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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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JOINT AMERICAN LAW INSTITUTE / UNIDROIT WORKING GROUP
ON
PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE

Report on the First Session
Rome, 22 to 26 May 2000

(Prepared by Antonio Gidi, Secretary to the Working Group)

Rome, October 2000

1. The first session of the **Joint ALI/UNIDROIT Working Group for the preparation of Transnational Rules of Civil Procedure** was held from 22 to 26 May 2000 in Rome at the seat of the Institute. The session was chaired by Mr. Ronald T. Nhlapo (South African Law Commission; Member of the Governing Council of UNIDROIT) and was attended by all members of the Working Group: Mr. Neil Andrews (Cambridge University, U.K.), Ms. Aída Kemelmajer de Carlucci (Supreme Court of Justice of Mendoza, Argentina), Ms. Frédérique Ferrand (Université Jean Moulin, Lyon, France), Mr. Geoffrey C. Hazard, Jr. (University of Pennsylvania Law School; former Director of ALI), Mr. Masanori Kawano (Nagoya University, School of Law, Japan), Mr. Pierre Lalive (Lalive & Partners and Geneva University, Switzerland), Mr. Rolf Stürner (Freiburg University, Germany) and Mr. Michele Taruffo (Pavia University, Italy). The session was also attended by Mr. Antonio Gidi (Brazil and University of Pennsylvania Law School) who was appointed Secretary to the Group. The UNIDROIT Secretariat was represented by Mr. Herbert Kronke (Secretary-General of UNIDROIT) and Mr. Joachim Bonell (Consultant).

The terms of reference of the Working Group as defined by the Governing Council at its 77th session in February 1998 were to exam the Feasibility Study prepared by Rolf Stürner and the Preliminary Draft of Transnational Rules of Civil Procedure prepared by Geoffrey Hazard and Michele Taruffo.

2. Reference documents for the session were:

Study LXXVI – Doc 1

Study LXXVI – Doc 2

Study LXXVI – Doc 2/Add.1

Principles of Transnational Litigation prepared by Rolf Stürner

Principles of Transnational Litigation prepared by Neil Andrews

Principles of Procedure in the French Code of Civil Procedure

(Documents not numbered are presented as attachment to this Report)

3. The newly elected President of UNIDROIT, Bernardino Libonati, opened the meeting saluting and welcoming the members of the Working Group.

Realizing the great importance of this project, the President noted that a few years ago nobody would have dared to propose unification in such a technical and highly sensitive field as procedural law. If today we are ready to embark upon such and exciting project is another demonstration of how the globalization affect the legal environment prompting us to overcome traditional barriers. Yet the project is exciting also for another reason: it is the first time that UNIDROIT undertake a joint venture with such a prestigious institution as the American Law Institute, represented in the meeting both by its current director, Lance Liebman as well as his predecessor Geoffrey Hazard, Jr. The first result of this joint venture is the establishment of this Study Group composed of the most eminent experts in the field of Civil Procedure from all over the world. The President thanked the members for accepting the invitation and desired good luck in their work.

4. Lance Liebman, Director of the American Law Institute demonstrated how happy and proud the American Law Institute was in working in a cooperative basis with UNIDROIT. Prof. Liebman made a brief statement about the history of both institutions stressing that they were founded at about the same time and had the same attitude towards the law: simplification, coordination, and unification. The Director explained that the ALI is a private organization that studies the law and makes suggestions to official bodies. Sometimes those suggestions are followed and sometimes they are not. He also stressed the relevance of the project and the worldwide interest it has suscitated. Thanks to the envisaged UNIDROIT/ALI co-operation it is expected to result in a truly international and much needed instrument. He also stressed the importance of this project as a model for future cooperation between the UNIDROIT and the ALI.

5. Herbert Kronke remembered Liebman's remarks that both Institutions were founded to harmonize and simplifying the law in the United States or worldwide but added that we need new products for new problems: not only harmonization and simplification but also modernization of the law. He proceeded discussing the schedule of the meetings.

6. Hazard, at instance of Bonell, gave a brief description of a previous meeting about the Rules at the ALI Annual Meeting in Washington. He also gave a brief summary of the meetings the ALI had already held worldwide about the project. He then described briefly the recent meetings with leading specialists in Japan and in Singapore, where we met with Singaporean, Philippines, New Zealanders and Australians. He then commented Rolf Stürner's Feasibility Study and the meeting with him in Gent four weeks before. He commented on the helpful document entitled Fundamental Principles of Civil Procedure. A First Continental Approach, produced by Stürner. Those Principles are perfectly compatible with the Rules and one of the topics to be discussed in this meeting is the method to incorporate the Principles into the Rules. He also mentioned the set of Principles prepared by Neil Andrews, who mirror the common law approach to the topic. These too are compatible with the Rules. Regardless of the fact that common law is lawyer-centered and civil law is judge-centered, all litigation involves three people. He asked UNIDROIT for a rough estimate of the duration of this project and the frequency of the meetings. The ALI has no preconception about it, because many projects take long, especially this one, that we have to acquaint people with the work. Besides, law reform is never complete.

He mentioned the future meetings the ALI plan to host in Paris, Jerusalem, South Africa, Argentina, Brazil, China, Japan, and the Philippines.

7. Kronke answered Hazard's questions explaining that no project in UNIDROIT took more than forty years, which is not very comforting. The task is considerable, and there is no hurry. He mentioned that it could be seven to ten years, depending on how the project goes. He explained that the product of this work would be a Model Law.

8. Bonell added that after the end of this work, there is also another necessary phase: the diplomatic phase with the governments of UNIDROIT members, under the auspices of UNIDROIT,

which will prolong the duration of this ambitious project. He mentioned the importance of deliberating a format for the project. He asked Stürner if he was ready to distribute his Feasibility Study and discuss it with all the members of the Working Group.

9. Stürner replied that it would be helpful to discuss first the Principles. He said that we should decide whether we would produce Model Rules of Procedure, incorporating the Principles or whether we will produce a set of Principles, which will incorporate the Rules of Procedure. He suggested producing first the Principles and after that the Model Rules.

10. Bonell suggested postpone this discussion until the Chairman arrives. He followed up Hazard's note and said that the projects under UNIDROIT sponsorship can and should be discussed in other arena, as long as the Secretary is informed.

11. Kronke and Bonell questioned if this project would be in the ALI or UNIDROIT Web Site and invite comments and said that it would have no objections to follow the decisions of the Reporters' and the Working Group's decisions. Every group has complete autonomy to proceed the way they see fit, unless delicate political issues are involved. This being such a small group, it would be easier to arrive to a decision.

12. It was commented that it could be early to put this information in the Web Site. It is true that we can receive interesting comments, but we can also attract needless complications. Practitioners may use this in courts worldwide. The best should be to defer this decision to the Reporters. It was welcomed the joint work between ALI and UNIDROIT, but this joint work might entail a proceeding different from the individual proceedings of the two institutions.

13. Hazard agreed and mentioned that the ALI has some experience in international joint ventures and that it can adapt accordingly with special procedures. It was decided that the document should be available in the Internet for the moment and that this decision could be reviewed in the future.

14. It was discussed about the role Rolf Stürner will have in the project and it was decided that he would be a reporter for UNIDROIT.

15. It was decided that Antonio Gidi would be the Secretary to the Working Group. About the Secretary's work, Bonell mentioned that the Report can be either detailed or only contain the decisions taken by the Working Group. This should be decided by the Working Group.

16. Bonell mentioned that the Reporters and the Working Group should decide the position that the Comments should have in the Project.

17. It was mentioned that there need to be a counterbalance from the civil law approach to the project, but that there must be only one draft.

18. It was manifested some concerns that the project has a very strong common law basis to which Hazard explained that the three most fundamental characteristics of American procedure (jury trial, notice pleading, and comprehensive discovery) are repudiated in the draft.

Jury trial is not allowed in these Rules. It is understood that if it were allowed, it would have no acceptance abroad. These Rules calls for specific pleading (code pleading) in which the parties must allege specifically the facts upon which you intend to recover and those facts define relevance and limit proof. Code pleading is feasible in the United States and some think that it is much preferable. In most American litigation, in practice, the parties plead facts they do not plead in broad allegations, in order to better explain the case to the judge. These rules also do not provide for wide-open discovery. If one excludes those three points (no jury, no notice pleading and no broad discovery) it does not resemble American procedure: it resemble much more international arbitration.

The whole concept of the draft is informed by common law other than the United States, which do not have notice pleading, do not have broad discovery and do not have jury trial.

19. Bonell reminded the participants that the draft presented by Hazard and Taruffo are a point of reference a starting point but it does not bind the Working Group. Taruffo reminded the group that this is only a draft and that the work is not completed.

20. Pierre Lalive said that he was skeptical about the project when he first heard about it but he is much less skeptical now after he has read and was acquainted by the draft. He was impressed by the quality of the work of the draft and the feasibility study. We should not forget that the only persons today that have to apply or create transnational principles of procedure are not the judges, but international arbitrators. It would be a serious mistake to forget the fact that they are applied everyday in international arbitration tribunals composed of members of civil and common law systems. He stressed against the danger of the tendency to overestimate the gap between common and civil law procedure. There is no such a thing as one common or one civil law systems of procedure. There is no insurmountable difficulty in presenting a joint draft by the ALI and UNIDROIT.

21. Ronald Nhlapo, the chairman of the Working Group, initiated a discussion about what each participant expected from this week's work.

22. Neil Andrews showed his interest in beginning the discussions with the principles, which will be the foundation of the project. He stressed, citing Stürner's Feasibility Study, that the Working Group should solve the tension between the need for brevity and the need for a more detailed set of rules and decide the acceptable level of detail.

23. Frédérique Ferrand, citing Stürner's Feasibility Study, stressed the importance of studying the role of the judge and the parties, especially connected with the rules of evidence, discovery and disclosure. She agreed with Andrews about the importance of studying the principles.

24. Hazard stressed the importance of the principles as a basis for discussion, its compatibility with the Rules and the necessity to address the specific implications of the principles in the Rules.

25. Masanori Kawano mentioned that the Japanese system is able to accommodate both civil and common-law rules. The new Japanese code of civil procedure has influence from all systems. He thinks possible to create a draft with common principles of procedure. He favors begin discussions with the principles.

26. Antonio Gidi stressed the importance of Stürner's principles as a foundation for the project. He also mentioned that it is crucial for the members of the group, when discussing specific rules, to have in mind to which extent they are searching for a compromise between the two systems and to which extent they are choosing the best rule.

27. Aída de Carlucci agreed with the importance of beginning the work with the study of the principles.

28. Lalive stressed that since he has received Stürner's principles on that same morning he could not read it and was not well prepared for criticizing it. He suggested begin with the discussion of the Rules.

29. Stürner stressed that between the principles prepared by him and the Rules there are many similarities and some differences. He said that the group's discussions should concentrate on the differences, because the similarities will not create insurmountable problems.

Stürner also mentioned that the Rules should be applicable only in the cases where the parties have the free disposition of the rights in controversy.

30. Taruffo suggested that since we were there to discuss the principles, we should set aside momentarily the Rules and concentrate all efforts on the discussion of the principles. The principles prepared by Stürner were an excellent job. We also should discuss whether this list is complete, whether we want to add other principles we want to consider.

31. Bonell advised against concentrate too much on the word "principles" because many principles are as detailed as the rules in a civil law code. Maybe, principles v. rules should not be in antagonism. He also advised the group to reflect in this preliminary stage whether this project should become a "model law" or a "soft law".

32. Kronke mentioned that the Governing Council's idea did not decide that the product of this group should be principles rather than a model law. The decision was that the final product might as well be a model law. Mr. Stürner presumption was also accepted that a model law might be the most likely instrument. However, before that, there should be an establishment of principles as a useful intermediate stage. The principles, therefore, should not be considered an alternative to the rules, but only a working tool to the way to become whatever in the end it may be.

He explained that he did not see the project as having two chapters, the first one being the Principles and the second, the Rules. Rather, there would be a heading that would be the principles and then the rules that would be tied to the principles. The discussion of the Working Group should analyze them at the same time, modifying either the principle of the rule according to the need.

As regards to the structuring of the group he advises not to divide the group into small working groups and the whole group should carry the burden of discussing all principles and rules.

33. Lalive considers that there is controversy over what is a principle and what is a rule and considers that the principles is more abstract and general. He considers that if we were to discuss rules, there would be more resistance over the project.

34. Andrews mentioned the fluidity of principles. He mentioned the principles (overriding objectives) in the new English Code of Civil Procedure. It is very interesting to see principles as a black law in England for the first time. He cautioned that we should be sensitive to the fact that the principles are evolving and it is a delicate task to identify them and to attribute to them their appropriate weigh. To a certain extent principles can be in competition with each other.

35. Taruffo stressed the fact that we are not thinking of principles of procedure in an indeterminate perspective. We are discussing about principles of transnational litigation. This means that we have a more limited scope of discussion. It is important also to determine what a transnational litigation is before trying to elicit principles. It is a difficult but useful effort. Even though we are national lawyers, we should be more general in the one hand and more focused in the other.

36. Kronke agreed that the first point of the discussion should be the scope of application. It may be necessary to enlarge the scope of the Rules.

37. Lalive alerts to the difficulty of the well-known problem of defining what is a transnational contract or an international situation. However, this is a problem that we cannot escape and that we have to face right now.

38. Hazard called attention to the fact that each member brought in his or her subjective continuousness a personal and subjective understanding of the scope and that may not coincide with the other's personal understanding. Therefore, it is important to have an exchange in order to be more specific as possible. He also said that we should not become entangled in a definition problem and disregard everything else, even because in the phase of adoption by the member states, this may be changed and also because different countries may have different scopes when they choose to adopt the rules. We should seek to be as specific as we can, but we should not let this controversy drag the work of the principles and rules. He favors identifying a transnational dispute according to a two-prong test: the type of the transaction and the parties (See Rule 2.1 and 2.3). He invited comments and criticisms.

39. Bonell called the attention to the difficulty of defining business or commercial transaction.

40. Kronke stressed the fact that rules of procedure have in mind two people from the same country: the country of the forum. This might not be fair whenever one of them is a foreigner and this stresses the importance of this project. He told that when he first discussed the possibility of this project with some judges and the European Court of Justice in Luxembourg their immediate response was approval: something has to be done. The English judge mentioned that he often remodels the procedural rules in order to be fair to non-English parties. The fact that two parties may not come from the forum's jurisdiction should be the starting point, but there may be other factors.

41. Taruffo agreed with Kronke and mentioned that this is the main problem. Historically, he added, the Transnational Rules draft was born with this problem in mind. However in our international economy, there are many labor, consumer and environmental cases involving foreigners, but these cases should be excluded. So nationality is not the only criterion to be adopted.

42. Stürner agreed that we should not worry too much about the scope of application because each country adopting the rules will decide the scope of application. We can recommend. The rules could govern all cases in which the parties have free disposition of the right such as contract as well as labor, antitrust etc.

43. Kronke suggested that we should accept as a starting point that the scope of the project is transnational cases and we should underscore the element "trans" and we see later on what exactly it means. The main objective of the project is to find fairness to the parties. He added that the Governing Council and the Feasibility Study stressed that the scope should not be limited to contractual disputes, even because those disputes are generally governed by arbitration clauses.

44. Hazard mentioned that we should be indicative but not definitive of what transnational litigation means. Because we know it will be modified in the future by the adopting states. Hazard agreed that the Rules should not be limited to contractual disputes and added that the big problem in international disputes are the cases in the border of contract, in which the dispute would be whether there is a contract or not.

45. Nhlapo summarized the discussion saying that the whole objective of this exercise should be to introduce a level of fairness in dealing with people who come from across borders. He asked for further thought before proceeding

46. Andrews wanted more clarification about the expression business dispute, asking whether both parties should be engaged in business or whether we want to include the situation in which one party is engaged in business and not the other. He has no strong views about the subject but think that it is an important topic to be clarified.

47. Lalive prefers the second option without hesitation and thinks that we should not enter in the discussion of who is a businessman and who is not. He prefers a wider scope and more limited exclusions.

48. Bonell prefers the first option. However, consumer transactions should be excluded.

49. Hazard agrees that consumer transactions should be excluded. It would be a mistake to be more precise because what is a consumer transaction varies from country to country. The Rules should exclude consumer transactions without defining it.

50. Andrews clarified that the expression transaction should be understood not as a contract, but as an event.

51. Stürner disagrees that personal injury cases should be excluded. With a scope so limited, the Rules would not be interesting for many countries. Excluding product liability and personal injury cases only to conform to the American right to jury trial is not the best way to cope with this problem.

52. According to Hazard, for the duration of the project, we should exclude personal injury cases, otherwise it will have no acceptability in the United States. Sooner or later the United States will have to come to terms with personal injury, product liability cases. It is a very serious, complex domestic problem right now, putting aside international matters. In his estimate, it would take at least ten years before there will be a political possibility of change. He recognized that around the world there is an interest that this project would exclude juries and be applicable to personal injury. If the project is to make a lasting contribution in the long run, the right way is to ignore those cases for the moment, recognizing their importance. Otherwise it would not last in the United States giving the intense energy of the plaintiffs personal injury bar. They are dominant in many states and very influential in the White House now. We could make provisions applicable to personal injury cases, we just do not say at this moment that they will apply and wait development of political sentiment down the road.

53. Answering Lalive's question whether it would be possible to exclude jury trial only for international controversies, Hazard compared the function of jury trial in society with the function of lotteries. A very small number of people become eligible to a large amount of money when they are fortunate enough to be injured by a business, largely, a tax free benefit (referring to compensatory damages). That is what the plaintiff's bar is interested in the moment: they do not care about normal automobile cases. What they want is a big case against a large corporation: they roll the dice to get a big amount of money.

54. Liebman mentioned the difference in political views between American and Europe. Anywhere in the world the government can raise taxes to discourage people to smoke and this money reverts to the public Health System. Americans cannot do that, so Americans do the same thing with a big charge against the companies through the tort system. The transaction costs is billions of dollars to the lawyers for achieving a good purpose: a higher price for the cigarettes and big payments to the health system. So he also thinks that it is a lottery to the lawyers and not only to the injured

55. Stürner still thinks that product liability should not be excluded for the rest of the world. It would be enough to let the United States to have the freedom not to adopt it. He thinks that each country should have the freedom to set the scope of application of these rules. In most cases, the application of these rules to product liability would be no problem. There is no reason to exclude from the scope of application of the project to accommodate the United State's interests. It would be enough to leave each country freedom to decide.

56. Kronke reminded that we should not harmonize for the sake or harmonization. Every participant in the negotiation process (each country) has the liberty of doing what it please with a model law.

57. Bonell expressed surprise that the group were considering discussing the procedural rules without concern to the subject matter to which they would be applied. There are policy

differences that are decisive in choosing a procedural rule and the group should be aware if the case is a big commercial case, between equally sophisticated parties or if it is a consumer case.

58. Stürner agreed with Bonell and said that the core of application should be defined in advance. He favors "business transaction." However, he stressed that we should make clear the freedom to each country to extend the application of these rules to other cases. It is very important not to make the application too narrow from the very beginning.

59. Carlucci suggested that we began the analysis of the Transnational Rules and the Feasibility Study. This discussion should happen when we discuss Rule 2. Then we will have the black letter before us and the discussion will be more focused.

60. Kawano stressed that the countries should be free to include other controversies in the scope of application

61. Taruffo mentioned that the fact that we are flexible with scope of application does not mean that we do not have in mind the core of the problem. Being flexible in the borders does not mean not to have a core. Commercial case is different from civil and commercial cases. Each country should be free to shape the scope of application with good reasons. The center idea is still rough and vague but there is some substance in it.

62. Kronke agreed that the core area should be commercial disputes and pointed out that we could have an opt-out list including personal injury cases, family law and maybe consumer transactions. As we go along studying each of the specific rules, we will be able to revisit this decision.

63. Hazard mentioned that in many occasions we should state in the blackletter only the general rule and leave the exceptions to be developed in the comments. Some exceptions are too unusual to be dealt with in a rule and can be developed in the comments.

64. Andrews were concerned about the connection between the Principles and the Rules.

65. Hazard answered that at this point it would not be very productive to talk much about that because the Reporters have a major task, which is to appropriate from Stürner's and Andrews' list what are real principles, because some of them are more specific than others. We have to identify the level of abstraction that we want to work with. We still have to work out what we will classify as a principle and what we will classify as a rule. It is very difficult to have a good discussion until there is a written expression from the Reporters to deal with that problem.

66. Hazard added that we need a further writing of the Principles for deepen the discussions. We also need to discuss the level of detail needed in the Rules. The level of detail that we now have is illuminating: this level of detail reveals serious points and problems. There are also problems of language. If UNIDROIT and ALI conclude that the level of detail is excessive, in the end we can just delete provisions or transfer them to the comments. Nothing is final until we say so. Lalive agreed that the can keep this level of detail in the Rules at this stage of discussion. This is important to understand the general idea and we can decide later what to keep and what to reject.

67. With that in mind, Hazard suggested that the most useful exercise today would be to comment on specific aspects of the Rules. Some may be too detailed and some may not be detailed enough.

68. There are some analogies between this project and the UNIDROIT's Principles of International Contracts.

69. Bonell remembered that this is a very heterogeneous group. There will be some difficulties of accepting suggestions and also of understanding each other.

70. Stürner suggested that we should ask ourselves three questions about each rule or principle:

- a) Is this a fundamental rule dealing with important issues?
- b) Is it perhaps too detailed?, and
- c) Could we agree on the contents?

71. Andrews added that the first question should also include making a connection between the principles and the rule. The very difficult challenge that faces the Reporters is to carry out the task of incorporating these principles into the rules. The Principles could be put as a preface to the Rules, but he suggests that a more subtle way is to take the values and concepts and redraft the Rules in light of our discussions.

72. Lalive reminded however, that we are in a preliminary stage, not a drafting stage. It follows that we should not be stop by some detailed discussion about what is principle and what is a rule. Naturally, drafting will be of the greatest importance.

73. Ferrand commented that the structure of the Rules is not precise enough for a civil lawyer point of view. She would like to see it more structured, maybe divided into sections or chapters: pleading, preliminary stage, plenary hearing, appeal, etc. She also mentioned the need for a French version, not only because of the terminology, but also because of the concepts. There are many rules that are not easily translated. She considers that some rules are too detailed and some others are not detailed enough.

74. Lalive agreed that the Rules should be presented and discussed in French, adding that this is not a question of equality of languages, but a question of substance and gave the following example in Swiss practice. He has spent years in expert committees appointed by the government to redraft part of the Civil Code and to draft the first Federal Code of Private International Law. He has many concrete examples that this is not a matter of form or translations. In many occasions the committee discovered in working with one language new notions and concepts which no one had discovered before working in his or her own language. The fact that you have to deal with two languages at the same time is very important.

75. Hazard mentioned the importance of working in the draft in two languages. It reveals underlying problems of concepts and approach that are not evident if one is working in only one language.

76. There were some doubts whether the group would discuss the principles under the background of the rules or vice versa, discuss the rules under the background of the principles.

77. Kronke explained to the group that Hazard, Taruffo, Stürner, Andrews, and Gidi met in Gent a couple of weeks before the Rome meeting in order to discuss the project. In that meeting it was decided that both Stürner and Andrews would present an alternative to the principles presented by Hazard and Taruffo, each one from the perspective of their own system (common and civil law).

78. According to Hazard the objective of the Working Group now would be to integrate most of the principles into a text that also has the Rules. It would be desirable to have a first part consisting of certain principles, particularly the most general ones like the ones in Andrews' list, such as, for example, the right to an independent and impartial court, assistance of counsel of choice, public trial (subject to protection to trade secrets) and the responsibility of the court to assure efficient and expeditious disposition.

Taruffo reminded that there are also the principles of interpretation in the Rules. However, there will not be any problem to create a new text integrating all the aspects of the problem because the principles prepared by Stürner and Andrews in large part overlap.

79. Hazard reminded the Group that these principles and rules are conceived also to be applied to emerging countries emerging from the socialist regimes and some underdeveloped countries, in which some principles are not well established and should be stated more clearly.

80. Hazard and Gidi prepared a table comparing the Transnational Rules and the two set principles (one prepared by Stürner and the other by Andrews). There is a high degree of

correspondence between the three texts, but they do not completely overlap and there are also minor divergences. There are far fewer fundamental differences that perhaps one might assume. There are also some matters in the principles that are presupposed but not addressed in the Rules or are not addressed at all and that should be part of the final product, such as orality, publicity of hearings and *res judicata*.

81. The draft style is an important point and should be discussed.

It was suggested that this project could aim not at rules of procedure as such, but only principles of transnational civil procedure. The first part would be general principles and the second would be principles that address each one of the problems related to the principles, but do not try to solve them with precision or specificity. The best example is time. We could have a principle of procedure that says that a national system of procedure shall have definite specification of the time to do something, subject to the power of the court to modify it, as necessary. Another principle of procedure could be that the court has a responsibility to facilitate possibilities of settlement and a national system may have a rule calling for preemptory settlement offers, such as the Canadian rule adopted in Rule 13. The details could be laid out in the comment, as example.

In disagreement, it was said that this project should not be a guideline for national legislatures. The project is very good and there are plenty of material to be discussed. If we look at the OACD Guidelines on Corporate Governance, that is something that we do not want: educational presentation, higher economic journalism, but we will go beyond that. On the other hand, what is too precise, or too specific, or too national, may go to the comments as a means of furthering discussion in any domestic contest.

82. After a lengthy discussion over the question of with which document should the Working Group begin the discussion (Feasibility Study, Principles or Rules), it was decided to begin with the Principles prepared by Stürner and Andrews.

83. There was valuable *discussion* over the many topics. However, there were few *decisions* or *conclusions* effectively taken by the Working Group in this preliminary meeting. Some of the statements herein reported were made by a member of the group, without express agreement from the others. Some remarks were received with silence, others encountered resistance, and others faced explicit or implicit disagreement. Because of that, this report is filled with contradictory and incompatible statements from different members. Therefore, none of the statements in this Report should be considered the position of the Working Group in any matter, unless it is expressly mentioned that it was a decision taken by the group. It may represent only the unchallenged position of one of its members.

84. The names of the persons who made the comments were omitted and only their ideas were reported. This will cause some internal contradictions to emerge in this Report.

85. The discussions did not follow a very logical order. The participants went from the rules to the principles and from the principles to the rules in a dialectical process, also making connections between the Rules and between the Principles. In addition, many different topics were discussed at the same time and the members would frequently return to topics previously discussed and comments previously made. However, the topics were arranged in this Report, as much as possible, in a logical rather than chronological order. Therefore, similar thoughts are collected together or merged, regardless of the author and of the moment they were made. As much as possible, this Report faithfully represents the literal transcript of the discussion of the group as a whole.

86. Whenever necessary to facilitate the better understanding of the discussion, the pertinent part of the Principle or Rule being discussed was copied into the Report. For the same reason, the Principles proposed by Mr. Stürner and Andrews were included into this Report, as well as a translation of the first 24 articles of the French Code of Civil Procedure.

Stürner's Principles

Principle 1

This principle is heavily influenced by the French and the new Spanish code of civil procedure.

It was mentioned that this principle has very important significance. It says that if the parties decide to terminate the litigation they have a right to do so and it is not the responsibility of the court to proceed with inquiry or judgment if the parties do not wish the court to do so.

In some countries, regarding some form of proceedings at least, once the proceeding has been commenced, the parties do not have the right to terminate it, e.g., proceeding concerning the welfare of children. This does not happen with commercial litigation (whatever that means), in which the general principle is that the parties have the right to terminate.

If the claimant terminate by withdrawal, he or she is still exposed to liability for costs. The plaintiff cannot immunize itself from responsibility for cost simply by withdrawing the suit. However, he can terminate his exposure to further liability for cost, making it stop to grow.

In admission, the idea is that the party has the right to admit the opposing party's claim or defense as the party desires. If the party admits partial liability, the court has to accept it and concentrate its effort in the part not admitted. Similarly, if the defendant claims statute of limitation to part of the claim and the plaintiff acknowledges that it applies to that part of the claim, the court has not authority to disregard that admission.

If the parties agree to a settlement, it is binding on the court and the court has no authority to question the terms or the substance of the settlement. In all procedures there are exceptions to this rule, notably in suits on behalf of minors, incompetents, mentally ill people and in some fiduciary proceedings such as class suits, suits by trustees, where there are requirements of approval by the court. However, this exception does not apply to commercial litigation. Is there some exception that should be made explicit in the comments?

It was noticed that the principle is expressed in the plural to refer to both parties. Within this concept it is included the unilateral discontinuance from the claimant in order to avoid higher liability of costs and attorney's fees without control from the court. Any counterclaim will continue regardless of the plaintiff withdrawal.

It was also noticed that the withdrawal should be with prejudice after the defendant has answered, because at that moment the defendant may have a legitimate interest in see the merits of the case decided in court and the plaintiff should not have the power to unilaterally withdraw the case and begin a new proceeding elsewhere. In the case the defendant objects, the judgment should have declaratory effect.

The principles are very broad and give room for the discussion of many specific rules. The consequences of withdrawal should be in the Rules, not in the principles.

Principle 2

This principle reflects and should be compared with Rule 20 (conferences), in which it is said that the court "may" schedule one or more conferences. It may well be that civil lawyers would think that the principle should be written more in stronger wording: the court "must" or "shall" conduct one or more conferences. This would indicate a duty to assume an active management through the mechanism of a conference that would address at least the scheduling matter. The court would have authority to have other subject matters in any conference and to have more than one conference. This is an implementation of this principle into the Rules.

In the new English rules, the judge is responsible for the management and completion of the litigation. Case management is a fundamental aspect of the new rules in England. This is the accepted concept in American Federal Courts and most State Courts too, where the courts are responsible to move the cases onward. Therefore, the court's duty to manage cases actively can be made part of the Rules with no problem.

It was suggested that Rule 20 should not have the title "conferences", but "case management".

Rule 21.1 should be expanded in order to cope with all the problems that are dealt with in civil law countries under the title of "role of the court" or "case management". This should be the general rule concerning the role of the court in the management of the cases and the obligation of the court to do that to respect the guaranties of the parties

In Rule 20.2, before listing some of the specific things that the judge may do, we should include a general power or duty to the court to manage cases efficiently and the obligation to the judge to apply the due process of law clause (the contradictory, article 16 of the French Code). It is an obligation to the court to hear the parties before all relevant decisions.

Another member showed concern that if we include this principle in the more special and technical Rules, there will be only rules and no principle. Principle 2 is very fundamental, taken from the English and French codes. We should decide whether we want a previous chapter with general principles.

Another member reminded the group that the principles are not a separate item and that the rules should reflect the principles.

A member said that this might not be advisable. A principle is very general and useful in many stages of the proceeding and should not be frozen in only one Rule. The proceeding is a continuation and it is not possible to make a reference in all rules to the fundamental principles. All codes that have fundamental principles have a first chapter and then many implementing technical rules in many stages and phases of the proceeding. We should learn with the French and the English Code. This is different from substantive law, which is not "moving".

Another member said that some of the principles may find technical implementation in one or many of the rules and some others may not. On the other hand, there are several rules that are not implementation of any specific principle. We cannot imagine that every rule is a

deductive consequence of a principle. Therefore, we cannot properly divide the matter we are dealing with into headings given by a general principle: there is no co-extension of such matters.

A member agreed with previous statement mentioning the UNIDROIT's experience in the contract principles project. There should be a pragmatic approach to this problem: some rules have leading principles and some do not. He also said that in the comments to each principle there should be a list of the rules which are the consequence.

In England there is a tension between the need for judicial case management and the need to hear the parties. Each side must have an opportunity to contradict what the judge proposes. However, in order to emphasize the case management, the judge might make decisions *sua sponte* and this should be spelled out clearly in the principle or the rule especially for common law jurisdictions.

When the court issues instructions or directives for the conduct of the case it should do so in consultation with the parties. The court does not simply ordain what it will be but consults concerning convenience, what is estimated in the development of the evidence and so on. Therefore, the specifications in this principle are entirely acceptable to the common lawyers.

It would be better to begin this principle by the end, stating that the judge must manage the case in order to further the due administration of justice (not just for the sake of management).

It should be said in the comment that the judge has authority to make a decision after hearing the parties. The court has inherent power to decline to extend an additional hearing or a prolongation of a hearing. The court does not have to keep hearing indefinitely all irrelevant contentions of the parties.

Responsibilities of the parties. How much do we want to assume and how much do we want to specify? In the Rules it is assumed that the general principles of the responsibility of the advocates are the following: an advocate has the duty to speak truthfully to the tribunal on matters that the court may properly ask the lawyer. It is one thing to present evidence (as long as you do not present false evidence, from a witness you get what you get) but if the judge asks the lawyer a question such as "will you have the witness available?", "are there any documents related to this question?", the lawyer is required to answer truthfully. The lawyer is required to adjust his own schedule within reasonable limits to facilitate the schedule of the court. Those are duties on the part of the advocates that were assumed in the rules. Should any of those kinds of duties be specified in the rules? This might be redundant in a developed system, but may be important in an undeveloped system.

According to a member, this is an extremely important topic. However, there are two points to be made. The easy one is to conceive the role of the parties in cooperation with the court. The difficult topic is the responsibility of the attorneys, because the systems do not share the same rules of ethics. This is an extremely complex and difficult area and maybe not possible to make uniform assumptions. Maybe this second aspect should not be dealt with here.

It was mentioned that the principle should not say "the parties" but "both parties" or "all parties". The situation of the defendant is quite different from the question of the defendant. The long experience of international arbitrators dealing with counsel from different countries shows that there is a huge difference within Europe of the rules of professional ethics. It is neither

possible nor advisable to get into details, but it is absolutely indispensable to have a general reference in the rules to the duties of counsel.

In general, obligations should be referred to the parties as distinct from the counsel. There are a few obligations of counsel that are universally recognized, such as the duty to speak truthfully when the advocate is referring to his or her own knowledge (I have a schedule conflicting, I do not have a document). That is universal. The next point is that other obligations of counsel are governed by the law and the applicable regulation of the profession. We should be voluntarily vague here. In general these obligations are established in the law of the forum, but there may be situations in which – either because the court is international or because some activities were conducted in another country – the proper applicable rule is the law where the activity has occurred or the rule of the home state of the attorney. Therefore, there is also the problem of cumulative application of laws. This is as far as we can go. If we try to be more specific we would invite complications.

It is easy to say that the parties have an obligation to tell the truth, but the same may not be true for the counsel. In civil law, if the party does not want to reveal some document, the attorney is not allowed to tell the court of its existence even if he or she is questioned by the judge. It is attorney client privilege. It is complicated. We cannot make a rule that the attorney has to speak the truth. The parties help the court. It is not good to make a difference between the parties and the attorneys. We cannot give more duties to the counsel than to the parties.

It was mentioned the parties' right to bring with his or her own counsel. It is not granted that the parties may come to court with his or her counsel of choice. This is the most important topic. We should have the rule that implement the right to counsel that adopts the principle that a forum administering these rules should permit a party to have assistance in the proceeding of counsel admitted to practice anywhere else in addition to having local counsel. This is a general problem in the Federal System in the United States.

About this authorization for a foreign practitioner to appear, it was mentioned that we should not recommend that the counsel should sit next to a local lawyer. We might in the comments to say that it is desirable, having regard to the transnational character of the problem that the party should be accompanied by an advisor of his own choice not more.

It was reminded that the duties of parties and counsel are different but closely interrelated. An example is the position of the counsel that discovers that his or her own client is lying.

It was brought to attention of the group that article 19 of the New French Code of Civil procedure provides that the parties choose freely the advocates to be represented or assisted, but according to what the law permits or orders. It is not possible to have a rule for free representation of any attorney.

There has been some development in this area in England and in the new rules there is a new provision that says: "the parties (including legal representatives) are required to help the court to further the overriding objectives (which include the duty to decide cases justly)". This is a prominent feature of the new rules. A recent statute in England call the Access to Justice Act from 1999 (the one that abolish legal aid), states that lawyers (solicitors or barristers) have a duty to the court to act with independence in the interest of the justice and a duty to comply with the rules of professional conduct. This duty to act with independence overrides any obligation the lawyer may have vis-à-vis the client.

In some systems, it is the professional duty of the lawyer to present all evidence he knows regardless of the fact that this information may be contrary to his or her client's interest. In other systems, the rule is that if the lawyer discloses information adverse to his or her client, the lawyer might incur in professional liability.

One point is how far the attorney can go to protect the attorney client privilege. Another point is the duties of the lawyer to the court or to the administration of justice. We must make a choice: should we rely upon the lowest degree of development of legal ethics in the world or should we go further than that and follow the trend of strengthening the obligations of the lawyers towards the administration of justice such as the new England statute. We should follow this trend, but without going to extremes. We should not rely on the bad examples and state some rules strengthening the obligation of the lawyers to the administration of justice. This may create problems of acceptance in some countries that are not yet sensitive to this question. However, those countries must accept that the trend goes in a different direction.

Problems of legal ethics are very tough and there is so much that can be done. The major problems were identified here.

It was decided that the first formulation of the principle should prevail.

Principle 3

According to this principle, the scope of the proceeding is governed by the parties' formal claims. We might compare it with Rule 9, which is the formulation we have made to determine what the plaintiff must do in making a formal claim (there is another parallel in Rule 10, which deals with defense).

This principle addresses the related problem of *res judicata* and *lis pendens*. According to this principle, the claims govern not only this litigation but they are the terms of reference for future inquiries under the rubric of *res judicata* as to what this litigation in fact adjudicated. This is an important addition, because there are differences in common law regarding issue preclusion, which is not recognized in the civil law system and also some differences regarding claim preclusion. This is a very important point in international litigation.

This principle should be understood in connection with Rule 9, which requires fact pleading ("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.") Our intention is to require a quite specific narrative. This is the rule in most countries, civil and common law. It is not the rule in the Federal Courts in the United States. However, the lawyers plead this way anyway – even though they are not required to – because it facilitates comprehension of the case to the court. The question is: is there any further description that would be useful concerning that obligation?

The breadth of the claim determines (or limits) the breadth of the judgment and the breadth of *res judicata*, *lis pendens*, issue preclusion (not recognized in civil law system). Issue preclusion could be determined by the law of the forum in which the judgment was rendered or would be subsequently invoked or it could be excluded altogether from the Rules.

Claim preclusion means that a claimant may not, in a subsequent action, assert a claim that was the subject of a prior action, whether the claim was victorious or defeated, if it was finally determined. The "claim" should be understood with comparison to the pleading and the judgment to determine what was adjudicated. There is also an auxiliary rule that says that you cannot split the cause of action: the claimant has to bring all claims possible. This auxiliary rule does not exist in civil law systems.

Issue preclusion means that if a fact issue was actually litigated in the first proceeding, the party who lost this issue may not relitigate it in another context. A public transport company is sued by passenger number one that asserts that the driver was negligent. If that case goes to trial and the passenger wins, it means that the bus company lost in the question whether the driver was negligent. If another case is brought by passenger number two, the question about the negligence of the company cannot be relitigated because it is precluded. The bus company cannot dispute that his driver was negligent because that issue was adjudicated in the prior case (considering that it was effectively litigated and adjudicated). However, if the bus company wins in the trial with passenger one, passenger two will not be bound by that unfavorable decision because he was not a party to that action and did not have his or her day in court. This is called offensive non-mutual issue preclusion.

This concept becomes relevant only if we are talking about a different claim because if it is the same claim, it is claim preclusion that prevents reconsideration. An example is the situation where a borrower undertakes an obligation of paying interest at specified intervals and at the first interval there is a question of the validity of the obligation. Then the lender brings another suit claiming interest on the second interval. Are the matters adjudicated in the first litigation conclusive in the second litigation? Was it the same issue?

This may be very important in product liability cases, particularly in a mass produced product when the claim is a defect in the design. If the defect is found in the first case, this rule may apply to the entire product line. In pharmaceutical cases, the claim will be that the product is dangerous to health and in the first case results in a judgment for the plaintiff that can be issue preclusive in all subsequent cases. From a defendant point of view this is very dangerous and many defendants will settle cases in order to avoid a trial that might determine liability for a whole product line.

The rules of issue preclusion are different from state to state. In the civil law, it is an incident or preliminary question, which the law normally does not give preclusive effect. This issue will only be *res judicata* if the parties request "incident declaratory relief". It is similar to issue preclusion, but is more formal because it is an incidental suit and binds only the parties to the case.

Another problem may be to define what an "issue" is because it may mean different things in different countries. As it happens, neither the idea of "claim" nor the idea of "issue" has a highly precise definition in the United States. In general, parties try to state their claims inclusively (in order to avoid the need for new litigation) and the courts tend to say that if the party had a fair opportunity to assert a claim in the first instance and decided not to do so or if have omitted to do so, nevertheless it is precluded. The idea is that the scope of preclusion should be as broad as the scope of the opportunity. Since the opportunity is broad, claim preclusion is equally broad.

This problem may not be important in international litigation. The most important problem may be *lis alibi pendens* and parallels proceedings or proceedings in similar cases. In the United States, in general, a state will not entertain a case that is pending in another state unless there is a good reason, which could be long delay in the first jurisdiction or a possibility of adding a new party that is not subject to jurisdiction in the first state or some other good reason.

There was some discussion and controversy over if it was important or possible for the Rules to state a clear and precise rule of *lis alibi pendens*. It was agreed that there should be some rule, but without much detail.

According to a member, the best solution is not the civil law solution, where the second suit will be extinguished, but the common law solution, where the second suit will be stayed and the court will have the possibility of go on when there is a good reason.

There is a strong interest in forum shopping. This is a very complicated problem and a still unstable area, involving the Brussels Convention and the common law principles and rules. Maybe this is a topic where we should recognize the problem without trying to solve it.

At the outset, we have agreed not to touch upon questions of jurisdiction and enforcement of foreign judgments, but limit consideration to the proceeding between those two phases. However, currently we are witnessing the breakdown of the Hague Worldwide Jurisdiction and Recognition Project over more than anything else *forum non-conveniens* and *lis pendens*. This would be an argument to take it on board here or strengthen the argument that we should not embark on this? Maybe we should not deal with them, but only acknowledge the existence of those problems. In addition, jurisdiction and *lis pendens* at the international level necessarily presupposes a treaty because the approach cannot be unilateral.

Permission of amendment is also a topic where there are wide differences in the many countries. In some systems there are few possibilities of amending a complaint or a defense. In contrast, in the American Federal Courts, amendments are necessary exactly because the pleadings are so general and we need specification if the case goes to trial. We cannot try a case with notice pleading, the pleading must be specified before trial. See Rule 16 of the American Federal Rules of Civil Procedure (pretrial orders). In the American procedure, the real pleadings come after discovery so to speak. In either event, we would be helped by further discussion of the proper scope for amendments of pleadings.

In Rule 9 the Reporters made a very explicit rule, a choice in favor of the specific facts pleadings encountered in civil law systems and against the American system of notice pleadings.

Rule 9 cannot be seen in isolation in the system of the Transnational Rules. Several consequences follow from a rule requiring detailed pleading. For example, discovery and amendments of claims. In the case of notice pleading (broad and vague pleadings), discovery and amendment rights must be broad. In a system where the pleadings are more detailed, however, it is possible to have stricter rules of amendments and limited discovery, aimed only at disclosure of evidence and not at developing the case.

It was decided that the first formulation of the principle should prevail.

There is always a need for amendment, especially because before hearing the opposing party point of view, the claimant does not understand his own situation. This is important particularly in an international commercial litigation, which is different from a normal automobile accident, in terms of access to information and because new facts are more likely to happen. The question is how to define the proper scope of amendment. One way is to limit amendment to issues introduced by opposing party or indicated by evidence developed during the course of the proceeding that was not reasonably available to the party at the time of the original pleading. This is a proper way of amendment. Since in some civil law countries there is great reluctance in accepting amendments, we should be explicit about it.

Principle 4

According to this principle, the parties have the responsibility to bring forth all relevant facts necessary to sustain their claim or defense. This principle is related with the rules concerning discovery and disclosure and the power related to examination and presentation of evidence. See also Rule 19 and 22.

The main problem arises later on, when we will discuss about disclosure and discovery. Our basis is pleading facts, which means that the plaintiff must have access to information sufficient to plead a claim in detail.

The one question that we have about this principle is "The court confines its consideration to facts from those sources which have been brought forward or have been identified by the parties." What does this mean? Does it mean that the court should limit its attention to evidence concerning what the parties had opportunity to address and that it cannot conduct its own unilateral investigation? And what does "sources" mean?

The court discovers new facts in the documents that the parties had produced. In the civil law tradition, the court can take those facts as a subject for evidence. It is in the court's power to bring facts into the proceeding which were not really pleaded and asserted by the parties.

It was thought that in Anglo American law, this might not be possible, if the facts are not specifically pleaded by the parties. However, it was explained that the common law judge also has this power. The court is permitted to consider facts that were not treated as significant by the parties, provided it gives the opportunity to the parties to offer refutational evidence before the judge treat is as a basis for decision.

In England, for example, it is not possible, for example, for the parties to suppress the illegal nature of a transaction or the fact that the transaction contravenes national public policy. The American judge can also see in a document a basis for waiver that was not brought by the party, as long as it is in a document brought by the parties.

What about a notorious fact, such as a United Nations boycott (if it is a matter of public policy in the court's jurisdiction), if the parties have interest to ignore it. The judge cannot deny that he or she knows about it because it is in all newspapers. The civil law judge has to consider this. The English concept is "judicial notice": the court may take notice of a notorious fact.

It was also mentioned article 7 of the French *Nouveau Code de Procédure Civile* "The judge cannot base his decision on facts that were not brought into the debate. Among the elements of the debate, the judge can take into consideration even the facts that the parties have not specifically invoked in support of their claims".

That is the sense of the principle.

It is very difficult to find the right words to solve this problem and principle four should be rewritten. The French article is very cautious and may be better written than the principle four.

A suggestion was: The court may consider matters indicated by the evidence, even if the parties have not, or matters of which the court may take judicial notice, but in either case the court is required to call the attention to the parties to the court's intention to give it significance.

However, the court will be inquisitorial in this way. We should limit the possibility of the court to bring new facts *sua sponte* to the proceeding.

It was suggested a case in which the parties are claiming the payment of agency fees in a case of bribery. Can the court, must the court recognize *sua sponte* that this is a clear case of illegality and extinguish the case without judging the merits of the claims? The answer both in common and in civil law systems is that the judge may, but he or she is not obliged to. It is a very subtle decision whether the judge should do it or not. There are degrees of illegality and seriousness.

Especially in transnational context, you may have question that is against the law or public policy in one county but not in another. This is closely connected to Public Foreign Law and in 1979 approximately the Institute of International Law unanimously approved a resolution in favor of the possibility to applying foreign public law, including foreign public policy.

If we refer to this, it should be treated in the comments and we should say that whether to give attention and if so what significance is determined by principles of international law to be applied by the forum. The main thing is the requirement that the parties be notified if the judge is going to rely on it, so they can dispute what the legal and factual issues are.

There is a connection of this principle with Rule 23 (expert evidence).

Principle 5

1. When it appears to the Court that the party has evidence that the party does not produce, the court may draw adverse inferences from that fact except where the refusal is based on a claim of privilege. In that case, the judge could not draw any adverse inference.

2. It was said that there are great differences in privileges between common and civil law procedure. In common law procedure, parties are normal witness and if you have a privilege for witness you have a privilege for parties, therefore there are fewer privileges. However, the continental system, there are privileges only to third persons and the privileges of parties are not well described in the codes. Normally the judge may decide whether the party had a good reason

to decide or not. There is no fast rule of privilege for parties. That is why the principle says "unjustified refusal", meaning that the party may convince the judge that there is a good reason to refuse to produce an evidence or to clarify facts. What is a good reason? If the party is a doctor and will have information that would infringe protection of the secrecy of third persons, for example.

3. It was questioned whether the first part of this principle ("The parties are responsible for describing the proof for each contested factual allegation of their claim or defense and to identify exactly the source of that proof") is not excessive. There are a number of cases in which the parties cannot in good faith identify exactly but can have a general idea of the source.

It was answered that this principle was only meant to limit discovery requests and eliminate the request of "category of documents". In civil law system, the party must describe exactly the document that it wants produced. There are some exceptions, but this is the fundamental rule.

It was said that the principle could say that the party must describe within reasonable limits, according to the circumstances. Exactly is too restrictive. Some members said that the word "identify" is sufficient without the need for the word "exactly".

There is also another point. One thing is to describe exactly a document and quite another is to describe the source of that document.

Since 1998 the Reform Act in France concerns also the problem of the documents that a party want to take as evidence and this Act says that the parties have to write a list (annex) of the documents that they want to mention and show to the court and it must be precisely described. This means that you have to produce an exact list of the documents you want to produce, but a much more difficult question is the documents that you want to get from opposing party. This is a different problem.

Principle 6

In part "a", it was thought that the second alternative would be a better one: ("The parties are responsible for providing the court with the correct legal basis for its decision. The court may give judgment on legal grounds no considered by the parties after having given them a fair opportunity for comment and change of their pleadings").

It is an universal principle that the court must satisfy itself on what the law is, but it is also an universal principle that the parties are entitled to make submissions, briefs, arguments addressed to the court concerning what legal principles should apply.

What is "law"? Foreign law is considered a question of "law" in this circumstance? Or is it considered a question of "fact". In American law, the judge will apply the law of the forum if foreign law is not submitted by the parties. Most courts, in fact, will ask the parties to give submission about foreign law either through briefs or expert's declarations. This does not necessarily mean that the judge cannot proceed in absence of the allegation by the parties.

Considering the foreign law as a question of fact is an old rule. It is not longer possible for a judge to say, in the electronic age, that the party has to prove foreign law, because the judge must make an effort to decide the merits. He can ask help from the parties, but it is his responsibility because it is a question of law.

It was said that in some civil law systems, the basic principle is "The court pursues its own research for the correct legal basis for its decision ("Da mihi facta dabo tibi ius")." The law is a question for the judge to decide. The parties can suggest the judge the legal ground for decision, but the judge may disagree with both parties.

It was agreed that if this principle was to be accepted, it should read "if the parties have agreed on the legal basis for decision, the court should accept their legal arguments, unless this would violate the law or public policy". That is also why the principle is written with "should" and not "must".

See also article 12 of the French Code, which makes the qualification that in only applies in the cases where the parties have free disposition of the rights ["[the judge] can raise *ex officio* the rules of law that are the legal foundation invoked by the parties. However, he cannot change the denomination or the legal foundation when the parties, in virtue of an express agreement and about rights that they have the free disposition, want to limit the debate to these qualifications and issues of law.

In most civil law systems, however, the parties cannot agree on the legal basis for the decision, because the judge has the duty to apply the law adequate to the case, regardless of the interests of the parties. A court is not bound by the parties' interpretation (*iura novit curia*). Article 12 of the French caused surprise in all civil law members of the group. This rule departs from the tradition of civil law systems.

It is very difficult to make a difference between an express agreement and the same legal arguments before the court. This part of the principle was a concession to the Anglo-American tradition, because it is much better way of deciding a private dispute.

It was asked if the French rule were not focusing exclusively on contractual relations. It was asked whether this is not true regarding property rights or company law or when there is public policy involved.

So, the general principle should be that the court is responsible for determining the correct legal basis for its decisions of law. And the law may or may not provide some specific exceptions. At the transnational level, however, we should set aside the possibility for exceptions.

It was said that the principle "iura novit curia", even though is not the written rule in the United States, is the practice in most courts. This is not, however, the rule in England, where "the parties are responsible for providing the court with the correct legal basis for its decision". Moreover, the court would be bound by an agreement of the parties to the legal ground of a claim. However, as a compromise, the English lawyer may live with a rule that says that "The court **can** pursue its own research for the correct legal basis for its decision". In fact, with the more activist judges, he or she often does, subject, of course for the opportunity for comments.

According to a member, the main point is not acknowledge the general principle, but the fact that in many systems that system is actually applied by courts provoking some violation to

the right to be heard, a problem that was dealt with in France by article 16 of the Code, but that is open in many other systems. The problem is not whether the court has the power to choose the legal rule to apply, the problem is when the courts do that in the last moment of the proceeding just in the moment of decision making, taking both parties by surprise. This is the real problem: how the courts will make use of this power.

Another member said that this is not the main problem because this is a general principle recognized everywhere. The main problem was really whether the parties could make an agreement that would bind the court.

A member considered that this part of the principle should be deleted because the parties cannot change the substantive law with a procedural device.

It was mentioned a peculiarity in the common law systems. There are cases in which the parties had not responded to a judicial hint and in the judgment the court will say that this field was not object of discussion and decision. It will be binding on the parties, but the decision loses its precedential value because it was not complete.

It was then discussed parts "b" and "c" of this principle, which were considered extremely important ("the parties may give hints and feedback"). There is problem especially in arbitration: how far can you go in helping one party by giving hints and feedback. This is an important problem when one party is represented by a less able counsel than the other. Should we take in account the concept of equality of the parties? If the judge or the arbitrator starts helping the weaker party or the less able counsel, this is a very serious problem.

In order to counter this argument, it was mentioned Principle 11 ("The court ensures that both parties have equal access to justice, both formally and substantively").

It was countered that "equal access to justice" may be construed rather too narrowly, not covering this situation.

It was said that it could be added in the beginning of this principle: "subject to the equality of the parties" or "subject to Principle 11".

This statement is rather unclear. If is the court asking for more particulars, or clarifications in some obscure facts, that is obvious and does not raise a problem. On the other hand, if we are stating that the court may say: "plaintiff, you did not state the material fact supporting your claim and you should do it and I suggest that your statement should be so and so", this is wrong. If I cannot state the facts that support my claim, I should lose the case on the basis of the burden of proof. This distinction should be made.

In that light, it was mentioned that this Principle should be read in connection with Principle 4, which says that "the parties have the responsibility to bring forth all relevant facts necessary to sustain their claim or defense. The court confines its consideration to facts from those sources which have been brought forward or have been identified by the parties." Within those limits, the court should give hints and feedback. Without this qualification, the principle would be too broad. The real meaning of the statement should be better specified.

In German law, the rule is that there is a strict rule for the judge to give hints and feedback. Some times it is not very clear rule and some time it is too much, because it contradicts the principle of neutrality. This Principle, however, is much more cautious because it says "may".

There are two contrasting principles: one is the responsibility of the parties to bring facts and the other is the responsibility of the court to give hints and feed back. However, it can be said that the main principle is the responsibility of the parties and only an implementing principle is the responsibility of the court. There is not system that has exact limits for this duty or responsibility of the court. It is a question for the case law.

Against the notion that this Principle should be read in connection with Principle four, it was said that the following situation is not adequately solved. Suppose that the claimant requests payment and produces a number of documents to fulfill the burden. However, in the oral arguments, you fail to stress that one of these documents contains an admission. The defendant would strongly object that the judge seizes the opportunity to give a hint to the claimant about the relevance of a document produced. Isn't this a violation of the equality of the parties? The principle of the equality of the parties is overwhelming and covers everything.

It was said that a German court would give a hint, a very cautious hint. The judge cannot teach how to use the point in the proceeding, but will give a hint. If the German judge does not do it, he will be wrong. Some civil law judges may not do it. However, if the judge gives no hint, perhaps the decision will be a surprising decision and it would be not fair and the losing party will say that the judge saw that it was a simple mistake from the party. It would be too much rigid a system.

Another civil law member said that this mistake from the counsel should be fatal. And the judge should not help the party with cautious hints: there is no "judicial Red Cross". However, it was recognized that it was an extremely difficult proposition.

We should distinguish those situations. One thing is to deal with the statements of facts made by the parties in their pleadings. The court may say to the claimant that the facts stated are not clear and ask for being more precise. From this point of view, the court is helping no one, the court is just trying to understand the facts the claimant is relying upon. It is just a matter of clarification. A different thing is whether the court has the power to advise the parties about mistakes or omissions. This is actually helping one of the parties. Another different problem is whether the court can deal with the circumstance or the facts that the parties did not state. Material facts cannot be considered by the court and circumstantial or secondary facts which function is only to illuminate the material facts. This assumes that a "hint" cannot be an advice.

Is the modern concept of the judge role partly also to be a defender of the parties interests against their counsel?

It was said that this part "b" of this Principle is accepted in English law as a normal dialog between the judges and the lawyers.

As far as access to justice concerns, we have to anticipate that many national systems will be interested in the fact that one party may not hire an expensive lawyer and the other party is very well represented. This may happen even in transnational cases. It seems that this proposition has a very useful function in this context. If one takes seriously the overriding duty of the court to maintain equality of opportunity to conduct the case fairly in England we expect the court to intervene to restore the equilibrium between the parties, even if that also comes close to jeopardizing the appearance of impartiality. There is a very delicate balance that the court has to do.

The better language would be the court has power to make clarification and suggestion and a statement by the judge assisting my presentation I would regard as a clarification, whereas if it has the result of weakening my case, I would think that this is a "suggestion". There is no way for the judge to straighten his or her mind without straighten the mind of the advocates. U.S. judges will say that they would intervene very reluctantly, partially because some times they do not know whether a lawyer is playing a "sleeper role", that is letting the thing go because he or she thinks that if the thing is clarified, it would be worse for his client. So you never can tell what a lawyer is doing and you could hurt trying to help. There are two contradictory principles: one is that the court is supposed to be perfectly neutral and the other is that the court is responsible for a just result. If the situation is developing that perfectly neutrality will lead to an unjust result, then the judge has to do something. This is a delicate balance. It is impossible to say that the court cannot clarify or suggest. We have to say in the comment that an exercise of restraint in doing that is the accustomed judicial role in both civil and common law.

We should add the point that when the court gives a suggestion or clarification, it is required to observe the general principle of allowing further exploration or development of evidence, if necessary. The opportunity to counter by way of evidence or argument should be preserved.

This rule exists in French law (article 8: "The judge can invite the parties to supply the explanations of fact that he considers necessary to the solution of the litigation.") but it is just a possibility for the judge, not a requirement, only if the judge consider them necessary to the solution of the case and we should add this qualification. And there are decisions from the French Court of Cassation that the judge should be always very cautious.

It was said that the wording of article 8 of the French code is much better than the wording of this principle.

This is a rather complicated problem. Responsibility for evidence assumes that the facts have been exactly and precisely stated, material and circumstantial facts. In that case, the problem is just of who come with evidence and prove these facts. One problem is the burden of proof and the consequences of not proving a fact. Another principle, rather disputed in some systems, is to what extent the court may play an active role in ordering or in admitting some items of evidence on its own motion. Assuming that the court is very active, that will mean that the force of the rule of the burden of proof will be weakened because the play will not be on the hands of the parties but also in the hands of the courts, that will fill in the gaps left by the parties in the production in the parties. In France the court has a general power to call evidence by its own motion, but this is far from being the general rule. In Italy, for example, this rule exists in labor courts, but not in civil litigation. This is the nineteenth century general rule in civil law systems. This is the general rule in most civil law systems, even though the most modern systems are going in that direction.

This principle says that "the court may order the taking of evidence on the motion of the parties or on its own motion". A member is in favor of this rule, but stressed that this is far from obvious in other systems. Taking this path is making an important choice about the role of the court in civil litigation. This is an important policy choice.

There is not a compulsory link between the court's responsibility to facts and the court's possibility to take evidence on its own motion. They do not go necessarily together.

The French Court of Cassation said that the judge can order every "misure d'instruction" that can be useful to know the truth. This is very broad. The same tendency can be found in

Germany. It may be important to differentiate witness, expert and document evidence. In England, for example, only with respect to expert evidence the court may order on its own motion.

In Japan, before the war, the judge could order evidence *sua sponte*. However, after the war, there was greater influence of American thinking and this rule was abandoned.

It was reminded that the Principle says that "the court may order the taking of evidence on its own motion". It does not say that the court "must". Even so, this might be too much for some systems.

There is a connection between the first and third sentences in "c". If the court has to give hints and feed back that the means of proof are not sufficient, for example, the judge has to tell the parties that it is not enough and we need further means of proof. What is the difference between this and when the court will order new proof *sua sponte* and not ask the parties to offer new evidence. It is nearly the same in most cases. However, we could be more cautious and say "in exceptional occasions".

Development in the Continental procedure, however, runs towards power to the court to order on its own motion. In the United States, the performance is widely various. Some judges will not touch the case, particularly a jury case, other judges are much more active, suggesting how a case should be developed. The main thing is to be able to convey to the parties and to the appellate court that it was done with a sense of fairness. The slogan is "the judge should not assume the role of an advocate". This conveys a sense of propriety.

The reporters are in favor of an idea of a guarded authority, cautious authority to direct reception of additional evidence when necessary to clarify, but the parties are entitled to notice and opportunity to provide counter evidence.

The first version of this Principle was "the court may clarify". However, some American scholars commented that it was too much for the American ideology, a bit inquisitorial. Therefore, the wording was changed to give hints and feedback, which more cautious, but "clarify" is much better.

Principle 7

1. The general proposition has already been addressed: if the court is going to make a ruling either of law or fact, it must be within the framework of the pleadings or the parties are entitled to specific notice that the court will address the issue. This is so because the pleadings frame the case in general but if we go beyond the scope of the pleadings, in terms of evidence or legal contentions, then the parties are entitled to notice.

This idea will be one of the most fundamental principles.

2. It was questioned why it is said in this principle that there is a right to appeal in absence of notice, but there is no reference to appeal in other provisions.

3. In the first sentence, this principle refers to the person on the receiving end (as a defendant or respondent). The duty to respect the principle of contradiction must extend to all parties. It must be extended also to nonparties subject to orders of the court. One example is that, in England, a nonparty may be subjected to an order to pay costs. Before rendering a person liable to this expense with legal cost, it's only fair and proper to give that person an opportunity to contradict that order. Another example is that also a lawyer can be personally responsible for costs improperly incurred (it is a quasi-punitive order). It is elementary that that person should be accorded the right to respond to that. We could perhaps use a wider expression to describe the person who has this benefit of being heard.

In the second sentence, the principle provides exceptions (*ex parte* order) to the general rule addressed. It is important that one should indicate that it is regarded as an exception context. It is deeply controversial, but it is accepted in England and also in many jurisdictions that in some emergency or special situations, you suspend "*ad alteram parte*" but on condition that you give to the respondent an opportunity to as soon as possible to come into court and challenge the decision made behind that person's back. It must be emphasized that this is an exceptional situation.

4. The second statement in this principle ("The court is required to consider and address each significant contention of fact and law which has been put forward by a party"), a member agreed with the first sentence. In the second sentence, however ("The court may not base a decision on a legal or factual proposition or on evidence which the affected parties had not the opportunity to address"), even though agreeing with the substance of the principle, it would be preferred to write it in positive terms: "the court has the obligation to hear the parties...". The French rule, for example, is stated in positive terms, stressing the obligation of the court to provoke the contradiction of the parties in any relevant issue. It was agreed by another member that it is a better wording and stronger, because the court must be active.

Principle 8

In Rule 13 of the Transnational Rules, there is a formal mechanism for settlement offers. This is modeled in a rule in Ontario, Canada, which seems to work rather well. This procedure is not exclusive of the court's authority or responsibility to invite settlement. It is just a mechanism where the party can demand consideration of a settlement offer, but the court retains authority to conduct informal discussions, or mediation, or so on. We should make this point sure in the comments.

It was asked if English courts would have problems with the principle that "The court is authorized to discuss with the parties the terms of settlement in settlement hearings or conferences." This is the continental trend (Germany, France, Spain).

It was answered that it is an evolving practice, because the new rules speak that the courts have responsibility to encourage the parties to reach amicable settlement. At present the main manifestation of this is the useful power that commercial courts developed years ago to stay an action and actually compel the parties to go away and pursue ADR, giving them three or six

months or three weeks. This stage in the development of English procedure it is not the custom for English judges to directly discuss the terms of a proposed settlement. The principle says that "the court is authorized to discuss". This is weak enough, the problem is that it is doubted that the English judge would act upon that suggestion.

The part which says "the court should encourage voluntary settlement at all stages of the proceedings," is accordance with English rules, but the practice has not caught up with the rules yet. One of the overriding objective responsibilities is that the court should procure settlement, but this is a matter of interpretation. However, the part which says "the court may encourage the parties to use an alternative dispute resolution", on the other hand, is very much compatible with the English system.

The general practice in the United States is to require mediation (not arbitration) in all complex cases. So this is compatible with American system. Normally, almost invariably, the mediator will not be the judge who tries the case. In many states they use senior lawyers or senior judge or settlement judge (a different judge). Should the rules say that the court might stay a proceeding in order to facilitate mediation or other settlement adjustment? Should we make it explicit in the Rules? Something like: "the court may enter an order staying the proceeding for reasonable time to permit the parties resort to mediation".

There is a consensus in international arbitration that the person who is the arbitrator should not be the same person who conciliate for the simple reason that in commercial matters, people will not speak in the same way to a mediator or conciliator if they know that that person is the same one who will adjudicate. However, it is common for a civil law arbitrator or judge to intervene in attempt to favor a settlement or even mediate. It is different in England.

The court can encourage the parties to go somewhere to find a solution to the case. Sentence one and three should be together. A different problem is the case in which the court is supposed to act as a mediator. And here there are contrasting experiences. In Italy, the rules force the judge to act as a mediator between the parties at any stage of the proceeding, but the experience is that it does not work. The judge is the worst mediator one can find in Italy. In Germany, the experience is different: the German judge is a good mediator. The Rules should say that the judge can, but is not forced to act as a mediator, because of the bad experiences with this. However, we should give power to the court to send the parties to an institutional out-of-court mediator.

The problem is that this proceeding will add costs to the proceeding. On the other hand, there are tendencies to give the possibility to stay the proceeding, a new wave of deregulation of the administration of justice. In most countries, sentence two would not be welcomed. The tendency runs towards court annex dispute resolution, but there are some countries in the German tradition where the court is a mediator. We see not conflict between the role of the mediator and the role of the judge.

Formulation should permit both possibilities. It would depend on culture. Americans, for example, would be against a judge acting a mediator if he is going to try the case. On the other hand, this could be acceptable in other legal systems.

In Argentina, mediation is in fashion, but the mediator should be someone different to the judge because he cannot say to the judge what the parties said. In Federal Procedure, mediation is compulsory. If the judge can see that the mediation cannot arrive to a fair solution the judge can call the parties to propose them to go to the mediator.

The significant topic here is the facilitation of settlement.

In England, the party appointed experts should retire and identify areas of agreement and disagreement. In this way the dispute can be narrowed down and large areas of settlement can be opened up.

A related idea is the relationship between settlement and the cost award. In England, the court has a broad discretion when deciding how to allocate and quantify costs. One of the facts will be the conduct of the parties during the course of the litigation and this conduct is analyzed also during the settlement process.

One question is Rule 13, which deals with one possibility for settlement. This question should be broadened in the Rules. We need to create another rule saying that the court may suggest the parties to go elsewhere (ADR), possibly staying the proceeding. This should not be a general suggestion, but give a specific amount of time.

Principles 9 and 10

We must differentiate between a "percipient witness" and "expert witness". The first is the witness that is testifying of his or her knowledge about the facts (ordinary witness).

Should it be permitted or encouraged that the testimony of a witness be received in writing and the oral examination begin with supplemental cross-examination by the court and opposing counsel? Whether the court goes first or the opposing party would go first would depend on the legal traditions. In civil law, the court would go first and the counsel will go second and in common law it would be the opposite.

The idea is very good. It has been adopted in England and is used conventionally in American administrative hearings (social welfare reports in family law).

A related problem is that Rule 16.5 says that counsel may confer with witnesses beforehand ("an advocate for a party may interview potential witnesses"). In some legal systems that communication is regarded as improper. This may be obsolete and bring more confusion. The way to cope with that is to have the clients talking with the prospective witness. The consequence is that you have contamination plus confusion. The best rule is to let the lawyers speak directly.

Another member confirmed the idea that the experience of international arbitration shows that the rule against contacts between counsel and witnesses is totally obsolete and cannot work in transnational affairs.

Although the idea of using a written deposition and affidavit is rather strange for the tradition of the civil lawyer, it is admitted in France ("attestation"). The trend is going in that direction. We should acknowledge and try to regulate it.

The other problem is how to deal with the prospective witness. In civil law, this is tightly connected with the machinery of the examination of witnesses. Since civil lawyers know that an examination led only by the judge gives no guaranties about the neutrality, impartiality and reliability of witness, we try to control this problem in advance, forbidding any contacts between the lawyer and the witness, also in the assumption that the witness is the witness of the court and not a witness for the party. However, these Rules made a clear option towards the common law model of the examination of witnesses, assuming that direct and cross-examination is the "most powerful engine ever invented for the discovery of truth" (Wigmore). One consequence of this choice is that the witness is no longer expected to be a witness of the court, or neutral, impartial and reliable a priori. The reliability of the witness is checked by the cross-examination.

There is no necessary connection between written witness statements and cross-examination. The court may order the written statement. The French "attestation" is ordered by the court. These two points should be separated.

The first sentence of Principle 9 ("The parties present their claims and arguments orally before the court, and witnesses and expert witnesses give evidence orally before the court, too") embraces two situations that should be distinguished. They are largely different.

Another point is the word "present" in this sentence. Does it mean that the parties have to present orally even if they agree that they prefer to have a purely written procedure (which goes much faster). In many arbitration rules, there is the possibility of purely written communications, unless one party or the tribunal requests oral proceeding. This flexible rule is much better than to have this compulsory oral argument. Most of the times, the parties or the court will want oral proceedings, but why impose this compulsory measure? Many times they prefer a written proceeding.

When the proceedings are only written (by agreement, for example), there is no publicity, because the records are not public in most countries. This is a difference between courts and arbitration. Arbitration is private, but litigation is public and written proceedings without oral argument, there will be no public proceeding. Therefore, the principle of orality and publicity should be discussed together. Some countries allow written proceedings (Germany), but the consequence is no publicity, unless the records are public.

In France, most of the time, the proceeding begins in written form and in the plenary hearing (30 minutes to 2 hours) there is no oral examination of witness. The court may order the parties to come and ask for explanations, but it is rare and not the rule. Therefore, Principle 9 is too far from French tradition. There should be no principle of orality stated.

We should discuss the principle of publicity. It is more important in criminal law than in commercial litigation, where it cannot be considered as an absolute principle. In Italian civil procedure, the hearings are not open to the public, for example. Orality and publicity are different problems. If we do not presuppose publicity, we can adopt a written or partly written procedure, according to the need. The trend is in the sense of reducing the orality in favor of written form. Writing is more economic, especially in transnational litigation.

It was asked whether there can be a rule that written documents are open to inspection? This is not the practice in Germany, but it is in the United States: all documents filed with the

court (except the ones covered by protective orders) are public documents open to public inspection (especially the media). The same rules apply in England, Argentina and Brazil. In some countries, such as Brazil, by constitutional mandate, the principle of publicity means public access to the hearings and public access to the files. Also in Japan publicity of hearings is a constitutional mandate.

In the United States, even in arbitration some files are public, such as in securities disputes. And there is a tendency to restrict the powers of courts to enter protective orders.

If we provide this, there will be no connection between orality and publicity. This is not the Continental tradition, where only in special cases the judge would allow consultation of document or pleadings. This would be a very sharp break of the Continental tradition and would bring objection to the Rules. However, in many civil proceedings, there should be at least partial publicity.

The principle of orality is in decline in England, to such an extent that it was doubt whether this should be considered a principle in the first place. Procedural efficiency brings a shift towards greater and greater resort to written proceeding. There is a tension between that and publicity.

The historical turning point was the invention of written witness statements, which was invented by the English Commercial Courts, regarded one of the most creative courts in England. When it first came into existence, people thought, in a naïve way, that this might have been a solution to many problems. It proved to be very popular because judges like it. However, in England, witness statements bear no resemblance to the language of the witness. Those statements are very long and prolix and this was not dealt at all in England. Someone has to pay for the production of two sets of witness statements, and this is the client but ultimately the loser. This is a problem that must be dealt with in the Transnational Rules.

It was also regretted that in some countries some judges are hostile to hearing to counsel.

The principle of orality was very important, but now is in decline. As a general principle, orality can be stated in these Principles as a general value. However, we cannot require any national system to use oral forms of presentation. And the parties should not be forced to present oral argument if they do not wish to do so. Fundamental rights can be waived. Even the stronger supporters of orality recognize that no proceeding can be completely oral: There are written pleadings, judgments, briefs, documents, etc. One thing is to leave open the possibility for the parties to request oral arguments. Something else is to compel that any case should be based upon oral discussion.

As was said by the United States and the European Court of Human Rights, the due administration of justice needs a co-operation of an enlightened public. We are discussing only countries with well-working administration of justice, but our rules should also be a guideline for developing countries. If we would concede the possibility of written proceedings behind closed doors, that would be a good possibility to put away the control of the public. There are two alternatives. One is the public record and the other is the public oral main hearing. However, we could not allow a local rule without any publicity. The due administration of justice and publicity are twin sisters. Another problem would be the effectiveness of this principle in practice.

National law differs with regard to publicity. One way is to say that, to the fullest extent possible or permitted under the national law, the proceedings and the documents in the proceedings should be open to the public.

However, publicity is the standard of the European Convention of Human Rights and should be respected. We should not go under that standard. There are countries developing their codes of procedure at this moment, for example, China. A tendency towards written or closed civil proceedings would not be a good message.

According to one member, the European Convention of Human Rights has a full meaning in criminal proceedings, not necessarily in civil proceedings and private litigation. The parties have a right of privacy, not only in family matters. According to another member, it is applied to civil proceedings as well. According to another, even if it is not applied to civil proceedings at this moment, it is easy to predict that it will be extended to it in the future.

It was asked if the United Nation's on Human Rights makes any reference to the structure of proceedings in court. We should be mindful of this aspect.

According to an English judgment rendered in London (speaking about the tendency towards written forms), "in some cases, especially in cases of obvious and genuine public interest the judge may, in the interest of open justice, permit or even require a full oral opening and fuller reading of crucial documents than it would be necessary if economy and efficiency were the only considerations". This is a sensitive and attractive formulation that we could use as a starting point. This might strike the right balance.

Principle 9 should not mix presentation of claims and presentation of witness in the same sentence. One thing is the right of the parties to be heard orally in court themselves. Something else is the right to hear witnesses. Something else is to force a hearing in all case. These should be in different provisions.

Rules 9 and 29 are inconsistent with this principle. We might give further consideration to these choices.

Principle 11

It would be desirable to make clear in the comments or in the text this principle of access to justice to stress the human rights aspect, with possible reference to the United Nations and to the European Convention of Human Rights, as an example. Article 6 of the European Convention refers to a right to a fair trial and therefore it would strengthen that principle.

Nobody has a problem with a principle of "equal access", as a general principle. This principle is expressed by specifications in the Transnational Rules that give equal opportunity to all litigants and recognize legal interests of third parties when they become involved in the case.

There is a problem of terminology, however, in the definition of "access". This could be solved by the comments. "Access" must be interpreted restrictively in order to avoid the idea of access to justice. In the whole proceeding there must be equality of treatment, but "treatment" is not the same thing as "access". The word "access" should not be there.

In agreement to the preceding paragraph, it was said that the formulation in England is "ensuring equal opportunity for litigants to assert or defend their rights". It contemplates the process, not the problem of access.

When we talk of guarantee of access to justice, we mean to say that all people must have possibility to file a case in court. It doesn't deal with the play between the parties already before the court, but with not having obstacles preventing any people from filing a case in court. This is the prevailing sense of the word. The problem of treating the parties equally in a commenced proceeding is fair hearing, due process, equal opportunity to be heard, equal protection, equal treatment, principle of contradiction, etc. They are connected, but two different problems. We should distinguish access to court from equal treatment of parties already before the court.

Instead of entering into detail, it would be sufficient if we speak just of the principle of "equality of the parties." We should not speak of equality of access, of treatment, substantive, formal, etc. That is what most codes do already.

In disagreement, it was said that the word "access" means not only access to the courts, but also access to the proceeding.

It was said that the European Court of Human Rights uses the word "access" in a very broad meaning. It is so broad, that would include the aspect in this principle. However, we should be more precise and say it is the principle of "equality of treatment/principle of contradiction".

This is one of the new features of the civil procedure in England. It was given emphasis in the new rules. The essence of it is that the courts must ensure that economic and procedural and social differences and disparities between the parties do not disturb the process. An abuse of this principle would be the absence of neutrality on the part of the court. Immediately after the introduction of the Rules in England, someone tried to challenge the fact that one party in a particular case had hired a very expensive lawyer, saying that it would affect the principle of equal opportunity. Predictably, the court said that another fundamental right is hire counsel of your own choice, which is in collision with the previous principle. This is a good example of competition between principles.

A civil lawyer said that if the judge or arbitrator is good, no lawyer, as much competent as he or she might be, would make a bad case turn into a good one. [This might be slightly different in some common law jurisdictions, but no common lawyer manifested their opinion about this.]

The Spanish Constitution has a provision about this that should be taken into account: "All persons have the right to the effective protection of the judges". This is a formula that is comprehensive and refers not only about the access, but the whole trial.

Equal opportunity for litigants to assert or defend their rights has an important connection with access to information relating to the case. It is well known that in a tort case, personal injury, the party that has the information is very often the company or the insurance company that has carried out a safety report immediately after the incident. They have in its possession the secret of the whole case. This involves discovery, for example.

This principle is gathering momentum in England. An important part of the Wolf Reform is to discover how we can ensure that the parties are placed in a roughly equal position

even before the case actually begins. We have now the "pre-action protocol", which represents an attempt to regulate the process of gathering information about the dispute before the claim is filed.

This principle of "equal access to information" was considered of very great importance by a civil lawyer, which described a real example in which exactly this point of "imbalance of information" was at stake. The insurance companies not only have more information than the individuals, but they exchange information between themselves, and the individuals are not in an equal position. This phenomenon was aggravated by the practice of the Swiss Supreme Court to refer in its judgments to unpublished previous judgments. Those judgments were not accessible by individuals, but were in the files of all insurance companies. This practice was carried on for many years and caused a formal protest of all law schools of Switzerland. This is a clear case of violation of the principle of equality of the parties.

We should acknowledge this problem in the Principles or in the Rules, but should be very cautious and not try to be definitive about this.

There are three different principles in this paragraph: the fundamental problem of access to justice (in the traditional sense, allowing any possible party to access the court), equality of the parties in the course of the proceedings, and also the access to all possibly relevant information. In the Rules, there are some rules about discovery and disclosure, but these are remedies used only when the case is already started. The point of obtaining information before and in preparation of a case is extremely important. Those problems are a sub principle of the principle of access to justice, but should be stated expressly as a principle of free access of information before beginning of the suit, in order to allow the parties to decide whether to file the case in the first place.

There are also some technical problems in the principle of access to information before the beginning of a suit, especially regarding to abuses. People may use this not in preparation to a suit, but for some other purposes. There should be some limitation and precision if we adopt this Principle.

It was questioned what "substantively" means. If it means that the judge has a duty to afford equality where there is none, does it mean that, in the case of the rich party hiring an expensive lawyer, should the court say that there is no substantial equality? This is an old problem, but the language of this principle might bring an impossible task to the judge. We should elaborate this point, and if the meaning is different, which surely is, we should be more precise.

In defense of the expression, it was said that sometimes the court has to balance inequality between the parties.

It is also true that no principle is clear, and for each principle there is a contrasting principle. For example, the contrasting principle to substantive equal access to justice is the principle of the responsibility of the parties for the case. It is nevertheless useful to say that as a principle the judge should take a look to equal information, to equal weapons of the parties, and so on. And this is not always formal, but also material. There are many examples. We can also make a clearer rule about this.

In defense of the expression, it was said that the principle of substantive equality could be applied even in the case of burden of proof. Which is the party in the best position to prove something? If one party is in the best position to give some evidence and fail to do so, the judge should take this into consideration. This is a very good formula.

This formula can also be further elaborated, and not appear as cryptic as it appears to be at the moment.

A very important problem relating to the topic of equality between parties is the language problem. This problem is in the Rule 21, but maybe should also be included in the principles. Another member said that it should not be in the principles, because it is just an elaboration of the principle of equality. It should be only in the Rules.

This is an important problem in international litigation. However, it is difficult for national courts to deal with this problem with "equal access to justice" in mind. If so, maybe there is some different knowledge between the parties, one party will be benefited and there will be no equality. Therefore, this point should not be related to the principle of "equal access." This discussion introduces us to the caution we must employ our enthusiasm to the idea of equality.

Principle 12

This is a very well established principle in some countries. However, the attentiveness with which the principle is given effect is different from country to country and from court to court. It is a prominent feature of the new rules in England, it is also important in the United States and in other common law countries. It is also a principle of civil law countries.

This should be analyzed together with article 6 of the European Convention of Human Rights. There is a lot of litigation going on in the European Court of Human Rights on the matter of delay. This is an important dimension of this problem in the European continent.

The rule in England is that one of the responsibilities of the court is to ensure that the case is dealt with expeditiously and fairly. And the qualification "and fairly" is perhaps significant. A practical manifestation of this is timetables. It is interesting and important that this formulation specifically refers to timetables. In the absence of timetables to ensure that the cases do progress in a reasonable speed, this is otherwise a platitude. And there are some Codes in the civil law systems that do exactly that.

We should refer in the comment to the idea of a standard timetable, realizing that the court may make adjustments according to the international character of the litigation or the complexity of the case. This was developed in the United States 20 years ago. In a project it was decided that civil litigation should be terminated within one year, allowing unusual complexities. Some states implemented that with great rigor. In many others, there is careful monitoring of judicial calendars.

We should also talk about the idea of judicial administration, which is the concept whereby a superior court or the administrative office of the courts can make inquiry, demand reports, and withdraw a case from a judge and send it to someone else. This is the rule in the

Federal Courts in the United States and in many State Courts. It was deeply resented when it was first applied, but it is now standard.

In UNIDROIT draft convention in security interest in mobile equipment, there was a provision about timetables, so that the creditor could be sure that some relief could be given under that convention within x days. In the diplomatic conference, during the delegation expert's committee stage, almost all delegations expressed their view that it was unconstitutional under their legal systems to give timetables to the judges. Only some Asian and African countries did not have great difficulties in accepting the very notion of providing precise guidelines for judges.

The comment in the preceding paragraph was taken with surprise and disbelief from the members of the Working Group. In some countries there are controls of the workload of the judges. There is no objection in principle to have timetables also for judges.

In some other countries, however, strict binding timetables for judges are unconstitutional. This is an important element of the independence of the judges. Timetables can be a proposal for judges, but cannot be binding.

We should make a distinction between "biding timetables" and the work of the court in "general" and in "specific" cases. The judge should not be forced to answer for the delay of one specific case, but should answer for the entire caseload. The great importance of international arbitration is the delay in national courts around the world, in an average of 5 to 9 years.

It was answered that the judge can be forced to make a report, but this report will have no consequence on the judge. The judge can say that the case is difficult and no one can contradict the judge.

It was acknowledged that there are differences in sensitivities in that subject. In the United States, some years ago, it was also thought that this sort of control damaged the judicial independence of judges, but growing dissatisfaction with the current situation of delay showed the judges that they should comply with the expectations.

Notwithstanding this strong notion of unconstitutionality and independence of the judiciary, we should also be mindful of the psychological aspects. The average time for a court of first instance to deal with a civil or commercial case is seven and a half months. Judges take pride of being better than what they have to under the constitution.

It is rather easy to enforce timetables to the parties, through sanctions. However, the real problem is that the courts do not comply with them and it is impossible to enforce the judge to do that. Sometimes it is the judge that does not want to set up timetables. Once again we face an obvious principle that is difficult to articulate and to make effective. No one would support the opposite principle: The real problem is to make this one work. We should think twice whether we should make timetables to be applied in systems without sanctions to the courts.

A member asked if the reference to "provisional measures" was not too specific. The member proposed to reformulate the principle to "In cases of urgent necessity the court may grant accelerated justice by provisional default or interim or summary procedures". It was answered that in continental procedure this expression is very broad. It is just a question of terminology and could be changed.

We also should discuss here the problem of *lis pendens*, in connection with the principle of justice in a reasonable time. In the context of the Brussels convention on jurisdiction, recognition and enforcement of foreign judgments, a plaintiff sued in an Italian court of first instance and the suit became pendent just a couple of minutes before the other party got to the court in Munich. The case was not dealt with in the Italian court for 12 years and still the European Court of justice upheld the doctrine of *lis pendens* under the Brussels Convention, reasoning that there is no presumption that the matter was not dealt with properly and expeditiously in the Italian court of first instance. We should look at the connection between these two principles.

There a contradiction between this case and a number of cases of the European Court of Human Rights who have decided and some of them have also criticized Switzerland for excessive delay.

Principle 13

In an earlier draft, the Transnational Rules strongly suggested that the tribunal should consist of three judges. However, the trend is to go into single-judge court. We decided not to have any specification.

We contemplate the idea of a special court for commercial litigation. In that case the legislature could decide to have three judges. In a multi-judge court, the idea of delegating for receiving evidence makes sense.

Should a court have the power to delegate to someone other than a member of the court the possibility of receiving testimony? This is essential in certain kinds of international litigation, where it would be unduly expensive to bring witnesses from a far place. Instead, there would be a commission to one court to another court in another country. In some common law systems, when there is special difficulties in obtaining some evidence, such as a hospitalized person, the court may delegate this task to non-judges (a lawyer) as a special officer of the court.

A member was not in disagreement. However, the only obstacle is that in some countries there is some sensitivity among lawyers about delegation, because some think that parties have the right to have the whole court hear the evidence, not only one of them. Some times, this one is the weakest, or the most biased etc. This could be in a comment, but not as a principle. According to the "right to be heard", it might be said that is the right to be heard by the full court.

For Continental countries, there is a problem in delegation. The judge taking witness evidence is understood as a protection for the witness against the person that examines the citizens. That person should be a judge. Perhaps, the voluntarily given testimony can be done by commissioners. The problem is to know what a voluntarily given testimony is.

In common law procedure the commissioner has the same power the judge has for protection of the witnesses (privileges, irrelevant questions, etc).

A member agreed and said that the important here are the guarantees of the parties when the evidence is taking by the commissioned person. If we adopt that rule, we should state also the guarantees of the parties.

We should also address also the possibility of videoconferences for interrogation of witnesses. This practice will be increasingly common with the development of technology and will make delegation less and less important.

The principle of immediacy has not the same importance in England. In a system where there is a "trial", it is obvious that the evidence is heard by the trial judge. The intriguing thing about this principle is that in England, trial is of very little significance. Most examples of civil litigation involve merely pretrial exercises and 98% of cases begun in England do not reach trial. Even though in some situations this is desirable, there is no principle that says that the judicial officer that manages the pretrial phase should be the same person who ultimately conducts the final trial.

In the London Commercial Courts, the practice is that the judge hearing the case is the same one conducting pretrial, whereas the rule in other court is to delegate it to less senior judges (masters), which are less expensive. This practice makes the London Commercial Courts very attractive for litigants. However, this should not be a principle.

It was agreed that for the traditional English system, there is no need for this rule. The principle of immediacy does not include the pretrial phase. As long as the judge is not receiving evidence, there is no problem that the pretrial judge is different from the trial judge and the judge that rendered the judgment.

In continental Europe, the principle of immediacy or "direct contact of the judge with the oral evidence" is a facet of the principle of orality. One may require that the trial be held by the same judge that will decide the case under the assumption that the trial is oral. However, this principle is not absolute but relative, and has to be understood in the context of other principles. In the context of a written proceeding, the immediacy is of less importance. That is why the pretrial phase in England can be conducted by a master. The possibility of delegation is an exception to the general principle of immediacy.

One point is to know whether the principle of immediacy is indeed a principle. Saying that the parties have a right to be heard may be enough. At least in the Rules this problem should be addressed and we have to take into account national differences. In some systems it would be relatively easy for a commissioner to have an evidentiary hearing in a different city, for example. We have to address this also in the comments.

There were deep disagreement over the importance of this principle, because in different systems there are different needs.

We should also take into account the machinery provided by the Hague Convention on the Taking of Evidence Abroad, where we have a burdensome model of committing another judge to the taking of evidence. In common law systems, these people can be non-judges. There is one rule in the Hague Convention that a commissioner can take evidence. However, a long list of country excluded this possibility.

The assumption that the adjudicator adjudicates should be tested in the situation where busy judges delegate de facto the task of drawing judgments to clerks.

In light of this, it was said that in the United States, the practice ranges from a judge that writes the whole decision to judges that invites the parties to propose a decision (with opportunity for opposing party for comments). Some judges would even submit their decision to the parties for comments before entering it in final format. This permits the people who have an intense interest in all aspects of validity to review the judgment with the vision of questions of validity. This is a measure of protection and may create a "bullet proof" decision.

In Germany it is usual for the judge to issue a court order with the possible contents of the judgment and the parties have the possibility to give statements and only after that the judgment is issued.

In multi-lingual countries, for linguistic reasons, it is a common practice that judgments are written by clerks. Sometimes, the language of the judgment is not the mother tongue of the judge. This is not a problem with the principle of immediacy.

This might be referred to in the comments, but not address in the Principles or the Rules.

Principle 14

The proper principle is that the party is required to display to the other party any evidence that the proponent intends to use as a basis for its case, identifying and supplying copies of documents, expert identification and report, and some appropriate form of the testimony of witness. It need not take the format of pretrial if there is an opportunity to offer contradictory evidence. It is the predicate to the principle of contradiction. There is no disagreement about this. The disagreement comes when the mechanics are discussed.

The very difficult problem is the right of one party to obtain evidence from the other party (discovery). This should be very well discussed here because there is strong sensitivity about American discovery. It should be said, however, that the massive discovery that excites this opposition is quite unusual in American litigation. In American Federal Courts, only 5% of the cases had extensive discovery. In the rest of the cases, there was either no discovery at all or very routine discovery (exchange of medical reports, tax returns, etc). However, in international litigation, there might be a tendency to extensive discovery.

At the same time, dissatisfaction with and fear of the rules of discovery is one of the reasons for the success of international arbitration and other ADR methods. This is a very live domestic problem confronted in the United States at this moment. It is also very controversial. There is no reason to assume that American discovery, as we know it today, will continue to have the same broad scope in the near future. The Federal Rules Committee has been working on restricting the scope of discovery. It is doubtful that this effort will succeed until we confront the problem of pleading. If we have detailed pleadings, this frames relevance and immediately has effect on the scope of discovery. With notice pleading, there is no framework to determine a proper scope.

There is increasing awareness, in civil law and common law systems, of the discrepancy between the information available to individuals or small businesses and a bureaucratic business, a government bureaucracy, or insurance network. The imbalance can be very serious. In selected

special situations developed in Germany there is the idea of the "information suit", which is a right to certain kinds of information and a corresponding right to bring a suit to get that information. This information suit can be linked to another suit based in the substantive claim concerning which the information is obtained. Functionally, this looks a lot like discovery.

Another problem is we call the "required record requirement." For example, in American environmental regulations, companies engaged in physical production are required to maintain detailed records of potential contaminants. They have to make reports to the agency in regular basis. In employment there are regulations that force employers to keep track of the gender, race, religion, and national origin of people in their employ and to keep track of application for employment. So someone bringing a claim for employment discrimination has information compiled by the person who has the obligation to the benefit of eventual opposing parties. In antitrust, we have the Rodino Act, requiring detailed reporting to the FTC and the Justice Department of the economic situation of businesses that propose a merger. In a private lawsuit, some of this information may be made available. At minimum, we should refer to those "right of information suits" available under the law of the forum and the concept of "required records".

The tough question is how to approach discovery meaning the definition of the right of a party to demand production of evidence from the other side.

The tough problem will be scope. Typically it will be documents, but also computer files. Some measure of discovery is essential for this to be accepted in the United States and substantial limitations in discovery will be essential for it to be accepted anywhere else. The question is how to do that.

There is no disagreement that third parties are entitled to evidentiary privileges. An interesting question is the proper approach. Should we say that the witness is entitled to all privilege available under the law that govern that witness? Or should we try to specify which privilege is applicable, because the principles of the law of the forum might be more or less extensive than the one enumerated in these Principles. In common law, for example, the privilege is limited to spouse, not family members.

The same problem happens with privileges to parties.

Principle 14(a) should be better articulated because there are two or three things involved under this label. First, it means the right of the party to use all available evidence this party already has. This is the problem of having or not rules of exclusion of certain types of evidence, which is a problem common to both civil and civil law jurisdictions, even though the types of exclusionary rules are completely different under both systems. For instance, in some countries the codes forbid oral proof of contracts, according to the type and the value of the contract. Written proof is always required. The problem is whether this limitations either to prove a given fact or to use a given type of evidence is compatible with the right to proof intended as an important specification of the right to access to justice. I have access to justice only insofar as I can use all available evidence. From that point of view, the main problem now is privileges, which is a limitation of my right to proof.

The second problem is access to evidence, being able to get evidence from the other party, which is the question of discovery.

The third problem is access to evidence by third parties, not involved in the litigation, which happens with state bureaucracy.

We should distinguish well in the Principles these three facets of the problem to right of proof. They are different problems and they may have different solutions.

One member asked if Principle 14(e) was not discussing about the first of these problems. If so, Principle 14(a) referred only to discovery.

Discussing about Principle 14(b), a civil law member was not in agreement that the judge could abandon the requirement of strict relevancy and allow fishing expeditions. If we openly admit this exception, we will attract criticisms.

Another civil law member, in defense of the Principle, said that in some cases one party can give a general overview of the facts but is not able to give particularized facts. In those cases, nearly all civil law courts give the permission to a very broad assertion of facts and there are exceptions where the other party has to give clarification without the particularized facts from the person which has the burden of proof. This is basis for a good compromise and we should discuss this. This comes pretty close to what discovery in the United States would be if we had strict fact pleading. That is the standard of relevance. The idea that the degree of specificity or detail required from a party is accessed in the light of the normal supposition as to what evidence that party would have. An individual dealing with a hospital would not have a detailed record of the treatment or somebody subjected to environmental damages. If we think in those terms, we might work out compatible concepts that we could use in this project.

The Rules says that the claimant must state facts in detail constituting a claim that would justify a remedy. In order to comply with that rule, it would be necessary that the plaintiff have at least a minimum of evidence available to plaintiff before the commencement of the litigation. These are general evidence, not specific. If the plaintiff already has this kind of evidence to comply with the pleading rule, then we can frame a disclosure rule in terms like "evidence likely to be relevant and supportive of issues set forth in the demanding parties pleading and likely to be in the possession of opposing party." There is the idea of supporting evidence, plus the idea of the evidence being relevant and in possession of opposing party. This should be carefully drafted and maybe we can approximate the idea of the preceding paragraph to the common law practice. It is more precise than what we now have in the Rules, which says "limited categories", but it doesn't say much. If you can relate it to issues formulated already in the pleading, you at least have a frame of reference for determining whether the discovery is relevant.

This formulation uses the word "evidence." It was asked if it means "material" as something tangible, relating to documents or computer files, or if it means "information", which is much more abstract and would extend beyond documentation.

It was answered that it means "information," and it could include oral deposition.

The word "possession" is not enough, and we should include also power, such as "possession or control."

Does the relevant information, which is in the person possession or power, should be confined to the other parties of does it extend to the non-party context?

We may not want to be specific, but, on the other hand, specificity derives from clarity of analysis.

In general, "party" makes sense. We might say a party or a person affiliated with the party, meaning corporate officials, partners and the like. The term "affiliated" is not precise, but

conveys the idea. In the American discovery, a person who is affiliated in this way with the party is treated for most discovery purposes like a party, meaning that it is fair, if there is a refusal to comply, to impose sanctions on the party for the refusal of, for example, the vice president to produce the document. For the moment, let's say "a party or a person affiliated with the party".

The problem with third parties is different. Their obligation should be, so far as documents are concerned, limited to documents specifically identified and, perhaps, ordered by the court. We do not have free discovery in the United States of documents from third parties. On the question of depositions, it might be sufficient to say that a deposition of a third party would be permitted only upon satisfactory showing to the court that the person is able to give admissible testimony concerning an essential issue. That is not very far from what the rule was in the United States back before the 1966 revision, in which you had to have a court order showing a good cause and an specification of the subject matter for the deposition. With that set of controls, it would not be excessive or burdensome because you have to persuade the court that this is something that you need. However, that is an approach that might well create anxiety and opposition. This is not a definite response.

It is contemplated a judicial control here. There will be no automatic right to demand information. A great deal of the anxiety generated in both sides of the Atlantic when it comes to documentary discovery is the fact that the rules were automatically operative. In the XIX Century England there was extensive judicial control of the discovery process, but that fell out of fashion and gave rise to abuse.

In 1938, when the Federal Rules were promulgated, the rule in all American jurisdiction was fact pleading and discovery limited to evidence relevant and some kind of judicial control: either you had to get permission first or a party had a right to object in terms of more specifically defined discovery. In practice, discovery was very narrow both in the method used and the target. The big change comes really with a combination of affirmative judicial decisions notably by Justice Black, who was a plaintiff's attorney in Alabama, where the judiciary was in control of the industrial establishment. He tried to fight that and he was very influential in loosening the standard of pleading to the point of nothing. In a famous case, he wrote that a complaint might not be dismissed unless there is no set of facts a plaintiff could develop under that pleading. This is too broad. The other example was the elimination of any requirement of judicial approval before obtaining discovery. The reason for this change was naïve. The trial judges said that they were tired of having to consider discovery motions because they usually grant them. However, one of the reasons that judges usually grant them is because people don't seek discovery unless they think that they have a pretty good basis for doing it, whereas if you do not require judicial approval, it loosens the whole thing up immediately. That is what leads to the present situation. Some people concerned about the administration of civil justice in the United States think that the pleading rule change and the elimination of any judicial control over discovery were terrible mistakes. However, against changes that would balance the situation, we have to face strong opposition from plaintiff's lawyers.

When there is discovery in the United States, does it become protected in some fashion? To use English terminology, is that implying in the taking that the recipient will not abuse it but will only use it for the legitimate purpose of the present proceeding? Does American law also contemplate any exception when the information enters the public domain, when it is either read out loud in court or when it is referred to? There are important safeguards.

It was answered that information obtained from discovery is protected against dissemination. Under American practice today, in general, in major litigation, discovery is protected by protective orders, which says that information produced in response to discovery demands will be disseminated only among counsel and the parties, and in some times it will limit even the parties, particularly in national security or trade secret cases, where only counsel and expert witnesses have access to the information. There is a big dispute in the United States because the media has contended that the judges have abused protective orders. They are making effort in the legislature, in Congress to have much great restriction on protective orders. It is a very political issue and perhaps will depend on the current presidential election outcome. The information goes into public domain if received in trial unless a protective order restricts access to it.

The protective order in favor of trade secrets in trial was not very convincing for some civil law members.

It was said that in some civil law countries, there is no law of evidence, because it belongs both to the civil procedure and to the private law, some rules being in the Civil Code. Therefore, it is impossible to assume that there is a law of evidence and if there is one, they are very different in civil and common law jurisdictions. There should be no such assumption.

In disagreement, it was said that also in civil law systems there is a law of evidence. In the civil code, when we find rules forbidding the use of oral evidence in contracts. It has nothing to do with the validity of the transaction from the substantive point of view, only the kind of evidence that can be used. The Spanish Code of Civil Law has more or less the same rules as in France and Italy, but never had prohibition of the use of oral evidence for written contracts. Therefore, there is no necessary logical connection between the substantive rules of validity of an act and rules of evidence prescribing a giving means of proof for that. In the code of civil procedure, there are rules about how the witness should be examined by the court. Those are all rules of evidence. The real problem is that the rules of evidence are different in both systems.

In Italian law, there is the following exception: when the document was destroyed without responsibility of one party, it can be proven by witnesses. In any event, those are very old and outdated rules and should be abandoned.

"Requirements of transaction formality" are also to be found in common law systems. For example, testamentary disposition, recordation of security interest and the conveyance of real property require writing or electronic equivalent. Then you have rules of privilege, rights of exclusion and rights of privacy, according to which, some relevant evidence are excluded.

A major problem in the US is the evaporation of the law of evidence. Rather, there are very different rules and exclusion in criminal cases and rules originated in substantive conceptions that have different operation in civil cases. Maybe the common law is catching up with the civil law system.

We should abandon the expression "rules of evidence" and have subheadings that talk about relevance, rules of formality and the rules of privilege or exclusion. The court should have authority to limit evidence that might be cumulative. We should distinguish between parties and third persons.

In 14(c), it was asked if it was the intention here to view third persons which may refuse to give evidence as third persons who are subject to the jurisdiction of the court or any third persons?

The problems of terminology in this Principle are very profound. From a common law perspective, there is a sharp difference between matters of discovery and matters of evidence. The law of evidence is tied to the trial. The exchange of information between the parties is not regulated by the law of evidence, but by the law of discovery. This takes us to the very heart of the terminological problem: are we referring here to questions of evidence or to questions of exchange of information?

For common lawyers this is cultural shock. The question of privileges of third parties is a good example. Why only limit this to third parties and not parties themselves?

There is a sharp difference in the way civil and common law address privileges. Common law countries extend all privileges to parties and therefore they have to diminish their privileges. Civil law countries make a difference between parties and third parties and therefore have all privileges for third persons and not for parties. Perhaps we should consider whether in the Rules we should distinguish between parties and third parties.

The chapter on evidence is the most difficult chapter and it is almost impossible to write down principles which this group could agree.

When the UNIDROIT Governing Counsel discussed about the Transnational Rules, two terms were used "evidence" and "procedure accompanying exchange of information". This was aiming at getting rid of a very disturbing connotation, which is "discovery". The process for looking for a neutral terminology is a good exercise in comparative law.

It was asked what the relationship, if any, between the rules of discovery as the right to obtain evidence, the right to ask for discovery on the one hand and the burden of proof on the other. From a civil law point of view, there is the general principle of good faith, which is a general principle.

The rules of burden of proof are substantive in nature and the rules for giving evidence are procedural. We should not mix them. Some rules are mixed and are difficult to determine their nature.

Another member said that in the Rules there is no rule about burden of proof because the legislature has specific interest in the rules of burden of proof. If there is some connection, the burden of proof is the point of reference of the right to proof. If I am a plaintiff and I know that I am charged with the burden of proving a fact, therefore, I have to be allowed to use all kinds of evidence to discharge my burden. It would be contradictory to give me a burden and not allowing me to use all possible evidence to do that. The rules allocating the burden of proof are a frame of reference for the parties because they have to know which fact they have the burden to proof.

The present draft refers to the standard of proof but not the burden of proof. In a civil case, on a whole, the standard is the preponderance.

A member said that we must consider the possibility of serious conflicts between rules about the burden of proof. Should we state a choice of law rule for burden of proof?

In some countries, because of the principle of good faith, the defendant has the duty to collaborate with the plaintiff, even if the burden is not on the defendant.

Talking about Principle 14(e), a member mentioned the second part that says that evidentiary rules might govern the "exclusiveness" of documentary evidence. This reminds us parole evidence rule, merger closes. Are these evidentiary rules? Another member asked for information because it was not understandable.

It was answered that each system has peculiar rules, which refer to conditions of admissibility, exclusiveness or, such is in the French Code, evaluation. We should give each system freedom to decide this point, which is a mixture of substantive and procedural law and we cannot find a satisfactory solution for all countries.

Two members said that this part should be deleted.

Another member said that this second part should just say that this principle does not address the problem. Another member suggested that we could say, "applicable law governs the admissibility, exclusiveness and evaluation of documentary evidence." All other agreed.

It was answered that that sentence is not a principle, but the exception from the principle previously stated.

On the first part of 14(e), it was said that this principle is very important, but should be explained to common lawyers because they do not know these concepts.

The expression "documentary evidence" should be qualified and include electronic messages. The drafting could be "documents and all other means of communication that permits to establish the proof".

It is difficult to create a uniform rule for all countries because there are different rules in many countries.

In the French Civil Code, e-mail can be considered a private document if the author can be identified.

In Principle 14(f), there are two possibilities. In some countries the standard is "fully convinced" and in common law countries and in Northern European countries it is the "preponderance of evidence." Most countries with adversarial system have "preponderance of evidence" and civil law systems, with a judge-centered procedure have a "fully convinced" judge. In practice this might not pose a problem because what is "fully convinced" could be the same as "preponderance of the evidence." For a continental lawyer, however, the preponderance might be a low standard of proof. Maybe we should have a discussion in the comments saying this. We could also add that these two standards are referring to two different things: while one is talking about what the evidence is, the other is talking about the impression of the evidence on the judge's mind. Also operationally a question of how much difference it makes. It would be a mistake to have a firm commitment to either rule because operationally there may be no

difference and it may be very disconcerting to a legal system if it has to deal with some alien standard. The law of the forum determines the standard of proof. We should not deal with that on the principles or the Rules and emphasize the principle of free evaluation of the proof, which is the key factor.

Principle 15

This is not a principle, but just a description of the proceeding.

This is a generally useful and accurate description. We should describe this in the comments.

We need a compromise between common and civil law systems.

The structure of the proceeding should be pleading, preparation, and plenary hearing.

In civil law, it is much more fragmented with no trial-type concentrated hearing to receive evidence and this is a very big difference. In civil law, there is no definite structure, in installments. The development in some European countries is in following this concentrated model, for example the Spanish Code of Civil Procedure, which goes more or less in the German-Austrian direction, which is similar to this structure.

In 1998 Japan adopted such a structure and it is working very well. They do not call it "pretrial stage", but "preparation to the proceeding." There are three kinds of "preparations": one for complex cases, one normal cases and one written preparation when the parties live far from the court. It works very well and acceptable for the Japanese community.

Hazard-Taruffo Rules

Rule 1

This may not be the correct title, except for Rule 1.1.

It is controversial whether principles of interpretation are a real rule of law. Later on, we could find agreement. Most of the controversy is over drafting. We should keep the contents in reserve for later consideration and reformulation, but we cannot go further at this stage of the discussions.

Maybe this rule should disappear, if we include the Principles of Transnational Civil Procedure.

We should differentiate very general introductory principles, to which we should dedicate a chapter and other principles to be integrated in the Rules. We should put general introductory principles on the very beginning.

Some systems do not have general rules of interpretation, but this can be acceptable.

This Rule is very important and should begin with a good faith or fairness principle. We need a clearer formula.

One cannot accuse this Rule of being too detailed. It is self-evident that it is purporting to be fundamental, but in content it may be very disputable. In saying this, we can open up some of the major points of discussions we had in the past few days.

The reference in Rule 1.2 to "substantive and procedural fairness" was found a "difficult dichotomy". Why a set of rules dealing with procedure is speaking of substantive law. In the hands of an English lawyer, "substantive" might mean legal aid, which is the very thing that the government just abolished.

A common lawyer disputed the propriety of this expression, but a civil lawyer mentioned that there is a meaning in civil law.

Rule 1.2 of the Transnational Rules says "each party must be granted the right to properly present its case and to receive equal treatment." This is the principle of equality of the parties, which is broader than "access." It would be preferable to reverse the order and say "Each party must receive equal treatment and be granted the right to properly present its case" because the right to present a case is an aspect of the principle of equal treatment (or maybe a different principle). Also, it is not a "principle of interpretation." It is a principle of substance. It has nothing to do with interpretation. This should be redrafted.

Another member disagreed with the affirmation that the principle of equality of the parties is broader than "access." "Equal treatment" is less than "equal access to justice".

Rule 1.3 does not say "whose" reasonable expectations: of the parties? Of the judiciary? Of leading members of the profession? Are these "expectations" culturally specific? Are there common expectations? Or are there different expectations?

Time is the greatest problem of litigation worldwide. The expression "time and cost efficient" may be too vague. We should be more specific, like the European Convention of Human Rights and say "justice in a reasonable time". We should not talk only about efficiency, but the reasonableness of the time.

Rule 1.4 is breathtaking in its brevity. It is a reference to the question of legal ethics and to professional rules of discipline (in England: Bar Code and Law Society Rules).

Rule 1.5. There is a problem of *caution judicatum solvi*. Some courts, like in England for example, require the non-domiciliary to arrange a sum of money as deposit for cost. In 1999, the French Court of Cassation decided not to recognize the English rule because of article 6 of the European of Human Rights and article 27 of Brussels Convention.

It was said that we haven't addressed in our discussions the principle of "procedural privity." The question is to what extent a dispute is "inter partes", a private matter, which benefit only the parties, and to which extent it can legitimately impinge upon or benefit a non-party. This is a big question, buried beneath the surface in English law.

A member did not understand this concept and it was explained that, in the essence, this principle encapsulates the fact and the desideratum, aspiration that private litigation primarily affects the immediate parties and should not impinge unduly upon the interest of nonparties. In circumstances where non-parties are liable to offer discovery or exposed to liability to pay costs (as it is possible in England), these examples of non-parties being affected, prejudiced by procedures need to be justified. Prima facie, non-parties should be immune from interference as a result of other's adjudication.

It was agreed on the importance of the principle of "procedural privity." It was said that a major impingement on non-parties is obligation arising from indemnity. All liability insurance companies are at risk of the outcome of a case affecting their insured and there are indemnity obligations arising of commercial situations. This principle can only be drafted in very general term "litigation should not unduly affect third parties." Some times, by reason of their relationship to other parties, the outcome will necessarily affect other parties.

Expressions like "unduly" are much too vague for a civil lawyer to be useful. A very important distinction for civil lawyers is "declaratory judgments" and "constitutive judgments." A decision about a property may be binding upon third parties.

About comment C-1.2, on the part " the evidence and legal contentions of the parties be fully considered," this is the reason of many problems in appeal. Does the judge have to answer all legal questions raised by the parties.

Rule 2

We should arrive at a consensus some time in the future about the precise criteria to be used for the scope of application of these Rules. As an example, it was mentioned the current language used for this particular purpose in the most recent international instruments, from the Vienna Sales Convention to the UNCITRAL model law in international arbitration. We should not use different language to say the same thing.

This rule might be too detailed. It is necessary to describe the purpose of the Model Code in the very beginning, but it could be described in one or two sentences. It may not be possible to give a precise description of a possible applicability of the Rules. Most of these details must be given in the comments.

What does dispute mean? Many cases of international law have discussed and adjudicated this matter. There are at least one or two definitions of "dispute" given by the International Court of Justice. In a number of cases, the defendant would say that there is no dispute or not a dispute yet, for absence of request of amicable settlement. This discussion is a subject of great importance and still going on.

One member did not agree with the current technique of having a strict scope of application in Rule 2.1 and allowing national systems to apply the Rules in other civil matter. The method should be the opposite: it would be better to have the widest scope for Rule 2.1 and in 2.6 let national systems exclude matters.

Another member agreed with the current drafting, but said that 2.6 could allow national systems to include or exclude matters from the scope of these rules.

One member mentioned that for a civil lawyer, this Rule should be divided into four or six different rules.

This text deals with several important questions of private international law, but they are implied or concealed. We cannot avoid facing those problems and should address them directly.

In Comment C-2.5, the sentence "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" is absolutely correct. However, that raises a well-known problem about which rule govern the characterization of a question.

Rule 2.2 does not seem controversial because it reflects general accepted law. This rule goes to the very core of the project.

One problem is the law applicable to corporations. It is a very known problem whether we should apply the criteria of incorporation or the social seat (former or effective). This Rule says "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." However, sometimes it is not "and", but "or." We should deal with this properly.

It is a very common-law style of drafting. The multiplication of categories of persons in 2.2, for example, has a flavor of the Companies Act, or the Insolvency Act in England. If one descends to that level of detail, one can easily find gaps. For example, university, local authority, etc. Maybe those are included. This is a key provision, but there is a question of textual balance between major statements and specificity. This is an elusive thing and maybe not appropriate.

It was mentioned that joint ventures are extremely common in international commerce and it is covered by the expression "unincorporated association".

Rule 2.3 is more complex and involves difficult problems and difficult questions which arises more and more. Often there are multiple parties to litigation and often there are also multiple claims. They tend to be related to the same transaction but this may not be the case. For example, a French national may sue an Italian and a French defendant in joinder. Or a claim that is international in character may be joined with another that is not. How do we deal with this problem? Are these controversies transnational or not? The solution given by this Rule is to give authority to the court to determine the principal matters in controversy. This can only be done after the defendant has answered. If it determines that those matters are within the scope of the rules, than these rules apply to all parties and all claims. Otherwise the court should apply the law of the forum, which is the residual rule. The court may also sever the proceeding. Some such rule is essential and this is our initial idea on how to deal with this problem, but there may be better ways to deal with. This is a problem that reflects the problem of scope.

In comment C-2.7, it is missing the reference to the civil-law requirement of "connexity."

2.4. This is a difficult matter because some systems have precise rules about this and maybe we should not be so detailed.

Rule 3

3.1. This is a very interesting and fundamental question. Do we wish this project to become directly applicable with existing judicial structures? Do we wish to encourage? The Rule is only a hint, not an obligation.

Creating new courts is not an easy matter. If the interpretation would be that these courts are needed, the delay would be great.

This provision is very interesting but should not be a Rule. Instead, it should be included in the Comments. This might even weaken the Rules as a whole.

In disagreement of this, it was said that this has a very educational value, because many states would not have the idea of creating specialized courts if we do not say it in a Rule. It was given examples of UNIDROIT projects in which it was suggested but some countries did not create specialized courts. The quality of decisions coming from specialized court suggest us that this is very important. These Rules should provide some leadership in the structuring of domestic judiciaries. A member that had first expressed a different view agreed to this remark. Giving a recommendation can be useful.

3.2. In the sentence "The Special Court may delegate a case, in whole or in part, to courts of general jurisdiction," does it mean courts of general jurisdiction of the same country or abroad? This Rule is detailed.

3.3. The emphasis in this rule is wrong. Instead of itinerant judge, we should emphasize the encouragement of the use of modern means of communication (video, e-mail). This was common in the XIX century. We should not begin by saying that the court should travel.

For one member, this Rule is too detailed. We should leave this to local law.

Does "different location" means abroad?

This Rule is important, but should be moved in the Rule of the taking of evidence.

Rule 4

This is a fundamental rule. It is very detailed Rule. In order to make sense of it, we should consult Dicey and Morris. It requires a great deal of close concentration because it is a notoriously technical area of the law.

Maybe we could enunciate some more principle statements.

We should also separate personal jurisdiction and joinder in two different rules.

There are many forms of third-party participation (just watching, third-party claim, etc.). We need a special rule for third party participation, dealing with the types and the problems of

jurisdiction. We could even analyze the European Brussels Convention, which has protocol and one rule about this.

The Hague Convention in Jurisdiction could be blocked. It would be a good thing to leave each country with freedom to rule personal international jurisdiction but to make recommendations on personal jurisdiction which could be agreed by many countries. We could take the pattern of the proposed convention.

If we want to say something about *lis alibi pendens*, this would be the right place under the chapter of jurisdiction. It would be very important.

4.2. Another problem is the question of intervention (voluntary or compelled). The problem of third persons in a proceeding is a very difficult one. In Argentina, for example, each province has its own rule. In Swiss law it is one of the most complex problems in civil procedure. We should analyze a case from the International Court of Justice in the Libyan-Tunisian dispute. Malta made an intervention. In the brief there is a study of comparative analysis.

4.4. This Rule says "Jurisdiction under these Rules may be exercised over claims arising from the same transaction." That begs the question whether this set of rules is confined to "transactions." Unless one is using this expression in a wider, "Continental" sense. It is not an English sense.

What is the meaning of "transaction"?

The Reporters welcomed suggestions.

Does this rule refer to what in England is referred to "counterclaims and setoff"? This happens when plaintiff brings action against defendant, and the question is whether the defendant can reduce the claim by reference to some sum of money, which is owed by the plaintiff to the defendant ("Compensation, in civil law terminology"). Similarly, when plaintiff brings action against defendant and defendant brings a counterclaim against the defendant. Also a defendant can bring a third party action against a nonparty and the nonparty can bring a counteraction against the defendant. And so on.

4.6. The *amicus curiae* is a very interesting device. In England this is dealt with in an *ad hoc* basis. The Law Society or the Attorney General some times do this. To institutionalize it is very interesting. Do we want to institutionalize the use of this to the extend to create a public right exercisable by citizens or corporations at large? If so, and this is controversial, one has transformed the nature of transnational litigation. Then the debate becomes of public interest. This is not the starting point of commercial litigation, which is tough litigation about money. It is not an opportunity to engage in high level politics. This is too broad.

In disagreement, it was said that litigation about money and litigation about high level politics are not mutually exclusive categories.

In France, the Court of Appeal of Paris have tried to use some statement or hearing of *amicus curiae*. However, this is limited to some public interest organizations, like the president of

the Bar Association, or the president of the Ethics Committee, but always in the public interest, in which the court wants to make sure that the decision would be acceptable in the society.

Some civil lawyers mentioned that is a strong supporter of this new institution and that we should keep this. Some times, the judge has technical problems and the parties do not give this information to the judge and the judge has to try to do personal research about these matters, but this is against the principle of transparency. It is much better if the judge can call an *amicus curiae*, so that the parties can hear and impeach the information. This is a very important rule for a judge to actively manage the case and take evidence.

A member is also in favor of *amicus curiae*, but reminded that few civil-law system have this device. There is a slow development of this in some countries. It raises the most serious political and economic problems. In international affairs, we see an increasing importance of NGO (non-governmental organizations), pressure groups and lobbyist and especially in commercial matters. This is getting extremely important within the dispute settlement system of the WTO. Even non-parties are allowed to express their views. This is a very touchy political problem of the first importance.

Rule 5

The problem here is with structure, *i.e.*, the location of this provision. The question of venue and the following rule (composition of the court,) they belong with Rule 3, as a matter of internal organization. They are concerned with the same problems. Rule 5 should become a subdivision of 3.

If you say "the proceeding shall be brought in the court of first instance," how does that connect with the situation where in a particular jurisdiction they have created a special court for transnational litigation?

What about the local rules concerning the competence of various courts of first instance? And, related to that, what sort of dispute do we have in mind? Are we really saying that, for example, someone from Thailand, with a claim for £500 can exercise a right under Transnational Rules to bring a claim in London? Or are we saying that, in fact, subject to local rules, certain types of claims, which are too small, that these should be excluded? For example, a suggestion would be to say "The proceeding shall be brought in the High Court (which are first instance court of major jurisdiction in England), whether in the Commercial court or (if we chose to include personal injury matters) in the Queen's Bench division, provided the claim is above [a certain amount]." We have to specify a minimum pecuniary threshold, such as £50.000.

From the point of view of private international law, this rule is very vague and ambiguous. We do not know whether they are taking a position in the traditional distinction between international jurisdiction and internal jurisdiction. And also material jurisdiction (*ratione materiae*) and personal jurisdiction. All this is too vague to express in such a concise rule.

Rule 6

The first sentence is important. As far as the United States of America is concerned, this provision would allow civil jury trial. We do need to think about this carefully and absorb the implications.

The second sentence. In England, we are not entirely unfamiliar with this device because the use of assessors is a feature of Admiralty Jurisdiction. Perhaps the drafting is a little vague ("who are experts in the subject matter of the dispute"). The vagueness here may be deliberate, but are we referring to questions of fact? This could include scientist, technicians, etc. The wording would permit (or at least not prohibit) a court selecting experts of foreign law. This is an interesting aspect.

Who are these assessors? What kind of creatures are they? If they have no vote, what is the difference from the experts?

According to a member, it might not be necessary to mention those assessors. Does the possibility for the court to appoint these assessors are not a violation of the principle of the "natural judge" (*juge naturel*)?

Another member considered the "assessors" an interesting idea. It is different from the "lay member of the court," because the assessor has technical knowledge. This is also different from the jury because they have no vote. It is a new important way of solving difficult technical problems. Those assessors might be useful to the court. We do not know the exact way civil law courts will deal with this provision, because we do not have this tradition. However, it does not violate the principle of the *juge naturel*, because they do not have vote. They are not only experts. They are members of the court and can ask questions to the witnesses. Since they have expertise, they know how to ask those questions the way the judge have no idea how to do. We should develop this idea.

Swiss law has extensive experience with assessors and lay judges. This very interesting provision raises a number of difficulties. What is the relation between the role of this assessors and the court's expert witness? This is a big question mark. What is their relation to the parties? This is vague. An old experience of international commercial arbitration is when the arbitrator is an expert. They are totally useless when there are controversies of law. The function of judge is different from the function of giving expert advice. By and large, the experience of assessors or experts as arbitrator is a clearly negative one. This interesting rule is a dangerous interference with the judicial organization of national jurisdictions without demonstrated necessity.

An important difference between experts and assessors is that the court can discuss problems with assessors in the absence of the parties. This might be an advantage or a disadvantage. Assessors could be useful, but if we are going to take the right to be heard seriously, it may be better to have experts and to have the discussions between the judges and assessors in the presence of the parties.

Under the new judiciary organization law of Hong Kong, they have for every term one foreign judge sitting on the Supreme Court of Hong Kong. Used to be House of Lords members. So far they had already an Australian judge and they are going to have a French or German judge soon. The reasoning is that English law is our mother legal system, the European Convention of Human Rights is having a very visible impact on English law. Therefore, the European Convention of Human Rights will be incorporated into national law in Hong Kong sooner or later. So it is good to have continental lawyer too. We should keep this experience in mind.

We should not discard the possibility of allowing a foreign judge to sit in the court with a national judge. This would make communication between legal cultures much easier and would open some interesting possibilities in this project.

According to one member, the provision that says that the assessors are paid by the parties is objectionable.

Is there any contradiction between the provision for special courts and this provision for assessors? If we should choose, the special courts are a much better idea because is composed of real judges.

About structure, it would be good to combine Rules 3 with 6. We could merge them and make them shorter.

Rule 7

This is a schizophrenic rule because it is doing two jobs. It has two different matters.

In 7.1, the phrase "including the time limits imposed on procedural matters" refers to timetables. However, there is an ambiguity because could be interpret as limitations of action (prescription). We should debate the question whether we want to include rules of limitations in this project.

A member said that the phrase "including the time limits imposed on procedural matters" is not necessary and should be deleted.

One member considered that 7.1 was not necessary because the judge who decides what the model rules is. Therefore, he or she can make an interpretation of the rule and nothing will be "not ruled" in the system. The judge can give a very limited scope to the rules and there will remain much room for the national rules. What are the purposes of this rule? If these rules are codified in state law, each state will handle with the problem as it wishes to do. Maybe this rule will not be very helpful.

Another member considered that 7.1 was a very important issue, which is to say how to interpret this rule and how to react when you find gaps. This is intended to be an internationally

prepared document. It is bound to be interpreted to the largest possible extent internationally, autonomously. There are precedents, such as article 7 of the Vienna Sales Convention. These Rules are by their very nature international and should be interpreted to the largest extent internationally. This means that there will be no narrow interpretation, no interpretation in light of domestic concepts. The rules should be the first source for solution. Only then, should the interpreter resort to local law. Otherwise, we lose a great momentum.

Another member agreed on the importance of Rule 7.1. This is a rule of interpretation. We should make sure that nationals would not try to use local concepts to interpret these rules. There should be an autonomous style of interpretation. This should also be a rule of interpretation.

How are we going to achieve that? Should we suggest or compel the national court to refer to the jurisprudence of fellow transnational courts? That would be an issue. There is a proliferation of interpretations of the European Convention of Human Rights. This raises a profound logistical problem: trying to locate all the relevant admissible legal information relating to the interpretation of article 6, for example. This is a continuing problem, if we try to regulate the process of interpreting these provisions.

Rule 7.2 is misallocated. Rule 7.2, from the English point of view, strongly suggest the question of sources of procedure and authority.

This is a preliminary question and should not be in Rule 7. To a large extent, this duplicates the principle of avoidance of delay and the court's responsibilities for the proceeding. This is a principle and should not be hidden here in a rule.

The court also "has authority to ... to make decisions in furtherance of justice." That is a very general statement. In common law jurisdiction, it may mean that the judges have full contempt of court powers. It would also mean that the judges may have an "inherent jurisdiction." That is to say that the judge will feel free to supplement these rules in a creative fashion, the way they wish, so to insure that justice is done.

One member considered this rule too vague. An English court relied on the inherent jurisdiction to assume jurisdiction between two foreign parties, none of whom were domiciled or resident in England on the some basis that the contract, which had been concluded elsewhere, provided for the application of English law. This is, to put it mildly, surprising. In that case, there was serious consideration from the client to go to the Court of Human Rights.

Rule 8

In 8.1, we should not use the word "deemed." If possible, we should say that something is or is not. It is not attractive to use the language of a fiction.

The reference to "filing" in "at the time of filing of the statement of claims" does not make sense in the English system. Filing is a word, which might suggest that a document has been lodged with the court. That is to be distinguished from the question of commencement of proceedings by service upon the other party.

A member agreed that the concept of "filing" is vague. In Switzerland, with 26 different systems, inspired by different traditions, contrary to what happens in the United States. There are differences in international civil procedure on the concept of when a proceeding start. In many places, no notice can be served or suit commenced before compulsory attempted conciliation. This is a pure formality, but the judge must give an authorization to serve notice. This is a difficult problem.

We should find a modern functional rule, but we have to be very detailed. Otherwise it would not work.

The other semantic point, which also goes to the substance, concerns the reference to "statement of claims." I suppose that this is a reference to the plaintiff's originating process. We have to be aware, however, to the fact that in England, the language is "statement of case." This word does not mean the plaintiff's statement of claims. "Statement of case", in the new rules refers to both the statement issued by the plaintiff, which commence the proceeding and the defendant's defense or response, and the plaintiff's reply to the defendant's defense. Statement of case is the generic word to embrace all pleadings.

The question of when proceedings are commenced is terribly important for the purposes of *lis alibi pendens*. Those of us who have the unfortunate experience of having studying the Brussels Convention know that article 21 has its own particular jurisprudence on this question. This has a very interesting comparative point, because in England the traditional concept is that proceedings are begun as soon as the plaintiff obtains from the court an originating process and then returns it to the court, or to use a technical jargon, "once you have issued a writ." Then we have an important qualification in the rule "as long as filing is followed by a timely and valid service of process in accordance with the rules of the forum." That is a departure from the traditional English view, but it strangely enough reflects the jurisprudence of article 21 of the Brussels Convention. Another point is: do we need the word "timely"? Isn't it the operative word here "valid"?

In Japanese systems, commencement begins with the arrival of service to defendant. There is when begins *lis pendens*. Limitations begin with the filing of the suit with the court.

A member said that would need a French version in order to understand this Rule 8.1. It is difficult to understand what is meant by this Rule. More precision is needed.

Another member considered Rule 8.1 a good compromise between different systems.

Rule 8.2 says that "notice shall be given to the defendant in accordance with an applicable international convention." What if there is no convention? One of the most important problems in the practice of international litigation is a language problem with the service of process. We must be aware that a transmission of the copy in a foreign language would be a severe infringement on the right to be heard. The conventions brought no solution to the problem of service. The new European Convention on the Service of Process does not solve the problems with different system of service of process (for example France and other European states). We could offer a very simple solution: service by mail in the language of the defendant.

A member gave the example of a resident of the Italian part of Switzerland that received notice in German and was prejudiced in his right.

Rule 8.3 is too rigid. For example, if an anglophone is an habitual resident in China, do we really want the notice to be in Chinese? When there is no prejudice to the defendant, such as a sophisticated Chinese that have business in London, this is also unnecessary. We must be aware of the unintended rigidity of this Rule.

The discussion of language of the notice was partially deferred to the comment to Rule 21.

Rule 9

9.1. This is a good rule.

Maybe there should be an adjective in front of "facts," such as "main" or "material." There are differences between civil and common-law perspective. This is a very strict system of pleading indeed, because of the detail. This is an example of "front loading," because in order to define your claim, you have to tell the whole story, and you need to be precise. It might well be that, after lengthy discussion, we accept that principle, but it does have a very severe cost.

A member said, in ironic disagreement, that the opposite of this approach, would be "front unloading."

There is no risk that attorneys do too much. There is always the possibility of amendments. Therefore, this is a very good rule.

Even in some civil law countries this might create problems, because some national constitutions give the right to plead without an attorney. In international commercial transaction this is not frequent, but it does happen.

There is a difference between "facts" and "law." As we already discussed in the Principles, the courts should have responsibility for questions of law. It would be necessary to connect this with the applicable principle. We should state whether the court is bound by the legal grounds mentioned in the claim, or if it may decide freely about the applicable legal rule.

9.2. Sometimes, it is very difficult for the plaintiff to say exactly the amount of damages claimed at the outset of the litigation. Therefore, we should not bind the plaintiff. We should qualify this and say "so far as possible."

Civil lawyers may not understand the expressions "declaratory" and "injunctive". "Declaratory" may not be confused with abstract answers from the court.

A common lawyer cannot accept Rule 9.2 for obvious reasons. This rule is a legitimate attempt to force the plaintiff to specify the relief or remedy sought, and to quantify it, but really, the world is not divided into distinctions between declaratory and injunctive relief and damages. This is too simple a dichotomy. The most frequently litigated claim is the claim for "debt." Why to force the plaintiff to specify the relief sought, whether pecuniary or otherwise?

Related to that, there is a whole history in England of some technical detail on the question whether the plaintiff needs to claim interest arising upon debt and also whether the

plaintiff needs to seek from the court actively costs. If you do not ask for them, you will not get them. Those are very important aspects also in international arbitration.

Comment C-9.1 rightly says that "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." However, in private international law, there are many systems of procedure in which the laws of the court allow the party to change that choice in favor of the *lex fori*.

Rule 10

Rule 10.1 may be too detailed. Is there a need for stating the 30 days? The more we go into detail, the more conflict of laws and culture we raise.

This rule is very complicated. It would be enough to say that the defendant has to admit or deny, and if he does not, this will be an admission. This rule is written in the Roman Canonic tradition.

Rule 10 is a compression of two things. It is an important set of proposition regarding the phenomenon of defendants and also it raises the question of in which circumstances can the defendant raise third party proceedings. We may need to separate those two issues, for the sake of clarity.

10.3 states "The defendant may state a claim seeking relief from a plaintiff or against a co-defendant or third party." This is the problem of intervention. We should connect this Rule to Rule 4.3 "When an additional person ought to be made a party to the proceeding." For logical reasons, we should rewrite this part to be clearer.

10.3 states "... as is permitted by the procedure of the forum." The following comment may be applicable in other rules. There should be some hesitation to use that formula in private international law of commercial transactions. The solution of a problem may not be the right one to refer to the procedure of the forum if in the forum itself they would make a distinction between domestic and international situations. There is quite often the tendency to believe that you must apply the procedural law of the forum implying that the forum itself would apply its own domestic law when they may take into account in the particular case the foreign element in the situation and not apply certain domestic rules of procedure. This automatic reference to the law of the forum, especially in matters that may not be totally procedural, but have connection with substance, may be a wrong solution.

According to 10.3, the defendant may broaden the procedure considerably. That is a common law phenomenon, and it is surprising that civil-law lawyers had no difficulty with that. As stated, it is not subject to any judicial control nor there are any criteria specified as to when defendant can make a third party claim or bring in a co-defendant. The expression "as is permitted by the procedure of the forum" is a little too vague on this point.

In Rule 10.4 it would be enough to say that if the defendant does not deny it is admitted. It may be a tradition of English interrogatory and tradition of giving particulars, but for normal civil-law lawyers it is not understandable. We could shorten the rule and make it simpler.

Rule 11

Rule 11.1 is reasonable, similar to French Rules.

A member remarked that in some civil law systems, the right of amendment is much more restrictive. However, this is a better rule.

According to a member, this rule is too restrictive. We should give a broad right of amendment to the parties, unless it is not possible to compensate the opposing party. We should favor avoidance of technicality, when it comes to a notorious convoluted area such as amendment. We should have a simple proposition, which delegate the task to make policy decisions in this area to the local court.

A member considered this rule too broad. In the part that says "on the basis of newly discovered evidence," there should be preclusion when the attorney works with no diligence. The proceeding may reach a phase where it would be very difficult to give new evidence. We should consider a more limited basis for this rule.

A member would prefer that this rule be broader, in order to take into account the "legal and cultural traditions of the litigants" (see Rule 1.1).

The Rule says that "a party may amend a pleading," but does not say "up to which time." In many countries, there is a time when the parties can no longer bring in new facts or amend the claim. This is an important problem.

Another member recognized that there is a need to limit possibility of amendment, but the last sentence, which says, "permission to amend shall be afforded only if the amendment will prevent manifest injustice and not impose unfair prejudice," which provide cumulative conditions, should be in the alternative.

Another member asked what this rule mean by pleading. Pleading in this draft includes statements of claim, defense and third parties proceedings and other things. We might need a definition clause.

Another member asked what is amendment. In some civil law systems, the statement of claims already says that the party reserves the right to amend or amplify the claim. This is more or less effective. It should have the broadest possible sense. There are quantitative and qualitative kinds of amendment. The difference of degree may become a difference of nature. And a difference between difference of degree and difference of nature is in itself a difference of degree. One can amplify the amount requested, but one can also change the nature of the legal basis of his or her original claim.

In England, a recent case allowed amendment of a pleading months after judgment had been entered. This is possible in England. Can you believe that? The United States Supreme Court recently said you cannot do that.

Rule 11.2 should not be so specific and speak in terms of "reasonable time," that the court may decide.

In the matter of the specification of time in the Rules, there are two solutions: one would be to put the time "in brackets" ("[]"), the other way would be to observe in the comments the very great importance of having a specific time. Non compliance with a rule as to time can normally be taken as a basis for default and that is a very serious consequence. That is why it becomes important to be highly specific. At the same time, it is not necessary that the same time be specified in all legal systems. One can imagine that in a big country, particularly in developing legal systems, might want to give even more time than 30 days (90 days, for example). Whereas in metropolitan communities fewer amount of time would be appropriate.

For one member, Rule 11.3 may not be necessary.

For another member, this is a very important Rule. In some countries that there is no need for a new service. When an Italian wife of an Italian lives in Germany and brings an action of divorce in Italian court, the Italian and German may think that it is a good thing to be divorced, but the wife may bring an amendment and request money. The Italian courts would not provide a new service of this additional claim. In Europe, there is a discussion whether this is necessary or not. In American courts, it is possible to bring an action more than 60,000 dollars. After all, the action will be 10,000,000 and normally, the American court will order no second service. Therefore, this rule is important, but it should be well considered, because it is against the customs and rules in many countries. As a correction, under the law of the Federal System and in most States, in case of default, the judgment is limited to the demand. So, if you ask for 60,000, and the other side defaults, the judgment may not exceed 60,000. If the other side has appeared answered and then defaulted, this is different. The defendant has to be informed that a default judgment may be entered.

According to Rule 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." Is that a reference to "further information," as it is now know in England, or to use an old terminology, is this "interrogatories"?

Answering this question, it was said that it could be called "request for a bill of particulars," "to make more definite and certain."

This opens up the possibility of forensic tactical battles between the parties who are wishing to spin up the process by seeking further clarification of pleadings or other matters.

Rule 12

This is a fundamental question that does need to be addressed. It is an aspect of accelerating the system of justice.

Behind this problem, we have very different historical traditions and attitudes. At one extreme we have the idea of default as an immediate, automatic sanction for non-appearance of a party. To the other extreme, we have the tradition of a sort of "right to default" of the defendant with the consequence that the defendant should not be sanctioned in any way by the sole fact of defaulting. In the middle, there are dozens of different solutions. This rule is an attempt to find a reasonable compromise between the different solutions.

There are two levels of discourse. By some mechanism or another one should have very great clarity on the basis of a default judgment and on the responsibility of the court concerning notice and adequacy of evidence to justify the default. Many people think that in default judgment in the United States the judge has no responsibility for adequacy of evidence. That may happen some times, but in most courts, the procedure requires the judge to be satisfied that the judgment sought in default is substantiated by adequate evidence. It is an "ex parte" hearing, but requires some testimony in that respect. In some civil-law systems, the court has a responsibility to determine the justice of a default judgment, and the judge has to be satisfied substantively that the judgment is warranted. Particularly in international litigation, this is a good rule.

The second level is detail of specification of procedure. We have fairly elaborate detail here. An alternative in a variety of these situations is to state the rule more generally, but then have a comment that says "if you adopt such rule you should have implementing specifications that prescribe precisely what are the conditions upon which a default may be granted.

Rule 12.1 says "default judgment shall be entered against a *party*." The concept of default judgment might need to be explained more fully. There are local preconceptions. It happens to the defendant, but someone in another system, reading in a translation, might not understand it the way we do. Can a defendant apply to have the plaintiff's case struck out by reason of some procedural default, noncompliance on the part of the plaintiff? One has to be very careful. Do we want to say that a default judgment shall be entered against a party (whether a plaintiff or a defendant)?

In Rule 12.1, why use the word "shall" and not "can"? After the word "shall," do we need to insert "by someone"? Is this a mechanism which is triggered by the other party or can it be triggered by the court? We could state a general principle or a vague proposition: "subject to the control of the court, default judgment can be exercised against (and we have to say against whom.)"

A member disagreed with the use of the word "can." This would mean that the party does not have a right to a default judgment in case of an unjustified default.

It was answered that in some examples, the plaintiff might not want a default judgment, but a judicial hearing. There are legitimate forensic reasons, but this is exceptional.

In Rule 12.1, would it be necessary to mention the reason why the party did not answer or did not proceed after having answered? In France, for example, it would make a great difference if it is "avec motif legitime," (with good reason not to answer), for example when the party could not be reached and could not answer. Another example is a defaulted defendant who is obliged not to appear by his national law because there were some hostility between the countries.

Maybe this would be an important point to mention. We should make connection between this rule and the rule about relief for judgment. Very often the person can show something that would justify setting aside the judgment and then proceed to inquire in the merits.

Maybe it would be useful to refer to article 27 of the Brussels Convention. In Rule 12.2, for example, we should add "and defendant had time enough to respond."

[The referred article 27 says that "A judgment shall not be recognized, where it was given in default of appearance, if the defendant was not dully served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange his defense."]

It was asked if Rule 12.2.2, in light of the comment C-12.2 ("For that decision, the judge shall analyze the evidence attached to the statement of claims.") It would be much better if it said to analyze "critically" the evidence. In civil law systems there is no "right to default," but there is a duty from the judge to protect the defaulting party. Therefore, we should strengthen this excellent comment.

In disagreement, it was said that this solution now is unclear, and the judge will have too much power to grant default judgment or not. It would be better a clear decision. In international cases, it would be better to say: "when the party does not appear and does not defend there is no room from judicial discretion to grant or not the judgment for default." The judge must only check if the default judgment does not go against the evidence in the file. A clearer rule would be: "a party who does not appear may suffer a judgment by default." Why the duty on the court to control the defaulting party case? It is not necessary.

A civil-law member considered rule 12.3 not necessary. In the general principle, in civil law systems, a judge could not go beyond the claim requested (*ultra* or *extra petita*).

It was answered, however, that in common law system the judge can go beyond the claim requested by the party.

Rule 12.4 says that "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." In some countries, this rule is not easy to understand, because

the defaulting party can make an appearance at any time, but has to accept the proceeding in the stage as it is. There is no problem of costs.

Comment C-12-4 says "The party who has defaulted should not be permitted to produce evidence in an appeal." A civil law lawyer think that it was not given adequate consideration to the special procedure which is called "relève du défaut," a special procedure when the defaulting party has been the object of a judgment but then decides to come and has to pay the cost. On that point, more detail is advisable, having regard to the great practical importance of the problem.

Rule 13

This rule was discussed in connection to Principle 8.

This Rule may be too narrow. It is too detailed, but with a common law approach to settle a dispute outside the court. It is a payment into court. When we discussed the principle of promoting settlement, we had three or four forms of settlement: court initiated settlement, alternative court annexed, and forms of pre action protocol, with great importance (it is hoped) in the English procedure. It would be necessary to mention those possibilities in this Rule.

Another member agreed that we should broaden the treatment of settlement and mention the possibility of the judge to try to find a settlement with the parties and mention also other means of alternative dispute resolution.

We should also take into account Part 36 of the new English Procedural Rules. It is a good source of comparison.

One of the principles of civil procedure is simplicity and transparency: clarity is of importance. In England, Part 36 is one of the most convoluted and complex and difficult features of the new Rules. In England, the complexity is attributed to the fact that before 1999 it was possible for a defendant to make payment into court. The money is transferred. Under the new English rules, there is a bifurcation and that is the source of complexity because it is now possible for payment into court but also settlement offer. When is it appropriate to make payment into court and when is it appropriate to make an offer? Rightly or wrongly, the defendant must make a payment when the claim is for money (debt or damages). If you wish to put pressure on the defendant, the appropriate way for the defendant is to make a payment into court. This Rule does not force actual transfer of money into court and the defendant does not incur any prejudice. It is a less drastic form of commitment.

Another innovation of the new English rules is that it is now possible for plaintiffs to make a settlement offer. This is a rather controversial aspect of the new rules. Another feature is that the offer may be made in anticipation of the proceeding.

The other important point is whether to describe a special form of settlement in detail or only give a guideline. Maybe we should mention all forms of settlement without getting entering in details.

According to a member, this is an interesting innovation, which could be welcome in international transaction within some limits. However, there should not be some details like time limits, for example.

When the Rule says that the offer "must refer to the penalties imposed under this Rule," we could add "unless otherwise specified by the offeror," or something to that effect, to make it more flexible.

Another member considered it very interesting, mainly Rule 13.5. In some systems there is no rule like that. This is a very important rule to avoid long procedures.

Another member considered Rule 13.5 not a good solution for a French mentality because in France everybody has access to justice. This Rule might violate the access to justice.

There are different attitudes toward settlement. In Asian countries the judges are involved in settlement proceedings. Sometime the judges make a plan of the settlement and show to the parties. It is a kind of mediation. The concept of settlement in Asian countries is different from the concept in Western countries. For Westerners, it might seem unfair for the judge to interfere so deeply in the settlement. Asian people want some plan of settlement. Sometimes, there are problems, especially with international arbitration. It is difficult to understand this Western settlement rule. We should have some kind of alternative possibilities for the settlement.

It was said that Central Europeans might have a similar attitude towards settlement. The practicing lawyers wait for the settlement proposals from the judges.

It was asked if that provision connected in some way to the general problem of the possible role of the court as conciliator or mediator. There is a consensus in international arbitration that the person who is the arbitrator should not be the same person who conciliate for the simple reason that in commercial matters, people will not speak in the same way to a mediator or conciliator if they know that that person is the same one who will adjudicate. However, it is common for a civil law arbitrator or judge to intervene in attempt to favor a settlement or even mediate. It is different in England.

The expression in Rule 13.7 is relatively vague. The local rules should specify the relevant time.

Rule 14

The drafting is rather elegant on the whole. It is at the right level in terms of balance. In 14.1 we should declare the power on the power of a transnational court. It confers jurisdiction upon that court to issue injunction. The equivalent in England is section 37 of the Supreme Court,

which is a general power to issue injunction. The question is how this would be in Thailand, for example, or Vietnam. It only make sense to speak in terms of injunctions if the relevant legal system is sensitive to the history of Equity, to the discretionary nature of injunction and, more important, to the backup power, which is the power to fine or imprison a party or a nonparty, who has challenged the authority of the court by failing to comply. This is an important feature of the common law understanding of injunction, that it is tough justice: justice with teeth.

Civil law courts regards themselves as having only the powers given to them by statutes. It is a long tradition, but there is no correspondence to the tradition to Equity. In the Continent, there are two possible solutions. Some codes give a general power for provisional measures and some others, more in Romanic tradition dealing only with specific cases. Modern development is giving general authority. Civil law countries emphasize proportionality. Civil law jurisdictions also have a concept of "fair balance," but this concept is more cautious than in England.

This Rule describes in a very good manner the common rules on provisional measures. There is only one point that must be discussed, which is "freezing order" or "Mareva injunctions." This is the only special form of injunction that is individually described in this rule. We could say, especially in transnational cases, that the Mareva injunction is a very effective measure because the normal form of provisional measure is preliminary attachment and this is very complicated and not very effective in international cases. However, the Mareva injunction must be enforced in foreign countries too, and the experience with enforcement is not too good so far. English courts punish third persons acting against Mareva injunctions in bad faith. Banks can be punished, for example. The effectiveness of this injunction depends on this possibility. However, normally, in foreign countries there is only the possibility to enforce Mareva injunctions against the parties. We could not give such emphasis on this point, because the development is open. Perhaps the preliminary attachment would be a more successful measure, perhaps the Mareva: we do not know it yet.

According to a member, we must consider the possibility of a freezing order, which is a very broad and impressive measure.

In disagreement, it was said that normally they are very broad and for the defendants it is reason to open insolvency proceeding, because the defendant cannot do anything. For many continental countries it is not acceptable to have very broad freezing order and this is against the principle of proportionality. There is a tendency in the jurisdiction of English courts to issue very broad freezing orders in international cases. This wide jurisdiction is contrary to the tendency in the European Court of Justice. We should proceed very cautiously.

Is not there a danger that by drawing attention to freezing injunctions, we create the impression that the Transnational Rules are not concerned about what was first known as "Anton Pillar relief" and now is called "civil search order"?

This is a fundamental, interesting and rather controversial provision. The words "provisional measures" were in a slightly different context when we discussed the principles prepared by Stürner [See Principle 12]. This one may have a more narrow sense.

There are some interesting connections between the Principles and the Rules. The whole mechanism apparatus of pretrial injunctive relief in England is based upon a number of principles, one of which was called by Andrew's Principles 'Effectiveness: Justice to be neither Evaded nor Warped (by the parties)'. It is also connected with the accelerated justice. It also raise questions of "procedural privity," because one of the important practical dimensions of Mareva relief (freezing order, attachment injunctions) is that the person who is immediately notified in practice of the injunction is not the defendant, but the defendant's bank. Within minutes of the injunction being granted, the bank is notified.

For a Japanese tradition, this worldwide injunction is far from current practice. It will depend on other countries.

When Rule 14.1 says "where necessary to preserve the status quo or to prevent irreparable injury pending the litigation," it may not include the French *ordonnance de référé*. This is more restrictive than French law, but maybe it is better. Article 24 of the Brussels Convention had to be limited by the European Court of Justice because of abuses. Therefore, the Transnational Rules offer a better solution.

Article 24 of the Brussels Convention and the Lugano Convention do not merely authorize the court to grant a supportive and protective relief, but actually require contracting states to make available such relief. There is a difference of emphasis there.

In vast areas of commercial litigation, such as unfair competition, maritime litigation, and labor law, there is no procedure proper, but everything is decided by provisional measures. Those areas are entirely governed by provisional measures.

The practical effect of most provisional measure is to end the dispute because it converts possibility of recovery into almost certain recovery, unless the decision is reversed. Possession is very important.

A very important problem is the enforcement of provisional measures in other countries, because in the nature of things some of these measures will have to be effective outside the jurisdiction of the judge.

There is a treaty about enforcement in the MERCOSUR. Even Brazil, which was a very reluctant adherent to this treaty, accepted it. This Rule may take into account international treaties. Only then should refer to local law.

Rule 14.1.3 allows the court to "require the posting of bond or other provision for indemnification of the person against whom an injunction is entered." This is very odd for an English lawyer. In England, it is regarded as automatic that if you obtain a pre-trial injunction the automatic consequence of that, unless the claimant gets permission from the court to relax the requirement, the defendant is protected by an implied promise made by the applicant that if it turns out that the injunction was wrongly granted the defendant will be fully indemnified. This is a natural consequence, whereas here it does seem that this is a discretion.

According to another member, the problem with 14.2.3 seems to be that the Rule does not set any condition for the posting of a bond, in all cases. In many systems there is a need for some conditions before the question may be dealt by the judge.

Another member remarked that in Argentina, for example, the judge must require the posting of a bond. It is not discretionary.

Rule 14.1 says that "The court has authority to issue an injunction to restrain or require conduct of any person *who is subject to the court's authority* (or jurisdiction)." We should not forget that questions of interim or urgent measures often arises before a court which has not authority or whose authority or jurisdiction is extremely doubtful, and this happens very often in international transactions. There is a general principle that the court may issue an injunction or provisional measure if there is at least some *prima facie*, apparent jurisdiction but without examining in depth or deciding whether there is authority or jurisdiction, authority or not. This is a very important practical point.

Another member disagreed because if we give authority to a court that is not sure of its jurisdiction to issue freezing order this will be too much.

It was answered that the problem is not related to freezing orders. There are other kinds of measures. More and more courts are called upon to give interim, urgent measures without being certain of their authority or jurisdiction and we must discuss this point.

Reference to the court's authority may create problems of interpretation. We could either drop this or explain in the comments.

There is a connection between this Rule and Rule 4 about jurisdiction. This formulation needs to be studied.

These Rules follow a chronological order, from commencement to appeal, but in the world of provisional measures these boundaries are crossed. Mareva injunctions were invented to deal with a situation where one needs to freeze assets before the main proceedings have even begun. In London, 95% of freezing injunctions are granted before the main proceedings are begun. In addition, the Mareva injunction, as well the Anton Pillar injunction, sometimes apply even after judgment has been granted.

As a matter of structure, Rule 14.1.1 would be categorized in England as describing species of injunction, which is the one known now as "without notice." We once called it "ex parte" injunction, but we are not allowed to use Latin in England. Rule 14.2 is an important encapsulation of the jurisdiction to order freezing injunction. It is no longer called Mareva Injunction. Rule 14.3 is a facet of that and is concerned with the forum application of attachment. We come back to 14.1.2 and 14.1.3. Logically, these are matters of procedure, concerned with the mechanisms for undoing the injunction, dissolving, renewing, and modifying the injunction. Rule 14.1.3 is a provision concerned with protection to the other party.

Comment C-14.1 says "Availability of other provisional remedies or interim measures, such as attachment or sequestration, is determined by local law." Maybe this is not entirely correct. The question of interim measure is extremely important in practice in arbitration between foreign parties in international transactions. Many measures might have to be taken which are known in the local law but known in the place of enforcement. When discussing chapter 12 of the new Swiss law on Private International Law on International Arbitration, the members of the commission tried to make it clear that there is nothing in local law which will prevent a judge or arbitrator to issue interim measures which in their nature must be enforced abroad although they are not known in the domestic system of procedure. This is why there are certain doubts about the terms of the comment "Availability of *other* provisional remedies or interim measures (...) is determined by local law." Why not local law in the broad sense, including private international measures?

About the comment on "urgent necessity," it was said that many specialist of commercial law are characterized by regrettable lack of information about public international law disputes and there are something to be learned from the general principles of law established by international tribunals. One general principle of law, according to article 58 of the Statute of the International Court of Justice, is that "every party to a dispute has the obligation to refrain from any act or omission which is capable of making the solution more difficult." We should add this to the comment.

Rule 15

This is a very important and rich provision.

The only problem with this rule is that it is the common law point of view, dividing proceedings in pretrial and trial.

For a civil law jurist, summary judgment (judgment without trial, as a contrasting concept of judgment after trial) is not an understandable concept. Civil law courts have a possibility, for example, to make a judgement that the court has no jurisdiction, but that is no general power. That is far too broad for a civil lawyer to say the court could make a determination or judgment that the "That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules." It depends also on the structure of the proceedings: where there is no pretrial and trial, but an instruction phase, those rules are very strange. There are similarities, but we should adapt the different legal cultures.

We should think about the relation between this provision and Rule 20 about conferences. Rule 20 approaches the problem as an event (conference) rather than an authority. Rule 20 also goes into considerable detail about exercise of powers. We should compare this with summary judgment. A fairly early conference, maybe in the first or second conference, but before development of evidence, there would be presented to the tribunal powerful evidence that the action is time barred or that the defendant is legally immune, or that there has been substantial payment (reducing the amount of the claim). Maybe this may look like only a conference, but it sounds like a summary judgment, in that it is relying upon legal and factual material readily at hand or quickly produced and peremptory in significance. Should not a civil law judge thereupon

render a total or partial judgement? The same is true in the plaintiff's side. If that is true, if there is a functional similarity, then we have an interesting problem on how to express this possibility in term that would be congenial for civil law and intelligible and familiar to common law. That is the drafting problem. Maybe there is no fundamental difference in the legal problem, confronted by a common law or civil law court, if it was presented with legal and/or factual grounds that the action should be either resolved in a judgment for plaintiff or a dismissal or a partial judgment.

It is true that in civil law jurisdiction the court has possibility to give judgments similar to preliminary determinations and summary judgments, but normally only in cases expressly enumerated in the statute. There is no general power to do it. For example, when jurisdiction is discussed, most civil law civil procedure codes say that the judge can make a special decision on jurisdiction, but that is no general power of the court. Therefore, this rule is far too broad.

It was asked if there are special provisions, in civil law countries, allowing judgment in the case of a claim for definite amount with evidence by written obligation, like a promissory note or a bond that immediate judgment would be possible in the absence of suggestion of grounds of avoidance of the obligation. It was said yes, but there are two possibilities in Europe. Some countries deal with those problems under the provisional measure during the proceeding, for example, the "ordinanza di pagamento" in Italian provision. Some other countries, under specific proceedings, such as proceedings involving checks, but no general provision. For example, a determination to strike out a part of a party's case that would not be common. Civil lawyers would decide this in the final judgment, but not give a specific decision on this question.

In a common law court, it would be common for a judge to withhold a judgment until the entire case is considered, but if the judge concluded that part of the claim cannot be supported. For example, some interest payments are barred by time and some are still alive. A common law judge could decide to wait until the end, and this is the way a civil law judge would do. A civil law judge could give a hint to the parties that the court would not accept part of the claim?

The French do not speak anymore of "jugement interlocutoire" (interlocutory judgment), but "jugement avant-dire droit," and jugement sur le fond. The first is, for example a decision of the court that will determine the need of an expert and call this expert to prepare a report. There is a difference between "jugement avant-dire droit simple" and "jugement mixte," which is a decision of part of the claim, for example, when the court decides about the liability of the defendant, but does not decide the amount. There is appeal only against the liability, not the decision about expert. Some judgments are preliminary in the sense of having an impact in the final decision of substance, while others only deal with aspects of the proceeding, with no consequence on the final judgment.

In English terms, there is an interim judgment determining an important pathway of proof and there is also an interim judgment determining one essential element of recovery, but not all elements.

It was added that the court has no power to give interim judgment for each interim discussion. Normally, only in limited cases can the court do this, expressly authorized by law. This is different from the broad powers of common law judges.

Rule 15.2 is also influenced by the pretrial stage of common law proceedings. In civil law proceedings, this timetable of the rule would not work well. We should discuss it.

Rule 15.1 gives power to the court to act on its initiative. We should examine the new 1998 English Procedure Rules Part 3. The judge can act on its own volition, or upon application to strike out a "statement of case" whether in whole or in part in three situations: where there are no reasonable grounds to support it (both questions of law and questions of fact), where there is to be an abuse of process on either party, or where there has been procedural non compliance by one of the parties. This is a central provision and widely expressed power. In England there would be a separate discussion of summary judgments. It is a very important and large area of the law.

The notion of *forum non-conveniens* is difficult for civil law judges. It is not even discussed in civil law systems.

A member was surprised by the categorical affirmation of C-15.2, when it says "A valid objection of this kind usually requires termination of the proceeding". It should be "termination or suspension."

C-15.1 says that "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 some civil law countries, this duty is never accomplished by the judge. It is very important that the judge have this power to control the proceeding. We must insist in this point.

Rule 16

The title "disclosure" should be changed. In a lot of the common law world, "disclosure" is the word to describe "discovery." The word "discovery" does not appear in the 1998 English Civil Procedure Rules.

It was said that this Rule does not correspond to the French law, but it can be a good innovation.

It was said that this rule does not correspond to the French law, but it can be a good innovation.

The Japanese Supreme Court Rules are similar, but 16.1, when it says "all documents," it is too detailed and too burdensome for a first stage of the proceeding.

This Rule does impose a considerable financial strain upon those who are commencing litigation. That is fine, if we have in mind multinationals. However, if we are talking about ordinary people or small companies, then the upshot of 16.1 is that one has to be in an excellent position to be able to identify all one's witnesses and to be able to supply telephone number and

other information, all such documents which will be material later on in the litigation at a very early stage of the action.

Another problem is that in some countries, the parties are guaranteed by the constitution to go to court "per se." A rule like this is much too burdensome to those people.

Rule 16.1 refers to "all witnesses." Does that mean expert as well as lay witnesses?

The juxtaposition of 16.1 and 16.2 is troublesome. Rule 16.2 states that "A party may amend the list specified in the previous subsection to include documents or witnesses not known when the list was originally prepared." If that is the case, what is the point of 16.1? It was answered that it is important to begin investigation from opposing party. Is it intended to impose an obligation in 16.1 or just expressing a hope? The answer, at least in civil law systems, is that if you want to amend, you have to prove that you did not know before, otherwise, amendment is precluded.

Rules 16.3 and 16.4 contemplate a choice: the parties can supply a summary or a statement. How is that choice going to be exercised by the parties? The choice is not made by the parties, but by their lawyers, in favor of the lawyers interest (and conversely less favorable to the client,) which is to present whatever will take the lawyer longer to prepare because the lawyer can charge more to the client.

This Rule is compatible with civil law procedure. The 30-day rule, however, is a problem. The German experience with those rules is 10 or 30 days after, and is not very good. Twenty years ago, this was the rule in Germany and parties needed more time. We should consider a more flexible approach, give the power to the judge to decide.

Rule 16.4 states that "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." We should take into account the French practice and add "if the examination seems to be necessary." If we have a written testimony, it may not be necessary. Only if it is necessary to the court or to the parties to hear this witness the examination should happen.

A civil lawyer considered rule 16.5 very good and important.

Rule 17

This is a very important provision and it was extensively discussed in relation to the Principles.

We need an adequate compromise between common and civil law systems.

It was reminded that in England there is the possibility of "pre action disclosure". It is standard in the world of intellectual property litigation that before you can commence a litigation you have to find out who the defendant is. What we need to contemplate is a procedure to enable the plaintiffs, under judicial control, in certain circumstances, before the litigation is commenced, to require an identified non party who has possession of information to disclose that information to enable the plaintiff to identify the defendant so that the process can begin.

In some civil-law countries, there are "information actions" to address this problem, but in very narrow limits and in very specific cases. Maybe it is not good to address this problem in the Rules. If this problem is not addressed in the Rules, the question becomes whether the national jurisdiction has this power under its ordinary procedure.

It was considered, in disagreement, that UNIDROIT is interested in the promotion of its future instruments and "access of information" may be **the** challenge for civil procedure for the next century. Why should we avoid it?

It was agreed that there is a need to address the problem of "access of information".

There is a difference between civil and common-law countries about the protection of third parties. In civil law countries, when you have "information actions," it is a full civil proceeding, with possibility of appeal. In common law, it is only an incident of the main proceeding.

The question of applicable law is important for application of the concepts "not privileged" and "directly relevant to the case" in Rule 17.1. Under what law is it privileged? Under what law is it "directly relevant?" It may be a different law from the law of procedure of the forum.

Also, Rule 17.3 says "any person may invoke a protection against self-incrimination recognized according to the law of the forum." Maybe "the law of the forum" is not the correct solution in private international law. If we want to refer to the law of the forum, we should at least add: "or another law applicable according to the foreign conflict rules," which seems more correct.

Normally, in international cases, time limits fewer than 60 days are too short. The ideal should be between 60 and 90 days. The parties may need translation, etc. It would be better to give the judge the power to specify time limits, rather than prescribe it peremptorily in the Rules.

A principle of procedure could be that a national system of procedure shall have definite specification of the time to do something, subject to the power of the court to modify it, if necessary.

In Rule 17.1, the expression "who has complied with disclosure duties prescribed in Rule 16" may create problems. The attorney might say that there is duty to give information to opposing party because opposing party has not complied with Rule 16. That logical sequence, in the wrong hands may go to the wrong direction.

It was considered that discovery must be subject to judicial control. However, the draft does not contemplate that yet. We could say that "a party may apply to the court for discovery." We have to decide the way to which the court should respond. The court should accept that the party is entitled to the material requested, unless there is compelling reason to deny production, such as privilege, excessive burdensome, and so on. It is a kind of *prima facie* right, but mechanically it should go through the court. A good point of reference is the current Rule 18.1, which says that deposition is conditioned to an order from the court. We should emphasize the necessity of judicial control of discovery.

As a further compromise, we should include a limitation that this rule only applies when the party who has the burden of proof is not able to particularize.

A frequent problem with regarding to "burden of proof", discovery, disclosure and expert witness is: "Can a party, who has the burden of proof, and is going to fail to carry out this burden, use the device either of discovery or disclosure or ask for an expertise in order to substitute the burden to produce the proof him or herself?" It is a very important practical matter.

Rule 17.1.3 says that the party has to disclose "the identity of any expert that another party intends to present". However, in civil-law systems, it is the court that orders expert evidence and chooses the expert. Maybe the parties may give hints to the court about the name of the best expert, but it is still the judge's decision.

It was answered that this Rule should relate to Rule 23.3. The party has a right to present its own experts even without authorization of the court.

About 17.1.3, it was said that it is always difficult to create a rule about people's intentions. "Statement expressing the opinion of the expert concerning controverted issues" was considered very wide.

It was considered that the obligation to present "the identity and whereabouts of persons having personal knowledge of matters in issue" is a very broad obligation.

It was answered that a defendant should not deny the plaintiff the names of the people with information about what happened because the plaintiff has no means to realize that. The defendant cannot say "too bad! I know but I will not going to tell you." In the United States, it is thought as denial of access to justice. A civil law court would say "if you know who that person is, bring that person to me."

It would be very unfair to a party, if opposing party do not inform her the theories of the expert witness, before the expert is in the witness stand. The party must know who the expert is and the substance of the expert witness statement.

The sanctions to noncompliance are quite significant. This is a real obligation, because failure to comply can result in the case being dismissed in complete defeat. There is a sanction missing, which is the contempt power for deliberate noncompliance.

It was said that the best sanction is the inference that the proof would not have favor the contentions of the non-compliant party or the power to strike out a party's means of proof. Dismissal is a decision of last resort.

Contempt, however, is not a very good option for civil law countries. If the party wishes to sacrifice and lose the case, that is enough. Why imprison a party?

A member said that could not contribute to the discussion because in that person's system there is nothing similar to discovery. However, considered it a very interesting rule to be introduced in civil law systems.

Comment C-17.7 says "Rule 17.1.3 provides that any party is entitled to discover the identity of a prospective expert." A member objected to this comment if, by "identity" it is meant not only the identity in a narrow sense, but also the professional qualifications and the independence of the prospective expert.

Rule 18

In civil law systems, the witnesses are always heard in front of a judge. Therefore, deposition or testimony by affidavit is unknown in many systems. Rule 18.5, however, corresponds to the French practice.

A member received this rule with skepticism. However, the good part of this rule is that it is conditioned to an order from the court, which is significant difference from Rule 17.1. We should emphasize the necessity of judicial control of discovery.

However, the discretion from the court must be carefully exercised. A party has not a right to demand deposition, but can petition and the court has discretion. What are the criteria for the exceptional grounds for engage in this form of collection of evidence? Saying simply "in the interest of justice" is not enough. This expression is meaningless.

In England, it would be said that this is a very exceptional device and court would authorize it only if consistent with the overriding objectives of English civil procedure. Some of those criteria are "proportionality," "efficiency," "economy". If this is in the formula "in the interest of justice," it should be made explicitly. In the wrong hands, this formula would create satellite litigation. This is not efficient.

We must narrow the conditions for possibility of deposition. It is a little broad now. This possibility, together with the possibility of a "commissioner" and not a judge who conducts the examination is, for civil law countries, nearly unacceptable. A party should have a right to have the witness heard by the judge.

Rule 19

The structural problem is that this rule is based on the structure of American civil procedure, of autonomous discovery. If we accept the control of the court over discovery, we can have some other concept for protective orders. We do not need those kind of protective orders, because the court will decide in advance whether the discovery request is proper or not. There should be some changes in this rule to adapt to this.

Comment C-19.1 says "Rule 19 gives the court broad authority to limit discovery that would be oppressive or unduly intrusive". If that is the case, 19.1 is insufficient. There should be more conditions. Rule 19.1 says that "the court 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". We could imagine other circumstances in which discovery should be limited, because, for example, of the extra cost involved in relation to the amount in dispute, or because of the delay involved.

As a matter of structure, 19.1 should be incorporated into the main provision regarding disclosure and discovery. If that provision is put there will give great prominence to the fact that the judge controls both disclosure and discovery.

Rule 19.2 is an important provision, and its contents are acceptable, but it may be too narrowly drafted. The main categories have been identified (trade and business secrets,) but we may use the opposite approach, which is to say "prima facie all material which is subject to compulsory disclosure should be protected by protective order" (implied undertaking,) so the net of protection is potentially universal, subject to one or two exceptions. This approach is better than the current one, which leaves things up in the air and requires the court to make a more specific order in individual cases. If we want to attract commercial business into this particular style of proceedings, business people will look at the protection they receive if they are subject to extensive disclosure duties. This is an important bargaining chip, if we are trying to attract a decent traffic of commercial work into this type of forum.

We should discuss more about "sanctions" applicable to breach of this obligation of confidentiality. In England, if there is a breach of this obligation, the person is in contempt of court and can be fined or imprisoned.

There is a fundamental problem, because under this rule, the court can order evidence protected by a privilege to be produced by a party, under a protective order. However, in civil law countries, a party protected by a privilege, could not be forced to produce any evidence, neither in pretrial nor in trial.

We should read that Rule 19 in connection with Rule 24 (evidentiary privileges). For example, if a defendant firm has a trade secret, in most civil law countries defendant can refuse to produce evidence in pretrial and trial. This rule is far too broad

Rule 19.2 says "the court should issue a suitable order imposing obligation of confidentiality on the parties, their counsel and witnesses". Common lawyers may trust on sanctions of contempt of court against parties, counsel, and witnesses. However, contempt of court is not recognized in civil law systems. In addition, when both parties are competitors, the fact that one party can keep it confidential may not be enough.

The success of Rule 19.2 depends on how successfully enforced are the rules of ethics in the national country. In some countries, they are very weak and this might be a problem to the practical utility of this rule.

The connection between Rule 19 and 24.2 is not very clear.

Rule 19 is very Anglo-American, because of differentiation of evidence produced in pretrial and the obligation to give evidence in trial, with different rules. However, in most civil law countries, the rules are the same for trial and pretrial. This is an important problem.

We cannot deal with the problem of trade secrets without close attention to the enormous experience with international commercial arbitration. This is precisely the field where this kind of question arises every day. Arbitrators are placed in the most difficult situations, for example, in cases in which some evidence is put in a sealed envelope and should not be opened before a certain date in the proceedings, etc. The question of business trade secret should be made an object of a separate comparative study, with the help of a number of experts, if we want to be concrete and not remain in generalities.

The civil law conception of privileges is in some aspects much broader than the common law conception, particularly business privileges. Suppose, for example, a case in which knowing what material a product is made of is important to the decision of the merits of the case. If the defendant refuses to answer, alleging trade secret, can the judge draw an inference against the defendant?

It was answered that if it is a third person, in civil law countries there would be no chance to have the information. If it is the parties to litigation, there are some judgments that give full privilege to them too, but this is not very useful. The most useful way to handle this problem would be the way described under Rule 24.2: "In case the information includes secret or highly sensitive matters, the court may require inspection by the court alone or with help of experts." This is the most common way to deal with this problem in arbitration courts. You can give all the information to the expert. However, the parties cannot be forced to give the information to the court, as provided under Rule 19.

There is also a great danger if the final decision is rendered on the report on the expert, without the access from the parties. There is a danger of violation of the right to be heard.

There is a very important comparative monograph on the protection of trade secrets written under Professor Stürner direction a couple of years ago. It was partially published in the *American Journal of Comparative Law*.

In many cases, the trade secret belongs to one of the subsidiaries, which happens not to be a party and some times that subsidiary was created in bad faith, precisely to that purpose. It is a question of balancing the interests. The court must have to take this into account when ordering so called third parties to produce evidence. In Germany, this concept of group of companies is not recognized. This is a very serious problem in international arbitration.

Rule 20

The title for this rule could be "case management". This Rule was already discussed under Principle 2.

In substance, this rule can be accepted. However, the conception of "conference" should be better explained. Since the court controls the proceeding in civil law systems, there is not much use for conferences.

Rule 20.1 says that "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". However, the Rules are not so strict even with the plenary hearing. What if the advocates do not attend? Especially in international litigation, a physical presence may not be necessary.

Why hold a conference to do all those things stated in Rule 20.2. The judge could do all this in his desk or in the hearing. Why would this tool be created as a separate vehicle during the final stage of the proceedings? What distinguishes a conference from a hearing?

Rule 20.2 says that the court "may." We should strengthen this rule and say that the court may, if necessary on its own motion.

Rule 20.2.1 says that "At a conference, the court may order the addition, elimination, or revision of claims, defenses, and issues in light of the parties' contentions at that stage". This is connected with the question of amendments (Rule 11).

Rule 20.2.2 is a very broad to civil law judges, to allow them to enter interlocutory decisions on any matter. Only in special cases a civil law judge can do this. We discussed this in connection to Rule 15.

Rule 20.2.3 says that "The final judgment shall address all the cases". What does "final judgment" mean in that context?

Rule 20.2.4 says that the judge may "make rulings on the admissibility of evidence and other procedural matters" We can strengthen the hand of the court, but be very careful. We can say it more clearly, so that the court is not just making positive declaration that material is admissible. Perhaps, conversely, in this early stage of the proceeding, in some circumstances the court could bar information which otherwise would be admissible. Is this the intention in this rule?

Is such a ruling irrevocable as far as the plenary hearing is concerned?

Rule 20.3 says that "The court may suggest that the parties consider settlement, mediation, or arbitration or any other form of alternative dispute resolution". A member considered that we may not need this anymore because we want to add that in Rule 13. Another member said that there is no harm in repeating this here.

We should strengthen the hand of the court and specify that the court has the power, in appropriate circumstances, not just to suggest, but to stay the proceedings in order to assure that the parties would explore those settlement avenues.

In France, since 1995, it is possible that the court stay the proceeding in order to give the possibility to the parties to a settlement or mediation (not for arbitration). In other civil law countries, like Argentina, the judge can suggest, but cannot stay proceedings.

In this phase, the proceeding is already in a developed stage, and considerable cost has been incurred. It is strange that the court would suggest arbitration at this phase.

We should make the connection of this rule with principle 7 of "due notice" because the process of case management might offend this important principle, because some unilateral decisions are made by the judges in the course of the case management, without opportunity for the affected party to contradict what is proposed. We should made this clear.

Rule 21

This is a very important rule and very well drafted.

The English formulation is fluid and at the same time strong. The rule speaks of the duty of the court to ensure that the parties are in an equal footing. We should analyze the English formulation.

This is a very important procedural problem in international litigation. However, it is difficult for national courts to deal with this problem with "equal access to justice" in mind. If so, maybe there is some different knowledge between the parties, one party will be benefited and there will be no equality. Therefore, this point should not be related to the principle of "equal access". This discussion introduces us to the caution we must employ our enthusiasm to the idea of equality.

A member considered impossible to approve Rule 21 as it is. In a transnational situation, we have to take into account the experience of all countries that are bilingual or multilingual. We

also have to take into account the practice in international courts, where there are commonly parties of different nationalities and different languages. We should also take into account the experience in international arbitration where there are proceedings in three or more languages.

Should we allow the court to use foreign language if the judge is competent in this language? The United States is now essentially a bilingual country because the Spanish population is about 25% and in some parts of the country it is 50%. This has created great difficulties and the lawyers are beginning to learn Spanish. This problem is different from the problems faced by bilingual European countries. There is always someone that does not speak the language. What if that person is the judge? We welcome suggestions, but in that case, the court will have to use the local language and use translators.

In Germany, for example, even though the rules of procedure compel the use of German, many judges that speak a foreign language do not do that. We should leave a valve to the pressure of individual competence in foreign language. This might prove useful.

French people are not reputed to speak several foreign languages. The French law, enacted 10 years ago, compels the use of French. The French government would not accept if we say that the court has to take evidence in a foreign language. The only solution is the translation.

It was agreed, however, that the need for agreement of the parties is a very severe condition. Usually one of the parties would refuse to give the permission, trying to delay the case, forcing translations, raising costs etc. It should be a decision for the court to allow the use of a foreign language. It would be better to say "if the court decides that it would be fair."

The court could also allow the use of more than one foreign language.

The decision could be related to part or to all the proceeding.

Rule 22

Rule 22.1 says that all evidence is admissible. However, we have already discussed the possibility of document evidence. We should also consider the Convention of Rome, on the conflict law of obligations. There is a rule that all means of evidence could be used under the "lex cose" or the "lex fori."

Rule 22.1 says "Except as provided in Rule 24". We should consider adding that it is subject also to Rule 20. It is not clear whether the consequence of a ruling on the admissibility of evidence in Rule 20 is binding upon the plenary court.

Do we need to spell out "circumstantial evidence?"

Rule 22.2 is an evidentiary rule. Rule 22.2 refers to "any person having mental capacity". What about infants? What is the meaning of "capacity?" Why not allow persons without mental capacity? They may know something useful and can be heard without oath.

Also, there is many conflict of laws in "mental capacity". The "lex patriae", the "lex domiciliae" and the "lex fori" may be very different. Mental capacity are misleading terms and oversimplify the problem. Many civil law systems distinguishes capacity of discernment, which is the capacity to judge (purely mental) and the capacity, when you have already judged, to decide to have the will and to act according to your mental judgment.

Rule 22.3 says that "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". In civil law systems, it is the court who calls the witnesses. However, this is not very important problem.

This rule considers a party as a witness to her own proceeding, and this is not the tradition in civil law systems. In Europe a party can be heard, but not as a witness. The possibility for the party to be heard by the court exists, but the rules of examination and privileges are different. We need to express this rule in another way. Civil law systems differentiate between the "personal deposition of a party" and the "testimony of witnesses".

Civil law systems recognize that a party is not expected to speak with the same sincerity as a non-interested witness. In order to avoid the perjury, civil law prefers to distinguish between them. In an international situation, the conflict between tell the truth and the parties interests are great, because of the high interests at stake. How can we expect a director of a corporation to testify with the same sincerity of a witness? This is totally unrealistic and counterproductive. A rule making no distinction between witnesses and parties may not be acceptable in civil law countries.

Another difference is that, if the witness do not come to testify, she will be forced by the police to come. However, if the party do not come to testify, the court would draw inferences. This is an important difference: for the parties, testifying is a burden and for the non-parties, this is an obligation.

This should be linked with the discussion we had on Rule 16 on the onerous burden of list all witnesses on the beginning of the suit. What happens if you do not list a person, but wants to call her?

What is important is to give the party the possibility to make a statement that will be accorded probative weight by the court so that if that party gave that statement and the court accept it as true, that testimony would be sufficient as a basis for judgment, without the need for corroboration from some other source either witness or document. If this is accepted in the group, there is no fundamental problem. It was said that in civil law systems, the judge is free to give any weight it wants to the declaration of a party.

Some civil law systems also have the "decisive oath of the party", and even in absence of other evidence, may be decisive for the final judgment.

We want in these Rules machinery to enable people to procure from non-parties access to information before the commencement of proceedings. Rule 22.4 is a very significant rule because it extends beyond documents to include "things". A non-party may have ownership or control of an item of equipment. It would be useful to have the means to compel the non-party to

allow inspection. Then the potential claimant can decide whether or not to bring the case. This device exists for 30 years in England.

In the expression "in that person's possession," we should add "control or power".

Rule 23

This rule is a fundamental one and is a good compromise between common and civil law countries. The contents are acceptable.

Japan adopts a continental system, but also adopt the private expert witness in written statements.

Rule 23.1 says that "The court *may* appoint a neutral expert". However, in some cases, the court *must* appoint an expert whenever there are certain questions beyond the knowledge of the court. This is an aspect of the right to be heard. However, this rule does not change the burden of proof, which is still with the parties. There should be a balance.

In Rule 23.1, who pays the neutral expert?

In Rule 23.2, it would be better to mention the principle of contradiction. In France, the expert has to hear the parties during the whole stage of expert investigation.

In Rule 23.3, it would be good to differentiate in terminology the "court expert" and the "parties expert". The parties' experts could be called "consultants" or "assessors," for example.

The question of the status of a party appointed expert has troubling English courts for many years. English courts are now deeply suspicious of party-appointed experts.

In some very complex cases, it is very difficult to find experts not connected, one way or the other, to one of the parties.

However, the judge should not accept to the report of the court's expert.

What is the relationship between court expert and party experts? This is a fundamental question. It is fair that the parties may have opportunity to challenge the report of the court expert. We would be not fair and maybe violate the Convention of Human Rights, if we did not allow parties experts.

In 23.3, not only the parties' experts but also the parties' counsel should normally be allowed to participate in the investigation.

We should make a cross-reference to Rule 6.1, 16.1, 16.3, 16.4, and 17.1.3.

Rule 24

In civil law, the concept of privilege is different. These persons may not give testimony, but it is not a "privilege."

Rule 24.1 refers to "evidence," however, the shield of privilege is not limited to matters of evidence, but also related to pretrial.

This list of privileges is different from the forum law list. What is the relationship between Rule 24 and Rule 7.1 (local law applies to matters not addressed in these Rules?) Is it possible for a local lawyer to argue that if a privilege is not enumerated in 24.1, the local privileges will still be respected?

It was answered that the local privileges would be respected according to Rule 24.2.

Rule 24.2 says that "evidence cannot be admitted". The better presentation would be: "one cannot compel a person who holds a privilege to adduce the relevant information". If the privilege holder waive the privilege, the evidence is admitted. It is a distinction between admissibility and compelability.

In most civil law countries, the person protected by the privilege or the professional secrecy is not the party, but the professional and that right cannot be waived.

In most systems, if the law recognizes a privilege, it is not possible that the court decide that the need for the evidence is of greater significance. This may not be acceptable and may give rise to difficulties.

This rule makes no difference between parties and non-parties. Normally, the privileges of third parties are nearly absolute a balancing of interest would be possible only for the parties. We should separate them into different rules.

Another problem is that in civil law system, sometimes this is not a privilege of the parties, but a duty of the person not to reveal an information. It is a duty of professional secrecy, under penalties of criminal and professional sanction. The right of the party not to have this information revealed normally coincides with this duty from the professional. Sometimes, a person with a duty not to reveal has to request court permission to violate the duty.

Civil law countries have more privileges than common law system.

Comment C-24.3 says that "The precise scope of confidentiality of communications concerning settlement is determined by the law governing the communications". In international communications, this is not an easy problem to solve.

We should eliminate rules of conflict of laws in all Rules. However, we could have a general provision that says that when questions of differences in legal rules arises, the forum shall be guided by generally applicable principles of choice of law, employed by the forum. We should acknowledge the problems, but it would be a mistake to specify which law applies to each question.

Rule 25

This rule may not be fundamental because in common law practice, a trial happens in only 2% of cases actually commenced.

This Rule is not the civil law tradition, which has a more written proceeding. It is also difficult to understand.

This Rule, however, is acceptable in Japan, which introduced cross-examination. This is very important and changed the attitude of lawyers to get important information related to the case.

Whether the court or the parties conduct the examination is an important question. Cross-examination may be of very difficult acceptance in civil law systems. It is a fundamental rule of civil law civil procedure that the judge should conduct the proceedings and the parties should not practice with the witness in advance of the judge's questioning.

This rule may be considered too detailed.

It was asked whether Rule 25.1 should not say "must" instead of "shall". The parties have to exchange evidence and the opposing party must be able to answer in regard to the new evidence.

Rule 25.1 expresses the principle of pretrial disclosure: the notion that the plenary hearing the party should be not taken by surprise. This may not belong to this Rule. We should give more prominence to this rule.

In Germany, witnesses are nearly never under oath and there is no affirmation to tell the truth. This was considered to have no effect. In addition, some witnesses are not under oath in some civil law systems, such as a child or the party.

This Rule should also be completed and say "unless the document was unknown before." Sometimes, the document is discovered hours before the plenary hearing.

Rule 25.2 relates to the principle of orality and the principle of concentration.

Rule 25.3.1 is clever because it uses the word "affirm." However, "affirm" is a specific word in common law systems, meaning the opposite of "oath," for non-religious persons.

Rule 25.3.2 may not be applicable in some civil law countries, because only the court asks the questions to the witnesses.

England, however, moved into a different direction. A witness will not need to present his or her evidence in chief. The persons' written statement, which has been exchanged before trial, is available to the court and the judge is expected to have read this very closely before trial. Therefore, there is an acceleration of the trial, and the examination begins with cross-examination.

This rule also mentions "improperly leading questions," which imply the existence of "properly leading questions". A civil lawyer considered that there are no "properly leading questions".

Rule 25.3.7 may not be indispensable.

Rule 26

Rule 26 should have cross-references to other rules. For example, there is overlap with Rule 20 (case management).

Rule 26.3 brings a concept of contempt of court. In some countries, it is possible to fine, but not imprison a person.

It was said that it is a mistake to say that there is no contempt of court in civil law countries. There is no contempt tradition against parties (except in enforcement,) but there is contempt tradition against third parties. The English contempt may even be a successor of a Germanic device. Also, in the criminal codes there is a crime of disobedience of a court order.

Another similar device is the French *astreintes*. However, the civil law judge cannot create sanctions: they must be prescribed by written law. These rules should develop the concept of *astreintes* (to parties and third parties). It is a very useful device, but unknown in some civil law countries, and judges are afraid to invent it.

It is not necessary to have contempt powers against parties. That would be very unusual in civil law procedure.

It looks to civil lawyers that the common law judge is a judge in his or her own cause, by inflicting contempt of court. He is no longer an independent judge.

Rule 27

It is helpful to have a rule, which tries to enumerate the circumstances in which the court exercises power against nonparties.

There is no problem to force third parties to give evidence (testimony or documents). This is broader than the civil law rule, but it can be accepted.

This rule is not exhaustive, because it does not deal with cost orders against nonparties, which is an expanding area of development in England.

The words "subject to its jurisdiction" in Rule 27.1 are very important. How do we deal with the situation of a nonparty not subject to the jurisdiction of the relevant court?

Rule 27.1.1 is not necessary in England. If, for example, the applicant has persuaded the court "ex parte" to freeze the assets of a respondent, who has not yet been notified, the order is addressed to defendant, but the solicitor would serve the injunction to a nonparty, namely a bank. The English concept of contempt of court and injunction includes the proposition that nonparties must not act in such a way as to undermine, jeopardize the efficacy of the primary injunction. The notion of a collateral impact upon a nonparty is built in the notion of injunction.

This extension of an injunction to a third person is problematic in civil law systems. This will not be accepted in civil law courts. Usually, civil law courts do not accept freezing orders to have effects against nonparties, because there is no possibility to enforce a decision without the right to be heard. The only way for a freezing order to be enforced in civil law systems against the bank is if the bank is a defendant in the case and has an opportunity to be heard.

Rule 27.1.3 allows the court to force a person to "give testimony in discovery or at the hearing". This may not work in France because it is the parties who decide which witness or which testimony by affidavit is to be given.

The possibility to retain funds prescribed in Rule 27.1.2 is usually a matter for special proceeding in civil law countries.

Rule 27.2 should read "must" instead of "may."

Rule 27.3 says that "An order directed to a third person may be enforced by imposition of a monetary penalty for noncompliance". We should add: "if this is possible in the *lex fori*."

Do we want in this rule to specify jurisdiction to order pre-action disclosure against a nonparty?

It was said, in reaction, that this would raise difficult problems in civil law countries.

Rule 28

This rule is acceptable and a good compromise.

Rule 28.2 is important because record done by the judge or clerk is often misleading. In addition, it is not possible for the lawyer to ask for too many corrections. This is a good criticism against civil law procedure that should be accepted.

We should also allow the court to order a verbatim transcript. In some cases, in some cases, it is indispensable. It is easy and not costly.

What happens to the record once it is generated? Who has access to it, and in what circumstances?

In what form will the record be taken?

Rule 29

This rule is acceptable.

Rule 29.1 says that "After the presentation of all evidence, each party is entitled to present a written submission of its contentions". How does that relate to the extensive obligation to state law? Isn't it a little late to invite the parties to present a written submission of their contentions? In commercial practice in England, there are the "skeleton arguments," in order to enable barristers and solicitors to set out in brief form the main legal submissions to be considered at the plenary hearing. It reduces the element of surprise and increases efficiency, but lawyers tend not to be succinct and this can be a source of prolixity.

Why is Rule 29.1 here, when the Rule related to plenary hearing is 25?

Rule 29.2 is correct in saying that the judge has to avoid undue delay.

Another thing that might be considered is to enable the court to give judgment initially in oral form, in very succinct way (such as "for the defendant" or "for the plaintiff,") with reasons to be supplied in due course. Reasons are very time consuming.

There are some problems, however, when the parties do not agree to waive their right to a motivated decision. In addition, to give a decision, one must have motives. Sometimes, the judge gives an oral decision, but when the judge has to explain it, he may arrive at a different decision. It is very difficult to give an oral judgment fully congruent with the final judgment.

We should give the choice between an oral statement or a written statement. We do not need to force the judge to produce written statements.

Some decisions do not have reasoning, such as default judgments, or judgments after admission.

Should judicial decisions be motivated? This is a very exciting question. Should we provide for a maximum or minimum length? In England, many first instance decisions have hundreds of pages. In other systems, there is extreme brevity.

In some countries, however, the need for a motivated decision is a constitutional mandate.

The last sentence ("Issues of fact shall be determined according to the applicable law governing burden of proof") is misleading. The Rule wants to say that the burden of proof is governed by international law and the law applicable to the case. In comment C-29.5, it is said that "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". However, the text is different than the comment.

Rule 30

This question is fundamental and this rule is acceptable. This rule is an attempt to compromise. This compromise appears to be too open. We should discuss the possibility of a more certain compromise.

Those rules are not helpful when the attorneys' fees are very different from most countries. We could deal with the rule of costs, but we cannot make a rule for attorneys' fees.

Attorneys' fees usually generate satellite litigation, and divert the attention of the court from more important matters.

This rule is fundamental, but too detailed. Rule 30.1 says "Each party initially pays its own costs and expenses, including court fees." However, in France, for example, the plaintiff does not pay court fees at the beginning. The parties wait until the end of litigation and it depends on the result of the case.

The question of costs is very close connected with the question of settlement because there is a fundamental difference in philosophy between the United States and England which is reflected, embodied, in the basic attitude to costs. In England, the plaintiff and the defendant are at risk for costs. On the one hand, this might be considered impairment to the access to justice. On the other hand, it deters improper claims and defenses.

Rule 30.5 is radical ("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"). This means that if plaintiff lost the case, the judge can make an exception to the normal cost rule. This may be a

necessary compromise, but there will be no disciplinary effect in the operation of the cost rule: if the plaintiff has hope that the judge will not apply the fee shifting, he or she will not be deterred.

The French Code allows the judge to sanction the lawyer who brought a case without any reasonable basis or is prolonging the case, etc. Those two things are connected: the question of costs and the question of sanctions.

Rule 31

Rule 32

Rule 33

Rule 34

Rule 35

Rule 36

Due to lack of time, the Working group could discuss only the first 30 rules of the project, regarding first instance proceedings.

The group was reminded that this discussion was at the same time a discussion of a preexisting document and a fresh start. The Principles provided to the group were a tool to approach the current draft of the Rules and the content of the future product. Since we are in the beginning of the project, it is possible that the group turn everything up side down in the future. All is open.

It was also reminded that the juxtaposition and reconciliation between traditional common law and traditional civil law approaches is not the primary objective of this exercise. The overriding objective should be to come up with something useful for the purpose of transnational litigation. The fact that a rule has a common or civil law origin has no importance in this deliberation.

There is also the language problem. The ideal would be to have bilingual discussions without interpretation and translations. If this is not possible, we should have alternate solutions to this ideal.

We have also to deal with the problem of observers. This meeting did not have observers. The usual organizations will be invited to participate as long as we think that their presence would make a contribution. Once we decide to invite someone as an observer, that person is invited to actively participate in the discussions.

For example, the International Bar Association and the European Court of Justice expressed interest in participating in the discussion. An open question is national and international arbitration organizations. Some of them explicitly asked to be kept posted. We are not primarily interested in arbitration, but in litigation. However, they have a very rich experience and could contribute to the project.

In disagreement, it was said that we need expertise in these matters, but expertise does not necessarily coincide with institutions. We should choose the observers on a personal basis, not sent by an institution.

A proper way of exchange is to have a transparent process, publish the drafts in the Internet and publish articles about the project. ALI and UNIDROIT will publish the drafts in their web site. This is a decision for the Working Group. Some members, however, considered that this is a rough draft and we should wait to put it in the Internet.

It was considered that the expertise of the group should be widened. We should invite other competent people for their individual skills and competence in the subject matter. We should also have a more global representation in the group, to embrace other regions of the globe, such as Asia, Africa, and former socialist countries.

It was considered important to prepare a bullet point document, in single sentences, with the primary aims and objectives of this project. This would assist in clarifying our own ideas. It would also be easier to communicate the nature of this project to interested people.

It was answered that this statement would be encompassed by the deliberation and document coming out of the 1999 session of the UNIDROIT Governing Council.

A member wondered whether the group was already in the position to indicate what are precisely the objectives. This could be picked up as one of the points to be further explored in the following sessions.

The next draft could have a one-page statement of purposes.

Considering that so many abstract comments were made in this meeting, a member suggested that all members should send to the Reporters and UNIDROIT Secretariat, within two months, written comments with more concrete suggestions. Then, the Reporters would prepare a new version of the project, send to the members again for comments by January 1st, revise the project in light of the reactions, and produce a final draft by March 15th. This draft should be the basis for discussion in the next meeting.

The Reporter accepted this suggestion and mentioned that those comments should bring small as well as great suggestions: "from larger, more fundamental questions all the way down to the semicolons".

A member, however, said that did not want to make any comments before seeing a new draft and reading the transcript.

In reaction, it was mentioned the inconveniences of a procedure of exchange of written comments between a member and the reporter, because of the lack of discussion within the group. One member may be more diligent than others regarding certain point and persuade the Reporter about changing some rule. The group may be surprised in the future with the changes. This applies also for the "second round" of exchange of written comments proposed in the previous paragraphs. Therefore, it is better not to be over ambitious, and have only personal discussions on the basis of the Report and the revised version of the Project. This might prolong the procedure, but it may be a mistake to try to have a "virtual session" through written exchanges.

It was decided that the Executive Secretary, Mr. Antonio Gidi, would produce the Report of the meeting. This is a daunting task and will take a long time to be completed, because it should not be a transcript, but a Report of the meeting.

It was considered that the next draft would not be perfect. The Reporters will do the best they can, but other meetings will be necessary. The formulations will be considered improved, but the underline differences in conception will remain. Further controversy and deliberation will be necessary.

It was decided that the ALI would continue to have meetings about the Rules.

The Working Group thanked and congratulated the Chairman, Mr. Ronald T. Nhlapo, for conducting the meeting with good humor, contributing for the creation a pleasant atmosphere.

It was decided that the next meeting would be held in Rome, in the first week of July.

The Chairman declared the meeting officially closed, and kindly invited the members of the Working Group for a photograph in the gardens of the Villa Aldobrandini.

Appendix

Stürner's Principles

Andrews's Principles

French Code of Civil Procedure (selected provisions)

Stürner's Principles

Fundamental Principles of Civil Procedure – A First Continental Approach –

1. Control of the initiation and termination of a lawsuit

The parties control the initiation of the action and its voluntary termination by withdrawal, admission or settlement.

2. The court's and the parties' responsibility to promote the case

It is the court's duty to manage cases actively, to decide the order in which issues are to be resolved and to give directions to ensure that the case proceeds quickly and efficiently. The court acts on its own motion to set dates and times for a hearing and deadlines for submission of briefs and papers. The parties help the court to further the due administration of justice.

or

The parties act in due course as required by their procedural obligations and apply to the court to set dates and times for hearings and to fix deadlines.

The court is / the parties are required to serve the claim form, pleadings, documents and summons.

3. Party control and scope of the proceeding

The scope of the proceedings is governed by the parties' formal claims for relief.

The claims for relief determine the scope of *lis alibi pendens*, the scope of the judgement and the scope of claim preclusion or cause of action estoppel.

or

The formal claim for relief determines only the scope of the judgement and the execution. The scope of *lis alibi pendens* and claim preclusion or cause of action estoppel covers all possible claims for relief and all facts as they could have been reasonably presented in court.

4. Parties' responsibility for facts

The parties have the responsibility to bring forth all relevant facts necessary to sustain their claim or defence.

The court confines its consideration to facts from those sources which have been brought forward or have been identified by the parties.

The parties can agree on the facts governing the proceeding and the truth of a fact may only be examined within the borders set for the court by the parties.

5. Parties' responsibility for evidence

The parties are responsible for describing the proof for each contested factual allegation of their claim or defence and to identify exactly the source of that proof.

It is the obligation of the parties to cooperate with the taking of evidence. In case of an unjustified refusal the court may draw the inference that the proof would not have favoured the contentions of the refusing party.

6. The court's responsibility for questions of law, for facts and evidence

a) Responsibility for questions of law

The court pursues its own research for the correct legal basis for its decision (“Da mihi facta dabo tibi ius”).

The court may rely on legal arguments which the parties have overlooked or considered insignificant only after having given them a fair opportunity for comment and change of their pleadings.

If the parties have agreed on the legal basis for decision, the court should accept their legal arguments.

or

The parties are responsible for providing the court with the correct legal basis for its decision. The court may give judgement on legal grounds not considered by the parties after having given them a fair opportunity for comment and change of their pleadings.

b) The Court's responsibility for facts

The court may give hints and feedback and may indicate where the parties have not particularized all relevant facts or where the parties have asserted contradictory or unclear facts.

c) The Court's responsibility for evidence

The court may give hints and feedback in case a party fails to describe the proof on a disputed factual issue, to name a source of a proof or to offer sufficient means of proof.

The court controls the evidence by giving directions as to the relevant issues on which it requires evidence as well as to the nature of the required evidence to decide those issues.

The court may order the taking of evidence on the motion of the parties or on its own motion.

7. Due notice and right to be heard

The court may not grant relief on a claim or application unless the defendant or respondent has had the opportunity to appear and defend or to submit counter-considerations. Where an application is made without notice to the respondent, the respondent has a right to apply to have the decision set aside or varied.

The court is required to consider and address each significant contention of fact and law which has been put forward by a party. The court may not base a decision on a legal or factual proposition or on evidence which the affected parties had not the opportunity to address.

The parties have to ensure that each party receives notice in due time of the other side's case, intended arguments and means of proof.

8. Principle of promoting settlements

The court should encourage voluntary settlement at all stages of the proceedings.

The court is authorized to discuss with the parties the terms of settlement in settlement hearings or conferences.

The court may encourage the parties to use an alternative dispute resolution.

9. Principle of Orality – Written proceedings

The parties present their claims and arguments orally before the court, and witnesses and expert witnesses give evidence orally before the court, too. The court may hear the parties in person.

Preparatory proceedings may be in written form. Parties are required to file and exchange written pleadings, briefs and documents. Hearings and trial dates may be prepared by written witness statements or written expertises. The court may allow these statements to be accepted by the parties as evidence in lieu of oral examination.

10. Principle of Publicity

Main hearings and trials are open to the public.

Part or all of the civil proceeding may be closed if a public hearing of the subject matter is likely to injure important interests of a party or witness.

11. Equal access to justice

The court ensures that both parties have equal access to justice, both formally and substantively.

12. Principle of justice in a reasonable time

The court and the parties deal with the cases in a reasonable period of time.

Procedural rules or court orders may establish time tables for the progress of the case. Sanctions will be applied to parties who do not comply with the timetables.

In cases of urgent necessity the court may grant accelerated justice by provisional measures.

13. Principle of immediacy

The main hearing or trial is held before the judge or judges giving the judgement.

The court is authorised to delegate the taking of evidence to one of its members or in special cases to another court.

14. Principle of the law of evidence

a) Right to proof

The parties have, in principle, the right to unrestricted access to all evidence.

b) Strict relevancy to the action or defence

The court controls the strict relevancy of discovery or evidence to the action or defence from the very beginning of the suit. The court may permit fishing expeditions only in exceptional cases.

c) Privileges of third persons (non-parties)

Third persons may refuse to give evidence under the protection of the following privileges: privilege against self-incrimination, privileges protecting the confidentiality of professional communications, privileges of spouses and family members.

d) Court conducted examination

The examination of witnesses, expert witnesses or parties is conducted by the court or a member of a court. The court or court member permits further direct and supplemental questioning by the parties.

e) *Free evaluation of proof*

The court's consideration of all evidence is governed by the principle of free admissibility and free evaluation of proof. Evidentiary rules may govern the admissibility, exclusiveness and evaluation of documentary evidence.

f) *Standard of proof*

Asserted facts are proved when the court is fully convinced of the truth without any reasonable doubts.

or

Standard of proof is the preponderance of evidence.

15. Structure of civil proceedings

The civil proceeding is divided into three stages: the initial written stage with the service of process, the statement of defence and the exchange at written pleadings; the pretrial stage with the taking of evidence ("instruction phase" in France, Italy, Spain) or with its preparation of the final hearing and of the taking of evidence at trial (Austria, Germany); the final hearing as a stage of legal decision ("construction phase" in France, Italy, Spain) or as a stage of the taking of evidence and of legal decision (Austria, Germany). Continental civil proceedings do not know a special preparatory stage where the parties can discover and gather new facts and evidence.

Andrew's Principles

Fundamental Features of English Civil Justice

- (1) Ensuring Access to Justice
- (2) Selection of Legal Representative of One's Own Choice
- (3) Legal Consultation: Constitutional Status of Legal Advice Privilege
- (4) Ensuring Equal Opportunity for Litigants to Assert or Defend their Rights
- (5) Proportionality
- (6) Specialisation
- (7) The Court as Custodian of Justice: The 1999 Assault on the Adversarial Principle
- (8) Principle of Procedural Equity
- (9) The Principle of Fair Play Between the Litigants
- (10) Procedural Privity
- (11) Promoting Settlement
- (12) Simplicity and Transparency
- (13) Effectiveness: Justice to be neither Evaded nor Warped
- (14) Protection against Spurious Claims and Defences
- (15) Accelerated Justice and the Avoidance of Undue Delay
- (16) Pre-trial Disclosure
- (17) The Principle of Due Notice
- (18) Judicial Independence and Impartiality
- (19) Publicity or Open Justice
- (20) Qualified Judicial Duty to Give Reasons
- (21) Oral Proceedings
- (22) Accuracy
- (23) Finality
- (24) Institutional and Professional Support

French Code of Civil Procedure

Nouveau Code de Procédure Civile¹

Book I

Common dispositions
for all jurisdictions

Title I

Preliminary dispositions

Chapter I

The directive principles of the proceedings

Section I

The instance

Art. 1. Only the parties introduce the instance, except when the law disposes differently. They are free to finish the instance before it is extinct by effect of the judgment or in virtue of the law.

Art. 2. The parties conduct the instance under the burdens prescribed to them. The parties shall accomplish the acts of the proceedings in the forms and time frame prescribed.

Art. 3. The judge controls the right evolution of the instance. He has the power to grant the extensions and to order the necessary measures.

Section II

The object of the litigation

Art. 4. The object of the litigation is determined by the claims of the parties (*prétentions*). These claims (*prétentions*) are determined by the statements of claims and defense. However, the object of the litigation can be modified by the incidental claims whenever they are connected to the original claims (*prétentions*) by a “sufficient” link.

Art. 5. The judge shall pronounce about all that is demanded and only about what is demanded.

Section III

The facts

Art. 6. In support of their claims (*prétentions*), the parties have the burden to allege the facts suited to support them.

Art. 7. The judge cannot base his decision on facts that were not brought into the debate. Among the elements of the debate, the judge can take into consideration even the facts that the parties have not specifically invoked in support of their claims (*prétentions*).

Art. 8. The judge can invite the parties to supply the explanations of fact that he considers necessary to the solution of the litigation. {See art. 13}

¹ Translated by Antonio Gidi. Whenever possible, preference was given to a literal translation, as an introduction to the civil law formal reasoning.

Section IV

The proofs

Art. 9. It is the burden of each party to prove, according to the law, the facts necessary to the success of her claim (*prétention*).

Art. 10. The judge has the power to order *ex officio* all the “*measures of instruction*” legally admissible.

Art. 11. The parties have to supply their concurrence to the “*measures of instruction*”, save to the judge to infer all the consequences of an abstention or a refusal.

If a party possesses an element of proof, the judge can, by request of the other party, compel him to produce it under penalty of *astreinte*. He can, by request of one of the parties, ask or order, under the same penalty, the production of all documents possessed by third parties, if there is no legal impediment.

Section V

The law

Art. 12. The judge decides according to the applicable rules of law.

He shall give the exact qualification to the facts and litigious act without being limited by the denomination proposed by the parties.

He can raise *ex officio* the rules of law that are the legal foundation invoked by the parties.

However, he cannot change the denomination or the legal foundation when the parties, in virtue of an express agreement and about rights that they have the free disposition, want to limit the debate to these qualifications and issues of law.

Once the litigation is began, the parties also can, within the same matters and under the same conditions, confer the judge the mission of acting as amicable mediator, with the right to appeal, if they have not renounced them.

Art. 13. The judge can invite the parties to supply the explanations of law that he considers necessary to the solution of the litigation. {See art. 8}

Section VI

The contradictory

Art. 14. No party can be judged without being heard or served.

Art. 15. The parties shall make known to each other in due course the elements of fact under which their claims (*pretentions*) are based, the elements of proof that will be produced and the elements of law that will be invoked, so that each party has opportunity to organize their defense.

Art. 16. The judge shall, in all circumstances, make observe and observe himself the principle of the contradictory.

He cannot use, in his decision, the elements, the explications and the documents invoked or produced by the parties if there is no opportunity for a contradictory debate.

He cannot base his decision on the elements of law that he invoked *ex officio* without having before inviting the parties to present their observations.

Art. 17. When the law allows or the necessity command that a measure be ordered against a party, she has an appropriate recourse against the decision that caused harm.

Section VII

The defense

Art. 18. The parties can defend themselves, except when the representation is compulsory.

Art. 19. The parties choose freely their advocates to be represented or assisted according to what law permits or order.

Art. 20. The judge however can hear parties themselves.

Section VIII

The conciliation

Art. 21. Among the missions of the judge is the one to reconcile the parties.

Section IX

The debates

Art. 22. The debates are public, except the cases where the law compels or permit that they take place *in camera*.

Art. 23. The judge does not have to use an interpreter when he knows the language in which the parties express themselves.

Section X

The duty of respect

Art. 24. The parties have to observe the respect due to the justice.

The judge can, according to the gravity of the breaches, pronounce even *ex officio*, injunctions, cancel the writings, the calumnious declarations, and order the printing and filing of his judgments.