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JOINT AMERICAN LAW INSTITUTE / UNIDROIT WORKING GROUP  
ON  
TRANSNATIONAL RULES OF CIVIL PROCEDURE

Preliminary Draft Rules and Comments prepared by  
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## PREFACE

Presented herewith is a Preliminary Draft of Transnational Rules of Civil Procedure. In the form of Discussion Drafts the Rules have been circulated to consultants from many countries, as well as to the Advisers.

There are, appropriately, skeptics who think the idea premature at best that there can be “universal” procedural rules, and others who, though sympathetic with the idea, have serious reservations about the concept. These reservations are at two levels. First, there is doubt that it is feasible to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, the peculiarities of the U.S. system. We think, however, that the reservations based on the civil-law/common-law distinction are unduly fearful. The U.S. system is unique among common-law systems in having broad discovery and jury trial and the more so in having the combination of these two procedures. Thus, a second-level reservation is that, if such a project is feasible, it is not feasible if it is based on characteristic U.S. procedure.

Our discussions have led us to accept the latter kind of reservation with important qualifications. We conclude that a system of procedure acceptable generally throughout the world could not include jury trial and would require much more limited discovery than is typical in the United States. This in turn leads us to conclude that the scope of the proposed Transnational Civil Rules should exclude personal-injury and wrongful-death actions, because barring jury trial in such cases would be unacceptable in the United States. Hence, the scope is now conceived in terms of “business disputes.” Obviously this definition may require some further specification, but we believe that it is adequate to frame the project for the present.

A major remaining issue is whether any kind of party-conducted discovery is appropriate. In most of the civil-law countries it is unethical for lawyers for a litigant to interview a witness, as distinct from the client. The underlying idea is that this would permit coaching and therefore taint the witnesses. Yet disclosure of intended testimony of witnesses is fundamental to common-law systems and, we believe, to fair procedure as a practical matter. Disclosure requires that witness interviews be permitted. It is therefore the position of the Reporters that the Rules should state straightforwardly that such contact is permitted in litigation covered by the Rules.

The reception given to the project generally has been very positive, but there has been dissent. Part of the dissent evidently reflects some irritation at “American cultural imperialism.” We hope that this work product of the Reporters, one of whom has a European civil-law background and the other a North American common-law background, may have dispelled this concern.

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# INTRODUCTION

## I. International “Harmonization” of Procedural Law

The human community of the world lives at closer quarters today than in ancient days. International trade is at an all-time high and steadily increasing; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; ordinary citizens in increasing numbers live temporarily or permanently outside their native countries. As a consequence there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.

In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems, whereby the same or similar “rules of the game” apply no matter where the participants may find themselves. The effort to reduce differences among national legal systems is commonly referred to as “harmonization.” Another term is “approximation,” meaning that the rules of various legal systems should be reformed in the direction of approximating each other. Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions. There is now in place a profusion of treaties and conventions governing these subjects and also some similar arrangements addressing personal rights such as those of employees, children, and married women.<sup>1</sup>

Harmonization of the law of procedure has made much less progress. It has been impeded by the assumption that national procedural systems are too different from each other, and too deeply embedded in local political history and cultural tradition, to permit reduction or reconciliation of differences among legal systems. There are, to be sure, some international conventions dealing with procedural law, notably The Hague Convention on the Taking of Evidence Abroad, the evolving Hague Convention on Jurisdiction and Judgments and European conventions on recognition of judgments.<sup>2</sup> The international conventions on procedural law have thus far addressed the bases of personal jurisdiction and the mechanics of service of process to commence a lawsuit, on one end of the litigation process, and recognition of judgments on the other end of the process.

However, the pioneering work of Professor Marcel Storme has demonstrated that harmonization in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure.<sup>3</sup> We have drawn extensively on Professor Storme’s project.

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<sup>1</sup> See, e.g., Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448; United States - Egypt Treaty Concerning the Reciprocal Encouragement and Protection of Investments, September 29, 1982, 21 I.L.M. 927; Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 19 I.L.M. 33; International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 16, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

<sup>2</sup> See, e.g., Catherine Kessedjian, Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (April 1997).

<sup>3</sup> Marcel Storme (ed.) *Approximation of Judiciary Law in the European Union*, Kluwer, 1994. See also *Anteproyecto del Codigo Procesal Civil Modelo para Iberoamerica*, REVISTA DE PROCESO, Vols. 52 and 53, 1988 and 1989.

International arbitration often is a substitute for adjudication in national courts. However, the international conventions on arbitration have the same limited scope as the conventions dealing with international litigation in judicial forums. Thus, the international conventions on arbitration specify aspects of commencement of an arbitration proceeding and specify also the recognition to be accorded an arbitration award, but say little or nothing about the procedure in an international arbitration proceeding as such.<sup>4</sup> Instead, the typical stipulation concerning hearing procedure in international arbitration is that the procedural ground rules shall be as determined by the neutral arbitrator.<sup>5</sup>

The project on Transnational Rules of Civil Procedure endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions.<sup>6</sup> The project is inspired in part by the model of the Federal Rules of Civil Procedure in the United States, undertaken over a half century ago. The Federal Rules established a single procedure to be employed in courts sitting in 48 different semi-sovereign States, each of which had its own procedural law, its own procedural culture, and its own bar. The Federal Rules thereby accomplished what many thoughtful observers thought impossible — a single system of procedure for four dozen different legal communities. Experience with the Federal Rules proves that it has been possible to establish a single procedure for litigation in Louisiana (civil-law system), Virginia (common-law pleading in 1938), and California (code pleading). The Transnational Rules project conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

## **II. Fundamental Similarities in Procedural Systems**

In undertaking international harmonization of procedural law, the Reporters have come to identify both fundamental similarities among procedural systems and fundamental differences between them. Obviously, it is the fundamental differences that present the difficulties. However, it is important to keep in mind that all modern civil-procedural systems have fundamental similarities. These similarities result from the fact that a procedural system must respond to several inherent requirements. Recognition of these requirements makes easier the task of identifying functional similarities in diverse legal systems and, at the same time, puts into sharper perspective the ways in which procedural systems differ from one another.

The fundamental similarities among procedural systems can be summarized as follows:

- Standards governing assertion of jurisdiction and subject-matter jurisdiction
- Specifications for a neutral adjudicator
- Procedure for notice to defendant
- Rules for formulation of claims
- Establishing facts through proof
- Provision for expert testimony
- Rules for deliberation and decision and for appellate review
- Rules of finality of judgments.

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<sup>4</sup> See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 19, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>5</sup> Alan S. Rau and Edward F. Sherman, Tradition and Innovation in International Arbitration Procedure, 30 TEX. INT'L L.J. 89, 90 (1995).

<sup>6</sup> See Geoffrey C. Hazard, Jr., and Michele Taruffo, Transnational Rules of Civil Procedure, 30 CORNELL INT'L L.J. 493, 493-94 (1997).

Of these, the rules of jurisdiction, notice, and recognition of judgments are sufficiently similar from one country to another that they have been susceptible to substantial resolution through international conventions. Concerning jurisdiction, the United States is aberrant in having an expansive concept of “longarm” jurisdiction, although this difference is one of degree rather than one of kind. Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator should be disinterested as between the parties. Accordingly, in transnational litigation reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system by definition requires a principle of finality. The concept of “final” judgment therefore is also generally recognized, although some legal systems permit reopening a determination more liberally than other systems. The corollary concept of mutual recognition of judgments is also universally accepted.

### **III. Differences Among Procedural Systems**

The differences in procedural systems are, along one division, differences between the common-law systems and the civil-law systems. The common-law systems all derive from England and include Canada, Australia, New Zealand, South Africa, India, and the United States, as well as Israel, Singapore, and Bermuda. The civil-law systems originated on the European continent and include those derived from Roman law (the law of the Roman Empire codified in the Justinian Code) and canon law (the law of the Roman Catholic Church, itself substantially derived from Roman law). The civil-law systems include those of France, Germany, Italy, and Spain and virtually all other European countries and, in a borrowing or migration of legal systems, those of Latin America and Japan.

The significant differences between common-law and civil-law systems are as follows:

- The judge in civil-law systems, rather than the advocates in common-law systems, has responsibility for development of the evidence and articulation of the legal concepts that should govern decision. However, there is great variance among civil-law systems in the manner and degree to which this responsibility is exercised, and no doubt variance among the judges in any given system.
- Civil-law litigation in many systems proceeds through a series of short hearing sessions —sometimes less than an hour each — for reception of evidence, which is then consigned to the case file until an eventual final stage of analysis and decision. In contrast, common-law litigation has a preliminary or pretrial stage, sometimes more than one, and then a trial at which all the evidence is received consecutively.
- A civil-law judgment in the court of first instance (i.e., trial court) is generally subject to more searching reexamination in the court of second instance (i.e., appellate court) than a common-law judgment. Reexamination in the civil-law systems extends to facts as well as law.
- The judges in civil-law systems serve a professional lifetime as judge, whereas the judges in common-law systems are almost entirely selected from the ranks of the bar. Thus, civil-law judges lack the experience of having been a lawyer, whatever the effects that may have.

These are important differences, but not worlds of difference.

The American version of the common-law system has differences from other common-law systems that are of at least equal significance. The American system is unique in the following respects:

- Jury trial is broadly available of right in the American federal courts and in the state-court systems. No other country routinely uses juries in civil cases.
- American rules of discovery give wide latitude for exploration of potentially relevant evidence.
- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common-law systems. In part this is because of the use of juries.
- The American system operates through a unique cost rule. Each party, including a winning party, ordinarily pays that party's own lawyer and cannot recover that expense from a losing opponent. In most all other countries the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.<sup>7</sup>
- American judges are selected by a variety of ways in which political affiliation plays an important part. In most other common-law countries judges are selected on the basis of professional standards.

However, it should also be recognized that the procedures in American administrative adjudications, which are conducted by professional judges without juries, much more closely resemble the counterparts in other countries.

#### **IV. Rules for Formulation of Claims (Pleading)**

The rules governing formulation of claims are substantially identical in most legal systems. The pleading requirement in most common-law systems requires that the claimant state the claim with reasonable particularity as to facts concerning persons, place, time, and sequence of events involved in the transaction sued on. This pleading rule is essentially similar to the Code Pleading requirement that governed in most American states prior to adoption of the Federal Rules of Civil Procedure in 1938.<sup>8</sup> The attempt in Federal Rules to eliminate disputes over pleading was largely unsuccessful because it simply postponed disputes concerning the legal sufficiency of a claim until later stages in the litigation.

#### **V. Discovery**

In most common-law jurisdictions, pretrial depositions are unusual and in some countries are typically employed only where the witness will be unavailable for trial. Documents are subject to discovery only when relevant to the proceeding. Relevance for this purpose is defined by reference to the pleadings in the case and, as noted above, the rules of pleading require full specification of claims and defenses.<sup>9</sup> In contrast, wide-ranging pre-trial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes.

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<sup>7</sup> See generally A. Tomkins and T. Willing, *Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts* (1986). See also, e.g., A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 *Calif. L. Rev.* 792 (1963); T. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *Duke L. Rev.* 651.

<sup>8</sup> L. Tolman, *Advisory Committee's Proposals to Amend the Federal Rules of Civil Procedure*, 40 *A.B.A. J.* 843, 844 (1954); F. James, G. Hazard, and J. Leubsdorf, *Civil Procedure* §§ 3.5, 36 (4th ed. 1992).

<sup>9</sup> See generally C. Platto, ed. *Pre-Trial and Pre-Hearing Procedures Worldwide* (1990).

The rules for document production in the common-law systems all derive from the English Judicature Acts of 1873 and 1875. In 1888 the standard for discovery was held in the leading *Peruvian Guano* decision to cover

any document that relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party . . . either to advance his own case or to damage the case of his adversary . . . [A] document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences . . .<sup>10</sup>

Under the civil law there is no discovery as such. A party has a right only to request the court to interrogate a witness or to require the opposing party to produce a document. This arrangement is a corollary of the general principle in the civil-law system that the court rather than the parties is in charge of the development of evidence. Moreover, in some civil-law systems a party cannot be compelled to produce a document that will establish liability against him — something like a civil equivalent of a privilege against self-incrimination. However, in many civil-law systems a party may be compelled to produce a document when the judge concludes that the document is the only evidence concerning the point of issue. This result can also be accomplished by holding that the burden of proof as to the issue shall rest with the party having possession of the document. In any event, the standard for production under the civil law appears uniformly to be “relevance” in a fairly strict sense.

## **VI. Procedure at Plenary Hearing**

Another principal difference between civil-law systems and common-law systems concerns presentation of evidence. As is well known, in the civil law the development of the evidence is done by the judge with suggestions from the advocates, while in the common law the evidence is presented by the advocates with supervision and supplementation by the judge. Furthermore, in many civil-law systems the evidence is taken in separate stages according to availability of witnesses, while in the common-law system it is taken in a consecutive hearing for which the witnesses must adjust their schedules. More fundamentally, the basic conception of the plenary hearing in the civil-law system is that of an inquiry by the judge which is monitored by advocates on behalf of the parties, while the conception of a trial in the common-law systems is that of juxtaposed presentations to the court by the parties through their advocates.

In more pragmatic terms, the effectuation of these different conceptions of the plenary hearing requires different professional skills on the part of judge and advocates. An effective judge in the civil-law system must be able to frame questions and pursue them in an orderly series, and an effective advocate must give close attention to that questioning and be alert to suggest additional directions or extensions of the inquiry. In the common-law system the required skills are more or less the opposite. The common-law advocate must be skillful at framing questions and pursuing them in orderly sequence, while the judge must be attentive to pursue further development by supplemental questions.

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<sup>10</sup> *Compagnie Financiere Et Commerciale Du Pacifique v. Peruvian Guano Co.* 11 QBD 55, 63 (1882). The court was interpreting Order XXXI., rule 12 from the 1875 Rules of Supreme Court, which required production of documents “relating to any matters in question in the action.”

## **VII. Second-Instance Review and Finality**

These Rules defer to the law of the forum concerning second-instance proceedings (“appeal”). The same is true for further review in a higher court, as is available in many systems. The Rules define conditions of finality that discourage re-opening of an adjudication that has been completed. An adjudication fairly conducted is the best approximation of true justice that human enterprise can achieve. On that basis, an adjudication should be left at rest even when there may be some reason to think a different result could be achieved, unless there is a showing of fraud in the proceeding or of conclusive evidence that was previously undisclosed. The rules adopt an approach to finality based on the common-law philosophy.

## **VIII. Adoption of These Rules**

The Rules are designed to express basic principles of civil procedure recognized in modern societies. They seek to combine the best elements of adversary procedure, particularly that in the common-law tradition, with the best elements of judge-centered procedure, particularly that in the civil-law tradition. They are expressed in terminology and through concepts that can be assimilated in all legal traditions.

The procedure and legal authority for adoption of these Rules is a matter of the internal law and international law of nation states. Hence, these Rules may be adopted by international convention or by legal authority of a national state for application in the courts of that state. In countries with a unitary legal system that legal authority is vested in the national government. In federal systems the allocation of that authority depends upon the terms of the particular federation. It might be, for example, that these Rules could be adopted for the federal courts in a federal system but in the state or provincial courts only as prescribed by the state or province. As used in the Rules, “state” refers to a national state and not to a province or state within a federal system.

These Rules could be adopted for use in the first-instance courts of general competence or for use in a specialized court, or division of the court of general competence, having jurisdiction over commercial disputes.

## **IX. Purpose of These Rules**

The objective of these Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from transnational transactions. The Rules seek thereby to reduce the uncertainty and anxiety that particularly attend parties obliged to litigate in unfamiliar surroundings, appreciating that all litigation is unpleasant from the viewpoint of the litigants. The reduction of difference in legal systems, commonly called “harmonization” of law, is an aspect of achieving such fairness. However, a system of rules is only one aspect of fair procedure. Much more important, as a practical matter, is the independence and neutrality of judges and the competence and integrity of legal counsel. Nevertheless, rules of procedure are influential in the conduct of litigation. These Rules seek to express, so far as rules can do so, the ideal of disinterested adjudication. As such they also can be terms of reference in matters of judicial cooperation, wherein the courts of different legal systems in particular provide assistance to each other. By the same token, reference to the principles expressed herein can moderate the unavoidable tendency of practitioners in a legal system, both judges and lawyers, to consider their system from a parochial viewpoint.

The Rules herein governing presentation of claims, development and presentation of legal argument, and the final determination by the tribunal (Rules 8 through 30) may be adopted or referenced in proceedings not otherwise governed by these Rules, particularly arbitration.



These Rules are proposed for adoption by nation states to govern litigation arising from transnational transactions, as defined in Rule 2. The method of adoption could be treaty, convention or other international agreement, or statute or rule of court of a nation state or political subdivisions thereof. A court could, when doing so is not inconsistent with its own organic or procedural law, refer to these Rules as generally recognized standards of civil justice. It is contemplated that, when so adopted, these Rules would be a special form of procedure applicable to these transactions, similar to specialized procedural rules that most nation states have for bankruptcy, administration of decedent's estates, and civil claims against government agencies.

Where permissible by forum law, these Rules could also be adopted through contractual stipulation by parties to govern, with the consent of the forum, litigation arising from a contractual relationship. The latter form of implementation in substance is a party stipulation to waive the otherwise governing rules of procedure in favor of these Rules.

## **X. Revisions from Prior Drafts**

Prior drafts of the Rules have been published. See 30 CORNELL INT'L L.J. 493 (1997) and 33 TEX. INT'L L.J. 499 (1998). These drafts, together with the past Discussion Draft No. 1, have elicited valuable criticism and comments from legal scholars and lawyers from both civil-and common-law systems.<sup>11</sup> Comparison will demonstrate that many modifications have been adopted as a result of discussions and deliberations following those publications, especially revision of the provisions on scope, composition of the tribunal, the incorporation of "principles of interpretation," the sequence and scope of discovery, and specification of a settlement-offer procedure. The net effect could be described as a new text.

The Discussion Draft No. 1 was translated into French; into German by Gerhard Walter from Bern University; into Japanese by Koichi Miki from Keio University; into Chinese by Terence Lau; into Italian by Francesca Cuomo and Valentina Riva from Pavia University; into Spanish by Evaluz Cotto from Puerto Rico University, Francisco Malaga from Pompeu Fabra University, Aníbal Quiroga León from Catholic University of Peru and Horácio Segundo Pinto from Catholic University of Argentina; and into Portuguese by Assistant Reporter Antonio Gidi from University of Pennsylvania. We hope to make translations into additional languages in the future.

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<sup>11</sup> Cf. Gary Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998), Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998), Jacob Dolinger and Carmen Tiburcio, *The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or lex Diligentiae?*, 33 TEX. INT'L L.J. 425 (1998), Gerhard Walter and Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998), Catherine Kessedjian, *First Impression of the Transnational Rules of Civil Procedure from Paris and The Hague*, 33 TEX. INT'L L.J. 477 (1998), Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Preliminary Draft No. 1*, 33 TEX. INT'L L.J. 499 (1998), Michele Taruffo, *Drafting Rules for Transnational Litigation*, ZYPINT'L L.J. 449 (1997).

For the previous drafts, we received written contributions from Mathew Applebaum, Stephen Burbank, Edward Cooper, Antonio Gidi, Stephen Goldstein, Richard Hulbert, J. A. Jolowicz, Dianna Kempe, Mary Kay Kane, Ramón Mullerat, Ernesto Penalva, Thomas Pfeiffer, Hans Rudolf Steiner, Rolf Sturner, Louise Teitz, Janet Walker, Gerhard Walter, Garry Watson, Des Williams, and others.

For this draft, we received written contributions from Robert Byer, Robert Casad, Edward Cooper, José Lebre de Freitas, Richard Hulbert, Mary Kay Kane, Richard Marcus, Michael Stamp, Tom Rowe, Ralph Whitten.

For this new draft, the main changes include provisions for special courts for transnational litigation, for amendment of pleadings, and for procedures for dealing with multiple parties or multiple claims. These revisions emerged from discussions at several locations with Advisers from various countries, including meetings in Bologna, Italy; Vancouver, Canada; San Francisco and Philadelphia, USA, Vienna, Austria, Tokyo, Japan and Singapore and also conducted through correspondence.

## **XI. Future Work**

This Preliminary Draft is still a “work in progress.” We have received a valuable critical report by Professor Rolf Stürner that was commissioned by UNIDROIT (The International Institute for the Unification of Private Law). We expect to proceed with cooperation of UNIDROIT and that the further discussions will proceed for at least two or three years and will result in additional revisions.

We are preparing Annotations that will correlate the provisions of these Rules with cognate provisions in various national-procedural systems.

Subsequent drafts will incorporate the latest revisions of these Rules. The latest version will be accessible at the American Law Institute's web site (<http://www.ali.org/ali/transrules.htm>).

The Reporters welcome suggestions and criticisms. Our address is as follows:

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# PRINCIPLES

## 1. Fundamental Principles

- a) *Independent judiciary*
- b) *Access to justice*
- c) *Due process*
- d) *Equal protection under the law*
- e) *Justification of judgments*
- f) *Finality and appeal*
- g) *Reasonable cost allocation*

## 2. Supporting principles

(connected with, or included in, Fundamental Principles)

- a) Impartiality of the court
  - Professional training of judges
  - Security of tenure
  - Freedom from political interference
  - Withdrawal and recusal of judges
- b) Geographical convenience
  - Availability of advocates. Right to employ counsel
  - Absence of artificial legal limitations
- c) Fair notice
  - Free assertion of claims and defences
  - Right to proof (including discovery)
  - Absence of unnecessary privileges and exclusionary rules
  - Parties' participation (including examination of witnesses)
  - Free evaluation of proof
  - Orderly judicial supervision
  - Efficiency of the court (speedy proceedings)
  - Efficient settlement offer procedures
  - Judicial control against procedural abuse
- d) Freedom from discrimination
  - Impartial application of law
  - Legal aid
- e) Justificatory opinions required
- f) Finality of first instance judgments
  - Recognition of judgments
  - Res judicata rules
  - Right to an appeal on the merits (with reasonable costs and expedition)
- g) Winner recovers litigation costs

### **3. Transnational Rules principles**

- Scope limited to transnational litigation
- Incorporation, by reference, of forum law in matters not specified within
- Advancement of substantive and procedural fairness
- Regard for the legal and cultural traditions of the litigants
- Procedural economy and efficiency
- Discretion of the court in procedural matters
- Detailed statements of fact and law in the statement of claims and defense, with disclosure of all evidence the parties intend to rely
- Burden of answer the complaint, under penalty of default
- Burden to deny or explain the facts alleged in the complaint
- Reasonable right of amendment
- Transparency and good faith in the relation between parties and between them and the judge
- Preliminary conferences
- Incentives for the parties to settle the dispute amicably
- Effective incentives to compel settlement
- Autonomy of the parties
- Strict control of the court of all stages
- Reasonableness of sanctions
- Structure of proceeding divided in two phases: gathering of evidence (pretrial) and presentation of evidence (trial)
- Disclosure, before plenary hearing, of all evidence a party intends to rely
- Right to discovery of relevant information and evidence
- Discovery limited to documents relevant to the controversy
- Oral discovery limited to the discretion of the judge
- Discovery conducted by the parties, with supervision of the judge
- Concentration of hearing
- Principle of orality
- Hearing limited to production of oral evidence
- Written evidence produced before the hearing
- Party presentation of evidence with judge participation and control
- Admissibility of all relevant evidence
- Neutral expert. Party designated expert optional
- Recognition of privilege of the legal profession and of settlement negotiations
- Limited recognition of privileges under local law
- Winner recovers reasonable litigation costs, unless there are compelling reasons to decide differently
- Reasonable allocation of interim costs of fees and expenses
- Right to appellate review limited to claims and evidence adduced in the first instance
- Enforceability of judgments pending appeal

# RULES WITH COMMENTARY

## 1. Principles of Interpretation

**1.1 These Rules shall be construed to advance substantive and procedural fairness, having regard for the legal and cultural traditions of the litigants.**

**1.2 Each party must be granted the right to properly present its case and to receive equal treatment.**

**1.3 The proceedings must fulfill reasonable expectations regarding fairness, and must be time and cost efficient.**

**1.4 The court must assure proper and professional conduct of all persons involved in the proceedings.**

**1.5 Use of procedural restrictions and penalties against parties and nonparties should be only in reasonable proportion to their purpose.**

### **Comment:**

*C-1.1* The principles of interpretation correspond to similar principles incorporated in most procedural systems. As applied in transnational disputes these principles require the court and the parties to apply the Rules with awareness of the differences in the legal systems with which the parties may be familiar. The term “having regard for the legal and cultural traditions of the litigants” does not mean that foreign law will supersede local law or that foreign parties may be excused from compliance with the Transnational Rules or the local rules. It means only that the judge should appreciate that every system has its own culture and tradition.

*C-1.2* The primary guiding principle is that the evidence and legal contentions of the parties be fully considered and that procedural restrictions and penalties be imposed only as reasonably necessary to assure orderly determination of the dispute.

## **A. Scope and Personal Jurisdiction**

### **2. Disputes to Which These Rules Apply**

**2.1 Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, the courts of a state that has adopted these Rules shall apply them in disputes arising from a sale, lease, loan, investment, acquisition, banking, security, property, intellectual property or any other business, commercial, or financial transaction:**

**2.1.1 That did not arise wholly within that state and concerning a plaintiff and a defendant who are habitual residents of different states; or**

**2.1.2 Concerning fixed property that is located in the forum state and concerning which a person who is a habitual resident of another state makes a claim of ownership or of a security interest.**

**2.2 A corporation, société anonyme, unincorporated association, partnership, or other organizational entity is considered a habitual resident both of the state**

**from which it has received its charter of organization and of the state where it maintains its administrative headquarters.**

**2.3 In cases involving multiple parties or multiple claims, the court shall determine the principal matters in controversy. If those matters are within the scope of these Rules, the Rules apply to all parties and claims. Otherwise, the court shall apply the rules of the forum. The court may also sever the proceeding.**

**2.4 Participation by additional parties, whether as claimant, defendant, or third party, is determined according to Rule 4.**

**2.5 Upon demand of all parties who are not habitual residents of the state, the litigation shall proceed according to the ordinary procedural law of the forum.**

**2.6 A state may apply these rules to other civil matters.**

**Comment:**

*C-2.1* Rule 2.1 defines the matters governed by these Rules. The Rules shall apply to contract disputes and disputes arising from contractual relations; injuries to property, including immovable (real property), movable (personal property), and to intangible property such as copyright, trademark, patent rights; and injuries resulting from breach of obligations and commercial torts in business transactions. The term “business, commercial or financial transaction” includes a series of related events, such as repeated interference with property.

*C-2.2* The scope of application of these Rules is limited to commercial cases as a matter of comity in public policy, not because the rules are inappropriate for other types of legal disputes. In many countries, for example, disputes arising from employment relationships are governed by special procedures in specialized courts. The same is true of domestic relations matters.

Commercial disputes include disputes involving a government or government agency acting in a proprietary capacity. The court should apply the definition of proprietary capacity established in forum law.

*C-2.3* The term “dispute” may have different connotations in various legal systems. For example, under Rule 20 of the Federal Rules of Civil Procedure in the United States, a dispute would be interpreted in accordance with the broad concept of “transaction or occurrence.” Under the civil-law systems the term “dispute” would be interpreted in accordance with the narrower concept of dispute as framed by the plaintiff’s claim.

*C-2.4* Rule 2.1.1 establishes that these Rules apply where a plaintiff and a defendant are habitual residents of different states. Thus these Rules would apply in a dispute between a Japanese on one side and a Japanese and a Canadian on the other side. However, the transaction itself must be transnational, as well as the parties. In accordance, the transaction should not be related exclusively to the forum state.

*C-2.5* Rule 2.1.2 provides that these Rules apply in a dispute concerning fixed property located in one state as to which a plaintiff or a defendant who is a habitual resident of another state makes a claim. Whether a legal claim concerns property and whether it is a claim of ownership or of a security interest is determined by general principles of private international law.

*C-2.6* The habitual residence of an individual is determined by general principles of private international law. The definition in Rule 2.2 of residency of a jural entity, such as a société anonyme, partnership, or unincorporated association, corresponds to generally accepted principles of private international law. When an organization is chartered in one state

and has its administrative headquarters in another, both attributed residences must be different from the habitual residence of an opposing party.

*C-2.7* Legal disputes may involve claims asserted on multiple substantive legal bases, one of which is under these Rules but another which is not. The court may entertain both the claim under these Rules and the other claim or claims.

*C-2.8* A case may be one not included in Rule 2 at the outset of the litigation, but a claim or a party may later be joined that would justify application of these Rules. For example, in a claim based on contract by A against B, B could implead C on the basis of an indemnity obligation. If A and C or B and C are habitual residents of different states, these Rules would apply. Rule 2.3 confers authority on the court to determine whether the principal matters in dispute are within these Rules and thereupon to direct that the dispute be governed by these Rules or forum law, according to that determination.

*C-2.9* A plaintiff who invokes the authority of a court under these Rules is thereby precluded from thereafter challenging that authority, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of authority was manifest. A defendant or other party who does not object to application of these Rules until after that party has answered concerning the merits is precluded from making subsequent challenge, subject to the same exception.

*C-2.10* Rule 2.6 recognizes that the forum law may adopt provisions that enlarge the scope of application of the Rules.

### **3. Special Courts for Transnational Litigation**

**3.1 A state that has adopted these Rules may create a Special Court for Transnational Litigation or a specialized division within the courts of general jurisdiction. It may also similarly create a Special Appellate Court or a division of its appellate courts for Transnational Litigation.**

**3.2 The Special Court may delegate a case, in whole or in part, to courts of general jurisdiction, whenever the court finds that the nature, the value and relative simplicity of the case do not justify the cost and burden of litigating in the forum.**

**3.3 The court may travel to hear evidence in a different location and may make use of telecommunication devices. In such event, the court shall allocate among the parties any additional expenses not provided by the court's budget.**

#### **Comment:**

*C-3.1* Typically it would be convenient that a specialized court or division of court be established in a principal commercial city, such as Milan in Italy or London in the United Kingdom. Committing disputes under these rules to specialized courts would facilitate development of a more uniform procedural jurisprudence.

### **4. Personal Jurisdiction and Joinder**

**4.1 A proceeding under these Rules may be maintained in the courts of a state:**

**4.1.1 Designated by prior mutual agreement of the parties; or**

**4.1.2 In which a defendant is subject to the compulsory judicial authority of that state, as determined by that state’s law governing personal jurisdiction or by international convention to which the state is a party; or**

**4.1.3 Where fixed property is located when the application of these Rules is based on Rule 2.1.2.**

**4.2 Jurisdiction may be exercised over an additional person who:**

**4.2.1 Has a legal interest in the dispute or its subject matter and who petitions to intervene in the proceeding; or**

**4.2.2 Should participate in the interest of fair and efficient adjudication if:**

**4.2.2.1 The person in question is subject to the compulsory judicial authority of the state; and**

**4.2.2.2 The court determines that a decision cannot be effective if that person is not present or that the participation of that person is useful in the interest of justice.**

**4.3 When an additional person ought to be made a party to the proceeding:**

**4.3.1 If the court has jurisdiction over that person, the person should be summoned as provided in Rule 8;**

**4.3.2 If the person is not subject to the jurisdiction of the Court, the person should be notified with a copy of the complaint and other pleadings and invited to intervene.**

**4.4 Jurisdiction under these Rules may be exercised over claims arising from the same transaction, other than those within the scope of these rules, subject to the provisions of Rules 2.2 and 4.5.**

**4.5 In accordance with the procedure of the forum, any party may join additional parties who are subject to the jurisdiction of the court. Application of these Rules is not affected by joinder or claims or participation of additional parties, except as provided in Rule 2.5. If, prior to plenary hearing, there is joinder of claim or an additional party whose presence as a party would render Rule 2 applicable, these Rules shall apply, unless in accordance with Rule 2.3 the court orders otherwise in the interest of orderly administration of justice.**

**4.6 Any person, private or public, may file an *amicus curiae* brief containing data, information, remarks, social background and considerations that may be useful for a fair and just decision of the case. The court may invite a third party to file an *amicus* brief. The parties shall have the opportunity to submit written comment addressed to the matters in an *amicus* brief before the brief is considered by the court.**

**Comment:**

*C-4.1* Rule 4.1 states rules of jurisdiction that are recognized in virtually all legal systems. A court whose jurisdiction is established by a prior agreement among the parties, as provided in Rule 4.1.1, may decline to exercise jurisdiction if the transaction has no relationship to that forum. A plaintiff submits to the court’s authority by commencing the proceeding under these Rules. That submission extends to counterclaims and third-party claims permitted under these Rules.



C-4.2 Rule 4.1.2 incorporates by reference the domestic law of the forum concerning exercise of personal jurisdiction. This provision could apply, for example, to a defendant who has committed a legal wrong while temporarily present in the state or conducted a commercial transaction in the state, etc. It applies to organizations, such as corporations, as well as to individuals. Domestic law may be superseded by international law or by international convention, for example, the Brussels and Lugano Conventions.

C-4.3 Rule 4.1.3 provides that the court where fixed property is located has authority over the parties who make claims to the property, whether of ownership or a security interest. This expresses a principle that is almost universally recognized.

C-4.4 It is a generally recognized principle that a plaintiff may, at his option, join as defendant any persons against whom a claim is asserted concerning the transaction involved in the dispute. In addition, other parties may be added under the principles of intervention and necessary party.

C-4.5 Rule 4.2.1 states the concept of intervention by a third party. The precise definition of intervention varies somewhat among legal systems. However, in general a person (whether individual or jural entity) who has some interest that could be affected by the proceedings and who seeks to participate should be allowed to do so.

C-4.6 Rule 4.2.2 states the concept of necessary parties. The precise definition of this concept also varies somewhat among legal systems. However, in general a person (whether individual or jural entity) is a necessary party when it would be difficult for the court to adjudicate the dispute between the existing parties without taking into account the legal interests of that person. If a necessary party cannot be brought into the proceeding, it should not continue unless there is definite need of the existing parties for a resolution of the dispute.

C-4.7 When a necessary party is not subject to the compulsory authority of the court, that person may nevertheless be interested in participating in the case. Rule 4.3 specifies the procedure for giving notice to a necessary party. Even if that person does not participate actively, it may be useful to deliver the decision to that person.

C-4.8 Rule 4.5 would permit a party to join a noncommercial claim, for example, along with a claim that is within the scope of these Rules, so long as the additional claim arose from the same dispute. However, under Rule 2.3 the court may determine that the additional claim is the principal subject of the dispute and adjudicate the dispute according to the law of the forum.

C-4.9 Rule 4.5 permits a party to employ procedures of the forum to add additional parties, but it does not authorize class-suit procedure. Whether class action procedure is permitted depends on the law of the forum. If defendant asserts in another forum a claim that could be a counterclaim in the proceeding under these Rules, the other forum may apply its own rules of deference to require the claim to be asserted as a counterclaim in the proceeding under these Rules.

C-4.10 Rule 4.5 provides that the Rules have precedence over the forum's ordinary procedure when additional parties participate in the litigation pursuant to Rule 4.3. However, the court has authority to apply the forum's ordinary procedure, for example, when the dispute involving the additional parties is more complex or significant than the original dispute. See Rule 2.3.

C-4.11 The *amicus curiae* brief is a useful means by which any nonparty may supply the court with information and legal analysis that may be useful to achieve a just and informed disposition of the case. Therefore, any person should be allowed to file such a brief notwithstanding a lack of legal interest sufficient for intervention. It is in the court's discretion

whether such a brief may be taken into account. A judge has authority to refuse an *amicus curiae* brief when such a brief would not be of material assistance in determining the dispute. An *amicus curiae* does not become a party to the case but is merely an active commentator. Factual assertions in an *amicus* brief are not evidence in the case.

*C-4.12.* In civil law countries there is no established practice of allowing third parties without a legal interest in the merits of the dispute to intervene in a proceeding. However, the *amicus curiae* brief is an important device, particularly in cases of public importance.

## 5. Venue

**The proceeding shall be brought in the court of first instance in the locality determined according to the state's rules of territorial competence.**

### Comment:

*C-5.1* This Rule specifies the locality within a state where the proceeding is to be conducted. In common law this concept is called "venue"; in the civil law it is called territorial competence. The locality is to be determined by the domestic procedural law of the state where the proceeding is conducted.

## 6. Composition of the Court

**6.1 The court shall be composed as ordinarily provided by the law of the forum. The court of first instance may appoint not more than two neutral assessors, who are experts in the subject matter of the dispute. In choosing the assessors, the court shall consider recommendations from the parties. The assessors have no vote.**

**6.2 In its deliberations the court may confer with the assessors in the presence of the parties or through written communication, copies of which are provided to the parties. The fees and expenses of the assessors shall be paid by the parties or as otherwise directed by the court.**

### Comment:

*C-6.1* In most legal systems today the courts of first instance are constituted of a single judge. However, many civil-law systems normally use three judges in courts of general authority. In some legal systems the composition may be one or three judges, according to various criteria.

*C-6.2* Lay experts or assessors are included in a tribunal under various procedures in various systems. This Rule authorizes neutral assessors in cases involving technical or scientific issues. The appointment of assessors does not preclude use by the parties of expert witnesses or appointment by the court of a neutral expert. See Rule 23. The assessors are to help the judge understand the case and the evidence, not to conduct investigation or research, which could be a function for a neutral expert. The assessor sits with the judge, the expert sits in the witness stand.

*C-6.3* Since the parties have no opportunity to ask questions of assessors, the parties should be enabled to comment and challenge the assessors' opinions before they are considered by the court.

*C-6.4* The court has discretion to allocate the costs of the assessors. However, this allocation is provisional, because the loser is liable for the costs and expenses of the winner. See Rule 30.

*C-6.5* Rule 6 excludes the use of juries, notwithstanding that jury trial is a matter of constitutional right under various circumstances in some countries, notably the United States. Where jury trial is of right, the parties may waive the right or these Rules can apply with the use of a jury. See Rule 2.1.

## **7. Forum Procedure and General Authority of the Court**

**7.1 Subject to the provisions of Rule 1, the procedural law of the forum shall be applied in matters not addressed in these Rules, including the time limits imposed on procedural matters.**

**7.2 In addition to authority expressly conferred by these Rules, the court has authority to give direction to the proceedings and to make decisions in furtherance of justice.**

### **Comment:**

*C-7.1* The Transnational Rules of Civil Procedure are not a comprehensive “code” in the civil law sense of the word. They are a set of rules to supersede inconsistent local law and to be supplemented by local law whenever local law is not inconsistent with the Transnational Rules system. Rule 7 confers general judicial authority on the court in addition to that conferred by the Rules themselves. All judicial systems have a concept of a court’s general authority. In common-law jurisdictions, it is expressed as “inherent authority.” In most civil-law systems a similar concept is implied from general terms in the codes of civil procedure. In some civil-law systems the court’s authority is specified in detail. When confronted with a question of its own authority, a court should refer to the concepts of authority in its domestic legal system.

## **B. Proceedings**

### **8. Commencement of Suit**

**8.1 A proceeding shall be deemed commenced at the time of filing of the statement of claims, as long as filing is followed by a timely and valid service of process in accordance with the rules of the forum. The proceeding shall be designated Transnational Proceeding.**

**8.2 Concurrently with filing the suit, notice shall be given to the defendant in accordance with an applicable international convention or, if no such convention is applicable, by transmitting a copy of the statement of claim and a notice that plaintiff elects to proceed under these Rules.**

**8.3 The notice shall specify the time provided under these Rules and local law within which defendant must respond and shall state that judgment by default may be entered if defendant does not respond accordingly. Notice of the suit shall be in the language of the forum and in the language of the state of which the defendant is a habitual resident.**

**Comment:**

*C-8.1* Rule 8.1 specifies the rule for commencement of suit for purposes of determining the competence of court, lis pendens, interruption of statutes of limitations and other purposes as provided by the forum law. The competence of a court, once established, is not ousted by subsequent changes in the facts. Designation of the suit as a Transnational Proceeding provides notice to the defendant that these Rules will govern the matter.

*C-8.2* Rule 8.2 provides for giving notice of the proceeding to the defendant, or “service of process” as it is called in common-law procedure. The Hague Service Convention specifies rules of notice that govern proceedings in countries signatory to that Convention. When judicial assistance from the courts of another country is required in order to effect notice, the procedure for obtaining such assistance should be followed. In any event, the notice must include a copy of the statement of claim, a statement that the proceeding is conducted under these Rules, and a warning that default judgment may be taken against a defendant that does not respond. See Rule 12. Requiring notice to be in the language of the defendant is designed to assure that it will be understood. Beyond these requirements, the rules of the forum govern the mechanisms and formalities for giving notice of the proceeding. In some states it is sufficient to mail the notice; some require that notice, such as summons, be delivered by an officer of the court.

## **9. Statements of Claim**

**9.1 The plaintiff shall state the facts on which the claim is based, the legal grounds that support the claim, and the basis upon which the claim is brought under these Rules. The statement of facts shall, so far as reasonably practicable, set forth detail as to time, place, participants, and events.**

**9.2 The plaintiff shall state the judgment demanded, including the amount of damages claimed and any requested declaratory or injunctive relief.**

**Comment:**

*C-9.1* Rule 9.1 requires the plaintiff to state the facts upon which the claim is based. This Rule calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions and traditionally required in American “code pleading.” In contrast, some American systems, notably those employing the “notice pleading” under Federal Rules of Civil Procedure, permit very general allegations. The facts pleaded in the statement of claim and defense establish the standard of relevance for discovery: discovery is limited to matters relevant to the facts of the case as stated in the pleadings. See Rule 17.

In addition, the plaintiff must refer to the legal grounds on which he relies to support his claim. Reference to such grounds is a common requirement in many legal systems and is especially appropriate where the transaction may involve the law of more than one legal system and problems of choice of law. Rules of procedure in many national systems require a party’s pleading to set forth foreign law when the party intends to rely on that law.

*C-9.2* Rule 9.2 requires a statement of the amount of money demanded and, if injunctive or declaratory relief is sought, the nature and terms of the requested remedy. If defendant defaults, the court may not award an amount greater than that demanded in the complaint, so that defendant can calculate on an informed basis whether to dispute the claim. See 12.3. It is a general principle that a default judgment may be entered only when plaintiff has offered sufficient proof of the claims for which judgment is awarded. See Rule 12.2. Forum procedure in many systems requires that, after a defendant has failed to respond, an additional notice be given to defendant of intention to enter default judgment.

## **10. Statements of Defense; Counterclaims**

**10.1 A defendant shall within 30 consecutive days from the date of service of process answer the claim by admissions and denials of the allegations. The time for answer may be extended for 30 days upon request of defendant, or for a reasonable time by agreement of the parties or by court order. The answer shall:**

**10.1.1 Deny such parts of the statement of claim as defendant wishes to dispute;**

**10.1.2 Admit with explanation such statements as defendant does not wish to dispute as thus explained or assert an alternative statement of facts;**

**10.1.3 State the facts and the legal grounds upon which any affirmative defenses are based.**

**10.2 The provisions of Rule 9 concerning the detail of statements of claims are applicable to the statements of other claims and of defense.**

**10.3 The defendant may state a claim seeking relief from a plaintiff or against a co-defendant or third party, for example in a claim for indemnity or contribution, as is permitted by the procedure of the forum. The party against whom such a claim is stated shall submit an answer thereto.**

**10.4 Allegations in a pleading to which a response is not required are deemed denied. Allegations in a pleading to which a response is required are deemed admitted if not denied. Facts admitted or deemed admitted need no proof, except as provided in Rule 12.2 with respect to a default judgment.**

**10.5 A party against whom a claim is stated may in the answer present objections referred to in Rule 15.1. Submitting an answer or asserting a counterclaim does not waive such objections.**

### **Comment:**

*C-10.1* Rule 10.1 requires that defendant's response address the factual allegations of the complaint, denying or admitting with explanation those allegations that are to be controverted. Allegations not so controverted are admitted for purposes of the litigation. An "alternative statement of facts" is simply a different narrative of the circumstances which defendant presents in order to clarify the dispute. Whether an admission in a proceeding under these Rules has effect in other proceedings is determined by the law governing such other proceedings. "Affirmative defenses" are the allegation of additional facts or arguments that avoid the facts and arguments raised by the plaintiff, rather than contradict them directly. An example is the defense that an alleged debt has previously been paid. The most important example of a "negative defense" is the denial. A period of 30 days generally should be sufficient. However, if the defendant is at great distance, additional time may be necessary and should be granted as of course.

*C-10.2* Rule 10.2 applies to defendant's answer the same rules of form and content as Rule 9 provides with respect to the statement of claim. Thus, additional facts stated by defendant, by way of affirmative defense or alternative statement, must be in the same detail as required by Rule 9.1 and, if a counterclaim is asserted, defendant must make a demand for judgment as required by Rule 9.2. This subsection applies to counterclaims, impleader claims, cross-claims and other claims available in the proceeding. Such claims are permissive. These Rules do not provide for compulsory counterclaims, so that omission to interpose a counterclaim does not result in a preclusion.

*C-10.3* Rule 10.3 permits defendant to assert a counterclaim or cross-claim in accordance with the procedure of the forum. In most civil-law systems, a counterclaim is permitted only for a claim arising from the dispute addressed in plaintiff's complaint. See Comment *C-2.3*, for reference to the civil-law concept of "dispute." In common-law systems a wider scope for counterclaims is generally permitted, including a "set off" based on a different transaction or occurrence. Compare United States Federal Rules of Civil Procedure, Rule 13.

This subsection requires plaintiff, third parties or co-defendant to submit a written answer to a counterclaim or cross-claim. No such response is required to an affirmative defense or other allegations in the answer that do not constitute a counterclaim or cross-claim.

*C-10.4* Rule 10.5 authorizes a defendant to make objections referred to in Rule 15.1 either by a motion pursuant to that Rule or by answer to the complaint. Rule 10.5 further provides that making such objections by answer does not result in waiver of any such objection. In the common-law tradition, a defendant waives objection to jurisdiction over the person unless that objection is asserted in a preliminary "special appearance." Similar waiver of objection to venue is imposed in some civil law systems. These Rules do not impose such a waiver.

## **11. Amendments**

**11.1 A party may amend a pleading upon such terms as the court may permit. If the amendment is required by events occurring subsequent to those alleged in the party's previous pleading, or on the basis of newly discovered evidence or facts, permission to make reasonable amendment shall be afforded. After obtaining disclosure or discovery under Rules 16 and 17, a party may amend a pleading to address information thus obtained. Otherwise, permission to amend shall be afforded only if the amendment will prevent manifest injustice and not impose unfair prejudice.**

**11.2 The amendment shall be served on opposing party, who shall have 30 days in which to respond, unless the court orders otherwise.**

**11.3 If the complaint has been amended, default judgment may be obtained on the basis of an amended pleading only if the amended pleading has been served on the party against whom default judgment is to be entered.**

**11.4 Any party may request that the court order another party to provide a more specific statement of a claim or defense on the ground that the challenged statement does not comply with the requirements of these rules.**

### **Comment:**

*C-11.1* The scope of permissible amendment differs among various legal systems, the rule in the United States, for example, being very liberal and that in many civil-law systems being less so. In many civil-law systems amendment is permitted of the legal basis of claim, as distinct from the factual basis, but amendment of factual allegations is permitted only upon a showing that there is newly discovered probative evidence not previously available and that the amendment is within the scope of the dispute. See Comment *C-2.3*, supra, for reference to the civil-law concept of "dispute."

*C-11.2* The appropriateness of permitting amendment also depends on the basis of the request. For example, an amendment to address material evidence newly discovered, which the party could not reasonably have anticipated, should be more readily granted than an amendment to add a new party whose participation could have been anticipated. Any amendment may

have some adverse effect on an opposing party. On the other hand, a rescheduling of the plenary hearing could eliminate prejudicial effects. Accordingly, exercise of judicial judgment may be required in considering an amendment. Also, the court may require the party seeking amendment to make compensation for additional cost to an opposing party.

*C-11.3* Rule 11.4 permits a party to request that another party be required to state facts with greater specificity or to admit or deny specific material facts. Failure to comply with an order so requiring may be considered as a concession as to those facts. Making such a request for more specific allegations suspends the duty to answer.

No motion under Rule 11.4 is appropriate when the initial pleadings are specific and detailed enough to define all the material and circumstantial facts of the case.

## **12. Default Judgment**

**12.1 Default judgment shall be entered against a party who does not answer, fails to offer a substantial answer, or fails to proceed after having answered.**

**12.2 Before entering a default judgment, the court shall:**

**12.2.1 Assure that the procedure for giving notice has been properly followed.**

**12.2.2 Determine that the claim is legally justified concerning liability and remedy, including the amount of damages.**

**12.3 The remedy awarded in the default judgment shall not be different in kind or in excess of the demand for judgment in the statement of claim.**

**12.4 A party who has answered after the time provided in these Rules, but before judgment, shall be permitted to appear upon offering justifiable excuse. If the defaulting party makes appearance before entry of default judgment, default judgment should not be entered but the court may order compensation for costs resulting to the opposing party.**

### **Comment:**

*C-12.1* Default judgment permits termination of a dispute where there is no contest and is a mechanism for compelling a defendant to acknowledge the court's authority. If the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding. However, reasonable care should be exercised prior to entering a default judgment because notice sometimes may not have been given to a defendant, or defendant may have been confused about the need to respond. Rule 12.3 limits a default judgment to the amount and kind demanded in the statement of claim. See Rule 9.2.

*C-12.2* The decision over the claim being legally justified does not require a full inquiry on the merits of the case. The judge must only check whether the default judgment will not go against the evidence in file and his or her own conscience. For that decision, the judge shall analyze the evidence attached to the statement of claims. See Rule 16.1. In case these documents are not enough, the judge may request production of more evidence or even schedule an evidentiary hearing.

*C-12.3* The absence of a substantial answer may be treated as no answer at all.

*C-12.4* The party who has defaulted should not be permitted to produce evidence in an appeal, unless to prove that the claim is not legally justified or notice was not proper.

### **13. Transnational Dispute Settlement Offer**

**13.1 A party may deliver to another party a written offer to settle one or more claims and the related costs and expenses. The offer shall be designated “Transnational Dispute Settlement Offer” and must refer to the penalties imposed under this Rule. The offer shall remain open for 60 days, unless rejected or withdrawn by a writing delivered to the offeree prior to delivery of an acceptance.**

**13.2 The offeree may deliver a counter-offer, which shall remain open for at least 30 days. If the counter-offer is not accepted, the party may accept the original offer, if still open.**

**13.3 An offer neither withdrawn nor accepted before its expiration is rejected.**

**13.4 An offer shall not be made public or revealed to the court before entry of judgment, under penalty of sanctions or dismissal with prejudice or default.**

**13.5 Within 10 days after entry of judgment, a party may reveal the offer to the court. If the court finds that the rejection was unreasonable, it shall impose an appropriate sanction, considering all the relevant circumstances of the case.**

**13.6 Unless the court finds that special circumstances justify a different sanction, the sanction shall be the reasonable costs incurred by the offeror from the date of delivery of the offer. That sanction shall be in addition to the costs determined in accordance with Rule 30.**

**13.7 If an accepted offer is not complied with in a reasonable time, the offeree may either proceed to enforce it or continue with the proceeding.**

#### **Comment:**

*C-13.1* Rule 13 is based on a similar rule under Ontario (Canada) civil procedure. The detailed protocol is designed to permit submission and consideration of serious offers of settlement, from either a plaintiff or a defendant. At the same time, the protocol prohibits use of such offers or responses to influence the court and thereby to prejudice of the parties. Experience indicates that a specifically defined procedure, to which conformity is strictly required, is essential to facilitate settlement. The law of the forum may permit or require the deposit of the offer into court. This procedure does not preclude parties from conducting settlement negotiations by other procedures, or by negotiation between the parties, procedures that are not subject to the Rule 13.5 sanction.

This Rule departs from traditions in some countries in which the parties do not generally have an obligation to negotiate with the opposing party. This Rule expresses an obligation to consider reasonable negotiation with opposing parties.

*C-13.2* This Rule aims at encouraging compromises and settlements and also deters parties from pursuing or defending a case that does not deserve a full and complete proceeding.

*C-13.3* The offeree may deliver a counter-offer. The counter-offer is regulated by the same rules of the offer.

*C-13.4* Rule 13.4 does not permit public disclosure of the offer or disclosure to the court before the entry of judgment, as parties may be reluctant to make a settlement offer if the judge or the public will have knowledge of it and interpret the offer as an admission of guilt.

*C-13.5* If the winning party had rejected a reasonable offer of settlement under this Rule, that party loses the right to be reimbursed of the costs and expenses incurred from the date of



rejection of the offer. Instead, the winning party must pay the costs and expenses thereupon incurred by the loser.

*C-13.6* The burden is on the party alleging unreasonableness to prove and convince the judge.

#### **14. Provisional Measures**

**14.1 The court has authority to issue an injunction to restrain or require conduct of any person who is subject to the court’s authority, where necessary to preserve the status quo or to prevent irreparable injury pending the litigation.**

**14.1.1 A court may issue an injunction, before the opposing party has opportunity to respond, only upon proof showing urgent necessity and a preponderance of considerations of fairness in support of such relief. The party or person to whom it is directed shall have the opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.**

**14.1.2 The court may, after hearing those interested, issue, dissolve, renew or modify an injunction.**

**14.1.3 The court may require the posting of bond or other provision for indemnification of the person against whom an injunction is entered.**

**14.2 An injunction may restrain a person over whom the court has jurisdiction from transferring property, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant.**

**14.3 When the property or assets are located abroad, enforcement of an injunction under the previous subsection is governed by the law of the country where the property or assets are located, and by means of an injunction by the competent court of that country.**

#### **Comment:**

*C-14.1* The term “injunction” refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Rule 14.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. Availability of other provisional remedies or interim measures, such as attachment or sequestration, is determined by local law.

*C-14.2* Rule 14.1.1 authorizes the court to issue an injunction without notice to the person against whom it is directed where doing so is justified by urgent necessity. Considerations of fairness include the strength of the merits of the applicant’s claim, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an *ex parte* injunction. In common-law procedure such an order is usually referred to as a “temporary restraining order.”

“Urgent necessity,” required as a basis for an *ex parte* injunction, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of “balance of equities.” The question for the court, in considering an

application for an *ex parte* injunction, is whether the applicant has made a reasonable and specific demonstration that such an order is required to prevent an irretrievable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until the opposing party has opportunity to be heard. However, opportunity for the opposing party or person to whom the injunction is addressed to be heard should be afforded at the earliest practicable time and the court must decide soon after the presentation of defense.

*C-14.3* Rules of ethics require that a party requesting an *ex parte* injunction make full disclosure to the court of all aspects of the situation, including those favorable to opposing party. Failure to make such disclosure is ground to vacate an injunction and may be a basis of liability for damages against the requesting party. In addition, the burden is on the party requesting the injunction to justify its issuance.

*C-14.4* As indicated in Rule 14.1.2, if the court had declined to issue an injunction *ex parte*, it may nevertheless issue an injunction upon a hearing. If the court previously issued an injunction *ex parte*, it may renew or modify its order in light of the matters developed at the hearing. In any event, the burden is on the plaintiff to show that the injunction is justified, rather than on the defendant to set it aside.

*C-14.5* Rule 14.1.3 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction. The particulars of such indemnification should be determined by reference to the general law of the forum.

*C-14.6* Rule 14.2 permits the court to restrain transferring property located outside the forum state and to require disclosure of the party's assets. In the law of the United Kingdom this is referred to as a *Mareva* injunction. The Brussels Convention requires recognition of such an injunction by signatories to that convention, because an injunction is a judgment. This subsection also authorizes an injunction requiring disclosure of the identity and location of persons.

*C-14.7* Rule 31.2 provides for the review of an order granting or denying a preliminary injunction, according to the procedure of the forum. Second-instance review is regulated in different ways in various systems so that only a general principle providing for an immediate review is stated here. The guarantee of a review is particularly necessary when the injunction has been issued *ex parte*. However, it should be also recognized that such a review may entail a loss of time or procedural abuse.

*C-14.8* Rule 14.3 deals with a preliminary injunction that concerns property or assets located in a different country. In transnational litigation property or assets may need to be "blocked" or "disclosed" in a country different from the one of the court having jurisdiction on the case. A further problem concerns the enforcement of such an injunction, which is regulated by the law of the country where the property or assets are located. Whether the injunction should be recognized depends on the rules and principles of the law of the country where the property or assets are located.

## **15. Preliminary Determinations and Summary Judgment**

**15.1 On motion of a party or upon its own initiative, the court may as soon as practicable determine:**

**15.1.1 That the dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or that the court lacks jurisdiction over a party;**

**15.1.2 That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules or is otherwise irregular;**

**15.1.3 That the dispute involves only questions of law or that a complete or partial decision can be made with the evidence available in the record with no need for an evidentiary hearing, but the court shall have regard for that party's opportunity for discovery under these Rules before making such a determination;**

**15.1.4 Other matters of substantive law or procedure necessary to advance the proper adjudication of the merits.**

**15.2 Upon having made a determination as provided in the previous subsection, the court may allow the party against whom the determination is made a reasonable opportunity to amend its statement of claims or defense when it appears that the deficiency could be remedied by amendment.**

**15.3 If necessary, before an adjudication under this Rule, the court shall order each party to reveal information as described in Rules 16 and 17.**

**Comment:**

*C-15.1* It is a universal procedural principle that the court may make determinations of the sufficiency of the pleadings and motions, whether concerning substantive law or procedure, that materially affect the rights of another party or the capability of the court to render substantial justice. In the civil-law systems, the court has an obligation to scrutinize on its own initiative the important elements of procedural regularity of the proceeding. In the common-law systems authority to make such determinations ordinarily is exercised only upon initiative of a party made through a motion. However, the court in common-law systems may exercise that authority on its own initiative and in civil-law systems the court may do so in response to a suggestion or motion of a party.

According to Rule 10.5, the objections referred in this subsection can be made by defendant either by a motion or by answer to the complaint. See Comment *C-10.4*.

*C-15.2* Rule 15.1 expresses a universal principle that the court's authority to proceed, its competence over the dispute, and its jurisdiction over the parties may be questioned. A valid objection of this kind usually requires termination of the proceeding. A similar objection may be made that the dispute is not within the scope prescribed in Rule 2 and hence is not governed by these Rules. Among factors that may be considered under Rule 15.1.1 is dismissal for *forum non conveniens* in jurisdictions that recognize that principle. Procedural law varies as to whether there are time limitations or other restrictions on delay in making such an objection, and whether participation in the proceeding without making such an objection results in its waiver or forfeiture. Subject to the provision of Rule 10.5, reference should be made to the forum's procedural law concerning such issues.

*C-15.3* Rule 15.1.2 empowers the court to adjudicate procedural irregularities. Ordinarily amendment should be permitted in order to correct such an irregularity, except when such permission would result in substantial injustice. See Rule 15.2.

*C-15.4* Rule 15.1.3 empowers the court to adjudicate the merits of a claim or defense at the preliminary stage. Such an adjudication may be based on matters of law or matters of fact, or both. Judgment is appropriate when the claim or defense in question is legally insufficient as stated. Judgment is also appropriate when, although the statement of claim or defense as stated is legally sufficient, it is demonstrated that evidence to support the claim or defense is lacking. In the latter case, the court should consider whether discovery may disclose sufficient evidence.

*C-15.5* In the civil-law systems the foregoing powers are exercised by the court as a matter of course. In the common-law systems, the power to determine that a statement of claim or defense is substantively insufficient derives from the old common-law demurrer and is usually exercised on the basis of a motion by a party. Examples of claims that typically may be so adjudicated are claims based on a written contract calling for payment of money, or to ownership of specific property, to which no valid defense is offered. Examples of defenses that typically may be so adjudicated are the defense of elapse of time (statute of limitations or prescription), release, and *res judicata*. In common-law systems the power to determine prior to trial that a claim or defense is not supported by evidence is usually exercised on the basis of a motion for summary judgment.

*C-15.6* Rule 15.1.4 confers residual authority on the court to make necessary procedural rulings. In some civil-law systems these powers are specified in detail. In the common-law system they are within the court's inherent powers.

*C-15.7* Rule 15.2 confers discretionary authority on the court. To invite that authority, a party must indicate that amendment will correct an irregularity or be based on additional specific facts or legal grounds.

*C-15.8* Under civil-law procedure discovery obligations ordinarily are imposed by order of the court, but under Rule 17 the court has a duty to order the discovery provided in that Rule. In common-law systems the procedural rules impose discovery obligations directly on the parties.

## **16. Disclosure**

**16.1 In a pleading the parties shall attach copies of all documents and list all witnesses, including parties and nonparties, through whom they intend to present evidence. The list shall include all such documents and witnesses as are known to the party when the pleading is submitted and shall identify witnesses by name, address, and telephone number.**

**16.2 A party may amend the list specified in the previous subsection to include documents or witnesses not known when the list was originally prepared. Any change in the list of documents or witness shall be communicated in writing to opposing party not later than 30 days before the plenary hearing, unless the court orders otherwise.**

**16.3 Within 30 days after the answer, each party shall supply to all other parties a summary of the testimony expected of each witness it intends to present. If pleadings are amended, the parties shall supply amended summaries of testimony.**

**16.4 In lieu of the summary referred to in the previous subsection, a party may present a statement of sworn written testimony by any witness it intends to present. The written testimony may be presented in the plenary hearing and the examination of that witness will begin with supplemental questioning by the opposing party.**

**16.5 For the purpose of this Rule, an advocate for a party may interview potential witnesses.**

**Comment:**

*C-16.1* Rule 16.1 requires that plaintiff attach documents on which he relies in support of the claim. This is a common requirement. The plaintiff must also list the witnesses upon whom he intends to rely. If the plaintiff later ascertains that there are additional documents or witnesses, he can exercise the opportunity to submit an amended statement of claim, as provided in Rule 16.2.

*C-16.2* Under the rules of ethics or procedure in some systems, an advocate is not permitted to discuss the matters in dispute with prospective witnesses (other than the advocate's own client). This rule is designed to protect testimony from improper manipulation. However, that Rule also has the effect of limiting the effectiveness of an advocate in investigating and organizing evidence for consideration by the court. Under systems in which discussion is permitted with prospective witnesses, rules of ethics and procedure prohibit a lawyer from suggesting to a witness what the testimony should be or offering inducements to witnesses. Recognizing that there is some risk of abuse in allowing lawyers to confer with prospective witnesses, these Rules consider that the risk of manipulation is less injurious to fair adjudication than is the risk that relevant and important evidence may remain undisclosed.

*C-16.3* The summary of testimony referred to in Rule 16.3 should address all propositions to which the witness will give testimony and be reasonably specific in detail.

## **17. Discovery**

**17.1 A party who has complied with disclosure duties prescribed in Rule 16 may demand production by any person, including third persons as provided in Rule 27, of any matter, not privileged, that is directly relevant to the case, not already produced in disclosure and that may be admissible in the dispute, as follows:**

**17.1.1 Documents and other records of information that are specifically identified or identified within specifically defined categories;**

**17.1.2 The identity and whereabouts of persons having personal knowledge of matters in issue;**

**17.1.3 The identity of any expert that another party intends to present and a statement expressing the opinion of the expert concerning controverted issues.**

**17.2 Unless otherwise agreed or ordered by the court, discovery demands may be made as follows:**

**17.2.1 Initial demands by plaintiff shall be made in the complaint or within 60 days after defendant has answered. Initial demands by defendants shall be made in the answer or within 15 days after plaintiff's demands.**

**17.2.2 A second demand may be made within 30 days after the opposing party has complied with initial demands.**

**17.2.3 The court may order additional discovery directed toward any relevant matter, not privileged, whose production appears necessary to prevent substantial injustice, including oral or written deposition of a party or other witness. Such a deposition shall be taken as provided in Rule 18.**

**17.2.4 A response to such an order shall be made within 30 days.**

**17.3 Any person may invoke a protection against self-incrimination recognized according to the law of the forum, but it is not a valid objection that the information is adverse to the interest of the party to whom the demand is directed. See Rule 24.**

**17.4 On request of a party, the court may appoint a special officer to preside at a deposition or to supervise document production or otherwise to assist in supervising compliance with this Rule. Decisions made by the special officer are subject to immediate review by the court.**

**17.5 To give effect to a proper discovery demand, the court may:**

**17.5.1 Draw adverse inferences concerning facts in issue against a party that failed to comply with the discovery demand;**

**17.5.2 Employ the measures authorized by Rules 26 and 27;**

**17.5.3 Dismiss claims, defenses, or allegations to which the discovery is relevant;**

**17.5.4 Enter judgment of dismissal with prejudice against a plaintiff or judgment by default against a defendant.**

**Comment:**

*C-17.1* These Rules adopt, as a model of litigation, a system consisting of preliminary hearings followed by a concentrated form of plenary hearing. The essential core of the first stage is preliminary disclosure, discovery, and clarification of the evidence. The principal consideration in favor of a unitary plenary hearing is that of expeditious justice. To achieve this objective a concentrated plenary hearing should be used, so that arguments and the taking of evidence are completed in a single hearing or in a few consecutive hearings.

*C-17.2* Rules 16 and 17 define the roles and the rights of the parties, the duty of voluntary disclosure, the procedure for discovery demands, the role of the court, and the devices to ensure that the parties comply with discovery demands. Proper compliance of disclosure obligations and discovery requests are not only a matter of law for the parties, but also a matter of professional honor and obligation by the advocates involved in the litigation.

*C-17.3* Rule 17.1 requires the parties to make the disclosures required by Rule 16 prior to demanding discovery from an opposing party. It also requires the parties to provide summaries of the testimony of the witnesses a party intends to present, according to Rule 16.3.

*C-17.4* Rule 17.1 provides that every party is entitled to obtain from any person the disclosure of any relevant evidence, not privileged, in possession of that person. Ideally, full disclosure of relevant evidence should result through dialogue among the parties, whereby the parties voluntarily satisfy each other's demands without intervention of the court. Rule 17.1 lists the evidence and information the disclosure of which may be demanded, defined as any relevant evidence.

Discovery is limited to matters directly relevant to the issues in the case as they have been stated in the pleadings. A party is not entitled to disclosure of information that "might lead" to further disclosure, which is the broad scope of discovery under Rule 26 of the Federal Rules of Civil Procedure in the United States, but only evidence and information that is directly relevant to the facts in issue. "Relevant" evidence is that which supports or contravenes the position of one of the parties. This Rule is aimed at preventing overdiscovery or "fishing expeditions."

A party who did not have the demanded evidence when the demand was made, but who thereafter comes into possession of it, must thereupon comply with the demand.

*C-17.5* Discovery may concern documents and any other things (films, pictures, videotapes, recorded tapes, or objects of any kind), including computerized information (disks, data, printings, or software systems). The demanding party must show the relevance of the information, document, or thing to prove or disprove the facts supporting a claim or a defense and identify the document or thing to be disclosed, which should be specifically identified or defined by specific categories. Thus, a document may be identified by date and title or by specific description such as “correspondence concerning the transaction between A and B in the period February 1 through March 31.” A party is not obliged to comply with a demand that does not fulfill these conditions. Disputes concerning whether the conditions of the demand have been satisfied, and whether the demand should be complied with, are resolved by the court on motion by any party. The court may declare the demand invalid or order production of the document or thing, and if necessary specify the time and mode of production.

*C-17.6* Discovery may concern the identity of a potential witness. As used in these Rules, the term “witness” includes a person giving statements to the court even if the statements are not strictly speaking “evidence,” as is the rule in some civil-law systems concerning statements by parties. Under Rule 16.3 a summary of the expected testimony of a witness whom a party intends to call or nominate to the court must be provided to other parties. A party is not allowed to examine a witness through deposition except when authorized by the court under Rule 17.2.3.

*C-17.7* Rule 17.1.3 provides that any party is entitled to discover the identity of a prospective expert that another party intends to present and to obtain a written statement of the expert’s opinion concerning the matters in dispute.

*C-17.8* Rule 17.2 provides a detailed protocol for discovery demands and for compliance with these demands. Discovery demands are connected to the time requirements for the pleadings, so that parties can make their demands in light of the information and allegations in the pleadings. When plaintiff’s demand is made in the complaint, defendant’s demand ordinarily will be made in the answer. If plaintiff’s demand is made within the period of 60 days, however, defendant’s demand shall be made within 15 days after receipt of plaintiff’s demand.

Ordinarily these demands provide sufficient opportunity for discovery. However, Rule 17.2.3 authorizes the court to order additional discovery upon a showing of justification, unless doing so would unfairly delay the proceeding.

*C-17.9* The general principle in the preliminary stage is that the parties bear the burden of obtaining evidence they need in preparation for plenary hearing. However, disclosure obtained by the parties on their own motion may be incomplete, resulting in insufficient evidence or surprise to the court or other parties. To deal with such inconvenience, the court may in its discretion order additional disclosure on its own initiative or on motion of a party. For example, the court may order that a party or a prospective witness submit a written deposition concerning the facts of the case. The court may also subpoena a hostile witness to be orally deposed. See Rule 18.

The court may not order additional disclosure simply because it might reveal relevant evidence. The term “to prevent substantial injustice” is a narrower standard than “relevant to prove the matters in issue.” Moreover, the court cannot order discovery of irrelevant or privileged matters. See also Rule 24.3.

*C-17.10* The right to refuse to answer questions that may incriminate a person is universally recognized. However, this right does not necessarily include the right to refuse to produce documents that may be incriminating, an issue that should be determined according to forum law.

The law in some systems permits a party also to refuse to answer questions or to produce documents that tend to establish the person's civil liability or to negate or mitigate a civil claim. This Rule does not authorize such a refusal based on civil as opposed to criminal liability.

*C-17.11* In cases involving voluminous documents or remotely situated witnesses, or in similar circumstances of practical necessity, the court may appoint someone as a special officer to supervise discovery. This will free the judge from the responsibility for personally supervising such discovery. Such an assistant may be appointed by another court through judicial assistance. A person so appointed should be impartial and independent, but her decisions are reviewable by the court who appointed her.

*C-17.12* If a party fails to comply with a discovery demand, Rule 17.5 provides that the court may impose sanctions to make disclosure effective. The choice among different sanctions, more or less severe, is left to the discretion of the court, taking into account any relevant features of the parties' behavior. See Rule 1.5.

The sanctions are:

1) Adverse inferences against the noncomplying party about facts supporting that party's claims or defenses, including conclusive determination of the facts. See Comment to Rule 26.

2) A monetary penalty, fixed by the court in its discretion, or other means of legal compulsion permitted by forum law, including contempt of court. The court should graduate the penalty or contempt sanction according to the circumstances of the case. When the discovery demand or order concerns a document or other thing, the court may order a direct seizure of the document or thing. See Rules 14, 26 and 27.

3) Dismissal of claims, defenses, or allegations to which the discovery is relevant. This sanction is more severe than the drawing of an adverse inference. The adverse inference does not necessarily imply that the party loses the case on that basis but dismissal of claims or defenses ordinarily has that result.

4) The most severe sanction against noncompliance with disclosure demands or orders is entry of adverse judgment with respect to one or more of the claims. The court may enter a judgment of dismissal with prejudice against the plaintiff or a judgment by default against the defendant, as the case may be.

## **18. Deposition and Testimony by Affidavit**

**18.1 A deposition may be taken when the court so orders in the interest of justice as provided in Rule 17.2.3.**

**18.2 The testimony shall be upon affirmation as provided in Rule 25.3.1 and shall be transcribed verbatim or by audio or video recording, as the parties may agree or as the court orders. The cost of the transcription shall be paid by the party that requested the deposition, unless the court orders otherwise.**

**18.3 The deposition shall be taken at such time and place as the parties may agree or as the court orders. All parties and the court shall be given written notice, at least 30 days in advance, of the time and place of the deposition. The examination**



**shall be conducted as provided in Rule 25. Prior to the deposition the court may submit supplemental questions to be answered by the person deposed.**

**18.4 A deposition may be presented as testimony in the record by agreement of the parties or by order of the court.**

**18.5 A party may present an affidavit signed by a nonparty who makes an affirmation to tell the truth, containing statements about relevant facts of the case. The court, in its discretion, may consider such statements as if they were made by oral testimony. If another party denies the truth of the statements made by affidavit, that party may move for an order of the court requiring the personal appearance of the affidavit's author at the plenary hearing.**

**Comment:**

*C-18.1* A deposition is a form of taking testimony employed in common-law and in some civil-law systems. A deposition is sworn testimony of a potential witness, including a party, taken outside of court prior to the plenary hearing. A deposition may be given orally in response to questions by lawyers for the parties or by questions from a judicial officer appointed by the court. A deposition may be conducted by electronic communication, for example, by telephone conference. It may also be given through written responses to written questions. Ordinarily, a deposition is given after commencement of litigation but also, in accordance with the law of the forum, may be given *de bene esse*, i.e., to preserve testimony when the witness is expected to be unavailable after litigation has commenced. Questioning may also be used to gather information and to test the witness's recollection and credibility. The testimony of a witness in a deposition may be presented as evidence, either in lieu of the witness or as direct testimony, but the court may require presence of a witness who can attend, in order to permit supplemental questioning. Under these Rules a deposition may be used in limited circumstances for discovery before trial. See Rule 17.2.3.

*C-18.2* Rule 18.2 provides that deposition testimony be taken on affirmation, as at a hearing before the court. It is to be transcribed verbatim or video or audio recorded. The parties may agree about the form of transcription or recording, but the court may order which form shall be used. The party who requests the deposition will pay the cost of transcription or recording, unless the court orders otherwise.

*C-18.3* Rule 18.3 specifies the procedure for a deposition. In general, the procedure should be similar to a presentation of the witness before the court except that the questioning is conducted by the parties. In some more complex or disputed cases, a deposition may be presided over by a special officer appointed by the court. See Rule 17.4.

*C-18.4* The deposition will follow, as far as possible, the procedure for taking testimony before a judge. Thus the party taking the deposition will examine the witness first, and the other parties will ask supplemental questions thereafter. As stated in Rule 18.3, before the deposition the court may specify questions that it requires to be asked of the witness. Time and place of the deposition may be agreed upon by the parties, or may be established by the court. In any case a written notice of the deposition shall be given to all the parties, at least 30 days in advance to permit any party to be present and actively participate in the deposition. Notice will also be given to the court.

*C-18.5* The general principle governing presentation of evidence is that evidence will be presented orally at the plenary hearing. See Rule 25. However, oral examination of a witness at the plenary hearing may be impossible, burdensome or impractical. Rule 18.4 permits the transcript of a deposition taken in accordance with Rule 18.3 to be presented to the court as a

substitute for reception of testimony of a witness who cannot conveniently be present in court, for example by reason of illness or because the witness is in a remote location. A deposition may be also convenient for presenting testimony in a language other than that of the court. A deposition in any event may yield a statement against interest that is admissible under Rule 25.3.6.

*C-18.6* Since these cases are exceptions to the general rule of direct presentation of evidence at the hearing, a party who wants to present testimony by deposition must obtain agreement from opposing party or apply to the court for authorization, stating the reasons why a deposition should be preferred. The court has broad discretion in deciding the request. Any party is entitled to contest the fidelity of the transcription or record. If such an objection is sustained, the court may set aside the deposition and order that the party or the witness be examined directly at the hearing.

*C-18.7* Rule 18.5 permits the presentation of testimony by means of written affidavits containing statements about relevant facts of the case. Such a statement, although upon affirmation, is *ex parte* in that neither the court nor opposing parties has been permitted to question the witness. The statement may be regarded with corresponding skepticism by the court. However, facts not in serious dispute often may be conveniently proved by this procedure.

The practice of producing written affidavits instead of witnesses for an oral examination is becoming common in several systems. Reasons of efficiency explain this trend: quicker availability of testimony, less trouble and expense for the nonparty, and less time required for the court. These factors may be specially important in transnational litigation, for instance when a witness would be obliged to travel to a far country to be examined in court. There are also means provided by international law and conventions on judicial assistance (see, e.g., The Hague Convention on the Taking of Evidence Abroad): requests by diplomatic channels, rogatory letters, and so forth. However, the court may, in its own discretion or on motion by a party, order that the author of an affidavit be examined orally at the hearing.

## **19. Protective Orders Concerning Discovery and Disclosure**

**19.1 The court, on its own initiative or on motion of a party or third person who is subject to a disclosure or discovery obligation under Rules 16, 17 or 27, shall limit or prohibit disclosure or discovery when it appears that compliance with the request would be onerous or is unlikely to produce admissible evidence or requires production of evidence protected by a privilege.**

**19.2 When the information sought to be revealed is a trade or business secret, or its public disclosure would otherwise cause injury or embarrassment that could be avoided or mitigated by a protective order, the court should issue a suitable order imposing obligation of confidentiality on the parties, their counsel and witnesses.**

**19.3 When it would assist the court in exercising its authority under this Rule, the evidence that is sought may be examined by the court *in camera*.**

### **Comment:**

*C-19.1* Rule 19 gives the court broad authority to limit discovery that would be oppressive or unduly intrusive. The philosophy expressed in Rules 16, 17, 19, and 27 concerning the right of discovery and disclosure is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure

is specified and limited, as in Rules 16 and 17. However within those specifications disclosure is generally a matter of right.

*C-19.2* Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that “may lead to admissible evidence.” This broad discovery is often criticized as responsible for the increasing costs of the administration of justice. However, reasonable discovery facilitates discovery of truth and hence justice.

*C-19.3* Discovery under the civil-law systems is generally much more restricted, or nonexistent. In particular, a much broader immunity is conferred against disclosure of trade-and-business secrets. This Rule should be interpreted as seeking to strike a balance between the restrictive civil-law systems and the broad system in the United States.

*C-19.4* A hearing *in camera* is one closed to the public and, in various circumstances, closed to others. As the court may direct according to the circumstances, such a hearing may be confined to counsel without the parties or it may be *ex parte*, i.e., confined to a party and that party’s counsel, for example, when trade secrets are involved.

## **20. Conferences**

**20.1** The court may schedule one or more conferences at any phase of the proceeding. The advocates for the parties shall attend all conferences and the court may order that the parties attend or, in the case of an organization, a responsible officer thereof.

**20.2** At a conference, the court may:

**20.2.1** Order the addition, elimination, or revision of claims, defenses, and issues in light of the parties’ contentions at that stage.

**20.2.2** Order the isolation for separate hearing and decision of one or more issues in the case. The court shall enter an interlocutory judgment addressing that issue and its relation to the remainder of the case.

**20.2.3** Order the consolidation of cases pending before itself, whether under these Rules or those of the forum, when they deal with the same or related transactions, and when consolidation may facilitate the proceeding and decision. The final judgment shall address all the cases.

**20.2.4** Make rulings on the admissibility of evidence and other procedural matters.

**20.2.5** Prescribe the sequence for hearing witnesses and experts.

**20.2.6** Fix the date for the plenary hearing and simplify the plenary hearing.

**20.2.7** Enter other orders to expedite the proceeding.

**20.3** The court may suggest that the parties consider settlement, mediation, or arbitration or any other form of alternative dispute resolution.

### **Comment:**

*C-20.1* This Rule determines the role of the court in preparing the case for plenary hearing, when discovery has come to an end and the terms of the dispute may be finally defined. The court has wide discretion in deciding how to conclude the preliminary phase, or phases, and in determining how to provide for the following plenary phase of the proceedings.

C-20.2 The court may decide that, in order to clarify the issues and to specify the terms of the dispute at the plenary hearing, one or more conferences may be useful. The court may schedule a conference by any means of communication available, such as telephone, videoconference and the like.

C-20.3 The court fixes a date for such a conference. The parties' lawyers are required to attend. Participation of advocates for the parties is essential to facilitate orderly progression to resolution of a dispute. Advocates in many systems have some authority to make agreements concerning conduct of the litigation. Parties may have additional authority in some systems. Where matters must be discussed that are outside of the scope of such authority, the court has authority to require the parties themselves to attend in order to discuss and resolve matters concerning progression to resolution, including discussion of settlement. The rule does not interfere with the possibility of *pro se litigants*.

C-20.4 In the conference the court will discuss with the parties' lawyers, and, as appropriate, with the parties personally, the issues of the case; which facts, claims, or defenses are no longer disputed; whether new disputed facts emerged from disclosure or discovery; whether new claims or defenses have been presented; and what evidence will be admitted at the plenary hearing. The principal aim of the conference is to exclude issues that are no longer disputed and to identify precisely the issues of fact and claims and defenses and the evidence concerning those issues that will be the subject matter of the plenary hearing.

The court may decide that a subsequent conference is unnecessary, and that the plenary hearing may proceed simply on the basis of the parties' pleadings and stipulations.

C-20.5 The court may give directives for the plenary hearing as provided in Rule 20.2. The court may sum up the terms of claims and defenses and order corresponding revision of the pleadings. Having defined the issues for the hearing, the court may rule on issues concerning admissibility of evidence and specify the items of admissible evidence, including witnesses and experts, and determine the order of their examination. The court may also resolve disputed claims of privilege. The court will fix the date for plenary hearing and enter other orders to ensure that it will be carried on in a fair and expedited manner.

Rule 20 authorizes various measures by the court to facilitate efficient hearing. Claims and defenses withdrawn or abandoned by the parties should be excluded. It is often useful to isolate one or more issues for hearing upon one occasion, with other issues reserved for consideration later if necessary. So also it is often useful that a hearing be consolidated with another case when the same or substantially similar issues are to be considered. As recognized in Rule 20.2.4, it is often convenient for the court to rule on admissibility of evidence prior to its presentation, especially evidence that is complicated, for example, voluminous documents.

C-20.6 The court may consider the possibility that the parties may settle the dispute or refer it to a mediator or to an arbitrator. In such a case the court, before entering the rulings described in Rule 20.2, may fix a hearing, calling the parties' lawyers and the parties personally to explore the possibility of a settlement, if necessary with the mediation of the court itself or a deferral of the dispute to mediation, arbitration or any other form of alternative dispute resolution. This subsection authorizes the court to encourage discussion between the parties, but not exercise of inappropriate coercion.

C-20.7 If a settlement is reached, the proceedings are terminated and judgment entered. If the parties agree about a deferral to mediation or arbitration, that agreement will be put into the record of the case and the proceeding suspended.

## **21. Languages**

**21.1 The proceedings, including documents, oral proceedings, and evidence, shall be conducted in the language of the court, except to the extent that the court, with the agreement of the parties, otherwise permits.**

**21.2 Translation of documents that are lengthy or voluminous shall be limited to relevant portions, as selected by the parties or determined by the court.**

**21.3 Translation should be made by a neutral translator selected by the parties or appointed by the court.**

**21.4 The cost of translations shall be paid by the party presenting the person or document unless the court orders otherwise.**

### **Comment:**

*C-21.1* The language in which the proceeding is conducted should be that in which the court is fluent. Ordinarily this will be the language of the state in which the court is situated. However, the court and the parties may agree upon some other language for all or part of the proceeding, for example, reception of the testimony of a specific witness in the witness's native language.

*C-21.2* In transnational litigation it happens frequently that witnesses and experts are not fluent in the language in which the proceeding is conducted, i.e., that of the country where the case is tried. In such a case translation is required for the court and for other parties. The testimony shall be taken at the hearing with the aid of an interpreter, with the party presenting the evidence paying the cost of the translation, unless the court decides otherwise.

*C-21.3* A second possibility is examining the witness by way of deposition, as provided in Rule 18.4, under agreement of the parties or by order of the court. See Rule 18.1. The deposition can then be translated and submitted at the hearing. The procedure and cost of the deposition are determined according to Rule 18.

## **22. Relevance and Admissibility of Evidence**

**22.1 Except as provided in Rule 24, all evidence relevant to matters in issue is admissible, including circumstantial evidence.**

**22.2 Any person having mental capacity is competent to give evidence, including parties.**

**22.3 A party may call any person whose testimony is relevant and admissible, including that party. The court may call any person on its own motion under the same conditions.**

**22.4 The parties may offer in evidence any relevant document or thing. The court may order any party or nonparty to present any relevant document or thing in that person's possession.**

### **Comment:**

*C-22.1* This Rule states principles concerning evidence, defining generally the conditions and limits of what may be properly considered as proof at the hearing. The basic principle is that any factual information, not privileged, that is rationally useful in reaching judgment on the relevant facts of the case should be admissible as evidence. Of course evidence governed

by a privilege is not admitted and the court may refuse to accept evidence that is merely cumulative. Common law concepts of hearsay and parole evidence as exclusionary rules are inappropriate in a nonjury case, except as they affect the credibility and weight of evidence.

C-22.2 There are three aspects to application of this principle. First is the usefulness of the evidence. In deciding upon admissibility of the evidence, the court makes a hypothetical evaluation connecting the proposed evidence with the issues in the case, i.e., a hypothesis concerning the possible outcome of the presentation of the evidence. If a probative inference may be drawn from the evidence to the facts, then the evidence is logically relevant. Second, the relevancy of evidence is determined by the rational reliability of the knowledge that the evidence tends to support. Third, and consequently, relevant evidence is aimed at achieving a knowledge about the facts of the case, specifically knowledge that should be rationally reliable.

C-22.3 In some legal systems there are rules limiting in various ways the use of circumstantial evidence. These rules, however, seem unjustified and are very difficult to apply in practice. More generally, there is no valid reason to restrict the use of circumstantial evidence when it is useful to establish knowledge of a fact in issue. Therefore under the general principle, the court may consider any circumstantial evidence, provided it is relevant for the decision on the facts of the case.

C-22.4 Rule 22.2 defines who can properly give evidence or present statements. In some national systems the rules exclude parties or “interested” nonparties as witnesses. However, even in such systems the trend favors admitting all testimony. A general rule of competency also avoids the complex distinctions that such exclusionary rules require. The proper standard for a person to give evidence is the principle of relevancy. This does not mean, however, that subjective or objective connections of the witness with the case must be disregarded, but only that they are not a basis for excluding the testimony. These connections, for example kinship between the witness and a party, may be meaningful in evaluating credibility.

Any person having information about a relevant fact is competent to give evidence. “Any person” includes the parties and any person having mental capacity. Witnesses are under obligation to tell the truth, as required in every procedural system. In many systems such an obligation is reinforced by an oath by the witness. When a problem arises because of the religious character of the oath, the court has discretion to determine the terms of the oath or to permit the witness merely to affirm the obligation to tell the truth.

C-22.5 Rules 22.3 and 22.4 govern the parties’ right to proof. They apply to testimony, documentary evidence, and real or demonstrative evidence. A party may call itself to the witness stand, a procedure not permitted in some civil-law systems, where the party is regarded too interested to be a witness on its own behalf. The court may exercise an active role in the taking of testimony or documentary, real, or demonstrative evidence. For example, when the court knows that a relevant document is in possession of a party or of a nonparty, and it was not spontaneously produced, the court may on its own motion order the party or the nonparty to produce it. The procedural device is substantially an order of *subpoena*. The court in issuing the order may establish the sanctions to be applied in case of noncompliance. See Rule 27.

## 23. Expert Evidence

**23.1 The court may appoint a neutral expert or panel of experts whenever, in the court’s discretion, expert evidence may be helpful in resolving issues in the case. Expert testimony may address the rules of foreign law and international law.**

**23.2 The court determines the issues that are to be addressed by the expert and such tests, evaluations, or other procedures as are to be employed by the expert. The court may issue orders necessary to facilitate the inquiry and report by the expert and may specify the form in which the expert shall make its report.**

**23.3 A party may designate its own expert or panel of experts on an issue. The parties' experts are entitled to participate in or observe the tests, evaluations, or other procedures conducted by the court's expert. The court may order all the experts to confer with each other before presenting their opinions. The parties' experts may submit their own opinions to the court in the same form as the report made by the court's expert. Each party pays for an expert whom that party has retained.**

**Comment:**

*C-23.1* Concerning experts these Rules adopt the basic civil-law system, according to which the court appoints a neutral expert or panel of experts. The court decides on its own motion whether an expert is needed in order to evaluate or to establish facts that, because of their scientific, legal or technical nature, the court is unable to evaluate or establish by itself. The court appoints the expert or the experts (if possible using the special lists that exist in many countries), on the basis of the expert's competence in the relevant field. If the expert's neutrality is disputed, that issue is for the court to resolve. The court, informed by the parties' recommendations, specifies the technical or scientific issues on which the expert's advice is needed, formulating the questions the expert should answer. The court also determines which techniques and procedures the expert will apply, and regulates any other aspect of the tests, inquiries, and researches the expert will make, and whether the expert will respond orally or by submitting a written report. In making such determinations, the court shall confer with the parties.

*C-23.2* The expert is the court's expert, neutral and independent from the parties and from other influence. The court is expected to rely on the expert's advice when it appears sound and credible; if the advice does not appear reasonable, the court may appoint another expert. However, the court is not obliged to follow the expert's advice. In such a case the court is expected to explain specifically the reasons why the expert's advice is rejected, and the reasons supporting the court's different conclusion.

*C-23.3* Rule 23 recognizes that the status of an expert is somewhat different from that of a percipient witness and that experts have somewhat different status in various legal systems. In common-law systems an expert is presented by the parties on the same basis as other witnesses, recognizing that the role is one of interpretation rather than recounting first-hand observations. In civil-law systems the parties may present experts but ordinarily do so only to supplement or dispute testimony of a court-appointed expert.

This Rule adopts an intermediate position. The court may appoint experts but the parties may also present experts whether or not the court has done so. The court-appointed expert provides the court with technical, legal or scientific information and analysis. Such an expert is obliged to perform this task in good faith and according to the standards of the expert's profession. A party's expert presents commentary rather than evidence but is subject to cross examination.

*C-23.4* In cases in which the court has appointed neutral assessors according to Rule 6.1, it may not be necessary to appoint a neutral expert. In more complex cases, however, especially when a formal investigation is needed, it may be necessary to have both. The judge has discretion to decide which device to use in light of the circumstances of the case.

C-23.5 Rule 23.3 provides that the parties are entitled to appoint their own experts, but party experts participate only under supervision by the court. The principal role of party expert is to advise the party about the technical and scientific matters involved and to comment on the activity of the court's expert. The parties' experts accordingly are entitled to be informed about any test, experiment, or inquiry carried on by the court's expert. They may raise problems, ask questions, and submit comments, data, and information to the court's expert.

However, when the court receives oral testimony from the court's expert, the parties' experts should be similarly heard. When the court's expert submits a written report, the parties' experts are allowed to do so also. The court may order all the experts to confer with each other in order to clarify the issues and to focus their opinions. Although the court's expert is by definition neutral and impartial, while the parties' experts are by definition partisan and partial, the advice of the parties' experts may be taken into account by the court, and the court may adopt a party's expert advice instead of that of the court's expert.

When an expert is examined orally, the provisions in Rule 25 generally apply. However, under Rule 23.2 the court may require a written report from the expert and oral examination of the expert after the report has been submitted.

## **24. Evidentiary Privileges**

**24.1 Evidence cannot be admitted of information covered by the following privileges:**

**24.1.1 Legal profession privilege;**

**24.1.2 Communications between counsel in settlement negotiation;**

**[24.1.3 National defense and security].**

**24.2 Evidence cannot be admitted of information covered by other privileges recognized by the law of the place with the most significant relationship to the parties to the communication, unless the court determines that the need for the evidence to establish truth is of greater significance than the need to maintain confidentiality of the information. Such evidence shall be produced in closed session of the court but in the presence of the parties and their lawyers. In case the information includes secret or highly sensitive matters, the court may require inspection by the court alone or with help of experts. The court shall order protection of the secrecy concerning the privileged material.**

**24.3 A claim of privilege made with respect to a document shall describe the document in detail sufficient to enable another party to challenge the claim of privilege.**

**24.4 A privilege may be waived by or on behalf of the person who is entitled to take advantage of it. A party waives a privilege, for example, by omitting to make a timely objection to a question or discovery demand seeking information covered by a privilege. The court in the interest of justice may relieve a party of waiver of a privilege.**

### **Comment:**

C-24.1 Privileges exclude relevant evidence. They are evolving and reflect various social interests. Organized professions (e.g., doctors, psychiatrists, accountants, lawyers) are interested in protecting their members' professional activities by means of the privilege not to



disclose information acquired during such an activity. Statutory law and case law have extended the list of the professional privileges. However, enlarging the protection of array of privileges has significant cost in the quality of proof and discovery of truth.

C-24.2 Rule 24.1.1 gives full effect to a “legal profession” privilege. The concept of this privilege is different in the common-law and civil-law systems but this Rule includes both concepts. The common law recognizes an “attorney-client privilege,” which enables the client to object to inquiry into confidential communications between client and lawyer that were made in connection with provision of legal advice or assistance. Under United States law a similar protection, called the “lawyer work product” immunity, additionally shields materials developed by a lawyer to assist a client in litigation. The civil law recognizes the same protections but under the concept of a professional privilege of the lawyer.

C-24.3 It is also a universal principle, recognized in Rule 24.1.2, that confidentiality should be observed of communications in the course of settlement negotiations in litigation. Various protocols are recognized for such communications, for example, in many English-speaking countries correspondence bearing the designation “without prejudice.” In some other systems it is presumed that correspondence between advocates is confidential in this way. In many systems party communications concerning settlement are similarly confidential. The precise scope of confidentiality of communications concerning settlement is determined by the law governing the communications, but the general principle stated above should be considered in determining the matter. See also Rule 19.

C-24.4 Rule 24.2 accords limited protection to other privileges, such as those involving financial advisers or other professionals. In general, the civil-law systems accord privacy to communications of many professionals. Many states recognize additional privileges, usually in qualified form. Thus, the European Court of Human Rights has recognized various professional privileges, e.g., for bankers, accountants, and journalists, and many countries also recognize a privilege for communications between family members. Many state jurisdictions in the United States recognize an accountant privilege and some recognize a “self-evaluation privilege” on the part of hospitals and some other organizations. However, in some civil-law systems the court may examine such confidences where they appear highly relevant to the matter in dispute. Such an approach is known in the common law as a conditional privilege and is adopted in this Rule. However, if the court permits receipt of such evidence, it should protect the confidential information from disclosure except as required for consideration in the dispute itself.

C-24.5 The court may make a determination whether to receive conditionally privileged information through an *in camera* hearing, in which the participants are limited to the court itself, the parties, and the parties’ lawyers. See Rule 19.3. The same device may be used concerning nonprivileged information when the court finds that publication could impair some important private or public interests such as a trade secret. The taking of evidence in a secret hearing should be exceptional, having regard for the fundamental principle of the public nature of hearings.

C-24.6 Rule 24.3 prescribes a procedure for claims of privilege with respect to documents. The claimant is required to identify the document in sufficient detail to permit an opposing party to make an intelligent disputation of the claim of privilege, for example, that the document had been distributed to third persons.

C-24.7 A person who is entitled to a privilege may waive it, in which event evidence in the privileged communication is received without limitation. The privilege may be waived by means of an explicit statement or tacitly; a tacit waiver results when the party does not timely claim the privilege. However, the court may decline to enforce a waiver when necessary to prevent substantial injustice.

## **25. Plenary Hearing**

**25.1 Documentar y evidence not earlier produced to the court shall be produced prior to the plenary hearing by the party intending to rely on such evidence.**

**25.2 Receipt of oral evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except when the court orders otherwise for the convenience of the parties or persons giving evidence or the administration of justice.**

**25.3 Evidence at plenary hearing will be received according to the following rules:**

**25.3.1 A person giving evidence must affirm to tell the truth. The court will determine the terms of the affirmation.**

**25.3.2 A person giving evidence is directly questioned by the lawyer of the party who called the person. The lawyers of the other parties are then permitted to ask supplemental questions. Further direct and supplemental questioning may be permitted by the court. The court shall exclude, on objection or on its own motion, irrelevant evidence and improperly leading questions. The court shall prevent embarrassment and harassment of persons giving evidence.**

**25.3.3 The court may at any time conduct questioning in order to clarify the testimony, including additional questions after the questioning by the parties.**

**25.3.4 A person called to give evidence by the court may be examined by the court first. The person then may be questioned by the lawyers for the parties.**

**25.3.5 Direct questions may deal with any relevant issue in the case. Supplemental questioning may deal with any issue addressed in the direct questioning, unless the court permits a more extensive scope.**

**25.3.6 A statement made by a party outside of the record against that party's own interest is admissible as evidence.**

**25.3.7 Any party may challenge the credibility of a witness or an expert by means of questioning or consideration of prior inconsistent statements or other evidence that may affect the credibility of the witness. The court may ask questions that affect the person's credibility. These challenges are allowed only concerning material issues.**

**25.3.8 The court may permit similar contest of the authenticity or accuracy of a document or an item of real and demonstrative evidence.**

### **Comment:**

*C-25.1* Rule 25.2 establishes a general principle concerning the structure of the plenary proceeding. It is consistent with the common-law "trial" model, according to which the taking of evidence should be made in a single hearing; when one day of hearing is insufficient the plenary hearing should continue in consecutive days. In civil-law systems a similar structure is reflected in "concentrated" procedures. The concentrated hearing is the better method for the presentation of evidence, although several systems still use the old method of separated

hearings. Exception to the rule of the concentrated hearing can be made in the court's discretion when there is good reason, for example when a party needs an extension of time to obtain evidence. In such a case the delay should be as limited as possible. Dilatory behavior of the parties should be penalized by the court.

C-25.2 In most civil-law systems, a party's statement is regarded as having lower standing than testimony of a nonparty witness; and, in some civil-law systems, a party may not be compelled to give testimony at the instance of another party, and in some the party cannot call itself as a witness. The common law treats parties as fully competent witnesses and obliges them to testify at the instance of an opposing party, subject to privileges such as that against self-incrimination, and also permits parties to call themselves to the stand. This Rule adopts the common-law approach, so that a party has both an obligation to testify if called by the opposing party and a right to testify on its own motion. See also Rule 22.3. Failure to testify without explanation or justification may justify the court drawing an adverse inference concerning the facts or holding the party in contempt. However, a party's failure to comply may have some reasonable explanation or justification. Sanctions may be gradually increased until the party decides to comply, according to the model of the French *astreintes*. See also Rule 1.5.

This procedure entails a departure from the "free examination" of the parties permitted in some continental systems, whereby parties are not witnesses in the strict sense in that they are under no obligation to tell the truth and do not swear.

C-25.3 Rule 25.3.2 governs the examination of witnesses. The traditional distinction between common-law systems, which are based upon direct and cross-examination, and civil-law systems, which are based upon examination by the court, is well known and widely discussed in the legal comparative literature. Equally well known are also the limits and defects of both methods. The chief deficiency in the common-law procedure is excessive partisanship in cross-examination, with the danger of abuses and of distorting the truth; in the civil law the chief deficiency is passivity and lack of interest of the court while conducting an examination, with the danger of not reaching relevant information. Both procedures require efficient technique, on the part of the judge in civil-law systems and the advocates in common-law systems. The problem is to devise a method effective for a presentation of oral evidence aimed at the search of truth. The rules provided here seek such a balanced method.

C-25.4 For a witness called by a party, the common-law system of direct and supplemental examination by the parties is the most suitable for a thorough examination. The witness is first questioned by the lawyer of the party who called him, and then questioned by the lawyer for the adverse parties. Further questioning may be permitted by the court when useful. To prevent abuses by the lawyers, the court should exclude, on the other party's objection or *ex officio*, questions that are irrelevant or improper or which subject the witness to embarrassment or harassment. If the court is too passive, it will be ineffective to prevent improper behavior by the lawyers. On the other hand, lawyers unaccustomed to questioning may have difficulty conducting an effective interrogation.

C-25.5 The civil-law method, in which the court examines the witness, has advantages in terms of the neutral search of the truth and of eliciting facts that the court considers especially relevant. The court therefore is afforded an active role in the examination of witnesses, an authority that is also recognized in common-law systems. The court may play such a role in the course of questioning by the parties to elicit clarification of testimony. The court may carry on an independent examination of the witness, after the parties' examinations, when it seems useful to elicit or clarify facts or circumstances that have not emerged sufficiently.

C-25.6 A witness called *ex officio* by the court is examined first by the court, then by the parties. This is the equivalent of a direct examination of a witness called by a party. After that, the parties have the right of questioning the witness. The court may therefore conduct a further

examination of the witness when it seems necessary to clarify, to control, or to deepen the testimony given.

C-25.7 If a party, during questioning as a witness, makes a statement the content of which is contrary to the party's own interest, the statement is to be treated as ordinary evidence and does not have any special probative weight. That is, such a statement is not to be treated as a "confession" having binding effect. Also, under Rule 25.3.6 a statement by a party outside court, for example in a deposition, that is contrary to her interest is admissible as evidence, if duly proved at the hearing. Such a statement is also to be treated as ordinary evidence to be freely evaluated by the trier of fact.

C-25.8 Generally the opinion of a witness should not be admitted as evidence. However, the opinion of a witness may be admitted when it will clarify her testimony. In the recollection of facts, knowledge and memory are often inextricably mixed with judgments, evaluations, and opinions, often elaborated unconsciously. Sometimes a "fact" implies an opinion of the witness, as for instance when he interprets the reasons of another person's behavior. Therefore the rule excluding the opinions of witnesses is properly understood as prohibiting comments that do not aid the reconstruction of the facts in issue.

C-25.9 Rule 25.3.7 permits disputation of the credibility of any witness or experts and parties when examined as witnesses. The best opportunity to cast doubt upon the credibility of a witness is through examination in court. The credibility of any witness can be disputed on any relevant basis, including adverse questioning, prior inconsistent statements, or any other circumstance that may affect the credibility of the witness, such as interest, personal connections, employment or other relationships, capacity to perceive and recollect facts, and the inherent plausibility of the testimony. Such prior statements may have been made in earlier stages of the same proceedings (for instance, during discovery) or made out of the judicial context, for instance before the beginning of the litigation.

However, the right to challenge the credibility of an adverse witness may be abused by harassment of the witness or distortion of the testimony. The court should prevent such conduct. The challenge of the credibility of a witness should be allowed only when there are serious reasons for doing so, concerning testimony dealing with important issues of the case.

C-25.10 The authenticity or the reliability of other items of evidence, either documentary or real and demonstrative, may also be disputed by any party. Special subproceedings to determine the authenticity of public or private documents exist in many national systems. They should be used when the authenticity of a document is doubtful or contested.

C-25.11 Scientific and technical evidence may also be scrutinized if its reliability is doubtful or disputed. Given the wide array of circumstances and types of evidence, it is impossible to establish generally and *a priori* how this should be done. The court has discretion to select the most effective procedures and techniques of control.

## **26. Powers and Remedies Concerning Evidence**

**The court may on its own motion or motion of a party:**

**26.1 Exclude irrelevant or redundant evidence, or evidence whose presentation involves excessive cost, burden, or delay.**

**26.2 Draw adverse inferences from a party's failure to give testimony, or to present a witness, or to produce a document or other item of evidence that the party was in a position to present.**

**26.3 Impose a fine on or hold in contempt of court any person who without justification, on being lawfully ordered to do so, fails to attend to give evidence, fails to answer proper questions, fails to produce a document or other item of evidence, or who otherwise obstructs the administration of justice.**

**26.4 In the interest of justice, relieve a party from a failure to comply with the rules concerning evidence.**

**Comment:**

*C-26.1* Rule 26 specifies various aspects of the authority of the court with reference to evidence. The court may exercise such powers on its own motion or on a motion of a party.

Rule 26.1 gives the court the power to exclude evidence on various grounds. The first is irrelevancy of the evidence or its redundant or cumulative character. Redundant or cumulative evidence is theoretically relevant if considered by itself but not when considered in the context of the other evidence adduced. The court may in the course of a plenary hearing admit evidence that was preliminarily excluded because it had appeared irrelevant, redundant, or cumulative. The standard of exclusion by reason of “excessive cost, burden, or delay” should be applied very cautiously. This power should be used by the court primarily when a party adduces evidence with the apparent aim of delaying or confusing the proceedings.

*C-26.2* Rule 26.2 and 26.3 provide for various other sanctions. The court may draw adverse inference from behavior of a party such as failing to give testimony, present a witness the party could present, or produce a document or other item of evidence the party could present. Drawing adverse inference means that the court will interpret the party’s conduct as circumstantial evidence contrary to the party.

Drawing adverse inference is obviously a sanction appropriate only against a party. Sanctions applied to nonparties include contempt of court and imposing a fine, subject to the limitation in Rule 35.2.4. The conduct that may be sanctioned includes failing to attend as a witness or to answer proper questions, and failing without justification to produce documents or other items of evidence.

*C-26.3* While failure to comply with rules and orders concerning evidence is always subject to sanction, the court has discretion concerning both the importance and the nature of the noncompliance, and the kind and measure of the sanction that will be imposed. See Rule 1.5. Rule 26.4 provides that the court may excuse a party’s failure to comply with the rules concerning evidence, or with court orders applying the rules, according to the discretion of the court. The court’s authority should be exercised reasonably.

## **27. Orders Directed to a Third Person**

**27.1 The court may order persons subject to its jurisdiction who are not parties to the proceeding:**

**27.1.1 To comply with an injunction issued in accordance with Rule 14.1;**

**27.1.2 To retain funds or other property the right to which is in dispute in the proceeding, and to disburse the same only in accordance with an order of the court;**

**27.1.3 To give testimony in discovery or at the hearing;**

**27.1.4 To produce documents or other things as evidence.**

**27.2 The court may require a party seeking an order directed to a third person to provide indemnification for the costs of compliance.**

**27.3 An order directed to a third person may be enforced by imposition of a monetary penalty for noncompliance and by other legal compulsion authorized by the court, such as contempt of court or direct seizure of evidentiary material or other things. See also Rule 35.**

**Comment:**

*C-27.1* The court has broad authority to order nonparties as well as parties to act or refrain from acting during pendency of the litigation, to preserve the status quo and to prevent irreparable injury. In various situations a person may be involved in a suit without being a party, but should be subject to orders in the interest of justice in the proceeding between the parties.

*C-27.2* A preliminary injunction issued according with Rule 14.1 may involve nonparties insofar as their cooperation is needed in order to carry the injunction into effect, particularly to maintain the status quo and to prevent irreparable injury. The court in its discretion determines the kind of cooperation required by nonparties and provides orders accordingly.

*C-27.3* When funds or other property involved in the dispute are in possession of a party or nonparty, the court may require that they be preserved against dissipation until the case is finally decided. The court may order the person in possession of the property to retain it until a further order of the court or the final decision of the dispute determines to whom the money or property shall be delivered.

The injunction and garnishment remedies provided in Rules 27.1.1 and 27.1.2 require notice and opportunity for that person to be heard.

*C-27.4* When a nonparty's testimony is required, on a party's motion or on the court's own motion, the court may direct the witness to give testimony in the hearing or through discovery deposition.

*C-27.5* When a document or any other relevant thing is in possession of a nonparty, the court may order its production in discovery or at the hearing.

*C-27.6* The order directed to the third party is enforced by sanctions for noncompliance. These sanctions include a monetary penalty or other legal compulsion, including contempt of court. When it is necessary to obtain evidentiary materials or other things, the court may order a direct seizure of such materials or things, defining the manner of doing it. See Rule 1.5.

## **28. Record of the Evidence**

**28.1 A summary record of the proceeding shall be kept by the court's clerk under the court's direction.**

**28.2 A verbatim transcript of the proceeding or an audio or video recording shall be kept upon the demand of any party, who shall pay the expense thereof.**

**Comment:**

*C-28.1* With regard to the record of the evidence, two principal methods can be used. One is typical of some common-law jurisdictions and consists of the verbatim transcript of everything said in the presentation of evidence; the other is typical of civil-law systems and

consists of a summary of the hearing that is written by the court's clerk under the direction of the court, including the matters that in the court's opinion will be relevant for the final decision. In most civil-law systems there is no procedure for making a verbatim transcript. The verbatim transcript is complete and provides a good basis both for the final decision and for the appeal, but in many cases it is exceedingly burdensome and expensive.

*C-28.2* These Rules regard the more desirable practice to be a summary record written by the court's clerk under direction of the court. The court should require the summary record to include all relevant statements made by the parties and the witnesses, and other events that might be useful for the final evaluation concerning the credibility of witnesses and the weight of proofs. The parties are entitled to ask for inclusion of specific statements, and the court has discretion to permit their reception.

*C-28.3* If a party requests a verbatim transcript or audio or video recording of the plenary hearing, the court should so order. The party or parties requesting the transcript shall pay the expense. The court should be provided a copy of the transcript and the other parties are entitled to have a copy upon paying their share of the expense. Such a transcript does not take the place of the official record that must be kept according to Rule 28.1.

## **29. Final Discussion and Judgment**

**29.1 After the presentation of all evidence, each party is entitled to present a written submission of its contentions. With permission of the court all parties may present an oral closing statement. The court may allow the parties' advocates to engage with each other and with the court in an oral discussion concerning the main issues of the case.**

**29.2 The court will then publish, without undue delay, a written judgment and an explanatory opinion including the findings of fact based upon the relevant evidence and the supporting inferences, and the principal legal propositions supporting the decision. The judgment shall be dated. Issues of fact shall be determined according to the applicable law governing burden of proof.**

### **Comment:**

*C-29.1* The plenary hearing ends when all the evidence has been presented. At this point the case is almost ready for decision, but the parties may request permission to present oral closing statements, the plaintiff first and then the defendant. In such closing statements the parties will suggest the conclusions to be drawn from the evidence presented, and may restate their "theories of the case" both from the factual and the legal point of view, briefly summing up their contentions and claims and stating their requests. If necessary, the court may allow the parties to discuss briefly among themselves and the court the main issues of the case. The court may put questions to the parties' lawyers in order to clarify the contentions and claims.

*C-29.2* A party has a right to present a written submission of contentions and the legal rules upon which the contentions are based. The court shall fix a date for written submissions and the date of a further hearing in which the closing statements will be presented and the oral discussion will take place.

*C-29.3* Rule 29.2 requires the court to publish a written opinion justifying its decision. The publication is made according to the local practice, but a written notice must be sent to the parties. All parties are entitled to obtain a copy of the whole judgment. The date of the judgment is the basis of time to appeal and for enforcement.

The justificatory opinion shall include the findings of fact supported by reference to the relevant proofs and the evaluations of evidence by which the court has found the facts as true or false, and the principal legal propositions supporting the decision, with reference to the relevant legal rules, principles, and precedents and to the arguments supporting the interpretation adopted by the court.

*C-29.4* If the court is composed of more than one judge, a member of the tribunal may give a dissenting or concurring opinion, orally or in writing. Such opinions, if in writing, are published together with the court's opinion.

*C-29.5* The standard of proof generally applied in civil cases at common law is that of preponderance of the evidence. In civil-law systems the standard is that the judge must be convinced. Many systems impose a higher standard of proof for certain issues in civil cases, notably proof of fraud. These standards contrast with the higher standard, such as "beyond a reasonable doubt," in criminal cases. Rule 29.2 defers to the standard under forum law.

In addition to the standard of proof is the problem of burden of proof. In general, it is universally recognized that a plaintiff has the burden of proof for all issues essential to his claim, and that defendant correlatively has the burden of proof as to issues of affirmative defense. In civil-law systems the allocation of burden of proof is considered to be a matter of substantive law so far as concerns choice of law. The rules of burden of proof applicable to various types of claims are in turn considered to be derived from substantive considerations, such as the nature of the claim and the relative capabilities of parties to transactions of the kind presented in the case. Thus, the forum would look to the law governing the transaction to determine the rules of burden of proof.

In common-law systems the allocation of burden of proof is generally considered to be "procedural" so far as concerns choice of law. The forum therefore applies its own rule of burden of proof. Common-law systems recognize exceptions where the claim is based on a statute of another jurisdiction whose law governs the transaction, at least if the statute provides a special allocation of burden of proof. In any event, the rules of burden of proof in common-law systems generally reflect the same kinds of "substantive" policy considerations as underlie the rules of burden of proof in the civil-law systems.

A classically vexing problem is the classification of issues in allocation of burden of proof, i.e., whether a specific issue is part of plaintiff's case or a matter of affirmative defense. That problem should be resolved according to the applicable law recognized by the forum.

### **30. Costs**

**30.1 Each party initially pays its own costs and expenses, including court fees, attorney's fees, and incidental expenses.**

**30.2 The interim costs of the fees and expenses of an assessor, expert, translator, other judicial officer or other person appointed by the court shall be provisionally paid equally by the parties or as otherwise ordered by the court. The court shall order final payment according to this Rule.**

**30.3 The prevailing party shall be reimbursed of its reasonable costs and expenses from the losing party, but determination of costs may be stayed with a stay of enforcement as provided in Rule 35.3.**

**30.4 The prevailing party shall within 30 days after rendition of the judgment submit a statement, certified by the party or its attorney, of its costs and**



**expenses. The losing party shall promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.**

**30.5 The court may reduce or preclude recovery of costs and expenses against a losing party who had reasonable factual or legal basis for its position. The court may also impose a penalty not to exceed twice the amount provided by Rule 30.3 against a party whose disputation the court determines was not conducted in good faith.**

**30.6 If there is appellate review, the rules and procedure stated above shall apply to costs and expenses incurred in connection with the appeal.**

**30.7 If it is authorized by the law of the forum, the court may require a party to give a security for costs and expenses.**

**Comment:**

*C-30.1* The rule governing allocation of costs and expenses of litigation in ordinary civil proceedings, recognized universally except in the United States, is that the prevailing party is entitled to reimbursement from the losing party. That principle is adopted here. Under the “American” rule in the United States each party bears its own costs and expenses except as statutes specifically provide otherwise or in case of exceptional abuse of process. The American rule creates incentives for a party to bring litigation or to persist in defense of litigation that would not be maintained under the generally recognized rule.

However, the rules concerning costs in common-law systems and some civil-law systems confer authority on the court to modify the normal allocation of costs to the losing party. Rule 30.5 adopts such a position. This Rule also allows the court to impose penalty costs on a party that has engaged in bad-faith disputation. “Bad faith” includes disputation of factual issues concerning which there is no substantial evidentiary dispute and assertion of legal contentions for which no professionally responsible argument can be offered.

*C-30.2* The parties are permitted, in accordance with applicable law, to contract with their lawyers concerning lawyers’ fees. Costs awarded should be reasonable, not necessarily those incurred by the party or the party’s lawyer. When it was reasonably appropriate that a party retained more than one firm of lawyers, those fees and expenses may be recovered. The party seeking recovery of costs has the burden of proving their amount and their reasonableness. The award belongs to the party, not the lawyer, subject to any contractual arrangement between them.

*C-30.3* Rule 30.7 recognizes that, if it is authorized by the law of the forum, the court may require posting of security for costs. It is well known that in several legal systems the security for costs is considered as a violation of the due-process guarantee, in connection with the principle of the equal treatment under the law. Security for costs could entail discrimination against parties not having enough money to give such a security, and – correspondingly – constitute preferential treatment for parties having money. On the other hand, in some countries it is considered as a normal means to ensure the recovery of costs.

However, in the context of transnational litigation such concerns may be less important than in usual internal litigation. Moreover, there is a higher risk of being unable to recover costs from a losing party who is not a resident of the forum state. Therefore these Rules leave the imposition of a security for costs to the discretion of the court. The court shall take care not to impose excessive or unreasonable securities.

## C. Subsequent Proceedings

### 31. Appellate Review

**31.1 Except as stated in the following subsection, an appeal may be taken only from a final judgment of the court of first instance. The judgment shall be enforceable pending appeal, subject to the provisions of Rule 35.3 and 35.4.**

**31.2 An order of a court of first instance granting or denying an injunction sought under Rule 14 is subject to immediate review. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise.**

**31.3 Orders of the court other than a final judgment and an order appealable under the previous subsection are subject to immediate review only upon permission of the court of first instance or upon order of the appellate court. Such permission may be granted when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.**

**31.4 Appellate review is limited to the claims, defenses, and counterclaims asserted in the court of first instance. No additional previously available evidence should be admitted except to prevent manifest miscarriage of justice.**

#### Comment:

*C-31.1* A right of appeal is a generally recognized procedural norm. It would be impractical to provide in these Rules for the structure of the appellate courts and the procedure to be followed in giving effect to this right. It is therefore provided that appellate review should be through the procedures available in the court system of the forum. “Appeal” includes not only appeal formally designated as such but also other procedures that afford the substantial equivalent, for example, review by extraordinary order (writ) from the appellate court or certification for appeal by the court of first instance.

*C-31.2* Rule 31.1 provides for a right of appeal from a final judgment. The only exceptions are those stated in Rules 31.2 and 31.3. Thus, interlocutory appellate review is not

permitted from other orders of the first-instance court, even though such review might be available under the law of the forum. In some countries, especially those of common law tradition, some of the decisions in a proceeding are made by adjuncts, such as magistrate judges. These decisions are normally appealable to the first-instance judge who delegated the issue. This subsection does not interfere with this practice. The restrictions on appeal set forth in this Rule do not apply to the relationships between a court of first instance and its adjuncts. See Rule 17.4.

*C-31.3* Rule 31.2 permits *pendente lite* interlocutory appellate review of orders granting or denying an injunction. See Rule 14. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise. The court could determine that an injunction should expire or be terminated if circumstances warranted.

*C-31.4* Rule 31.3 permits interlocutory appeal of orders other than the final judgment at the initiative of either the first-instance court itself or the appellate court. The judges of the first-instance court or the appellate court, as the case may be, must determine that the order is of the importance defined in Rule 31.3. Permission for the interlocutory appeal may be made by motion addressed to the court from which permission is sought.

*C-31.5* Rule 31.4 permits appellate review of factual issues on the basis only of evidence previously presented to the court of first instance. This limitation accords with the principle followed in the common-law tradition and is also recognized in some civil-law systems. Within the foregoing limitation the appellate court may determine that evidence should have been received that was excluded by the first-instance court, or require that evidence which was received be disregarded, for example, where the first-instance court made an erroneous ruling concerning a claim of evidentiary privilege. When the appellate court has determined that evidence was improperly excluded or received, and that the effect was prejudicial, it may direct judgment where justified or order further proceedings in the court of first instance.

The restriction upon presenting additional evidence to the second-instance court reflects the practice in common-law systems. However, that practice is subject to the exception that an appellate court may consider additional evidence under extraordinary circumstances, such as the uncovering of determinative evidence after the appeal was taken and the record had been completed in the first- instance court.

### **32. Further Appellate Review**

**An appeal or other form of review may be taken from the decision of a court of second instance in accordance with the law of the forum. The review performed by the court of second appeal will deal only with issues of substantive or procedural law. The facts in issue will not be reconsidered. No evidence or additional claims or defenses will be admitted.**

#### **Comment:**

*C-32.1* Most modern court systems are organized in a hierarchy of at least three levels. In many systems, after appellate review in a court of second instance has been obtained, further appellate review is available only on a discretionary basis. The discretion may be exercised by the higher appellate court, for example, on the basis of a petition for hearing. In some systems such discretion may be exercised by the second-instance court by certifying the case or an issue or issues within a case to the higher appellate court for consideration.

*C-32.2* This Rule adopts by reference the procedure in the courts of the forum concerning the availability and procedure for further appellate review. It is impractical to specify special provisions in these Rules for this purpose. A party must act with due diligence in seeking reexamination and must show no inexcusable neglect in having failed to make objection prior to the judgment.

### **33. Nullification of judgment**

**A judgment may be nullified only through a new proceeding and only upon showing that the applicant acted with due diligence and that:**

**33.1 The judgment was procured without jurisdiction over the party seeking relief; or**

**33.2 The judgment was procured through fraud; or**

**33.3 There is evidence available which was not previously available by reason of fraud in disclosure, discovery or presentation of evidence that would lead to a different outcome; or**

**33.4 The judgment constitutes a manifest miscarriage of justice.**

**Comment:**

*C-33.1* As a general rule a final judgment should not be reexamined except in appellate review according to the provisions included in Rules 31 and 32. Only in exceptional circumstances may it be nullified through a new proceeding.

*C-33.2* Reexamination of a judgment may be requested in the court that rendered the judgment. In seeking such a reexamination a party must act with due diligence. The grounds for such an application are: (1) the court had no jurisdiction over the party asking for reexamination; (2) the judgment was procured by fraud on the court; (3) there is evidence, not previously available, that would lead to a different outcome; or (4) there has been a manifest miscarriage of justice.

*C.33.3* The challenge under Rule 33.1 should be allowed only in case of default judgments. If the party contested the case on the merits without raising this question, the defense is waived and the party should not be allowed to attack the judgment on those grounds.

*C-33.4* The court should consider such an application cautiously when Rule 33.3 is invoked. The applicant should show that there was no opportunity to present the item of evidence at the plenary hearing and that the evidence is decisive, i.e., that the final decision should be changed.

*C-33.5* In interpreting Rule 33.4, it should be recognized that the mere violation of a procedural or substantive legal rule, or errors in assessing the weight of the evidence, are not proper grounds for reexamining a final judgment, but are proper grounds for appeal (see Rules 31 and 32). A miscarriage of justice is an extreme situation in which the minimum standards and prerequisites for fair process and a proper judgment have been violated.

#### **34. Expiration of Time to Appeal**

**Except as stated in Rule 33, a judgment is not subject to reexamination for procedural regularity or substantive propriety upon expiration of the time for appellate review of such a judgment.**

**Comment:**

*C-34.1* The rule of finality is recognized in the common-law systems and many civil-law systems. However, procedure in many systems permits reconsideration or correction of a judgment under specified conditions. In some common-law systems a “new trial” may be granted. All systems impose time limits on use of such procedures and generally require that they be invoked before the time to appeal has expired. The forum rules in such matters should govern finality.

#### **35. Enforcement of Judgment**

**35.1 A final judgment, including judgment for a provisional remedy, is immediately enforceable, unless it has been stayed as provided in Rule 35.3. In particular, a final judgment may be enforced through attachment of property owned by or an obligation owed to the judgment obligor.**

**35.2 If a person against whom a judgment has been entered does not comply within the time specified, or within 30 days after the judgment becomes final if no time is specified, the court may impose enforcement measures on the obligor.**

**These measures may include compulsory revelation of assets and a monetary penalty on the obligor, payable to the opposing party or to whom the court may direct.**

**35.2.1 Application for such a sanction must be made by a person entitled to enforce the judgment.**

**35.2.2 The penalty for noncompliance will include the cost and expense incurred by the party seeking enforcement of the judgment, including attorney's fees, and may also include a penalty for defiance of the court, not to exceed twice the amount of the judgment.**

**35.2.3 If the person against whom the judgment is rendered persists in refusal to comply, the court may impose additional penalties.**

**35.2.4 No penalty shall be imposed on a person who demonstrates to the court financial or other inability to comply with the judgment.**

**35.2.5 The court may order third parties to reveal information relating to the assets of the debtor.**

**35.3 The trial court or the appellate court, on motion of the party against whom the judgment was rendered, may grant a stay of enforcement of the judgment pending appeal when necessary in the interest of justice.**

**35.4 The court may require a suitable bond or other security from appellant as a condition of granting a stay or from respondents as a condition of denying a stay.**

**Comment:**

*C-35.1* Rule 35.1 provides that a final judgment is immediately enforceable. If the judgment has to be enforced in the country of the court in which the judgment was entered, the enforcement will be based on the forum's law governing the enforcement of final judgments. Otherwise, the international rules including international conventions such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments will apply. When a monetary judgment is to be enforced, attachment of property owned by the judgment obligor, or obligations owed to him, may be ordered. Monetary penalties may be imposed by the court for delay in compliance, with discretion concerning the amount of the penalty. See Rule 1.5.

*C-35.2* Rule 35.2 authorizes the court, upon request of the judgment holder, to impose monetary penalties upon the judgment obligor for the case of noncompliance with a judgment. These penalties may become effective if the judgment obligor does not pay the obligation within the time specified or within 30 days after the judgment has become final if no time is specified. The monetary penalties shall be imposed according to the following rules:

1) Application for the enforcement costs and penalties may be made by any party entitled to enforce the judgment.

2) Enforcement costs include the probable fees required for the enforcement, including the attorney's fees, and including a conditional penalty in case of defiance of the court. A conditional penalty may not exceed twice the amount of the judgment. The court may require the penalty to be paid to the person obtaining the judgment or to the court or otherwise.

3) Additional penalties may be added against an obligor who persists in refusal to pay, considering the amount of the judgment and the economic situation of the parties. Here, too,

the court may require the penalty to be paid to the person obtaining the judgment or to the court, or otherwise.

4) No penalty shall be imposed on a person who satisfactorily demonstrates to the court an inability to comply with the judgment. See Rule 1.5.

5) “Third parties” includes any institution which holds an account in the name of the debtor.

C- 35.3 Rule 35.3 permits either the first-instance court or the appellate court to grant a stay of enforcement in exceptional cases. Rule 35.4 authorizes the court to require a bond or other security as a condition either to permit or to stay the immediate enforcement.

### **36. Judicial Assistance**

**The courts of a state that has recognized these Rules shall, and courts of other states may, enforce orders in aid of proceedings in another state.**

#### **Comment:**

*C-36.1* It is a general principle of private international law that judgments of one state will be recognized and enforced in the courts of other states. This principle is being given expression in The Hague Convention on Jurisdiction and Judgments, now in the drafting process. The same principle has been recognized with respect to interlocutory orders, such as orders directing testimony from third-party witnesses. The extent of such assistance and the procedures by which it may be provided are governed in many respects by the Brussels and Lugano Conventions.

*C-36.2* Rule 36 provides that, as a matter of the domestic law of the forum, assistance to the courts of another state is to be provided to such extent as may be appropriate. The general governing standard is the measure of assistance that one court within the state would provide to another court in the same state.

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