A workable solution could be a kind of “dual system”, where the choice between opt-in and opt-out can be determined by the value of the claims. This choice could be left to be decided on a case by case basis by the court (following the example of the Danish regulation)⁴², or based on a strict legislative quantification.

The law envisages two possible alternatives for the final decision⁴³: (a) coercive relief, applicable in all cases where the decision on liability of the defendant automatically leads to the determination of the amount to be recovered, or (b) a declaration that is limited to a finding of liability, where an individualised decision may be needed. The amount of damages is not

³⁹ Art. 140-*bis*, para. 3, second sentence Cons. Code.

⁴⁰ They may bring an individual action even if the class action suit does not conclude with a ruling on the merits, but they may not bring further class action suits on the same acts and against the same enterprise after the deadline for joining assigned by the court in the decision on admissibility: Art. 140-*bis*, para. 14 Cons. Code.

⁴¹ Art. 140-*bis*, para. 10 Cons. Code.

⁴² In class actions under Section 254e(8) of the Danish Act, i.e. actions under the opt-out arrangement, the only eligible class representative is a public authority authorised for the purpose by law.

⁴³ The issue of determination of recoverable damages is one of the most delicate aspects of class action suits. The problem would require a solution by substantive law, so as to allow mechanisms of collective determination of damages, as happens, for example with the U.S. experience on “fluid recovery”.

determined as part of the collective process⁴⁴ but in a collective negotiation or, if no agreement is reached, in further proceedings limited to the *quantum*⁴⁵. The law provides a *spatium deliberandi* in favour of the defendant. The decision is not enforceable until six months after its publication. Payments of amounts due made during this period are exempt from any increase. The clear aim is to encourage voluntary compliance with the decision.

To sum up, the class action suit perform a variety of functions. First, it fullfils the guarantee of access to justice in the case of small claims. The advantages of this instrument make it preferable not only to a more traditional series of individual actions, but also to individual mediation proceedings. In instances of mass damage (because the injured parties are many and where the individual harm is so small that it is not worth claiming it before the court or even making it on the basis of a mediation proceeding: “negative value claims”) the aggregation of the homogeneous individual claims by a class representative, as stated by Art. 140-*bis* Cons. Code, cuts costs. It therefore constitutes the cornerstone of a judicial response aimed at removing the reasons why consumers and users relinquish their right to assert their claims before the courts. In this case, the new instrument serves not only the purpose of procedural economy and efficiency, but it also allows for the emergence of latent disputes that would not otherwise appear before the courts due to the disproportionality between the value of a single case, typically modest, and the costs of the individual plea before the courts or of the mediation proceedings. In this last respect, the class action suit works a little like a “vacuum cleaner” regarding mediation proceedings, freeing the latter from the “dust” of low-value series of individual controversies and allowing it to concentrate on matters of a larger scale. It frees up resources which can subsequently be put to use in reaching individualised mediation agreements (or for the efforts of a collective mediation after a class action is brought) and thus enhances the professional competence and the work of the mediator. In other words, the introduction of the class action suit is a fundamental element of a strategy to improve the conditions of the civil justice system in the field of consumers’ protection. It is aimed at preventing alternative methods of dispute resolution from turning into a way to provide an (inadequate) response to a demand for justice that is frustrated due to the lack of an efficient alternative to the civil justice system.

In addition to providing individual relief to injured parties, as a second feature, the new instrument deters companies from engaging in harmful illegal acts against a relatively broad range of consumers. This new (regulatory) function of the civil justice system can be placed in a historical perspective and compared with the classical model, according to which the purpose of the civil proceedings is the protection of individual rights. The basic structures of civil justice

⁴⁴ Art. 140-*bis* does not regulate a second stage of the collective proceeding centred on the determination of the *quantum*. The absence of this provision will not be missed, except in exceptional cases where the collective process concludes with a declaratory judgment on the liability of the company.

⁴⁵ Art. 140-*bis*, para. 12, second sentence Cons. Code.

systems in continental Europe, from standing to sue to adjudication, still bear traces of their historical foundation in natural law theory and were aimed at protecting the “new bourgeois individual” and his economic freedom, in a fragmented and individualistic perspective of social relationships. As a consequence of adopting this approach for a long time the State civil justice had significant difficulties in dealing with disputes with collective dimensions. As an “essentially new turn in legal events” (S. C. Yeazell), the class action suits constitute a collective reaction by consumers against the mass torts of enterprises. They have a deterrent effect on the latter, which would certainly not be achieved by individual actions of consumers before the courts or mediation bodies. In this area, the private judicial initiative of the consumers (private enforcement) supports public efforts to prevent and control the misuse of a company’s economic power. It can be conceived as a sort of counterpower that emerges from society, as opposed to the economic power of the company. In this sense, the Italian civil procedure (like that of other European countries that have introduced collective redress actions) might be enriched with a new function, traditionally entrusted to the state and the public administration in continental Europe: the regulation of business activities that impact not so much on the interests of an isolated individual, but on the interests of a broad number of people. Such a regulatory function should be complementary to the control function of the public administration: private enforcement and public enforcement should go hand and hand⁴⁶. Third, class actions suits meet the goal of procedural economy and efficiency in disputes that would otherwise be suited to ordinary multi-party litigation.

⁴⁶ On this topic see generally S. Issacharoff, *Class Actions and State Authority*, in New York University School of law, Public Law & Legal Theory Research Paper Series, Working paper no. 12-33, 2012.