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

Draft Principles and Rules prepared by  
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# INTRODUCTION

## **I. International “Harmonization” of Procedural Law**

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

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

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

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

<sup>2</sup> See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 8 I.L.M. 37; Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229, reprinted as amended in 29 I.L.M. 1413; Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept 16, 1988, 28 I.L.M. 620. See also, e.g., Catherine Kessedjian, Hague Conference on Private International Law, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (April 1997).

jurisdiction and the mechanics for service of process to commence a lawsuit on one end of the litigation process and recognition of judgments on the other end of the process.

However, the pioneering work of Professor Marcel Storme has demonstrated that harmonization is possible in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure.<sup>3</sup> This project to develop rules for transnational civil procedure has drawn extensively on the work of Professor Storme.

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

This project endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international commercial transactions.<sup>6</sup> The project is inspired in part by the Approximation project led by Professor Storme, mentioned above; in part by The American Law Institute project on Transnational Insolvency; and in part by the successful effort in the United States a half-century ago to unite many diverse jurisdictions under one system of procedural rules with the adoption of the Federal Rules of Civil Procedure. The Federal Rules established a single procedure to be employed in courts sitting in 48 different semi-sovereign states, each of which with its own procedural law, its own procedural culture, and its own bar. The Federal Rules thereby accomplished what many thoughtful observers thought impossible — a single system of procedure for four dozen different legal communities. Experience with the Federal Rules proves that it has been possible to establish a single procedure for litigation in Louisiana (civil-law system), Virginia (common-law pleading in 1938), and California (code pleading). The project to establish Rules and Principles of Transnational Civil Procedure conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

## **II. UNIDROIT Partnership**

In 2000, after a favorable report from Professor Rolf Stürner, the International Institute for the Unification of Private Law (UNIDROIT) joined the ALI in this project. Professor Stürner has been a Reporter, appointed by UNIDROIT, since 2001. It was at UNIDROIT's initiative that the preparation of Principles of Transnational Civil Procedure was undertaken. The Principles inform the interpretation of the Rules, the more detailed body of procedural law. The project thus now encompasses both levels.

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

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

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

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

The Principles generally appeal to the civil-law mentality. Common-law lawyers may be less familiar with this sort of generalization. Since the Principles and Rules are being developed simultaneously, the relation between generality and specification is illuminated more sharply. The Principles are interpretive guides to the Rules and could be adopted as principles of interpretation. They could also be adopted as guidelines in interpreting existing national codes of procedure. Correlatively, the Rules can be considered as an exemplification or implementation of the Principles.

During May 22-26, 2000, the ALI/UNIDROIT Working Group had a preliminary meeting in the UNIDROIT Headquarters in Rome. In this meeting, three proposals for Principles were extensively discussed. One was presented by Reporters Hazard, Taruffo, and Gidi, another by Reporter Rolf Stürner, and another by Professor Neil Andrews of the Working Group. The group also extensively discussed the previous draft of the Transnational Rules. From July 2-6, 2001, the ALI/UNIDROIT Working Group had its second meeting in Rome.

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

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

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

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

Of these, the rules of jurisdiction, notice, and recognition of judgments are sufficiently similar from one country to another that they have been susceptible to substantial resolution through international practice and formal conventions. Concerning jurisdiction, the United States is aberrant in that it has an expansive concept of “long-arm” jurisdiction, although this difference is one of degree rather than one of kind, and in that it perpetuates jurisdiction based on simple presence of the person (“tag” jurisdiction). Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator should be disinterested. Accordingly, in

transnational litigation reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system by definition requires a principle of finality. Therefore, the concept of “final” judgment is also generally recognized, although some legal systems permit the reopening of a determination more liberally than other systems do. The corollary concept of mutual recognition of judgments is also universally accepted.

#### **IV. Differences Among Procedural Systems**

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

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

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

These are important differences, but they are not irreconcilable.

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

- Jury trial is a broadly available right in the American federal and state courts. No other country routinely uses juries in civil cases.

- American rules of discovery give wide latitude for exploration of potentially relevant information and evidence.
- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common-law systems. In part this is because of the use of juries.
- The American system operates through a cost rule under which each party, including a winning party, ordinarily pays that party's own lawyer and cannot recover that expense from a losing opponent. In most all other countries, except Japan and China, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.<sup>7</sup>
- American judges are selected through a variety of ways in which political affiliation plays an important part. In most other common-law countries judges are selected on the basis of professional standards.

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

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

The rules governing formulation of claims are substantially similar in most legal systems. The pleading requirement in most common-law systems requires that the claimant state the claim with reasonable particularity as to facts concerning persons, place, time, and sequence of events involved in the relevant transaction. This pleading rule is essentially similar to the Code Pleading requirement that governed in most American states prior to adoption of the Federal Rules of Civil Procedure in 1938.<sup>8</sup> The attempt in the Federal Rules of Civil Procedure to eliminate disputes over pleading through the technique of "notice pleading" has been largely unsuccessful because it simply postpones disputes concerning the sufficiency of a claim until later stages in the litigation. The Principles and Rules require that pleading be in detail with particulars as to the basis of claim and that the particulars reveal a set of facts that, if proved, would entitle the claimant to a judgment.

## **VI. Discovery**

The pleading rule requiring specific allegations of fact reduces the potential scope of discovery, because it provides for tightly framed claims and defenses from the very beginning of the proceeding. Moreover, that rule of pleading contemplates that a party who has pleaded specific facts will be required to reveal, at a second stage of the litigation, the specific proof on which it intends to rely concerning these allegations, including documents, summary of expected testimony of witnesses, and experts' reports.

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<sup>7</sup> See generally Hughes and Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995); A. Tomkins and T. Willging, *Taxation of Attorney's Fees: Practices in English, Alaskan and Federal Courts* (1986). See also, e.g., A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1963); T. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. REV. 651.

<sup>8</sup> L. Tolman, *Advisory Committee's Proposals to Amend the Federal Rules of Civil Procedure*, 40 A.B.A. J. 843, 844 (1954); F. James, G. Hazard, and J. Leubsdorf, *Civil Procedure* §§ 3.5, 3.6 (5th ed. 2001).

The Principles and Rules require disclosure of these sources of proof before the plenary hearing. These requirements presuppose that a person properly may commence litigation only if the claimant has a provable case and not merely the hope or expectation of uncovering such a case through discovery from the opposing party.

The combination of strict rules of pleading and compulsory disclosure further reduces the necessity of additional exchange of evidence. A party generally must show its own cards, so to speak, rather than getting them from an opponent. Within that framework, the Rules attempt to define a limited right of document discovery and a limited right of deposition. These are regarded as improper in many civil-law systems. However, in a modern legal system, there is a growing practical necessity — if one is serious about justice — to permit document discovery to some extent and, at least in some cases, deposition of key witnesses.

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

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

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

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

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

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

event, the standard for production under the civil law appears uniformly to be “relevance” in a fairly strict sense.

## **VII. Procedure at Plenary Hearing**

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

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

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

The Principles and Rules defer to the law of the forum concerning second-instance proceedings (“appeal”). The same is true for further review in a higher court, as is available in many systems. The Principles and Rules define conditions of finality that discourage the re-opening of an adjudication that has been completed. An adjudication fairly conducted is the best approximation of true justice that human enterprise can afford. On that basis, an adjudication should be left at rest even when there may be some reason to think that a different result could be achieved, unless there is a showing of fraud in the proceeding or of conclusive evidence that was previously undisclosed and not reasonably discoverable at the time. The Rules adopt an approach to finality based on that philosophy.

## **IX. Recognition of the Principles and Rules**

The Principles express basic concepts of fairness in resolution of legal disputes prevailing in modern legal systems. Most modern legal systems could implement the Principles by relatively modest modifications of their own codes of civil procedure. More substantial modification would be required in systems in which a party ordinarily has no opportunity to obtain evidence in its favor from an opposing party. The Rules are a suggested implementation of the Principles, providing greater detail and illustrating



concrete fulfillment of the Principles. Both Principles and Rules seek to combine the best elements of adversary procedure in the common-law tradition with the best elements of judge-centered procedure in the civil-law tradition. They are expressed in terminology and through concepts that can be assimilated in all legal traditions. The Principles and the Rules could also apply in arbitration proceedings.

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

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

These Principles and Rules can also serve as models in the reform of various basic procedural systems.

## **X. Purpose of These Principles and Rules**

The objective of these Principles and Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from transnational commercial transactions. Appreciating that all litigation is unpleasant from the viewpoint of the litigants, the Principles and Rules seek to reduce the uncertainty and anxiety that particularly attend parties obliged to litigate in unfamiliar surroundings. The reduction of difference in legal systems, commonly called “harmonization” of law, is an aspect of achieving such fairness. However, a system of rules is only one aspect of fair procedure. Much more important, as a practical matter, is the competence, independence, and neutrality of judges and the competence and integrity of legal counsel. Nevertheless, rules of procedure are influential in the conduct of litigation.

These Principles and Rules seek to express, so far as such formulations can do so, the ideal of disinterested adjudication. In this regard, they also can provide terms of reference in matters of judicial cooperation, wherein the courts of different legal systems provide assistance to each other. By the same token, reference to the principles expressed herein can moderate the unavoidable tendency of practitioners in a legal system, both judges and lawyers, to consider their system from a parochial viewpoint.

The Rules prescribed for pleading, development and presentation of evidence and legal argument, and the final determination by the tribunal (Rules 11 through 32), may be adopted or referenced in proceedings not otherwise governed by these Rules, particularly arbitration. Also, a court could refer to the Principles and Rules as generally recognized standards of civil justice, when doing so is not inconsistent with its own organic or procedural law.

It is contemplated that, where adopted, the Rules would be a special form of procedure applicable to the disputes to which they are addressed, parallel to other specialized procedural rules that most nation states have for such matters as bankruptcy,

administration of decedent's estates, and civil claims against government agencies. Where permissible by forum law, with the consent of the court, the Rules could also be adopted through stipulation by parties to govern litigation between them. Such an implementation in substance would be a party stipulation to waive the otherwise governing rules of procedure in favor of these Rules.

## XI. Revisions from Prior Drafts

Prior drafts of the Rules have been published. See 30 CORNELL INT'L L.J. 493 (1997), 33 TEX. INT'L L.J. 499 (1998), and 33 N.Y.U. J. INT'L L. & POL. 769 (2001). These drafts, together with the previous Discussion Draft No. 2 (2001) and Council Draft No. 1 (2001), have elicited valuable criticism and comments from legal scholars and lawyers from both civil- and common-law systems.<sup>11</sup> Comparison will demonstrate that

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<sup>11</sup> See, more recently, VERS UN PROCES CIVIL UNIVERSEL? LES REGLES TRANSNATIONALES DE PROCEDURE CIVILE DE L'AMERICAN LAW INSTITUTE (Philippe Fouchard ed., 2001): Michele Taruffo, *La Genèse et la finalité des Règles Proposées par l'American Law Institute*; Pierre Mayer, *L'Utilité des Règles Transnationales de Procédure Civile: Une vue Critique*; Horatia Muir Watt, *Quelle Méthode?*; Marie-Laure Niboyet, *Quels Litiges?*; Hélène Gaudemet-Tallon, *Quel Judge?*; Geoffrey Hazard, *Le Déroulement du Procès*; Jacques Normand, *La Confrontation des Principes Directeurs*; Catherine Kessedjian, *Quelques Réflexions en Matière de Preuves*; Loïc Cadiet, *Quelles Preuves? Discovery, Témoins, Experts, Rôle Respectif des Parties et du Juge*; Antonio Gidi, *Vers un Procès Civil Transnational. Une Première Réponse aux Critiques*; Philippe Fouchard, *Clôture*; Gabriele Mecarelli, *Les Principes Fondamentaux et les «nouvelles» Règles de Procédure Civile Transnationale: Premières Observations*.

See also Hazard, Taruffo, Stürner, and Gidi, *Principles and Rules of Transnational Civil Procedure*, 33 N.Y.U. J. INT'L L. & POL. 769 (2001), ESSAYS ON TRANSNATIONAL AND COMPARATIVE CIVIL PROCEDURE (Federico Carpi and Michele Lupoi, eds. 2001), Gerhard Walter and Samuel P. Baumgartner, *Improving the Prospects of the Transnational Rules of Civil Procedure Project: Some Thoughts on Purpose and Means of Implementation*, 18 KITSUMEIKAN L. REV. 169 (2001), Rolf Stürner, *Règles Transnationales de Procédure Civile? Quelques Remarques d'un Européen sur un Nouveau Projet Commun de l'American Law Institute et d'UNIDROIT*, R.I.D.C. 845 (2000); Rolf Stürner, *Some European Remarks on a New Joint Project of The American Law Institute and UNIDROIT*, 34 INT'L LAW. 1071 (2000); Antonio Gidi, *Presentación del Proyecto de Normas Transnacionales del Proceso Civil*, 52 DERECHO PUC 607 (1999); Antonio Gidi, *Normas Transnacionais de Processo Civil*, 8 REVISTA DOS MESTRANDOS EM DIREITO ECONÓMICO DA UFBA 54 (2000); José Lebre de Freitas, *O Anteprojecto Hazard-Taruffo para o Processo dos Litígios Comerciais Internacionais*, 2 THEMIS. REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE NOVA DE LISBOA 19 (2000); Eduard Kunštek, *Transnacionalna Pravila Gradanskog Postupka*, 21 ZBORNIK PRAVNOG FAKULTETA SVEUČILIŠTA U RIJECI 351 (2000); Antonio Gidi, *Apresentação às Normas Transnacionais de Processo Civil*, 8 REVISTA DOS MESTRANDOS EM DIREITO ECONÓMICO DA UFBA 40 (2000) [Brazil], also published in 52 DERECHO PUC 593 (1999) [Peru], in ROMA E AMERICA 335 (2000) [Italy] and in 102 REPRO 185 (2001) [Brazil]; Gerhard Walter & Samuel P. Baumgartner, *Improving the Prospects of the Transnational Rules of Civil Procedure Project: Some Thoughts on Purpose and Means of Implementation*, 6 ZEITSCHRIFT FÜR ZIVILPROZEB INTERNATIONAL (2000), also published in 18 KITSUMEIKAN L. REV. 169 (2001), Samuel P. Baumgartner, *Gaining a Worldly Perspective for the World in Our Courts*, unpublished manuscript (on file with ALI), Joaquim-J. Forner Delaygua, *El Proyecto del American Law Institute 'Transnational Rules of Civil Procedure': La Cooperación Judicial*, 0 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO 275 (2000), Geoffrey C. Hazard, Jr., *Litigio Civil Sin Fronteras: Armonización y Unificación del Derecho Procesal*, 52 DERECHO PUC 583 (1999), and Geoffrey C. Hazard, Jr., *Civil Litigation Without Frontiers: Harmonization and Unification of Procedural Law*, 52 DERECHO PUC 575 (1999).

See also Gary Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998), Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998), Jacob Dolinger and Carmen Tiburcio, *The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign*

many modifications have been adopted as a result of discussions and deliberations following those previous publications. The net effect can be described as a new text.

Earlier drafts of the Rules were translated into Russian, into German by Gerhard Walter from Bern University; into Japanese by Koichi Miki from Keio University; into French by Gabriele Mecarelli from Paris University; into Chinese by Chen Rong and Chi-Wei Huang; into Italian by Francesca Cuomo and Valentina Riva from Pavia University; into Croatian by Eduard Kunštek; into Spanish by Evaluz Cotto from Puerto Rico University, Franciso Malaga from Pompeu Fabra University, Aníbal Quiroga León from Catholic University of Peru, Horácio Segundo Pinto from the Catholic University of Argentina, and Lorena Bachmaier Winter from Universidad Complutense de Madrid; and into Portuguese by Associate Reporter Antonio Gidi from the University of Pennsylvania. It is hoped that there will be translations into additional languages in the future.

The numerous revisions of the Principles and Rules emerged from discussions at several locations with Advisers and Consultants from various countries, including meetings in Bologna and Rome, Italy; Freiburg, Germany; Barcelona, Spain; Vancouver, Canada; San Francisco, Washington, and Philadelphia, United States; Vienna, Austria; Tokyo, Japan; Singapore; Paris, France; Mexico City, Mexico; and Beijing, China. Criticism and discussion also were conducted through correspondence.<sup>12</sup>

The project was the subject of extensive commentary and much candid and helpful criticism at an October 27, 2000, meeting of French proceduralists in Paris, in which participants included Judges Guy Canivet, Jacques Lemontey, and Jean Buffet, and Professors Bernard Audit, Georges Bolard, Loïc Cadiet, Philippe Fouchard, Hélène Gaudemet-Tallon, Serge Guinchard, Catherine Kessedjian, Pierre Mayer, Horatia Muir-Watt, Marie-Laure Niboyet, Jacques Normand, and Claude Reymond.<sup>13</sup>

On October 10 and 11, 2001, the project was presented in Renmin University, in Beijing to a large group of Chinese law professors, judges, arbitrators, and practicing attorneys. On October 13, 2001, the project was also presented in Tokyo for the second

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*Jurisdictions: Lex Fori or lex Diligentiae?*, 33 TEX. INT'L L.J. 425 (1998), Gerhard Walter and Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998), Catherine Kessedjian, *First Impression of the Transnational Rules of Civil Procedure from Paris and The Hague*, 33 TEX. INT'L L.J. 477 (1998), Geoffrey C. Hazard, Jr., *Transnational Rules of Civil Procedure: Preliminary Draft No. 1*, 33 TEX. INT'L L.J. 499 (1998), Michele Taruffo, *Drafting Rules for Transnational Litigation*, ZZPINT'L L.J. 449 (1997), and John Barcelo III, *Transnational Rules of Civil Procedure. Introduction*. 30 CORNELL INT'L L.J. 493 (1997).

<sup>12</sup> For the present draft, we received written contributions from Lucio Cabrera Acevedo, Neil Andrews, Samuel Baumgartner, Stephen Burbank, Edward Cooper, Thomas Cope, Sheldon Elsen, Carl Goodman, Richard Hulbert, Mary Kay Kane, Richard Marcus, Ramón Mullerat-Balmaña, Thomas Rowe, Julius Towers, Gerhard Walter, Lorena Bachmaier Winter, and Rodrigo Zamora.

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<sup>13</sup> See *VERS UN PROCES CIVIL UNIVERSEL? LES REGLES TRANSNATIONALES DE PROCEDURE CIVILE DE L'AMERICAN LAW INSTITUTE* (Philippe Fouchard ed., 2001).

time to a small group of Japanese experts. On February 28, 2002, the project was presented in the Mexican Center for Uniform Law and on March 1, 2002 in the UNAM Law School. The meetings were organized in Mexico City by Jorge Sánchez Cordero and Carlos Sánchez-Mejorada y Velasco. From March 7 to 9, 2002, an intensive review was conducted by the Reporters, meeting at Freiburg, Germany.

It is hoped that this process of continuing dialogue has made the Principles and Rules more understandable and therefore more acceptable from both common-law and civil-law perspectives.

## **XII. Future Work**

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

This Discussion Draft is still a “work in progress.” Intensive discussions of the Principles and Rules are to be held at The American Law Institute Annual Meeting in May, 2002, in Washington and in the UNIDROIT Working Group at UNIDROIT headquarters in Rome from May 27 to 31, 2002. On May 24, 2002, the project will be presented in London, in a conference being organized by Professor Neil Andrews of Cambridge University. On June 4, 2002, the project will be presented in Moscow, in a conference organized by Roswell Perkins.

We expect also to have discussions of these texts in the coming year in several other countries. We expect to present a further revision in the next year or two.

Subsequent drafts will incorporate further revisions of the Principles and Rules. The latest version will be accessible at The American Law Institute’s website (<http://www.ali.org/ali/transrules.htm>).

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

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**PRINCIPLES OF TRANSNATIONAL  
CIVIL PROCEDURE**  
(with commentary)

**1. Purpose and Scope of Application**

**The procedure of a forum for adjudication of disputes arising from transnational commercial transactions should conform to these Principles.**

**Comment:**

*P-1A* The scope of application of these Principles is limited to transnational commercial disputes, although they are equally appropriate for most other kinds of civil disputes. Transnational commercial transactions include commercial contracts between nationals of different states and commercial transactions in a state by a national of another state, including sale, lease, loan, investment, acquisition, banking, security, property (including intellectual property), and other business or financial transactions.

*P-1B* These principles do not apply to transactions that arise wholly within a state and involve disputing parties who are nationals of the same state.

*P-1C* For purposes of these Principles, an individual is considered a national both of a state of the person's citizenship and the state of the person's habitual residence; a corporation, société anonyme, unincorporated association, partnership, or other organizational entity is considered a national both of the state from which it has received its charter of organization and of the state where it maintains its administrative headquarters.

*P-1D* In cases involving multiple parties or multiple claims, these Principles apply in disputes where the court determines that the principal matters in controversy are within the scope of application of these Principles.

*P-1E* Forum law, when adopting these Principles may exclude categories of matters from application of these Principles and may extend application of these Principles to other civil matters.

**2. Independence, Competence, and Impartiality of the Court**

**2.1 The court should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper external influence and interference from other officials of the judicial system.**

**2.2 The judges and other members of the court should have reasonable tenure in office or be designated by a procedure assuring their independence, including the procedure for selection of any nonprofessional members of the court.**

**2.3 Judges should have substantial legal experience and legal knowledge.**

**2.4 The court should be impartial. There should be a fair and effective procedure for addressing reasonable and substantial contentions of judicial bias.**

**Comment:**

*P-2A* This Principle recognizes that typically judges serve for an extensive period of time, usually their careers. However, in some systems most judges assume the bench only

after careers as lawyers and some judicial officials are designated for short periods. The objective of this Principle is to avoid the creation of ad hoc courts.

*P-2B* A procedure for addressing questions of judicial bias is necessary only in unusual circumstances, but availability of the procedure is a reassurance to litigants, especially nationals of other countries.

### **3. Jurisdiction Over Parties**

**3.1 Jurisdiction over a party should be exercised when the connection between the forum state and the party or the transaction or occurrence in dispute is substantial. A substantial connection exists when a substantial part of the transaction or occurrence arose in the forum state, when a defendant is a habitual resident of the forum or has consented to jurisdiction in the forum, or when property to which the dispute relates is located in the forum.**

**3.2 Jurisdiction may be exercised, when no other forum is reasonably available, on the basis of:**

**3.2.1 Presence of the person;**

**3.2.2 Presence of the property, whether or not the dispute relates thereto.**

**3.3 Provisional measures may be provided with respect to a person or property in the forum state, even if the courts of another state have jurisdiction over the controversy.**

**3.4 Exercise of jurisdiction over a party may properly be declined on the basis of judicial discretion addressing the inconvenience of the court relative to some other forum.**

#### **Comment:**

*P-3A* The standard of “substantial connection” has been generally accepted for international legal disputes. That standard excludes mere physical presence, which within the United States is colloquially called “tag jurisdiction.” Mere physical presence as a basis of jurisdiction within the American federation has historical justification but is inappropriate in international disputes.

*P-3B* Principle 3.3 recognizes that a state may exercise jurisdiction by sequestration or attachment of locally situated property, even though the property is not the object or subject of the dispute. The procedure is called “quasi in rem jurisdiction” in some legal systems. Principle 3.3 contemplates that, in such a case, the merits of the underlying dispute may be adjudicated in some other forum.

*P-3C* The concept recognized in Principle 3.4 corresponds in common-law systems to the rule of forum non conveniens.

### **4. Procedural Equality of the Parties**

**4.1 The court should ensure equal opportunity for litigants to assert or defend their rights.**

**4.2 The right to equal opportunity includes avoidance of discrimination by reference to nationality, place of residence, sex, race, color, language, religion, political or other opinion, national or social origin, property, birth or other status, sexual orientation, or association with a national minority.**

**4.3 Special protection, such as conservatorship, should be afforded to protect the interests of persons who are minors or who otherwise lack full legal capacity.**

**4.4 A person must not be required to provide security for costs, or for liability for provisional measures, solely because that person is not a national or resident of the forum state.**

**4.5 Venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.**

**Comment:**

*P-4A* Some jurisdictions require a person to provide security for costs, or liability for provisional measures, in order to guarantee full compensation of possible future damages incurred by an opposing party. Other jurisdictions do not require such security, and some of them have constitutional provisions regarding access to justice or equality of the parties that prohibit such security. Principle 4.4 is a compromise between those two positions.

*P-4B* Special protection for a litigant, through a conservatorship or other protective procedure, should not be abusively imposed to disadvantage a foreign litigant.

*P-4C* Venue rules of the forum state generally reflect considerations of convenience for litigants within the country. A venue rule that would impose substantial inconvenience within the forum state should not be given effect.

**5. Right to Assistance of Counsel**

**5.1 A party has the right to be assisted by legal counsel of the party's choice; both representation by counsel admitted to practice in the forum, and assistance before the court of counsel admitted to practice elsewhere.**

**5.2 The professional independence of legal counsel should be respected. Counsel should be permitted to fulfill the duty of loyalty to a client and the responsibility to maintain client confidences.**

**Comment:**

*P-5A* A forum may appropriately require that a party be represented by counsel admitted to practice in the forum. However, a party should also be permitted the assistance of other counsel, particularly its regular counsel, who should be permitted to attend all hearings in the dispute.

*P-5B* The principles of legal ethics vary somewhat among various countries, but all countries should recognize that lawyers in independent practice are expected to advocate the interests of their clients and to maintain the secrecy of confidences obtained in the course of representation.

**6. Due Notice and Right to Be Heard**

**6.1 Notice, provided by means that are reasonably likely to be effective, should be directed to parties at the commencement of a proceeding. The notice should set forth the claims and defenses presented by another party. Notice should also be provided of important developments thereafter. A defendant should be given notice of the possibility of default judgment upon failure to make timely responses.**

**6.2 The parties have the right to submit contentions of fact and law, and to submit evidence and legal argument.**

**6.3** A party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party.

**6.4** The court should consider each significant contention of fact and law that is presented.

**6.5** The parties should have the right, by agreement and with approval of the court, to employ expedited means of communications, such as electronic means.

**6.6** The parties should make known to each other in due course the elements of fact upon which their claims or defenses are based and the rules of law that will be invoked, so that each party has the opportunity to organize its case before the final hearing.

**6.7** Exceptionally, a court may make an order affecting a party's interests without giving prior notice. Such an order should be proportionate to the interests that the applicant seeks to protect. As soon as practicable, the party should receive notice of the order, and of the matters relied upon to support it, so that the respondent can apply for a full reconsideration by the court.

**Comment:**

*P-6A* The specific procedure for giving notice varies somewhat among legal systems. For example, in most civil-law systems the court is responsible for giving the parties notice, including copies of the pleadings, while in some common-law systems that responsibility is imposed on the parties.

*P-6B* The possibility of a default judgment is especially important in international litigation.

*P-6C* The standard stated in Principle 6.4 does not require the court to consider contentions reiterated from an earlier stage of the proceeding or contentions that are incidental to the matters in dispute.

*P-6D* The right of a party to be informed of another party's contentions is consistent with the responsibility of the court to consider and determine all substantial issues in the dispute.

*P-6E* Principle 6.7 recognizes the propriety of "ex parte" proceedings, such as a temporary injunction or an order for sequestration of property, particularly at the initial stage of litigation. However, an opposing party should be given prompt notice of such an order, opportunity to be heard immediately, and a right to full reconsideration of the factual and legal basis of such an order.

**7. Prompt Rendition of Justice**

**7.1** The dispute should be adjudicated within a reasonable time.

**7.2** Regarding that objective, the parties have a duty to cooperate and a right of consultation concerning scheduling. Procedural rules and court orders may prescribe time schedules and deadlines and impose sanctions on the parties or their advocates for noncompliance with such orders.

**7.3** The court may grant accelerated attention to provisional measures and issues that may be peremptorily dispositive, such as issues of jurisdiction or statutes of limitations.



**Comment:**

*P-7A* In all legal systems the court has a responsibility to move the adjudication forward. It is a universally recognized axiom that “justice delayed is justice denied.”

**8. Sequence of the Proceedings**

**8.1 A proceeding ordinarily should consist of three phases: the pleading phase, the interim phase, and the final phase.**

**8.2 In the pleading phase, the parties must present their claims, defenses, and main contentions in writing.**

**8.3 In the interim phase, the court:**

**8.3.1 Will hold an early conference to establish the schedule for the progress of the proceeding;**

**8.3.2 Will address the matters appropriate for early attention, such as jurisdiction, provisional measures, and statute of limitations;**

**8.3.3 Will address availability, admissibility, disclosure, and exchange of evidence;**

**8.3.4 May identify potentially dispositive issues for early determination;**

**8.3.5 May order the taking of evidence.**

**8.4 In the final hearing, evidence not already received by the court will be presented in a concentrated sequence and the parties shall make their concluding arguments.**

**Comment:**

*P-8A* The concept of “phases” of a proceeding should be applied flexibly, according to the nature of the particular case. An orderly schedule facilitates expeditious conduct of the litigation. Discussion between the court and counsel for the parties facilitates practicable scheduling and orderly hearings. See Principle 10.2 and Comment *P-10A*.

*P-8B* Traditionally, courts in civil-law systems functioned through a sequence of short hearings, while those in common-law systems organized a proceeding around a final “trial.” However, in modern practice courts in both systems have come to employ preliminary hearings on preliminary issues and a concentrated hearing for most evidence concerning the merits.

**9. Party Initiative Concerning Scope of the Proceeding**

**9.1 The proceeding should be initiated by the claim or claims of the plaintiff, not by the court acting on its own motion.**

**9.2 The scope of the proceeding is determined by the claims and defenses of the parties in the pleadings, including amendments.**

**9.3 A party, upon showing good reason, has a right to amend its claims or defenses, within reasonable time limits and upon notice to other parties and when doing so does not unreasonably postpone the proceeding or otherwise result in injustice.**

**9.4 The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission in whole or in part, or settlement. Unilateral termination or modification of the action should not be permitted when it would result in prejudice to an opposing party that cannot be adequately compensated by an award of costs, or avoided by an adjournment or continuance.**

**Comment:**

*P-9A* All modern legal systems recognize the principle of party initiative concerning the scope and particulars of the dispute. These Principles require the parties to provide details of fact and law in their contentions. See Principle 12.3. It is within the framework of such party initiative that the court carries out its responsibility for just adjudication. See Principles 9.2 and 25.2.

*P-9B* The right to amend a pleading is very restricted in some legal systems. However, particularly in international disputes, the parties should be accorded some flexibility, particularly when new or unexpected evidence is confronted.

**10. Court Responsibility for Direction of the Proceeding**

**10.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising judicious discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed.**

**10.2 The court’s management of the proceeding, to the extent reasonably possible, should be in consultation with the parties.**

**10.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court can revise these arrangements.**

**Comment:**

*P-10A* The court’s management of the proceeding will be fairer and more efficient when conducted in consultation with the parties. See also Comment P-8A.

*P-10B* Principle 10.3 is particularly important in complex cases. As a practical matter, judicially oriented timetables and the like are less necessary in simple cases, but the court should always address details of scheduling.

**11. Sanctions for Failure or Refusal to Participate**

**11.1 The court should have authority to impose sanctions on parties, counsel, and third persons for failure or refusal to comply with directions concerning the proceeding and other procedural abuse.**

**11.2 Sanctions should be reasonable and proportional to the importance and seriousness of the matter involved, and take account of the extent of participation and the evident intentions of the persons whose conduct is involved.**

**11.3 Among the sanctions that may be appropriate are: drawing adverse inferences; dismissing the claim or defense, in whole or in part; rendering default judgment; staying of the proceeding; awarding cost in addition to those permitted under ordinary cost rules; and awarding other pecuniary sanctions, such as interest awards, fines, or *astreintes*.**

**11.4 The law of the forum may also provide criminal or penal liability for severe or aggravated misconduct by parties or others, for example submitting perjured evidence or threatening or violent behavior.**

**Comment:**

*P-11A* The sanctions a court is authorized to impose under forum law vary from system to system. These Principles do not confer authority for sanctions not permitted under forum law.

*P-11B* In all systems the court may draw adverse inferences from a party's failure to advance the proceeding as required or to respond as required and, as a further sanction, to enter a default judgment. Entry of default judgment against a defendant requires specific notice. See Principle 6.1. In common-law systems the court has authority under various circumstances to hold a party or counsel in contempt of court.

**12. Responsibilities of the Parties**

**12.1 The parties should conduct themselves fairly in dealing with the court and other parties.**

**12.2 The parties share with the court the responsibility to promote an efficient, fair, and reasonably speedy resolution of the proceeding.**

**12.3 In the statement of claims and defenses, the parties should present detailed facts and contentions of law, and specifically refer to the evidence to be offered in support thereof. When a party shows good cause for inability to provide sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop in the course of the proceeding.**

**12.4 A party should not make a claim, defense, motion, or other initiative or response that is not reasonably grounded in law, or reasonably derived from a recognized legal concept, and having a reasonable factual basis. In appropriate circumstances, failure to conform to this requirement may be declared an abuse of the court's process and subject to cost sanctions and fines.**

**12.5 A party's unjustified failure to make a timely response to an opposing party's contention may be taken by the court as a sufficient basis for considering that contention to be admitted or accepted.**

**Comment:**

*P-12A* Principle 12.3 requires the parties to make detailed statements of facts in their pleadings, in contrast with "notice pleading" permitted under the Federal Rules of Civil Procedure in the United States.

*P-12B* Principle 12.4 does not preclude a party from making a reasonable effort to expand a legal concept not yet established or to extend an existing concept based on a change of circumstances. In any event, the court does not have the power to dismiss an action without proper inquiry into the relevance of the asserted facts.

*P-12C* A lawyer has an ethical duty to refuse to support an initiative that violates Principle 12.4.

*P-12D* The parties have several other duties and responsibilities. See, e.g., Principles 18.3 and 21.2.

*P-12E* Principle 12.5 authorizes a court, in appropriate circumstances, to infer a fact adverse to the party who fails to respond. See also Principles 11.3 and 13.8.

### **13. Access to Information and Evidence**

**13.1 Generally, the court and each party should have access to information relevant to the issues and to nonprivileged evidence.**

**13.2 The court should have access to nonprivileged, admissible, and necessary evidence from nonparties.**

**13.3 Admissible evidence includes testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person. The parties should have the right to give statements that are accorded evidentiary effect.**

**13.4 Eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum. A party should have the right to conduct supplemental questioning of another party or witness who has first been questioned by the judge or by another party.**

**13.5 Upon timely request of a party, the court should order disclosure of relevant, nonprivileged, and reasonably identified evidence in the possession or control of another party or nonparty. It is not a basis of objection to such disclosure that the material may be adverse to the party or person making the disclosure.**

**13.6 A person who produces evidence, whether or not a party, has the right to a court order to protect against improper exposure of confidential information.**

**13.7 The court should make free evaluation of the evidence and attach no special significance to evidence according to its type or source.**

**13.8 The court may draw adverse inferences from a party's failure to produce evidence that reasonably appears to be within that party's control or access, or from a party's failure to cooperate in production of evidence as required by the rules of procedure.**

#### **Comment:**

*P-13A* “Relevant” evidence is probative material that supports, contradicts, or weakens a contention at issue in the proceeding.

*P-13B* In some legal systems the statements of a party are not admissible as evidence or are accorded diminished weight. Principle 13.3 accords a party's testimony the same weight as that of any other witness, but the court in evaluating that evidence may take into account the party's interest in the dispute.

*P-13C* According to Principle 13.4, eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum, either with the parties conducting the primary examination or with the judge doing so. In any event, a party should have the right to conduct supplemental questioning of another party or witness who has first been questioned by the judge or by another party.

*P-13D* Principle 13.7 means that no special legal value, positive or negative, should be attributed to any kind of relevant evidence, for example, testimony of an interested witness. However, this Principle does not interfere with national laws that require a

specified formality in a transaction, such as written documentation of a contact involving real property.

#### **14. Evidentiary Privileges and Immunities**

**14.1 Privileges and immunities of a party or third party concerning production of evidence, including protection from self-incrimination, confidentiality of professional communication, rights of privacy, and privileges of a spouse or family member, should be recognized when the court exercises its authority to impose directly compulsory sanctions on a non-cooperative party or third party, such as interest awards, fines, or *astreintes*. The court should also take into account these privileges as reasonable grounds for a party's failure to produce evidence when it considers drawing adverse inferences from the party's refusal.**

**14.2 The court should give effect to any procedural requirement of the forum that an evidentiary privilege or immunity be expressly claimed.**

#### **Comment:**

*P-14A* All legal systems recognize various privileges and immunities against being compelled to give evidence. However, the conceptual and technical bases of these protections differ, as do the legal consequences of giving them recognition. In some civil-law systems, for example, a party can refuse to give evidence under circumstances in which it is not apparent whether it is exercise of a right to decline (in which event the court may draw adverse inference) or is exercise of a right to confidentiality of client-lawyer communication (in which event an adverse inference is improper). There are parallel differences in concept and effect when the refusal to give evidence is by a third person instead of a party. Principle 14.1 takes account of these differences while accepting the concept of confidentiality of professional communication and other rights of privacy.

#### **15. Joinder of Claims and Parties; Intervention**

**15.1 A party may assert any claim against another party or a third person that is subject to the jurisdiction of the court.**

**15.2 A person having an interest substantially connected with the subject matter of the proceeding may seek to intervene.**

**15.3 An additional party has the same rights and obligations of participation and cooperation as the original parties.**

**15.4 The court may order separation of claims, issues, or parties, or joinder with other proceedings, for more efficient management and determination.**

**15.5 When it is necessary and just, the court should grant permission for a person to be substituted for a party in a proceeding.**

#### **Comment:**

*P-15A* Principle 15 recognizes the broad right to assert any claim available against another party, which is afforded in many legal systems. In some legal systems joinder is permitted only of claims related to the same transaction or occurrence. In either event, the court has authority to sever claims and issues, and to consolidate them, according to their subject matter and the affected parties.

## **16. Oral and Written Presentations**

**16.1 Pleadings, motions, and legal argument should be presented initially in writing, but the parties should have the right to present oral argument on important substantive and procedural issues.**

**16.2 The final hearing should be held before the judicial officers who are to give judgment.**

**16.3 The court should specify the procedure for presentation of testimony. Ordinarily, testimony of parties and witnesses should be received orally, and reports of experts in writing, but the court may require, upon consultation with the parties, that principal testimony of witnesses be in writing, which should be supplied to other parties in advance.**

**16.4 The parties should be allowed supplemental oral questioning of witnesses, including another party or an expert.**

**16.5 Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony or of an expert's report.**

**16.6 Written submissions concerning important legal issues in the proceeding and matters of background fact may be received from third persons with the consent of the court, upon consultation with the parties. The parties shall have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.**

### **Comment:**

*P-16A* The tradition in some civil-law systems has been that all evidence should be submitted in writing, while the common-law tradition has been for witness testimony to be in person. Both traditions have undergone change. Principle 16 allows flexibility in this regard. It contemplates that testimony ordinarily can be presented initially in writing, with orality commencing upon supplemental questioning by the court and opposing parties.

*P-16B* The right to put questions to an adverse party or third-person witness is of first importance and is now recognized in most legal systems.

*P-16C* Principle 16.6 does not authorize third persons to present written submissions concerning the facts in dispute. It refers only to background information relevant to the case.

## **17. Public Proceedings**

**17.1 Ordinarily, pleadings, motions, and other documents on file with the court should be open to examination by the public.**

**17.2 Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public.**

**17.3 Following consultation with the parties, the court may order that hearings, or portions of the court file and evidence, be kept confidential in the interest of justice, public safety, or privacy.**

**17.4 Judgments, final or otherwise, and their supporting reasons, and ordinarily other orders should be accessible to the public.**

**Comment:**

*P-17A* There are conflicting traditions concerning publicity of proceedings. In some systems the parties may request, and the court may grant, privacy of all proceedings except the final judgment. The same practice is almost invariably followed in arbitration. On the other hand, some systems have a constitutional guaranty of publicity in judicial proceedings, but may have special exceptions for such matters as trade secrets, matters of national security, etc.

**18. Burden and Standard of Proof**

**18.1 Facts are considered proven when the court is reasonably convinced of their truth, regardless of who presented the evidence.**

**18.2 Ordinarily, each party has the burden to prove the facts regarding an issue essential to that party's case.**

**18.3 The court may impose on a party the burden of proving an issue that the party usually would not have, but as to which it appears the party has possession or control of relevant evidence that it declines to produce.**

**Comment:**

*P-18A* The standard of “reasonably convinced” is in substance that applied in most legal systems. It is consistent with the standard in common-law systems for decisions made by the judge. The standard in jury trials in the United States is “preponderance of the evidence” but functionally that may be essentially the same.

*P-18B* The facts that are “essential to that party's case” refer both to the elements of a legally valid claim and the elements of an affirmative defense. The determination of this allocation is often a matter of substantive law and in any event should be guided by the forum's rules.

*P-18C* Principle 18.3 is based on the principle that both parties have the duty to contribute in good faith to the discharge of the opposing party's burden of proof. See Principle 12. Implementation of this Principle can reduce the necessity for disclosure of evidence to an opposing party.

**19. Responsibility for Determinations of Law and Fact**

**19.1 The court is responsible for determining the correct legal basis for its decisions. Before giving judgment or making an important intermediate decision, the court should give the parties an opportunity to comment on any point of law or fact that the parties have not already addressed during the proceeding.**

**19.2 The court may rely on evidence that has not been advanced by a party, but only upon giving all parties opportunity to comment, subject to Principle 19.4.**

**19.3 The court may on its own motion order the taking of evidence on an issue not previously advanced by a party, subject to Principle 19.4.**

**19.4 The court may invite the parties to amend their contentions of law or fact and to offer additional evidence accordingly.**

**19.5 The court ordinarily should hear all evidence directly, but when necessary it may delegate the taking of evidence prior to the final hearing to a suitable judicial officer or other person.**

**19.6 The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate.**

**19.6.1 If the parties agree upon an expert the court ordinarily should appoint that expert.**

**19.6.2 A party may present additional expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.**

**19.7 An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.**

**Comment:**

*P-19A* Principle 19.1 is universally recognized, even in common-law systems in which the parties are expected to submit contentions as to the governing law.

*P-19B* Principles 19.2 and 19.3 are applicable only to courts of first instance. As stated in Principle 24.2, “Appellate review ordinarily should be limited to claims, defenses, counterclaims, evidence, and issues addressed in the first-instance proceeding.”

*P-19C* Use of experts is common in complex litigation. Court appointment of a neutral expert is the practice in most civil-law systems. However, party-appointed experts can provide valuable assistance in the analysis of difficult factual issues. Expert testimony may be received on issues of foreign law.

**20. Decision and Reasoned Explanation**

**20.1 Upon completion of the hearings the court should promptly give judgment by written decision, including specification of the remedy awarded and any award of interest to be paid on a money judgment.**

**20.2 The written decision should be accompanied by a reasoned explanation of the legal and factual basis of the decision.**

**Comment:**

*P-20A* When a judgment determines less than all the claims and defenses at issue, it should specify the matters that remain open for further proceedings.

*P-20B* In case of a default judgment, the reasoning can be stated in simplified terms.

**21. Settlement**

**21.1 The court, while respecting the parties right to participate in litigation, should encourage settlement and reconciliation of the parties when reasonably possible. The court should facilitate party participation in alternative-dispute-resolution procedure and voluntary settlement at any stage of the proceeding.**

**21.2 The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors. The court may adjust its cost awards to reflect unreasonable failure to cooperate in this respect or bad-faith participation in settlement endeavors.**

**Comment:**



P-21A Principle 21.2 departs from traditions in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party. It can be implemented by a rule about “settlement offers” such as the Ontario (Canada) civil-procedure rules or Part 36 of the new English procedural rules.

## **22. Costs**

**22.1 The prevailing party ordinarily should be awarded a substantial portion of its actual and reasonable costs. “Costs” include court filing fees, fees paid to officials such as referees or court reporters, expenses of presenting evidence, and attorneys’ fees.**

**22.2 Exceptionally, the court may withhold or limit costs to the winning party when there is clear justification for doing so. The court may limit the award to a proportion that reflects expenditures for matters in genuine dispute and award costs against a winning party that has been unreasonably disputatious. The court in making cost decisions may take account of any party’s procedural misconduct in the proceeding.**

### **Comment:**

*P-22A* Award of costs, including attorneys’ fees, is the rule prevailing in most legal systems, although not in China, Japan, and the United States.

*P-22B* According to Principle 22.2, the court may decide not to award any costs to a party or award only part of the costs, or it can calculate costs more generously or more severely than it otherwise would.

## **23. Finality and Enforceability**

**23.1 Subject to the right of appeal, the judgment should be final.**

**23.2 The forum should have a rule defining finality with reasonable clarity.**

**23.3 A judgment upon becoming final should be immediately enforceable.**

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

**23.5 A suitable bond or other security may be required from the appellant as a condition of granting a stay or from the respondents as a condition of denying a stay.**

### **Comment:**

*P-23A* The Principle of finality is essential to effective adjudication. Any decision, however apparently reasonable, theoretically could be shown to depend on false evidence.

*P-23B* Many legal systems have archaic and inefficient procedures for enforcement of judgments. From the viewpoint of litigants, particularly the winning party, effective enforcement is an essential element of justice.

## **24. Appeal**

**24.1 A party suffering adverse judgment should have opportunity for appellate review on substantially the same terms as other judgments under the law of the forum.**

**24.2 Appellate review ordinarily should be limited to claims, defenses, counterclaims, evidence, and issues addressed in the first-instance proceeding.**

**24.3 The appellate court may permit presentation of new facts, evidence, and contentions of law when necessary in the interest of justice.**

**Comment:**

*P-24A* Appellate procedure varies substantially among legal systems. The procedure of the forum therefore should be employed.

*P-24B* Concerning scope of appellate review, in some civil-law systems, a proceeding in the court of second instance can be essentially a new trial. In other systems the decision of the court of first instance can be reversed or amended only for egregious miscarriage. This Principle rejects both of these extremes. However, reception of new evidence at the appellate level should be permitted only in unusual circumstances. But see Principles 19.2 and 19.3.

**25. Lis Pendens and Res Judicata**

**25.1 In applying the rules of lis pendens, the scope of the proceeding is determined by the claims in the parties' pleadings, including amendments.**

**25.2 In applying the rules of claim preclusion, the scope of the claim or claims decided is determined by reference to the claims and defenses in the parties' pleadings, including amendments, and the court's decision and reasoned explanation.**

**25.3 The concept of issue preclusion, as to an issue of law or fact, should not be applied, except to prevent substantial injustice.**

**Comment:**

*P-25A* This Principle is related to Principle 9.2, which establishes that the scope of the proceeding is determined by the parties in their pleadings.

*P-25B* Under Principle 25.3, issue preclusion might be applied when, for example, a party has justifiably relied in its conduct on a determination of an issue of law or fact in a previous proceeding.

**26. Effective Enforcement**

**Procedures should be available for prompt, speedy, effective, proportional, and efficient execution of a provisional remedy, a judgment for money, including costs, or a judgment for an injunction.**

**Comment:**

*P-26A* Many legal systems have archaic and inefficient procedures for enforcement of judgments. From the viewpoint of litigants, particularly the winning party, effective enforcement is an essential element of justice.

**27. Recognition**

**27.1 A final judgment or provisional remedy in a proceeding under these Principles, and its eligibility for effective enforcement, must be accorded the same recognition, in the forum and other states, as other judgments or provisional remedies of the forum.**

**27.2 A final judgment or provisional remedy in a proceeding conducted in accordance with these Principles should not be denied recognition on procedural grounds.**

**Comment:**

*P-27A* Recognition of judgments of another forum, including judgments for provisional remedies, is especially important in international litigation. All legal systems have firm rules of recognition for judgments rendered within the system.

**28. International Judicial Cooperation**

**The courts of a state that has recognized these Principles must provide assistance to the courts of any other state that is conducting litigation under these Principles, including the grant of protective or provisional relief, or assisting in the identification, preservation, or production of evidence.**

**Comment:**

*P-28A* International judicial cooperation and assistance supplements international recognition and, in modern context, is equally important.

*P-28B* For the significance of the term “evidence,” see Principle 13.

**RULES OF TRANSNATIONAL  
CIVIL PROCEDURE**  
(with commentary)

**A. Standards of Interpretation**

**1. Standards of Interpretation**

**1.1 These Rules must be interpreted in accordance with and to fulfill the purposes of the Principles of Civil Procedure for Transnational Commercial Disputes.**

**1.2 The procedural law of the forum must be applied in matters not addressed in these Rules.**

**Comment:**

*R-1A* Rule 1.2 is a rule of interpretation. It does not authorize use of local concepts to interpret these Rules. The Transnational Rules should develop an autonomous style of interpretation, consistent with the principles and concepts by which they are guided.

*R-1B* The Transnational Rules of Civil Procedure are not a comprehensive “code” in the civil-law sense of the word. They are a set of rules to supersede inconsistent local law and to be supplemented by local law whenever local law is not inconsistent with the Transnational Rules.

**B. Scope of Applicability of These Rules**

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

**2.1 Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, these Rules apply to disputes arising from transnational commercial transactions, if the dispute:**

**2.1.1 Is between habitual residents of different states; or**

**2.1.2 Concerns property located in the forum state (including movable property and intangible property), to which a habitual resident of another state claims an interest, whether of ownership, lien, security or otherwise.**

**2.2 In a proceeding involving multiple claims or multiple parties, some of which are not within the scope of this Rule, the court must determine the principal matters in dispute.**

**2.2.1 If those are within the scope of these Rules, the Rules apply to all parties and all claims. Otherwise, the rules of the forum apply.**

**2.2.2 The court may separate the proceeding and then apply Rule 2.2.1.**

**2.3 The forum state may exclude categories of matters from application of these rules and may extend application of these Rules to other transnational civil matters.**

**Comment:**

*R-2A* Rule 2.1 defines the matters governed by these Rules. The Rules apply to contract disputes and disputes arising from contractual relations; injuries to property, including immovable (real property), movable (personal property), and to intangible property such as copyright, trademark, patent rights; and injuries resulting from breach of obligations and

commercial torts in business transactions. They do not apply to claims for personal injury or wrongful death. The term “transnational commercial transactions” includes a series of related events, such as repeated interference with property.

*R-2B* The scope of application of these Rules is limited to commercial disputes as a matter of comity in public policy, not because the rules are inappropriate for other types of legal disputes. In many countries, for example, disputes arising from employment relationships are governed by special procedures in specialized courts. The same is true of domestic relations matters.

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

*R-2C* The term “dispute” as used in Rule 2.1 may have different connotations in various legal systems. For example, under Rule 20 of the Federal Rules of Civil Procedure in the United States, the term “dispute” would be interpreted in accordance with the broad concept of “transaction or occurrence.” Under the civil-law systems, the term “dispute” would be interpreted in accordance with the narrower concept of dispute as framed by the plaintiff’s claim.

*R-2D* Under Rule 2.1.1, these Rules apply when a plaintiff and a defendant are habitual residents of different states. Thus, these Rules would apply in a dispute between a Japanese on one side and a Japanese and a Canadian on the other side.

*R-2E* Rule 2.1.2 provides that these Rules apply in a dispute concerning property located in one state as to which a claim is made by a plaintiff or a defendant who is a habitual resident of another state. 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.

*R-2F* The habitual residence of an individual or of a juridical entity is determined by general principles of private international law.

*R-2G* Legal disputes may involve claims asserted on multiple substantive legal bases, one of which is under these Rules but another of which is not. The court may entertain both the claim under these Rules and the other claim or claims and apply the Rules as provided in Rule 2.2.

*R-2H* A case may be one not governed by Rule 2 at the outset of the litigation, but a claim or a party may later be joined that would justify application of these Rules. For example, in a claim based on contract by A against B, B could implead C on the basis of an indemnity obligation. If A and C or B and C are habitual residents of different states, and the claim between them did not arise wholly within the forum state, these Rules would apply. Rule 2.2 confers authority on the court to determine whether the principal matters in dispute are within these Rules and thereupon to direct that the dispute be governed by these Rules or forum law, according to that determination.

*R-2I* For the purposes of these Rules, “Party” includes plaintiff, defendant, and a third-party; “Person” includes a corporation or other organization such as a société anonyme, partnership, and an unincorporated association recognized as a jural entity; and “Witness” includes third persons, expert witnesses, and may include the parties themselves.

*R-2J* Rule 2.3 recognizes that the forum law may adopt provisions that enlarge or restrict the scope of application of the Rules.

### **3. Forum and Venue**

**3.1 A proceeding under these Rules must be conducted in the forum state’s first-instance courts of general jurisdiction or in a court of specialized jurisdiction for commercial disputes.**

**3.2 Appellate jurisdiction of a proceeding under these Rules must be in the court having jurisdiction over the first-instance court.**

**3.3 Venue should be established, originally or by transfer of venue, at a place in the forum state that is reasonably convenient to a defendant.**

#### **Comment:**

*R-3A* Typically it would be convenient that a specialized court or division of court be established in a principal commercial city, such as Milan in Italy or London in the United Kingdom. Committing disputes under these rules to specialized courts would facilitate development of a more uniform procedural jurisprudence.

## **C. Jurisdiction, Joinder, and Venue**

### **4. Jurisdiction Over Parties**

**4.1 Jurisdiction is established over a plaintiff by the plaintiff commencing a proceeding or over a person who intervenes.**

**4.2 Jurisdiction may be established over another person as follows:**

**4.2.1 By consent of that person to the jurisdiction of the court;**

**4.2.2 Over an individual who is a habitual resident or national of the forum;**

**4.2.3 Over a corporation, société anonyme, unincorporated association, partnership, or other organization recognized as a jural entity that has received its charter of organization from the forum state or maintains its administrative headquarters in the state;**

**4.2.4 Over a person that has:**

**4.2.4.1 Provided goods or services in the forum state, or agreed to do so, when the proceeding concerns such goods or services;**

**4.2.4.2 Committed tortious conduct in the forum state, when the proceeding concerns such conduct.**

**4.3 Jurisdiction may be exercised over a person who claims an interest (of ownership, lien, security, or otherwise) in property located in the forum state.**

**4.4 Jurisdiction may be exercised, when no other forum is reasonably available, on the basis of:**

**4.4.1 Presence of the person; or**

**4.4.2 Presence of the property, whether or not the dispute relates thereto.**

**4.5 Jurisdiction may be exercised over a person who is subject to the court’s compulsory jurisdiction and:**

**4.5.1 That person has an interest that is so connected with the dispute that, in the interest of efficient administration of justice, the person should be made a party; or**

**4.5.2 The proceeding is in aid of the jurisdiction of another forum before which a proceeding is pending that is in accordance with the Principles of Civil Procedure for Transnational Commercial Disputes.**

**4.6 The forum should decline to exercise jurisdiction, unless there are compelling reasons not to do so, if:**

**4.6.1 Another forum was designated by the parties; or**

**4.6.2 The forum is seriously inconvenient.**

**Comment:**

*R-4A* The standard of “substantial connection” has been generally accepted for international legal disputes. That standard excludes mere physical presence, which within the United States is colloquially called “tag jurisdiction.” Mere physical presence as a basis of jurisdiction within the American federation has historical justification but is inappropriate in international disputes. But see Rule 4.4.1.

*R-4B* Rule 4.4.2 recognizes that a state may exercise jurisdiction by sequestration or attachment of locally situated property, even though the property is not the object or subject of the dispute. The procedure is called “quasi in rem jurisdiction” in some legal systems. The Rule contemplates that, in such a case, the merits of the underlying dispute may be adjudicated in some other forum.

*R-4C* The concept recognized in Rule 4.6.2 corresponds in common-law systems to the rule of forum non conveniens.

**5. Joinder of Parties or Claim; Intervention**

**5.1 A party may assert any claim against another party or against a third person that is subject to the jurisdiction of the court.**

**5.2 A third person made a party as provided in Rule 5.1 should be summoned as provided in Rule 7.**

**5.3 A person having an interest substantially connected with the subject matter of the proceeding may seek to intervene. If the intervention will not unduly delay or prejudice the determination of the rights of the parties to the proceeding, the court may direct that the person be added as a party.**

**5.4 An additional party has the same rights and obligations of participation and cooperation as the original parties. When a party is joined after the initial stage of the proceeding, further proceeding must be adjusted to assure that that party has adequate opportunity to participate.**

**5.5 When it is necessary and just, the court should grant permission for a person to be substituted for a party in a proceeding.**

**5.6 The court may order separation of claims, issues, or parties, or joinder with other proceedings, for more efficient management and determination.**

**Comment:**

*R-5A* Rule 5 recognizes the broad right to assert any claim available against another party, which is afforded in many legal systems. In some legal systems joinder is permitted only of claims related to the same transaction or occurrence. In either event, the court has authority to sever claims and issues, and to consolidate them, according to their subject matter and the affected parties.

*R-5B* Rule 5.3 states the concept of intervention by a third party. The precise definition of intervention varies somewhat among legal systems. However, in general a person (whether individual or juridical entity) who has some interest that could be affected by the proceedings, and who seeks to participate should be allowed to do so. Some systems also allow intervention when there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

**6. Amicus Curiae Submission**

**Any person may present a written submission to the court containing data, information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case. The court may refuse such a submission. The court may invite a third party to present such a submission. The parties must have opportunity to submit written comment addressed to the matters in the submission before it is considered by the court.**

**Comment:**

*R-6A* The “amicus curiae brief” is a useful means by which a nonparty may supply the court with information and legal analysis that may be helpful to achieve a just and informed disposition of the case. Therefore, any person may be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention. It is in the court’s discretion whether such a brief may be taken into account. A judge has authority to refuse an amicus curiae brief when such a brief would not be of material assistance in determining the dispute. An amicus curiae does not become a party to the case but is merely an active commentator. Factual assertions in an amicus brief are not evidence in the case.

*R-6B* In civil-law countries there is no established practice of allowing third parties without a legal interest in the merits of the dispute to intervene or participate in a proceeding. Neither do most of the civil-law countries have a practice of allowing the submission of amicus curiae briefs. However, the amicus curiae brief is an important device, particularly in cases of public importance.

**7. Due Notice**

**7.1 A party must initially have formal notice of the proceeding commenced against that party, provided by means reasonably calculated to be effective.**

**7.2 The notice must:**

**7.2.1 Contain a copy of the statement of claim;**

**7.2.2 State that the proceeding is governed by the Transnational Rules of Civil Procedure; and**



**7.2.3 Specify the time within which response is required and that default judgment may be entered against a party who does not respond within that time.**

**7.3 The notice must be in the language of the forum and either in the language of the person to whom the notice is addressed or in the language in which the transaction in dispute was conducted.**

**7.4 All parties must have written notice of the claims and defenses presented by another party.**

**7.5 All parties must have notice of directions and rulings of the court and of motions by other parties.**

**Comment:**

*R-7A* Responsibility for giving notice in most civil-law systems and some common-law systems is assigned to the court. In other common-law systems it is assigned to the parties. In most systems the notice (called a summons in common-law terminology) must be accompanied by a copy of the complaint, which is itself detailed notice about the dispute. Many systems require a recital of advice as to how to respond. The warning about default is especially important. See Comment *R-11B*.

*R-7B* Concerning the language of the notice, the court ordinarily will assume that its own language is appropriate. The parties therefore may have responsibility to inform the court when that assumption is inaccurate. Requiring notice to be in the language of the person to whom it is addressed or in the language of the transaction is designed to assure that it will be understood.

*R-7C* In all systems, after the complaint has been transmitted and the defendant has responded, communications among the court and the parties ordinarily are conducted through the parties' counsel.

## **8. Languages**

**8.1 The proceedings, including documents and oral communication, must be conducted in the language of the court.**

**8.2 The court may allow use of other languages in all or part of the proceeding if no prejudice to a party will result.**

**8.3 Translation must be provided when a party or witness is not fluent in the language in which the proceeding is conducted. Translation must be made by a neutral translator selected by the parties or appointed by the court. The cost must be paid by the party presenting the pertinent witness or document unless the court orders otherwise. Translation of documents that are lengthy or voluminous may be limited to relevant portions, as selected by the parties or determined by the court.**

**Comment:**

*R-8A* The language in which the proceeding is conducted should be that in which the court is fluent. Ordinarily this will be the language of the state in which the court is situated. However, if the court and the parties have competence in a foreign language, they may agree upon or the judge may order some other language for all or part of the proceeding, for example the reception of a particular document or the testimony of a witness in the witness's native language.

*R-8B* In transnational litigation, it happens frequently that witnesses and experts are not fluent in the language in which the proceeding is conducted, ordinarily, that of the country where the case is tried. In such a case translation is required for the court and for other parties. The testimony must be taken with the aid of an interpreter, with the party presenting the evidence paying the cost of the translation unless the court decides otherwise.

*R-8C* A second possibility is examining the witness by way of deposition, as provided in Rule 22.1, under agreement of the parties or by order of the court. The deposition can then be translated and submitted at the hearing. The procedure and cost of the deposition are determined according to Rule 22.

## **D. Composition and General Authority of the Court**

### **9. Composition of the Court**

**The court is constituted as follows: [---].**

**Comment:**

*R-9A* Rule 9 contemplates that the forum state may have constituted a court of special jurisdiction to adjudicate disputes according to these Rules.

*R-9B* In most legal systems today, the courts of first instance consist of a single judge. However, many civil-law systems normally use three judges in courts of general authority. In some legal systems the composition of the court may be one or three judges, according to various criteria.

*R-9C* Rule 9 does not contemplate the use of juries, notwithstanding that jury trial is a matter of constitutional right under various circumstances in some countries, notably the United States. Where jury trial is of right, the parties may waive the right or these Rules can apply with the use of a jury. See Rule 2.1 (subjecting these Rules to domestic constitutional provisions).

### **10. Independence and Impartiality of the Court**

**10.1 A judge or other person having decisional authority must not participate if there is reasonable ground to doubt their impartiality.**

**10.2 A party must have the right to make reasonable challenge of the impartiality of a judge, referee, or other decisional participant. A challenge must be made promptly after the party has knowledge of the basis for challenge.**

**10.3 A challenge of a judge must be heard and determined by a judge other than the one so challenged.**

**10.4 The court may not accept communications about the case from a party in the absence of other parties, except for communications concerning routine court administration and communications in initially applying for a provisional remedy as provided in Rule 17.2.**

**Comment:**

*R-10A* All legal systems require judges to be impartial. In many systems, however, there is no recognized procedure by which a party to litigation can challenge a judge's

impartiality. The absence of such a procedure means the problem itself is not openly acknowledged. A procedure for challenge is essential to give reality to the concept.

*R-10B* A challenge to a judge’s impartiality should be made only on substantial grounds and must be made promptly. Otherwise, the challenge procedure can be abused as a device for attacking unfavorable rulings.

*R-10C* The prohibition on ex parte communications should extend not only to communications from the parties and the advocates but also to communications from other government officials. There have been instances in which improper influence has been attempted by other judges in a court system.

## **E. Pleading Stage**

### **11. Commencement of the Proceeding and Notice**

**11.1** The plaintiff shall submit to the court a statement of claim, as provided in Rule 12. The court shall thereupon give notice of the proceeding, as provided in Rule 7.

**11.2** The time of submission of the claim to the court determines lis pendens, interruption of statutes of limitation (prescription), and other requirements of timeliness.

#### **Comment:**

*R-11A* Rule 11 specifies the rule for commencement of suit for purposes of determining the competence of the court, lis pendens, interruption of statutes of limitations, and other purposes as provided by the forum law.

*R-11B* Rule 11 also provides for giving notice of the proceeding to the defendant, or “service of process” as it is called in common-law procedure. The Hague Service Convention specifies rules of notice that govern proceedings in countries signatory to that Convention. When judicial assistance from the courts of another country is required in order to effect notice, the procedure for obtaining such assistance should be followed. In any event, the notice must include a copy of the statement of claim, a statement that the proceeding is conducted under these Rules, and a warning that default judgment may be taken against a defendant that does not respond. See Rule 7.2. Beyond these requirements, the rules of the forum govern the mechanisms and formalities for giving notice of the proceeding. In some states it is sufficient to mail the notice; some states require that notice, such as a summons, be delivered by an officer of the court.

### **12. Statement of Claim (Complaint)**

**12.1** The plaintiff must state the facts on which the claim is based, describe the evidence to support those statements, refer to the legal grounds that support the claim, including foreign law, and the basis on which these Rules apply.

**12.2** The reference to legal grounds must be sufficient to permit the court to determine the legal validity of the claim.

**12.3** The statement of facts must, so far as reasonably practicable, set forth detail as to time, place, participants, and events. The court should consider the possibility that necessary facts and evidence will develop in the course of the proceeding.

**12.4 If plaintiff is required to have first resorted to a notice of claim, arbitration, or conciliation procedure or other condition precedent, the complaint must describe the effort to do so.**

**12.5 The complaint must state the judgment requested, including the monetary amount demanded and any other remedy sought.**

**Comment:**

*R-12A* Rule 12.1 requires the plaintiff to state the facts upon which the claim is based. This Rule calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions and traditionally required in American “code pleading.” In contrast, some American systems, notably those employing the “notice pleading” under Federal Rules of Civil Procedure, permit very general allegations. In these Rules, the facts pleaded in the statements of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings. See Rule 24.2.

*R-12B* Under Rules 12.1 and 12.2, the complaint must refer to the legal grounds on which the plaintiff relies to support the claim. Reference to such grounds is a common requirement in many legal systems and is especially appropriate when the transaction may involve the law of more than one legal system and present problems of choice of law. Rules of procedure in many national systems require a party’s pleading to set forth foreign law when the party intends to rely on that law. However, according to Principle 19.1, the court has responsibility for determining the correct legal basis for its decisions.

*R-12C* Rule 12.5 requires a statement of the amount of money demanded and, if injunctive or declaratory relief is sought, the nature and terms of the requested remedy. If the defendant defaults, the court may not award a judgment in an amount greater or more severe than that demanded in the complaint, so that the defendant can calculate on an informed basis whether to dispute the claim. See Rule 15.3. It is a general principle that a default judgment may be entered only when the plaintiff has offered sufficient proof of the claims for which judgment is awarded. See Rule 15.2.3.

**13. Statement of Defense and Counterclaims**

**13.1 A defendant must, within [60] consecutive days from the date of service of notice, answer the complaint. The time for answer may be extended for a reasonable time by agreement of the parties or by court order.**

**13.2 A defendant in the answer must admit, admit with explanations, or allege an alternative statement of facts, and explicitly deny allegations defendant wishes to controvert. Failure to explicitly deny an allegation is considered an admission for purposes of the proceeding and obviates proof thereof, except as provided in Rule 15 concerning default judgment.**

**13.3 The defendant may state a counterclaim seeking relief from a plaintiff, or a claim against a co-defendant or a third person. Such a claim must be answered as provided in this Rule.**

**13.4 The requirements of Rule 12 concerning the detail of statements of claims apply to denials, affirmative defenses, counterclaims, and third-party claims.**

**13.5 Objections referred to in Rule 19.1.1 must be presented in a motion before the answer or in the answer.**

**Comment:**

*R-13A* Rule 13.2 requires that the defendant’s statement of defense address the allegations of the complaint, denying or admitting with explanation those allegations that are to be controverted. Allegations not so controverted are admitted for purposes of the litigation. The defendant must assert an “alternative statement of facts,” which is simply a different narrative of the circumstances that the defendant presents in order to clarify the dispute. Whether an admission in a proceeding under these Rules has effect in other proceedings is determined by the law governing such other proceedings. An “affirmative defense” is the allegation of additional facts or contentions that avoid the facts and contentions raised by the plaintiff, rather than contradict them directly. An example is the defense that an alleged debt has previously been discharged in bankruptcy. A “negative defense” is the denial.

*R-13B* These Rules do not specify the number of days within which a specific procedural act should be performed. A transnational proceeding must be expeditious, but international transactions often involve severe problems of communications. It is generally understood that the time should be such as to impose an obligation of prompt action, but should not be so short as to create unfair risk of prejudice. Therefore, a period of 60 days in which to respond generally should be sufficient. However, if the defendant is at a remote location, additional time may be necessary and should be granted as of course. In any event, the forum state should prescribe time limits, and the basis on which they are calculated, in its adoption of the Rules.

*R-13C* Rule 13.4 applies to the defendant’s answer the same rules of form and content as Rule 12 provides with respect to the statement of claim. Thus, additional facts stated by the defendant, by way of affirmative defense or alternative statement, must be in the same detail as required by Rule 12.3. If a counterclaim is asserted, the defendant must make a demand for judgment as required by Rule 12.5.

*R-13D* Rule 13.3 permits the defendant to assert a counterclaim, third-party claim, or cross-claim. They often include a claim for indemnity or contribution. In most civil-law systems, a counterclaim is permitted only for a claim arising from the dispute addressed in the plaintiff’s complaint. See Comment *R-2C* for reference to the civil-law concept of “dispute.” In common-law systems a wider scope for counterclaims is generally permitted, including a “set off” based on a different transaction or occurrence. Compare United States Federal Rules of Civil Procedure, Rule 13. These Rules, however, do not provide for compulsory counterclaims, so that omission to interpose a counterclaim does not result in preclusion. See Principles 9.2 and 25.2.

Rule 13.2 requires a plaintiff, third party, or co-defendant to submit an answer to a counterclaim or cross-claim. No such response is required to an affirmative defense or other allegations in the answer that are not counterclaims or other claims.

*R-13E* Rule 13.5 authorizes a defendant to make objections referred to in Rule 19.1.1 either by a motion pursuant to that Rule or by answer to the complaint.

## **14. Amendments**

**14.1 A party, upon showing good reason, has a right to amend its claims or defenses, within reasonable time limits, upon notice to other parties, and when doing so does not unreasonably postpone the proceeding or otherwise result in injustice. In particular, amendments may be justified to take account of events occurring after those alleged in earlier pleadings, newly discovered facts or evidence that could not previously have been**

obtained through reasonable diligence, or evidence obtained through exchange of evidence.

**14.2** Leave to amend must be granted on such terms as are just, including, when necessary, adjournment or continuance, or compensation by an award of costs to another party.

**14.3** The amendment must be served on the opposing party, who must have [30] consecutive days in which to respond, or such other time as the court may order.

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

**14.5** Any party may request that the court order another party to amend the statement to provide a more specific statement of that party's pleading on the ground that the challenged statement does not comply with the requirements of these Rules. This request temporarily suspends the duty to answer.

**Comment:**

*R-14A* The scope of permissible amendment differs among various legal systems, the rule in the United States, for example, being very liberal and that in many civil-law systems being less so. In many civil-law systems amendment of the legal basis of a claim is permitted, as distinct from the factual basis, but amendment of factual allegations is permitted only upon a showing that there is newly discovered probative evidence and that the amendment is within the scope of the dispute. See Comment *R-2C*, supra, for reference to the civil-law concept of “dispute.”

*R-14B* The appropriateness of permitting amendment also depends on the basis of the request. For example, an amendment to address material evidence newly discovered should be more readily granted than an amendment to add a new party whose participation could have been anticipated. An amendment sometimes could have some adverse effect on an opposing party. On the other hand, compensation for costs reasonably incurred by the party, or rescheduling of the final hearing, could eliminate unfair prejudicial effects. Accordingly, exercise of judicial judgment may be required in considering an amendment. The court may postpone the award of costs until the final disposition of the case. See Rule 14.2.

*R-14C* In accordance with the right of contradiction stated in Principle 6, Rule 14.4 requires that if the complaint has been amended, default judgment may be obtained on the basis of an amended pleading only if the amended pleading has been served on the party against whom default judgment is to be entered. See Rules 14.3 and 15.3.

*R-14D* Rule 14.5 permits a party to request that another party be required to state facts with greater specificity or to admit or deny specific material facts. Failure to comply with such an order may be considered a concession to those facts. Such a request for more specific allegations temporarily suspends the duty to answer.

## **15. Default Judgment**

**15.1** Default judgment must be entered against a plaintiff who abandons prosecution of the proceeding, or against a defendant or other party who, without justification, does not respond within the prescribed time, or who fails to offer a substantial answer, or otherwise abandons the proceeding after having answered.

**15.2 The court, before entering a default:**

**15.2.1 Against a plaintiff for abandonment, must give reasonable warning to plaintiff that default may be granted;**

**15.2.2 Against another party, must determine that notice to that party has been properly transmitted and that the party has had sufficient time to respond;**

**15.2.3 Against a defendant, must determine that the claim is reasonably supported by available evidence and is legally justified concerning liability and remedy, including the amount of damages and any claim for costs.**

**15.3 A default judgment may be no greater in monetary amount or in severity of other remedy than was demanded in the complaint.**

**15.4 A party who appears after the time prescribed, but before judgment, may be permitted to enter a defense upon offering reasonable excuse, but the court may order compensation for costs resulting to the opposing party.**

**15.5 If the requirements in this Rule for a default judgment are not complied with, an aggrieved party may appeal or seek to set aside the judgment, according to the law of the forum.**

**Comment:**

*R-15A* Default judgment permits termination of a dispute if there is no contest. It is a mechanism for compelling a defendant to acknowledge the court's authority. If the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding and later dispute the validity of the judgment.

It is important to consider the reason why the party did not answer or did not proceed after having answered. For example, a party may have failed to answer because that party was not found and did not receive personal notice, or because the party was obliged by his or her national law not to appear by reason of hostility between the countries.

Reasonable care should be exercised before entering a default judgment because notice sometimes may not have been given to a defendant, or the defendant may have been confused about the need to respond. Forum procedure in many systems requires that, after a defendant has failed to respond, an additional notice be given to the defendant of intention to enter default judgment.

*R-15B* Rule 15.3 limits a default judgment to the amount and kind demanded in the statement of claim. See Rule 12.5. This Rule is important in common-law systems in which the judge is normally not limited to the original claims made by the parties on the pleadings. In civil-law systems and some common-law systems, however, there is a traditional prohibition against a judgment that goes beyond the pleadings (*ultra petita* or *extra petita* prohibition).

*R-15C* The absence of a substantial answer may be treated as no answer at all.

*R-15D* The decision about whether the claim is reasonably supported by evidence and legally justified under Rule 15.2.3 does not require a full inquiry on the merits of the case. The judge must only determine whether the default judgment is not inconsistent with the available evidence and is not legally unconscionable. For that decision, the judge must analyze critically the evidence supporting the statement of claims. See Rule 20.1. The judge may request production of more evidence or schedule an evidentiary hearing.

*R-15E* A plaintiff’s abandonment of prosecution of the proceeding is, in common-law terminology, usually referred to as “failure to prosecute” and results in “involuntary dismissal.” It is the equivalent of a default.

*R-15F* Rule 15.3 must be interpreted together with Rule 14.4, which requires that an amendment must be served on the party before a default judgment may be rendered.

*R-15G* The party who has defaulted should not be permitted to produce evidence in an appeal, unless to prove that the notice was not proper.

*R-15H* Every system has a procedure for invalidating a default judgment obtained without compliance with the rules governing default. In some systems, including most common-law systems, the procedure is pursued in the first-instance court, and in other systems, including many civil-law systems, it is through an appeal. This Rule defers to forum law.

## **16. Settlement Offer**

**16.1** Before or after commencement of a proceeding under these Rules, a party may deliver to another party a written offer to settle one or more claims and the related costs and expenses. The offer must be designated “Settlement Offer” and must refer to the penalties imposed under this Rule. The offer must remain open for [60] days, unless rejected or withdrawn by a writing delivered to the offeree before delivery of an acceptance.

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

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

**16.4** Unless by consent of both parties, an offer must not be made public or revealed to the court before acceptance or entry of judgment, under penalty of sanctions or adverse determination of the merits.

**16.5** Not later than [30] days after notice of entry of judgment, a party may file with the court a declaration that such an offer was made but not accepted. If the offeree has failed to obtain a judgment that is more advantageous than the offer, the court must impose an appropriate sanction, considering all the relevant circumstances of the case.

**16.6** Unless the court finds that special circumstances justify a different sanction, the sanction must be the loss of the right to be reimbursed for the costs as provided in Rule 32, plus reimbursement of a reasonable amount of the offeror costs taking into account the date of delivery of the offer. That sanction must be in addition to the costs determined in accordance with Rule 32. An offeree is entitled to costs up to the date upon which the offeror serves notice of acceptance, unless the offer states otherwise.

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

**16.8** This procedure is not exclusive of the court’s authority and duty to conduct informal discussion of settlement and does not preclude parties from conducting settlement negotiations that are not subject to sanctions.



**Comment:**

*R-16A* This Rule aims at encouraging compromises and settlements and also deters parties from pursuing or defending a case that does not deserve a full and complete proceeding.

This Rule departs from traditions in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party.

*R-16B* Rule 16 is based on a similar provision under the Ontario (Canada) civil-procedure rules and Part 36 of the new English Procedural Rules. The detailed protocol is designed to permit submission and consideration of serious offers of settlement, from either a plaintiff or a defendant. At the same time, the protocol prohibits use of such offers or responses to influence the court and thereby to prejudice the parties. Experience indicates that a precisely defined procedure, to which conformity is strictly required, can facilitate settlement. The law of the forum may permit or require the deposit of the offer into court.

This procedure is just a mechanism whereby a party can demand from an opposing party serious consideration of a settlement offer. It is not exclusive of the court's authority and duty to conduct informal discussions and does not preclude parties from conducting settlement negotiations by procedures that are not subject to the Rule 16.5 sanction. See Rule 16.8.

*R-16C* The offer must remain open for a determinate amount of time, but it can be withdrawn prior to the acceptance. According to general principles of contract law, in general the withdrawal of an offer can only be accomplished before the offer reaches the offeree. See, e.g., UNIDROIT's Principles of International Commercial Contracts article 2.3. However, the context of litigation requires a different protocol designed to facilitate settlement: the facts or the evidence may develop, or expenses may be made that justify the withdrawal, reduction, or increase of the offer. When the offer is withdrawn, there will be no cost sanctions.

The offeree may deliver a counter-offer. According to the principle of equality of the parties, a counter-offer is regulated by the same rules as the offer. See Principle 4. For example, it can be withdrawn under the same conditions as an offer can be withdrawn. In addition, the counter-offer may lead to the same sanctions as an offer.

According to general principles of private contract law, the delivery of a counter-offer means rejection of the offer. See, e.g., UNIDROIT's Principles of International Commercial Contracts article 2.11. However, the rule specified here seems to be more effective in the context of settlement offers in litigation, in which a rejection of an offer may lead to serious consequences.

*R-16D* Rule 16.4 prohibits public disclosure of the offer or disclosure to the court before acceptance or entry of judgment. Parties might be reluctant to make a settlement offer if that could be interpreted as an admission of liability or of weakness of one's position.

*R-16E* If the offeree fails to obtain a judgment that is more advantageous than the offer of settlement under this Rule, that party loses the right to be reimbursed for the costs and expenses. Instead, the winning party must pay the costs and expenses thereafter incurred by the loser. The court will award an appropriate proportion of the costs and expenses taking into account the date of delivery of the offer.

According to Rule 16.6, the cost sanction in this Rule is independent from and in addition to the costs awarded according to Rule 32. If the person who has to pay the cost sanction was also the loser of the action, that person will have to pay twice.

When the offer is partial, or the offeree fails only in part to obtain a more advantageous judgment, the court may order a sanction that is proportional. The rejection of the offer may have been reasonable under the specific circumstances of the case, and under Rule 16.6 the judge may apply the sanction accordingly.

*R-16F* Rule 16.5, permitting notice to the court of an offer that was not accepted, is linked to Rule 31.3, which provides that the court must promptly give the parties notice of judgment. When such notice has been received, the party whose offer was not accepted may inform the court, in order to obtain the cost sanctions prescribed in this Rule.

## **17. Provisional Measures**

**17.1 The court may issue an injunction to restrain or require conduct of a person where necessary to preserve the opportunity to grant effective relief by final judgment. The extent of the remedy is governed by the principle of proportionality. An injunction may require disclosure of assets wherever located.**

**17.2 The injunction may be issued before the opposing party has opportunity to respond only upon proof of urgent necessity and preponderance of considerations of fairness.**

**17.3 A person against whom the injunction is directed must have opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.**

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

**17.5 An applicant for an injunction is liable for full indemnification of a person against whom an injunction is issued if the injunction was unjustifiably granted.**

**17.5.1 The court may require the applicant for an injunction to post a bond or formally to assume a duty of indemnification.**

**17.6 An injunction under this Rule is subject to immediate appellate review.**

### **Comment:**

*R-17A* The term “injunction” refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Rule 17.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. The term is used here in a generic sense to include attachment, sequestration, and other directives. Availability of other provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law.

*R-17B* Rule 17.2 authorizes the court to issue an injunction without notice to the person against whom it is directed where doing so is justified by urgent necessity. “Urgent necessity,” required as a basis for an ex parte injunction, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of “balance of equities.” Considerations of

fairness include the strength of the merits of the applicant’s claim, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an ex parte injunction. In common-law procedure such an order is usually referred to as a “temporary restraining order.” See Rule 10.4.

The question for the court, in considering an application for an ex parte injunction, is whether the applicant has made a reasonable and specific demonstration that such an order is required to prevent an irreparable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until the opposing party has opportunity to be heard. The burden is on the party requesting an ex parte injunction to justify its issuance. However, opportunity for the opposing party or person to whom the injunction is addressed to be heard should be afforded at the earliest practicable time. The party or person must have the opportunity of a de novo reconsideration of the decision, including opportunity to present new evidence. See Rule 17.3.

*R-17C* Rules of procedure generally require that a party requesting an ex parte injunction make full disclosure to the court of all aspects of the situation, including those favorable to the opposing party. Failure to make such disclosure is grounds to vacate an injunction and may be a basis of liability for damages against the requesting party.

*R-17D* As indicated in Rule 17.4, if the court had declined to issue an injunction ex parte, it may nevertheless issue an injunction upon a hearing. If the court previously issued an injunction ex parte, it may renew or modify its order in light of the matters developed at the hearing. The burden is on the party seeking the injunction to show that the injunction is justified.

*R-17E* Rule 17.5.1 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction. The particulars of such indemnification should be determined by reference to the general law of the forum.

*R-17F* Rule 17.6 provides for the review of an order granting or denying a preliminary injunction, according to the procedure of the forum. Review by a second-instance tribunal is regulated in different ways in various systems. The guarantee of a review is particularly necessary when the injunction has been issued ex parte. However, it should also be recognized that such a review might entail a loss of time or procedural abuse. See Rule 33.2.

## **18. Case Management**

**18.1 In order to further the due administration of justice, the court should assume active management of the proceeding in all stages of the litigation.**

**18.2 The court must order a planning conference early in the proceeding and may schedule other conferences thereafter. The advocates for the parties must attend such conferences and other persons may be ordered to do so. The court may conduct a conference by any available means of communication.**

**18.3 In giving direction to the proceeding, the court may, upon discussion with the parties:**

**18.3.1 Order or suggest amendment of the pleadings for the addition, elimination, or revision of claims, defenses, and issues in light of the parties' contentions at that stage;**

**18.3.2 Order the separation for preliminary or separate hearing and decision of one or more issues in the case. The court may enter an interlocutory judgment addressing that issue and its relation to the remainder of the case;**

**18.3.3 Order the separation or consolidation of cases pending before itself, whether those cases proceed under these Rules or those of the forum, when doing so may facilitate the proceeding and decision;**

**18.3.4 Make decisions concerning admissibility and exclusion of evidence; the sequence, dates, and times of hearing evidence; and other matters to simplify or expedite the proceeding;**

**18.3.5 Order any person subject to the court's authority to produce documents or other evidence or to submit to deposition as provided in Rule 22.**

**18.4 To facilitate efficient determination of a dispute, the first-instance court may take evidence at another location or delegate taking of evidence to another court of the forum state or of another state or to a judicial officer specially appointed for the purpose.**

**18.5 The court may at any time suggest that the parties consider settlement, mediation, or arbitration or any other form of alternative dispute resolution. If requested by the parties, the court must stay the proceeding while the parties explore those alternatives.**

**18.6 In conducting the proceeding the court may use telecommunication devices, for example, video or audio transmission.**

**18.7 Time limits should begin to run in consecutive days from the date of notice.**

**Comment:**

*R-18A* This Rule determines the role of the court in organizing the case and preparing for the final hearing. The court has wide discretion in deciding how to conclude the interim phase, and in determining how to provide for the following final phase of the proceedings.

*R-18B* The court must order a planning conference early in the proceeding and may decide that, in order to clarify the issues and to specify the terms of the dispute at the final hearing, one or more conferences may be useful. The court may conduct a conference by any means of communication available such as telephone, videoconference, or the like.

*R-18C* The court fixes the date or dates for such conferences. The parties' advocates are required to attend. Participation of advocates for the parties is essential to facilitate orderly progression to resolution of the dispute. Advocates in many systems have some authority to make agreements concerning conduct of the litigation. Parties may have additional authority in some systems. If matters to be discussed are outside of the scope of the advocates' authority, the court has authority to require the parties themselves to attend in order to discuss and resolve matters concerning progression to resolution, including discussion of settlement. The rule does not exclude the possibility of pro se litigants.

*R-18D* In the conference, the court should discuss the issues of the case; which facts, claims, or defenses are no longer disputed; whether new disputed facts have emerged from disclosure or exchange of evidence; whether new claims or defenses have been presented; and what evidence will be admitted at the final hearing. The principal aim of the conference is to exclude issues that are no longer disputed and to identify precisely the facts, claims, defenses, and evidence concerning those issues that will be addressed at the final hearing.

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

*R-18E* After consultation with the parties, the court may give directives for the final hearing as provided in Rule 18.3. The court may sum up the terms of claims and defenses, rule on issues concerning admissibility of evidence, specify the items of admissible evidence, and determine the order of their examination. The court may also resolve disputed claims of privilege. The court should fix the date for final hearing and enter other orders to ensure that it will be carried on in a fair and expedited manner.

Rule 18 authorizes various measures by the court to facilitate an efficient hearing. It is often useful to isolate one or more issues for hearing upon one occasion, with other issues reserved for consideration later if necessary. So also, it is often useful that a hearing be consolidated with another case when the same or substantially similar issues are to be considered. As recognized in Rule 18.3.4, it is often convenient for the court to rule on admissibility of evidence before its presentation, especially evidence that is complicated, such as voluminous documents.

*R-18F* The court may consider the possibility that the parties may settle the dispute or refer it to a mediator. In such a case the court, before entering the rulings described in Rule 18.3, may fix a hearing to explore the possibility of a settlement, if necessary with the mediation of the court itself or a deferral of the dispute to mediation or any other form of alternative dispute resolution. This Rule authorizes the court to encourage discussion between the parties, but not to exercise coercion.

If a full settlement is reached, the proceedings are terminated and judgment entered or the case dismissed with prejudice. If the parties agree about a deferral to mediation or arbitration, that agreement should be put into the record of the case and the proceeding suspended.

*R-18G* A judicial officer especially appointed for the purpose of taking evidence at another location might be a single judge, a special master, a magistrate, an auditor, a referee, or a law-trained person specifically appointed by the court.

## **19. Early Court Determinations**

**19.1 On its own motion or motion of a party, the court at any stage before the final hearing may determine that:**

**19.1.1 The dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or, upon a party's motion, that the court lacks jurisdiction over that party;**

**19.1.2 That a complete or partial decision can be made by deciding only questions of law;**

**19.1.3 That a complete or partial decision can be made on the basis of evidence immediately available. In that case, the court must have regard for the**

**opportunity under these Rules for offering contradictory evidence or obtaining evidence before making such a determination.**

**19.2 Upon having made a decision under this Rule the court must allow the party against whom the determination is made reasonable opportunity to amend its statement of claims or defense when it appears that the deficiency can be remedied by amendment and that affording such opportunity will not unreasonably postpone the proceeding or otherwise result in injustice.**

**Comment:**

*R-19A* It is a universal procedural principle that the court may make determinations of the sufficiency of the pleadings and other contentions, concerning either substantive law or procedure, that materially affect the rights of a party or the capability of the court to render substantial justice. In the civil-law systems, the court has an obligation to scrutinize the procedural regularity of the proceeding. In the common-law systems, authority to make such determinations ordinarily is exercised only upon initiative of a party made through a motion. However, the court in common-law systems may exercise that authority on its own initiative and in civil-law systems the court may do so in response to a suggestion or motion of a party.

According to Rule 13.5, the objections referred to in this subsection can be made by defendant either by a motion or by answer to the complaint.

*R-19B* Rule 19.1 expresses a universal principle that the court's competence over the dispute and its jurisdiction over the parties may be questioned. A valid objection of this kind usually requires termination of the proceeding. A similar objection may be made that the dispute is not within the scope prescribed in Rule 2 and hence is not governed by these Rules. Among factors that may be considered under Rule 19.1.1 is dismissal for forum non conveniens. See Rule 4.6.2. Procedural law varies as to whether there are time limitations or other restrictions on delay in making any of these objections, and whether participation in the proceeding without making such an objection results in its waiver or forfeiture.

*R-19C* Rules 19.1.2 and 19.1.3 empower the court to adjudicate the merits of a claim or defense at the preliminary stage. Such an adjudication may be based on matters of law or matters of fact, or both. Judgment is appropriate when the claim or defense in question is legally insufficient as stated. Judgment is also appropriate when, although the statement of claim or defense as stated is legally sufficient, it is demonstrated that evidence to support the claim or defense is lacking. In the latter case, the court should consider whether exchange of evidence might disclose sufficient proof to support the claim or defense at issue.

Rules 19.1.2 and 19.1.3 authorize the court, prior to the final hearing, to make a partial award of some proportion of the debt or damages, when part of the dispute is not controverted or when it can be decided with the evidence available in the record.

In the civil-law systems, the foregoing powers are exercised by the court as a matter of course. In the common-law systems, the power to determine that a statement of claim or defense is substantively insufficient derives from the old common-law demurrer and the modern motion for summary judgment and is usually exercised on the basis of a motion by a party. Examples of claims that typically may be so adjudicated are claims based on a written contract calling for payment of money, or to ownership of specific property, to which no valid defense or denial is offered. Examples of defenses that typically may be so adjudicated are the defense of elapse of time (statute of limitations or prescription), release, and res judicata. In common-law systems, the power to determine

prior to trial that a claim or defense is not supported by evidence is usually exercised on the basis of a motion for summary judgment.

## **20. Disclosure**

**20.1 In accordance with the court’s scheduling order, a party must identify to the court and other parties the evidence on which the party intends to rely, in addition to that provided in the pleading, including:**

**20.1.1 Copies of principal documents, such as contracts and relevant correspondence;**

**20.1.2 Summaries of expected testimony of witnesses, including parties, nonparty witnesses, and experts, then known to the party. Witnesses must be identified, so far as practicable, by name, address, and telephone number.**

**20.1.3 In lieu of a summary of expected testimony, a party may present a written statement of testimony.**

**20.2 A party must amend the specification required in Rule 20.1 to include documents or witnesses not known when the list was originally prepared. Any change in the list of documents or witnesses must be immediately communicated in writing to the court and to other parties, together with a justification for doing so.**

**20.3 To facilitate compliance with this Rule, a lawyer for a party may have a voluntary interview with a potential nonparty witness. The interview may be on reasonable notice to counsel for other parties, who may be permitted to attend the interview.**

### **Comment:**

*R-20A* Rule 20.1 requires that a party disclose documents on which that party relies in support of the party’s position. A party must also list the witnesses upon whom it intends to rely and include a summary of expected testimony. The summary of expected testimony should address all propositions to which the witness will give testimony and should be reasonably specific in detail.

If a party later ascertains that there are additional documents or witnesses, it must submit an amended list, as provided in Rule 20.2. See also Rule 21.5. In accordance with Rules 12.1 and 13.4, the parties must state with reasonable detail the facts and the applicable law.

*R-20B* Under the rules of ethics or procedure in some systems, an advocate is not permitted to discuss the matters in dispute with prospective witnesses (other than the advocate’s own client). That rule is designed to protect testimony from improper manipulation, but it also has the effect of limiting the effectiveness of an advocate in investigating and organizing evidence for consideration by the court. Under systems in which discussion is permitted with prospective witnesses, rules of ethics and procedure prohibit a lawyer from suggesting to a witness what the testimony should be, or offering inducements to witnesses. Recognizing that there is some risk of abuse in allowing lawyers to confer with prospective witnesses, these Rules consider that the risk of manipulation is less injurious to fair adjudication than is the risk that relevant and important evidence may remain undisclosed.

*R-20C* Rule 20.3 permits a voluntary interview, not a deposition. See Rule 22. It also provides that the lawyer initiating the interview may give notice to other counsel, inviting them to attend. This procedure can foreclose or ameliorate subsequent objection that the interrogation was improperly suggestive. On the other hand, there are circumstances when counsel would prefer to risk such subsequent recrimination and therefore interview the witness in private.

## **21. Exchange of Evidence**

**21.1 A party that has complied with disclosure duties prescribed in Rule 20 may, on notice to the other parties, request the court to order production by any person of any evidentiary matter, not protected by confidentiality or privilege, that is directly relevant to the case and that may be admissible, as follows:**

**21.1.1 Documents and other records of information that are specifically identified or identified within specifically defined categories and that are relevant to an issue concerning which the demanding party has the burden of proof;**

**21.1.2 The identity of persons having personal knowledge of a matter in issue;**

**21.1.3 A copy of the report of any expert that another party intends to present.**

**21.2 The court must determine the request and order production accordingly. The court may direct that another judge or a specially appointed officer supervise compliance with an order for exchange of evidence. In fulfilling that function, the special officer has the same power and duties as the judge. Decisions made by the special officer are subject to immediate review by the court.**

**21.3 The requesting party may present the request directly to the opposing party. That party may acquiesce in the request, in whole or in part, and must promptly provide the evidence accordingly. If the request is adequate, the party must comply with it within a reasonable time, unless it calls for irrelevant or privileged evidence or is otherwise improperly burdensome.**

**21.4 If the party refuses, the requesting party may, on notice to the opposing party, request the court to order production of specified evidence. The court, after opportunity for hearing, must determine the request and make an order for production accordingly.**

**21.5 A party that did not have possession of demanded evidence when the court's order was made, but that thereafter comes into possession of it, must thereupon comply with the order.**

**21.6 It is not a valid objection that demanded information is adverse to the interest of the party to which the demand is directed.**

**21.7 Evidentiary privileges of third persons must be recognized. Evidentiary privileges of parties must be recognized, but the court may draw inferences from invocation of a privilege, except of the right of confidentiality of the legal profession, including the attorney-client privilege.**

**21.8 If a party fails unjustifiably to fulfill obligations under this Rule, the court may:**

**21.8.1 Draw adverse inferences;**



**21.8.2 Award costs to an opposing party and impose other sanctions authorized by forum law;**

**21.8.3 Dismiss claims, defenses, or allegations to which the evidence is relevant;**

**21.8.4 Enter a default judgment.**

**Comment:**

*R-21A* These Rules adopt, as a model of litigation, a system consisting of preliminary hearings followed by a concentrated form of final hearing. The essential core of the first stage is preliminary disclosure and clarification of the evidence. The principal consideration in favor of a unitary final hearing is that of expeditious justice. To achieve this objective, a concentrated final hearing should be used, so that arguments and the taking of evidence are completed in a single hearing or in a few hearings on consecutive judicial days.

*R-21B* Rules 20 and 21 define the roles and the rights of the parties, the duty of voluntary disclosure, the procedure for exchange of evidence, the role of the court, and the devices to ensure that the parties comply with demands for evidence. Proper compliance with these obligations is not only a matter of law for the parties, but also a matter of professional honor and obligation on the part of the advocates involved in the litigation.

*R-21C* The philosophy expressed in Rules 20 and 21 is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited, as in Rules 20 and 21. However within those specifications disclosure is generally a matter of right.

*R-21D* Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that “appears reasonably calculated to lead to the discovery of admissible evidence.” This broad discovery is often criticized as responsible for the increasing costs of the administration of justice. However, reasonable disclosure and exchange of evidence facilitates discovery of truth.

*R-21E* Discovery under the civil-law systems is generally much more restricted, or nonexistent. In particular, a much broader immunity is conferred against disclosure of trade and business secrets. This Rule should be interpreted as seeking to strike a balance between the restrictive civil-law systems and the broader systems in common-law jurisdictions.

*R-21F* Rule 21.1 requires the parties to make the disclosures required by Rule 20 prior to demanding production of evidence from an opposing party.

*R-21G* Rule 21.1 provides that every party is entitled to obtain from any person the disclosure of any relevant evidence, not privileged, in possession of that person. Request for evidence should normally be made to the court, and the court should direct the opposing party to comply with an order to produce evidence or information. This procedure can be unnecessarily burdensome on the parties and on the courts, especially in straightforward requests. Ideally, full disclosure of relevant evidence should result through dialogue among the parties, whereby the parties voluntarily satisfy each other’s demands without intervention of the court. A party therefore may present the request directly to the opposing party, which should comply with an adequate request within a

reasonable time. If the opposing party refuses, the party may request the court to order the production of the evidence. The court will then hear both parties and decide the issue. See Rules 21.3 and 21.4.

*R-21H* According to Rule 21.1, compulsory exchange of evidence is limited to matters directly relevant to the issues in the case as they have been stated in the pleadings. See Rule 24.2. A party is not entitled to disclosure of information merely that “appears reasonably calculated to lead to the discovery of admissible evidence,” which is the broad scope of discovery under Rule 26 of the Federal Rules of Civil Procedure in the United States. “Relevant” evidence is that which supports or contravenes the allegations of one of the parties. This Rule is aimed at preventing overdiscovery or “fishing expeditions.”

*R-21I* Exchange of evidence may concern documents and any other things (films, pictures, videotapes, recorded tapes, or objects of any kind), including any records of information, such as computerized information (disks, data, printings, or software systems). The demanding party must show the relevance of the information, document, or thing to prove or disprove the facts supporting a claim or a defense, and identify the document or thing to be disclosed, specifically identified, or defined by specific categories. Thus, a document may be identified by date and title or by specific description such as “correspondence concerning the transaction between A and B in the period February 1 through March 31.” A party is not obliged to comply with a demand that does not fulfill these conditions. Disputes concerning whether the conditions of the demand have been satisfied, and whether the demand should be complied with, are resolved by the court on motion by any party. The court may declare the demand invalid or order production of the document or thing, and if necessary specify the time and mode of production.

*R-21J* Exchange of evidence may concern the identity of a potential witness. As used in these Rules, the term “witness” includes a person who can give statements to the court even if the statements are not strictly speaking “evidence,” as is the rule in some civil-law systems concerning statements by parties. Under Rule 20.1.2 a summary of the expected testimony of a witness whom a party intends to call must be provided to other parties. A party is not allowed to examine a witness through deposition except when authorized by the court. See Rules 18.3.5, 20.3, and 22.

*R-21K* The general principle is that the parties bear the burden of obtaining evidence they need in preparation for final hearing. However, disclosure obtained by the parties on their own motion may be incomplete, resulting in insufficient evidence or surprise to the court or other parties. To deal with such inconvenience, the court may order additional disclosure on its own initiative or on motion of a party. For example, the court may order that a party or a prospective witness submit a written deposition concerning the facts of the case. The court may also subpoena a hostile witness to be orally deposed. See Rule 22.

*R-21L* The right to refuse to answer questions that may incriminate a person is universally recognized. However, this right does not necessarily include the right to refuse to produce documents that may be incriminating, an issue that should be determined according to forum law. The court may draw adverse inferences from a refusal to answer questions invoking a protection against self-incrimination. See Rule 21.7.

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

*R-21M* In cases involving voluminous documents or remotely situated witnesses, or in similar circumstances of practical necessity, the court may appoint someone as a special officer to supervise exchange of evidence. A person so appointed should be impartial and independent, and have the same powers and duties as the judge, but decisions by such an officer are reviewable by the appointing court. See Rule 21.2.

*R-21N* If a party fails to comply with a demand for exchange of evidence, Rule 21.8 provides that the court may impose sanctions to make disclosure effective. The determination of sanctions is within the discretion of the court, taking into account relevant features of the parties' behavior.

The sanctions are:

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

2) A monetary penalty, fixed by the court in its discretion, or other means of legal compulsion permitted by forum law, including contempt of court. The court should graduate the penalty or contempt sanction according to the circumstances of the case.

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

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

Unless the court finds that special circumstances justify a different sanction, the preferred sanction is to draw adverse inferences. Dismissal and entry of adverse judgment is a sanction of last resort.

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

**22.1 Deposition of a witness, including a party, may be taken only by order of the court or agreement of the parties. The deposition may be presented as evidence in the record on the same basis.**

**22.2 Testimony by deposition must be upon affirmation and transcribed verbatim or recorded by audio or video, as the parties may agree or as the court orders. The cost of transcription or recording must be paid by the party that requested the deposition, unless the court orders otherwise.**

**22.3 The deposition must be taken at such time and place as the parties may agree or as the court orders. All parties and the court must be given written notice, at least [30] days in advance, of the time and place of the deposition. The examination may be conducted before a judicial officer specially appointed as provided in Rule 21.2.2. Before or during the deposition the court may submit supplemental questions to be answered by the deponent.**

**22.4 A party may present a statement of sworn testimony of a nonparty witness, who makes an affirmation to tell the truth, containing statements about relevant facts. The court, in its discretion, may consider such statements as if they were made by oral testimony. If another party denies the truth of the statements made by affidavit, that party may move for an order of the court requiring the personal appearance or deposition of the affidavit's author. Examination of that witness may begin with supplemental questioning by the court or opposing party.**

**Comment:**

*R-22A* A deposition is a form of taking testimony employed in common-law and in some civil-law systems. It consists of sworn testimony of a potential witness, including a party, taken outside of court prior to the final hearing. A deposition may be given orally in response to questions by lawyers for the parties or by questions from a judicial officer appointed by the court. A deposition may be conducted by electronic communication, for example by telephone conference. It may also be given through written responses to written questions. Ordinarily, a deposition is given after commencement of litigation but also, in accordance with the law of the forum, may be given *de bene esse*, i.e., to preserve testimony when the witness is expected to be unavailable after litigation has commenced. Questioning may seek to gather information and to test the witness's recollection and credibility. The testimony of a witness in a deposition may be presented as evidence, either in lieu of the witness or as direct testimony, but the court may require the presence of a witness who can attend in order to permit supplemental questioning. Under these Rules a deposition may be used in limited circumstances for exchange of evidence before trial.

*R-22B* A party is not allowed to examine a witness through deposition except when authorized by the court. See Rule 18.3.5. Rule 22.2 provides that deposition testimony be taken on affirmation, as at a hearing before the court. It is to be transcribed verbatim or recorded on audio or video. The parties may agree about the form of transcription or recording, but the court may nevertheless determine what form is to be used. The party who requests the deposition must pay the cost of transcription or recording, unless the court orders otherwise.

*R-22C* Rule 22.3 specifies the procedure for a deposition. In general, the procedure should be similar to a presentation of the witness before the court, except that the questioning is conducted by the parties and in many depositions no judicial officer will be present. In some more complex or disputed cases, a deposition may be presided over by a special officer appointed by the court. See Rule 21.2.

*R-22D* The deposition will follow, as far as possible, the procedure for taking testimony before a judge. Thus the party taking the deposition will examine the witness first, and the other parties will ask supplemental questions thereafter. As stated in Rule 22.3, before the deposition the court may specify questions that it requires to be asked of the witness. Time and place of the deposition may be agreed upon by the parties, or may be prescribed by the court. Unless the parties otherwise agree, a written notice of the deposition must be given to all the parties at least 30 days in advance to enable any party to be present and participate in the deposition. Notice will also be given to the court.

*R-22E* The general principle governing presentation of evidence is that evidence will be presented orally at the final hearing. See Principle 16 and Rule 29. However, oral examination of a witness at the final hearing may be impossible, burdensome, or impractical. Rule 22.1 permits the transcript of a deposition taken in accordance with this

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

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

*R-22F* Rule 22.4 permits the presentation of testimony by means of written affidavits containing statements about relevant facts of the case. Such a statement, although upon affirmation, is *ex parte* in that neither the court nor opposing parties has been permitted to question the witness. According to Principle 16.3, “Ordinarily, testimony of parties and witnesses should be received orally.” Therefore, a written statement may be regarded with corresponding skepticism by the court, especially if another party denies the truth of the statements made by affidavit. However, facts not in serious dispute often may be conveniently proved by this procedure. See also Rule 20.1.3.

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

## **23. Confidentiality**

**23.1 Information obtained under these Rules but not presented at the final hearing must be maintained in confidence.**

**23.2 The court may enter suitable protective orders for trade or business or national-security secrets of information whose disclosure might cause injury or embarrassment.**

**23.3 To facilitate administration of this Rule, the court may examine evidence in camera.**

### **Comment:**

*R-23A* A hearing in camera is one closed to the public and, in various circumstances, closed to others. As the court may direct according to the circumstances, such a hearing may be confined to counsel without the parties or it may be *ex parte*, e.g., confined to a party and that party’s counsel, for example when trade secrets are involved.

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

**24.1 All relevant evidence, except that which is privileged, is admissible, including circumstantial evidence.**

**24.2 The facts alleged in the pleadings determine relevance.**

**24.3 A party, if not competent to give evidence, may nevertheless make statements that will be accorded probative weight. A party making such a statement is subject to questioning by the court and other parties.**

**24.4 A party has a right to proof through testimony, not privileged under applicable law, of any person whose testimony is relevant, admissible, and the production of which is subject to the court's authority. The court may call any witness having these qualifications.**

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

### **Comment:**

*R-24A* This Rule states principles concerning evidence, defining generally the conditions and limits of what may be properly considered as proof at the hearing. The basic principle is that any factual information, not privileged, that is rationally useful in reaching judgment on the relevant facts of the case should be admissible as evidence. Evidence governed by a privilege is not admitted and the court may refuse to accept evidence that is redundant. Common-law concepts of hearsay and parol evidence as exclusionary rules are generally inappropriate in a nonjury case, except as they affect the credibility and weight of evidence.

*R-24B* In applying the principle of relevance, the primary consideration is the usefulness of the evidence. In deciding upon admissibility of the evidence, the court makes a hypothetical evaluation connecting the proposed evidence with the issues in the case. If a probative inference may be drawn from the evidence to the facts, then the evidence is logically relevant. See Rule 12.1 and Comment *R-12A*.

*R-24C* In some legal systems there are rules limiting in various ways the use of circumstantial evidence. However, these rules seem unjustified and are very difficult to apply in practice. More generally, there is no valid reason to restrict the use of circumstantial evidence when it is useful to establish knowledge of a fact in issue. Therefore under the general principle, the court may consider any circumstantial evidence provided it is relevant for the decision on the facts of the case.

*R-24D* Rule 24 defers to local law the decision of who can properly give evidence or present statements. In some national systems the rules exclude parties or “interested” nonparties as witnesses. However, even in such systems the trend favors admitting all testimony. A general rule of competency also avoids the complex distinctions that exclusionary rules require. The proper standard for the submission of evidence by a witness is the principle of relevancy. This does not mean, however, that subjective or objective connections of the witness with the case must be disregarded, but only that they are not a basis for excluding the testimony. These connections, for example kinship between the witness and a party, may be meaningful in evaluating credibility.

Any person having information about a relevant fact is competent to give evidence. This includes the parties and any other person having mental capacity. Witnesses are

under obligation to tell the truth, as required in every procedural system. In many systems such an obligation is reinforced by an oath by the witness. When a problem arises because of the religious character of the oath, the court has discretion to determine the terms of the oath or to permit the witness merely to affirm the obligation to tell the truth.

*R-24E* Rules 24.4 and 24.5 govern the parties' right to proof in the form of testimony, documentary evidence, and real or demonstrative evidence. A party may testify in person, whether called by the party, another party, or the court. That procedure is not permitted in some civil-law systems, where the party is regarded as too interested to be a witness on its own behalf.

*R-24F* The court may exercise an active role in the taking of testimony or documentary, real, or demonstrative evidence. For example, when the court knows that a relevant document is in possession of a party or of a nonparty, and it was not spontaneously produced, the court may on its own motion order the party or the nonparty to produce it. The procedural device is substantially an order of subpoena. The court in issuing the order may establish the sanctions to be applied in case of noncompliance.

## **25. Expert Evidence**

**25.1 The court must appoint a neutral expert or panel of experts when required by law and may do so when it considers that expert evidence may be helpful. If the parties agree upon an expert the court ordinarily should appoint that expert.**

**25.2 The court must specify the issues to be addressed by the expert and may give directions concerning tests, evaluations, or other procedures to be employed by the expert, and the form in which the report is to be rendered. The court may issue orders necessary to facilitate the inquiry and report by the expert.**

**25.3 A party may designate an expert or panel of experts on any issue. An expert so designated is governed by the same standards of objectivity and neutrality as a court-appointed expert. A party pays initially for an expert it has designated.**

**25.4 A party's expert is entitled to observe tests, evaluations, or other investigative procedures conducted by the court's expert. The court may order experts to confer with each other. Experts designated by the parties may submit their own opinions to the court in the same form as the report made by the court's expert.**

### **Comment:**

*R-25A* These Rules adopt the civil-law rule according to which the court appoints a neutral expert or panel of experts. The court decides on its own motion whether an expert is needed in order to evaluate or to establish facts that because of their scientific, legal, or technical nature, the court is unable to evaluate or establish by itself. The court appoints the expert or the experts (if possible using the special lists that exist in many countries) on the basis of the expert's competence in the relevant field. If the expert's neutrality is disputed, that issue is for the court to resolve. The court, informed by the parties' recommendations, should specify the technical or scientific issues on which the expert's advice is needed and formulate the questions the expert should answer. The court also should determine which techniques and procedures the expert will apply, regulate any other aspect of the tests, inquiries, and research the expert will make, and determine whether the expert will respond orally or by submitting a written report. In making such determinations, the court should consult with the experts as well as the parties in determining the tests, evaluations, and other procedures to be used by the experts.

*R-25B* The court's expert is neutral and independent from the parties and from other influence. The court is expected to rely on the expert's advice when it appears sound and credible. If the advice does not appear reasonable, the court may appoint another expert. However, the court is not obliged to follow the expert's advice. In such a case, the court ordinarily should explain specifically the reasons why the expert's advice is rejected and the reasons supporting the court's different conclusion.

*R-25C* Rule 25 recognizes that the status of an expert is somewhat different from that of a percipient witness and that experts have somewhat different status in various legal systems.

*R-25D* In common-law systems an expert is presented by the parties on the same basis as other witnesses, recognizing that the role is one of interpretation rather than recounting first-hand observations. In civil-law systems the parties may present experts but ordinarily do so only to supplement or dispute testimony of a court-appointed expert.

This Rule adopts an intermediate position. The court may appoint experts but the parties may also present experts whether or not the court has done so. In addition, if the parties agree upon an expert, the court ordinarily should appoint that expert. Such an expert is obliged to perform this task in good faith and according to the standards of the expert's profession. Both a court-appointed expert and a party-appointed expert are subject to supplemental examination by the court and by the parties.

*R-25E* When the court receives oral testimony from the court's expert, the parties' experts should be similarly heard. When the court's expert submits a written report, the parties' experts should also be allowed to do so. The court may order all the experts to confer with each other in order to clarify the issues and to focus their opinions. The advice of the parties' experts may be taken into account by the court and the court may adopt a party's expert advice instead of that of the court's expert.

Under Rule 25.2 the court may examine the expert orally in court or require a written report and conduct oral examination of the expert after the report has been submitted.

## **26. Evidentiary Privileges**

### **26.1 Evidence may not be elicited in violation of:**

**26.1.1 The right of confidentiality of the legal profession, including the attorney-client privilege;**

**26.1.2 Confidentiality of communications between counsel in settlement negotiations;**

**26.1.3 [Other specified limitations].**

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

**26.3 A privilege may be forfeited, for example, by omitting to make a timely objection to a question or demand for information protected by a privilege. The court in the interest of justice may relieve a party of such forfeiture.**

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



**Comment:**

*R-26A* Privileges exclude relevant evidence. They evolve over time and reflect various social interests. Organized professions (e.g., doctors, psychiatrists, accountants, lawyers) are interested in protecting their members’ professional activities by means of the privilege not to disclose information acquired during such an activity. Statutory law and case law have extended the list of professional privileges. However, the protection of such privileges has significant cost in the quality of proof and discovery of truth.

*R-26B* Rule 26.1.1 gives full effect to a “legal profession” privilege. The concept of this privilege is different in the common-law and civil-law systems but this Rule includes both concepts. The common law recognizes an “attorney-client privilege,” which enables the client to object to inquiry into confidential communications between client and lawyer that were made in connection with the provision of legal advice or assistance. Under United States law a similar protection, called the “lawyer work product” immunity, additionally shields materials developed by a lawyer to assist a client in litigation. The civil law recognizes the same protections but under the concept of a professional right or privilege of the lawyer. See also Rule 21.7.

*R-26C* Rule 26.1.2 reflects the universal principle that confidentiality should be observed with regard to communications in the course of settlement negotiations in litigation. Some systems presume that only correspondence between advocates is confidential, whereas many other systems extend this privilege to party communications concerning settlement. The precise scope of confidentiality of communications concerning settlement is determined by the law governing the communications, but the general principle stated above should be considered in determining the matter. See also Rule 24.

*R-26D* Rule 26.1.3 may be used to accord protection to other privileges recognized under the law of the forum, such as those involving financial advisers or other professionals. In general, the civil-law systems accord privacy to the communications of many professionals. Many legal systems recognize additional privileges, usually in qualified form. Thus, the European Court of Human Rights has recognized various professional privileges, e.g., for bankers, accountants, and journalists, and many countries also recognize a privilege for communications between family members. Many state jurisdictions in the United States recognize an accountant privilege and some recognize a “self-evaluation privilege” on the part of hospitals and some other organizations. However, in some civil-law systems the court may examine otherwise protected confidences if they appear highly relevant to the matter in dispute. Such an approach is known in the common law as a conditional privilege. However, if the court permits receipt of such evidence, it should protect the confidential information from exposure except as required for consideration in the dispute itself.

*R-26E* The court may make a determination whether to receive conditionally privileged information through an in camera hearing, in which the participants are limited to the court itself, the parties, and the parties’ lawyers. See Rule 23.3. The same device may be used concerning nonprivileged information when the court finds that publication could impair some important private or public interests, such as a trade secret. The taking of evidence in a closed hearing should be exceptional, having regard for the fundamental principle of the public nature of hearings.

*R-26F* Rule 26.4 prescribes a procedure for claims of privilege with respect to documents. The claimant is required to identify the document in sufficient detail to

permit an opposing party to make an intelligent disputation of the claim of privilege, for example that the document had been distributed to third persons.

*R-26G* A person who is entitled to a privilege may waive it, in which event evidence in the privileged communication is received without limitation. The privilege may be waived by means of an explicit statement or tacitly. An illustration of tacit waiver is when the party does not timely claim the privilege. However, the court may decline to enforce a waiver when necessary in the interest of justice.

## **27. Reception and Effect of Evidence**

**27.1 Each party has the burden of proof as to issues constituting an element of that party's case.**

**27.2 The court must determine factual issues according to the principle of free evaluation and upon being reasonably convinced on the basis of the evidence.**

**27.3 The court may, on its own motion or motion of a party, order reception of any relevant evidence.**

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

**27.4.1 Exclude evidence that is redundant or that involves unfair prejudice, excessive cost, burden, confusion, or delay;**

**27.4.2 Impose sanctions on a person for unjustified failure to attend to give evidence, to answer proper questions, or produce a document or other item of evidence, or who otherwise obstructs the proceeding;**

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

### **Comment:**

*R-27A* Rule 27 specifies various aspects of the authority of the court with reference to evidence. The court may exercise such powers on its own motion or on a motion of a party.

Rule 27.4.1 gives the court the power to exclude evidence on various grounds. The first is irrelevancy of the evidence or its redundant or cumulative character. Redundant or cumulative evidence is theoretically relevant if considered by itself but not when considered in the context of the other evidence adduced. The court may in the course of a final hearing admit evidence that was preliminarily excluded because it had appeared irrelevant, redundant, or cumulative. The standard of exclusion by reason of “unfair prejudice, excessive cost, burden, confusion, or delay” should be applied very cautiously. The court should use this power primarily when a party adduces evidence with the apparent aim of delaying or confusing the proceedings.

*R-27B* Rule 27.4.2 provide for various sanctions, including *astreintes*. The court may draw adverse inference from the behavior of a party such as failing to give testimony, present a witness, or produce a document or other item of evidence that the party could present. Drawing adverse inference means that the court will interpret the party's conduct as circumstantial evidence contrary to the party.

Drawing adverse inference is obviously a sanction appropriate only against a party. Sanctions applied to nonparties include contempt of court and imposing a fine, subject to the limitation in Rule 35.2.4. The conduct that may be sanctioned includes failing to

attend as a witness or answer proper questions and failing without justification to produce documents or other items of evidence.

*R-27C* While failure to comply with rules and orders concerning evidence is always subject to sanction, the court has discretion concerning the importance and the nature of the noncompliance and the kind and measure of the sanction that will be imposed. Rule 27.4.3 provides that the court may excuse a party's failure to comply with the rules concerning evidence or with court orders applying the rules, according to the discretion of the court.

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

**28.1** The court may, upon reasonable notice to the person to whom an order is directed, order persons subject to its jurisdiction who are not parties to the proceeding:

**28.1.1** To comply with an injunction issued in accordance with Rule 17.1;

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

**28.1.3** To give testimony as provided in Rules 22 and 29;

**28.1.4** To produce information, documents, or other things as evidence or for inspection by the court or a party.

**28.2** The court shall require a party seeking an order directed to a third person to provide compensation for the costs of compliance.

**28.3** An order directed to a third person may be enforced by means authorized against such persons by forum law, including imposition of cost sanctions, a monetary penalty, *astreintes*, contempt of court, or seizure of documents or other things.

### **Comment:**

*R-28.1* The court has broad authority to order nonparties as well as parties to act or refrain from acting during pendency of the litigation, to preserve the status quo, and to prevent irreparable injury. In various situations a person may be involved in a suit without being a party, but should be subject to orders in the interest of justice in the proceeding. The right of contradiction stated in Principle 6 should be respected at all times. Therefore, interested persons should be notified and afforded a reasonable opportunity to respond.

*R-28.2* An injunction issued in accordance with Rule 17.1 may involve nonparties insofar as their cooperation is needed in order to carry the injunction into effect, particularly to maintain the status quo, to prevent irreparable injury, and to assure an effective remedy. The court should determine the kind of cooperation required by nonparties and provide orders accordingly.

*R-28.3* When funds or other property is involved, the court may require that they be preserved against dissipation until the case is finally decided. The court may order the person in possession of the property to retain it until a further order of the court.

*R-28.4* When a nonparty's testimony is required, on a party's motion or on the court's own motion, the court may direct the witness to give testimony in the hearing or through deposition.

*R-28.5* When a document or any other relevant thing is in possession of a nonparty, the court may order its production at the preliminary stage or at the final hearing.

*R-28.6* An order directed to the third party is enforced by sanctions for noncompliance authorized by forum law. These sanctions include a monetary penalty or other legal compulsion, including contempt of court. When it is necessary to obtain evidentiary materials or other things, the court may order a direct seizure of such materials or things, and define the manner of doing it.

## **F. Final Hearing (Trial)**

### **29. Concentrated Final Hearing**

**29.1** So far as practicable, the final hearing must be concentrated in consecutive judicial days.

**29.2** The final hearing must be before the judge or judges who are to render the judgment.

**29.3** Documentary evidence may be presented only if it has previously been disclosed to all other parties. Testimonial evidence may be presented only if notice has been given of the identity of the witness and the substance of the contemplated testimony.

**29.4** A person giving testimony may be questioned first by the court or the party seeking the testimony. All other parties then must have opportunity to ask supplemental questions. The courts and the parties may challenge a witness's credibility or the authenticity or accuracy of documentary evidence.

**29.5** The court on its own motion or on motion of a party must exclude irrelevant or redundant evidence and prevent embarrassment or harassment of a witness.

### **Comment:**

*R-29A* Rule 29.1 establishes a general principle concerning the structure of the final hearing. It is consistent with the common-law “trial” model, according to which the taking of evidence should be made in a single hearing; when one day of hearing is insufficient the final hearing should continue in consecutive days. In civil-law systems a similar structure is reflected in “concentrated” proceedings. The concentrated hearing is the better method for the presentation of evidence, although several systems still use the older method of separated hearings. Exception to the rule of the concentrated hearing can be made in the court's discretion when there is good reason, for example when a party needs an extension of time to obtain evidence. In such a case the delay should be as limited as possible. Dilatory behavior of the parties should not be permitted.

*R-29B* In most civil-law systems, a party's statement is regarded as having lesser standing than testimony of a nonparty witness; in some civil-law systems, a party may not be compelled to give testimony at the instance of another party; and in some systems a party cannot call itself as a witness. The common law treats parties as fully competent witnesses and permits parties to call themselves to the stand and obliges them to testify at the instance of an opposing party, subject to privileges such as that against self-incrimination. This Rule adopts the common-law approach, so that a party has both an obligation to testify if called by the opposing party and a right to testify on its own motion. See Rule 24.3. Failure without explanation or justification to testify may justify the court's drawing an adverse inference concerning the facts, or, in common-law

countries, if a party disobeys an order to testify, holding the party in contempt. However, a party's failure to comply may have some reasonable explanation or justification. Sanctions may be gradually increased until the party decides to comply, according to the model of the French *astreintes*.

This procedure entails a departure from the “free examination” of the parties permitted in some continental systems, whereby parties make statements but are not witnesses in the strict sense because they are under no obligation to tell the truth and do not take an oath.

*R-29C* Rule 29.4 governs the examination of witnesses. The traditional distinction between common-law systems, which are based upon direct and cross-examination, and civil-law systems, which are based upon examination by the court, is well known and widely discussed in the comparative legal literature. Equally well known are also the limits and defects of both methods. The chief deficiency in the common-law procedure is excessive partisanship in cross-examination, with the danger of abuses and of distorting the truth. In the civil law the chief deficiency is passivity and lack of interest of the court while conducting an examination, with the danger of not reaching relevant information. Both procedures require efficient technique, on the part of the judge in civil-law systems and the advocates in common-law systems. The problem is to devise a method effective for a presentation of oral evidence aimed at the search for truth. The rules provided here seek such a balanced method.

*R-29D* For a witness called by a party, the common-law system of direct and supplemental examination by the parties is the most suitable for a thorough examination. The witness is first questioned by the lawyer of the party who called the witness, and then questioned by the lawyers for the adverse parties. Further questioning is permitted by the court when useful. To prevent abuses by the lawyers, the court should exclude, on the other party's objection or sua sponte, questions that are irrelevant or improper or which subject the witness to embarrassment or harassment.

*R-29E* The civil-law method, in which the court examines the witness, has advantages in terms of the neutral search for the truth and of eliciting facts that the court considers especially relevant. The court therefore is afforded an active role in the examination of witnesses, an authority that is also recognized in common-law systems. The court may play such a role to clarify testimony during the questioning by the parties or may independently examine the witness after the parties' examinations.

*R-29F* If, during questioning as a witness, a party makes a statement the content of which is contrary to the party's own interest, the statement is to be treated as ordinary evidence and does not have any special probative weight. Such a statement is not to be treated as a “confession” having binding effect. Also, a statement by a party outside court, for example in a deposition, that is contrary to his or her interest is admissible as evidence if duly proved at the hearing. Such a statement is also to be treated as ordinary evidence to be freely evaluated by the trier of fact.

*R-29G* The opinion of a witness may be admitted when it will clarify the witness's testimony. In the recollection of facts, knowledge and memory are often inextricably mixed with judgments, evaluations, and opinions, often elaborated unconsciously. Sometimes a “fact” implies an opinion of the witness, as for instance when the witness interprets the reasons for another person's behavior. Therefore a rule excluding the opinions of witnesses is properly understood as only prohibiting comments that do not aid in the reconstruction of the facts at issue.

*R-29H* The credibility of any witness, including experts and parties can be disputed on any relevant basis, including adverse questioning, prior inconsistent statements, or any other circumstance that may affect the credibility of the witness, such as interest, personal connections, employment or other relationships, incapacity to perceive and recollect facts, and inherent implausibility of the testimony. Such prior statements may have been made in earlier stages of the same proceedings (for instance, during deposition) or made out of the judicial context, for instance before the beginning of the litigation.

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

*R-29I* The authenticity or the reliability of other items of evidence, either documents or real and demonstrative evidence, may also be disputed by any party. Special subproceedings to determine the authenticity of public or private documents exist in many national systems. They should be used when the authenticity of a document is doubtful or contested. Scientific and technical evidence may also be scrutinized if its reliability is doubtful or disputed.

### **30. Record of the Evidence**

**30.1 A summary record of the hearings must be kept under the court's direction.**

**30.2 A verbatim transcript of the hearings or an audio or video recording must be kept upon order of the court or motion of any party. A party demanding such a record must pay the expense thereof.**

#### **Comment:**

*R-30A* With regard to the record of the evidence, two principal methods can be used. One is typical of some common-law jurisdictions and consists of the verbatim transcript of everything said in the presentation of evidence. The other is typical of civil-law systems and consists of a summary of the hearing that is written by the court's clerk under the direction of the court, including the matters that in the court's opinion will be relevant for the final decision. In most civil-law systems there is no procedure for making a verbatim transcript. A verbatim transcript is complete and provides a good basis both for the final decision and for the appeal, but in many cases it is exceedingly burdensome and expensive.

*R-30B* A summary record should include all relevant statements made by the parties and the witnesses, and other events that might be useful for the final evaluation concerning the credibility of witnesses and the weight of proofs. The parties are entitled to ask for inclusion of specific statements and the court has discretion to permit their reception.

*R-30C* If a party requests a verbatim transcript or audio or video recording of the final hearing, the court should so order. The party or parties requesting the transcript should pay the expense. The court should be provided a copy of the transcript and the other parties are entitled to have a copy upon paying their share of the expense. The court may, on its own initiative, order a verbatim transcript of the hearing. A verbatim transcript does not take the place of the official record that must be kept according to Rule 30.1 unless ordered by the court.

### **31. Final Discussion and Judgment**

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

**31.2** The decision must be accompanied by a reasoned explanation of its legal and factual basis.

**31.3** The court must promptly give notice of judgment to the parties.

#### **Comment:**

*R-31A* The final hearing ends when all the evidence has been presented. At this point the parties may request permission to present oral closing statements, the plaintiff first and then the defendant. In such closing statements the parties will suggest the conclusions to be drawn from the evidence presented, and may restate their "theories of the case" from both the factual and the legal point of view, briefly summing up their contentions and claims and stating their requests. The court may allow the parties to discuss briefly among themselves and the court the main issues of the case. The court may put questions to the parties' lawyers in order to clarify the contentions and claims.

*R-31B* A party has a right to present a written submission of contentions and the legal rules upon which the contentions are based. The court should fix a date for written submissions and, if the court permits oral statements, the date of a further hearing in which the closing statements will be presented and the oral discussion will take place.

*R-31C* Rule 31.2 requires the court to publish a written opinion justifying its decision. The publication is made according to the local practice, but a written notice must be sent to the parties. See Rule 31.3. All parties should be sent a copy of the entire judgment. The date of the judgment, determined according to forum law, is the basis for determining the time for appeal and for enforcement.

The justificatory opinion must include the findings of fact supported by reference to the relevant proofs and the court's evaluations of evidence and the principal legal propositions supporting the decision.

*R-31D* If the court is composed of more than one judge, in some countries a member of the tribunal may give a dissenting or concurring opinion, orally or in writing. Such opinions, if in writing, are published together with the court's opinion.

*R-31E* The standard of proof generally applied in civil cases at common law is that of preponderance of the evidence. In civil-law systems the standard is that the judge must be convinced. Many systems impose a higher standard of proof for certain issues in civil cases, notably proof of fraud. These standards contrast with the higher standard, such as "beyond a reasonable doubt," in criminal cases. See Principle 18.

*R-31F* In addition to the standard of proof is the problem of burden of proof. In general, it is universally recognized that a plaintiff has the burden of proof for all issues essential to his claim and that the defendant correlatively has the burden of proof as to issues of affirmative defense. In civil-law systems the allocation of burden of proof is considered to be a matter of substantive law for purposes of choice of law. The rules of burden of proof applicable to various types of claims are in turn considered to be derived

from substantive considerations, such as the nature of the claim and the relative capabilities of parties in transactions of the kind presented in the case.

In common-law systems the allocation of burden of proof is generally considered to be “procedural” so far as concerns choice of law. The forum therefore applies its own rule of burden of proof. However, common-law systems recognize various exceptions to this approach. In any event, the rules of burden of proof in common-law systems generally reflect the same kinds of “substantive” policy considerations as underlie the rules of burden of proof in the civil-law systems. See Rule 27.1.

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

## **32. Costs**

**32.1 Each party initially must pay its own costs and expenses, including court fees, attorneys’ fees, fees of a translator appointed by a party, and incidental expenses.**

**32.2 The interim costs of the fees and expenses of an assessor, expert, other judicial officer, or other person appointed by the court must be provisionally paid by the party with the burden of proof or as otherwise ordered by the court.**

**32.3 The prevailing party must ordinarily be reimbursed its reasonable costs and expenses from the losing party.**

**32.4 The prevailing party shall within [30] days after rendition of the judgment submit a statement, certified by the party or its attorney, of its costs and expenses. The losing party must promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.**

**32.5 The court may reduce or preclude reimbursement against a losing party that had a reasonable factual and legal basis for its position. The court may also impose a penalty against a party whose position the court determines was excessive or maintained in bad faith.**

**32.6 The court may delegate the determination and award of costs to a specialized costs official.**

**32.7 Reimbursement may be stayed if appellate review is pursued.**

**32.8 If appellate review is pursued, this rule applies to costs and expenses incurred therein.**

**32.9 A person may be required to provide security for costs, or for liability for provisional measures, only when necessary in the interest of justice to guarantee full compensation of possible future damages. Security should not be required solely because a party is not domiciled in the forum state.**

### **Comment:**

*R-32A* The rule governing allocation of costs and expenses of litigation in ordinary civil proceedings, recognized almost universally except in the United States, China, and Japan, is that the prevailing party is entitled to reimbursement from the losing party. That



principle is adopted here. The prevailing party must submit the statement seeking reimbursement referred to in Rule 32.4.

Under the “American” rule in the United States, each party bears its own costs and expenses, including its attorneys’ fees, except as statutes, rules, or contracts specifically provide otherwise or in case of exceptional abuse of process. The American rule creates incentives for a party to bring litigation or to persist in defense of litigation that would not be maintained under the generally recognized rule.

However, the rules concerning costs in common-law systems and some civil-law systems confer authority on the court to modify the normal allocation of costs to the losing party. Rule 32.5 adopts such a position. This Rule also allows the court to impose penalty costs on a party that has engaged in bad-faith disputation. “Bad faith” includes disputation of factual issues as to which there is no substantial evidentiary dispute and assertion of legal contentions for which no professionally responsible argument can be offered.

*R-32B* The parties are permitted, in accordance with applicable law, to contract with their lawyers concerning their fees. Costs awarded should be reasonable, not necessarily those incurred by the party or the party’s lawyer. If it was reasonably appropriate that a party retained more than one firm of lawyers, those fees and expenses may be recovered. The party seeking recovery of costs has the burden of proving their amount and their reasonableness. The award belongs to the party, not the lawyer, subject to any contractual arrangement between them.

*R-32C* Rule 32.9 recognizes that, if it is not inconsistent with constitutional provisions, the court may require posting of security for costs. In several legal systems a requirement of security for costs is considered a violation of the due-process guarantee in connection with the principle of the equal treatment under the law. Security for costs could entail discrimination against parties unable of giving such a security, and, correspondingly, constitute preferential treatment for parties who can. On the other hand, in some countries it is considered as a normal means to ensure the recovery of costs.

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

## **G. Appellate and Subsequent Proceedings**

### **33. Appellate Review**

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

**33.2** An order of a court of first instance granting or denying an injunction sought under Rule 17 is subject to immediate review. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise.

**33.3** Orders of the court other than a final judgment and an order appealable under the previous subsection are subject to immediate review only upon permission of the appellate court. Such permission may be granted when an

**immediate review will resolve an issue of general legal importance or of special importance in the immediate proceeding.**

**33.4 Appellate review is limited to claims (including counterclaims), defenses, evidence, and issues addressed in the first-instance proceeding, but the appellate court may permit presentation of new evidence when necessary to prevent manifest injustice.**

**33.5 Further appellate review of the decision of a second-instance court may be permitted.**

**Comment:**

*R-33A* A right of appeal is a generally recognized procedural norm. It would be impractical to provide in these Rules for the structure of the appellate courts and the procedure to be followed in giving effect to this right. It is therefore provided that appellate review should be through the procedures available in the court system of the forum. “Appeal” includes not only appeal formally designated as such but also other procedures that afford the substantial equivalent, for example, review by extraordinary order (writ) from the appellate court or certification for appeal by the court of first instance.

*R-33B* Rule 33.1 provides for a right of appeal from a final judgment. The only exceptions are those stated in Rules 33.2 and 33.3. Thus, interlocutory appellate review is not permitted from other orders of the first-instance court, even though such review might be available under the law of the forum. In some countries, especially those of common-law tradition, some of the decisions in a proceeding are made by adjuncts within the first-instance tribunal, such as magistrate judges. These decisions are normally appealable to the first-instance judge who delegated the issue. This subsection does not interfere with this practice.

*R-33C* Rule 33.2 permits interlocutory appellate review of orders granting or denying an injunction. See Rule 17.6. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise. The court may determine that an injunction should expire or be terminated if circumstances warrant.

*R-33D* Rule 33.3 permits interlocutory appeal of orders other than the final judgment at the authorization of the appellate court. The judges of the appellate court must determine that the order is of the importance defined in Rule 33.3. Permission for the interlocutory appeal may be sought by motion addressed to the appellate court.

*R-33E* Rule 33.4 permits appellate review of factual issues on the basis only of evidence previously presented to the court of first instance. This limitation accords with the principle followed in the common-law tradition and is also recognized in some civil-law systems. Within the foregoing limitation the appellate court may determine that evidence should have been received that was excluded by the first-instance court or require that evidence that was received be disregarded, for example, where the first-instance court made an erroneous ruling concerning a claim of evidentiary privilege. When the appellate court has determined that evidence was improperly excluded or received and that the effect was prejudicial, it may direct judgment where justified or order further proceedings in the court of first instance.

The restriction upon presenting additional evidence to the second-instance court reflects the practice in common-law systems. However, that practice is subject to the

exception that an appellate court may consider additional evidence under extraordinary circumstances, such as the uncovering of determinative evidence after the appeal was taken and the record had been completed in the first-instance court.

*R-33F* Most modern court systems are organized in a hierarchy of at least three levels. In many systems, after appellate review in a court of second instance has been obtained, further appellate review is available only on a discretionary basis. The discretion may be exercised by the higher appellate court, for example, on the basis of a petition for hearing. In some systems such discretion may be exercised by the second-instance court by certifying the case or an issue or issues within a case to the higher appellate court for consideration.

Rule 33.5 adopts by reference the procedure in the courts of the forum concerning the availability and procedure for further appellate review. It is impractical to specify special provisions in these Rules for this purpose.

*R-33G* The rule of finality is recognized in most legal systems. However, procedure in many systems permits reconsideration or correction of a judgment under specified conditions. In some common-law systems a “new trial” may be granted. All systems impose time limits on use of such procedures and generally require that they be invoked before the time to appeal has expired. The forum rules in such matters should govern finality.

#### **34. Nullification of Judgment**

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

**34.1.1 The judgment was procured without notice to or jurisdiction over the party seeking relief; or**

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

**34.1.3 There is evidence available that was not previously available or could not have been known through exercise of due diligence, or by reason of fraud in disclosure, exchange, or presentation of evidence that would lead to a different outcome; or**

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

**34.2 An application for nullification of judgment must be made within [90] days from the date of discovery of the circumstances justifying nullification. An objection based on fraud on the court is not subject to that time limit.**

#### **Comment:**

*R-34A* As a general rule a final judgment should not be reexamined except in appellate review according to the provisions included in Rule 33. Only in exceptional circumstances may it be nullified through a new proceeding.

*R-34B* Reexamination of a judgment may be requested in the court that rendered the judgment. In seeking such a reexamination a party must act with due diligence. The grounds for such an application are: (1) the court had no jurisdiction over the party asking for reexamination; (2) the judgment was procured by fraud on the court; (3) there is evidence not previously available through the exercise of due diligence that would lead to a different outcome; or (4) there has been a manifest miscarriage of justice.

*R-34C* The challenge under Rule 34.1.1 should be allowed only in case of default judgments. If the party contested the case on the merits without raising this question, the defense is waived and the party should not be allowed to attack the judgment on those grounds.

*R-34D* The court should consider such an application cautiously when Rule 34.1.3 is invoked. The applicant should show that there was no opportunity to present the item of evidence at the final hearing and that the evidence is decisive, i.e., that the final decision should be changed.

*R-34E* In interpreting Rule 34.1.4, it should be recognized that the mere violation of a procedural or substantive legal rule, or errors in assessing the weight of the evidence, are not proper grounds for reexamining a final judgment, but are proper grounds for appeal. See Rule 33. A miscarriage of justice is an extreme situation in which the minimum standards and prerequisites for fair process and a proper judgment have been violated.

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

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

**35.2 If a person against whom a judgment has been entered does not comply within the time specified, or within 30 days after the judgment becomes final if no time is specified, the court may impose enforcement measures on the obligor. These measures may include compulsory revelation of assets wherever they are located and a monetary penalty on the obligor, payable to the judgment obligee or to whom the court may direct.**

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

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

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

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

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

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

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

**Comment:**

*R-35A* Rule 35.1 provides that a final judgment is immediately enforceable. If the judgment has to be enforced in the country of the court in which the judgment was entered, the enforcement will be based on the forum's law governing the enforcement of final judgments. Otherwise, the international rules including international conventions such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments will apply. When a monetary judgment is to be enforced, attachment of property owned by the judgment obligor, or obligations owed to the obligor, may be ordered. Monetary penalties may be imposed by the court for delay in compliance, with discretion concerning the amount of the penalty.

*R-35B* Rule 35.2 authorizes the court, upon request of the judgment holder, to impose monetary penalties upon the judgment obligor in the case of noncompliance with a judgment. These penalties may become effective if the judgment obligor does not pay the obligation within the time specified, or within 30 days after the judgment has become final if no time is specified. The monetary penalties are to be imposed according to the following rules:

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

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

3) Additional penalties may be added against an obligor who persists in refusal to pay, considering the amount of the judgment and the economic situation of the parties. Here, too, the court may require the penalty to be paid to the person obtaining the judgment or to the court, or otherwise.

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

5) "Third parties" includes any institution that holds an account of the debtor.

*R-35C* Rule 35.3 permits either the first-instance court or the appellate court to grant a stay of enforcement when necessary in the interest of justice, as it is, for example, when a meritorious appeal is pending. Rule 35.4 authorizes the court to require a bond or other security as a condition either to permit or to stay the immediate enforcement.

## **36. Recognition and Judicial Assistance**

**36.1 A judgment rendered under these Rules should be accorded recognition in other states.**

**36.2 Courts of other states must provide reasonable judicial assistance in aid of the proceeding, including provisional remedies and enforcement of a judgment.**

### **Comment:**

*R-36A* It is a general principle of private international law that judgments of one state will be recognized and enforced in the courts of other states. This principle is being given expression in The Hague Convention on Jurisdiction and Judgments, now in the drafting process. The extent of such assistance and the procedures by which it may be provided are governed in many respects by the Brussels and Lugano Conventions.

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

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