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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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

Report on the Third Session
Rome, 27 to 31 May 2002

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

Rome, September 2002

1. The third session of the **Joint ALI/UNIDROIT Working Group for the preparation of Transnational Rules of Civil Procedure** was held from 27 to 31 May 2002 in Rome at the seat of the Institute. The session was chaired by Mr. Ronald T. Nhlapo (South African Law Commission; Member of the Governing Council of UNIDROIT) and was attended by all members of the Working Group: Mr. Neil Andrews (Cambridge University, U.K.), Ms. Aída Kemelmajer de Carlucci (Supreme Court of Justice of Mendoza, Argentina), Ms. Frédérique Ferrand (Université Jean Moulin, Lyon, France), Mr. Geoffrey C. Hazard, Jr. (University of Pennsylvania Law School; former Director ALI), Mr. Masanori Kawano (Nagoya University, School of Law, Japan), Mr. Pierre Lalive (Lalive & Partners and Geneva University, Switzerland), Mr. Rolf Stürner (Freiburg University, Germany), and Mr. Antonio Gidi (Brazil and University of Pennsylvania Law School, and Secretary to the Working Group). The meeting was also attended by Observers, such as Mrs. Luigia Maggioni (representing the Court of Justice of the European Community), Olivia Hahn (representing the European Commission), Justice Priestley (from Sydney Australia), Aníbal Quiroga León (Pontificia Universidad Católica de Perú), and Mr. Michael Traynor (representing the American Law Institute). The UNIDROIT Secretariat was represented by Mr. Herbert Kronke (Secretary-General of UNIDROIT) and Mr. Joachim Bonell (Consultant).

2. Reference documents for the session were:
Study LXXVI – Doc 6 (Report on the Second Session, prepared by Secretary Gidi)
Study LXXVI – Doc 7 (Draft prepared by Hazard, Stürner, Taruffo, and Gidi)

3. The Chairman opened the session with a warm welcome to the Working Group and to the observers. The Chairman noted the quality of the reference documents and observed that the Working Group had made outstanding progress in the draft thus far and would make an even faster progress this year.

4. The Unidroit Secretary welcomed the Working Group, the Observers, and the President of the American Law Institute, Mr. Michael Traynor. He agreed with the statement that the Group is likely to make more progress, observing that looking back over the last two years, in talking to members of the governing counsel and people outside watching this project, this group is making far better progress than anyone expected three years ago.

5. Mr. Traynor, responded that it was a great privilege and honor to participate in the meeting. He stressed that the ALI/UNIDROIT was an important partnership and that this project is their first effort together. The project is working quite well so far, seeking to blend the best of the civil law and the common law systems.

6. The Chairman invited the Secretary to offer an update of the work done during the past year, between the previous and the present meeting.

7. The Secretary began his report saying that an important event was the Reporter's meeting in Freiburg, under the invitation of professor Stürner. In this three-day meeting, the Reporters intensely discussed every aspect of the project, and rewrote all Principles and most of the Rules. This meeting represented a major development for the project. This meeting was attended by Professors Hazard, Stürner, Taruffo, and Gidi.

Following the Working Group discussions last year, the Reporters concluded that they should do a thorough revision of the Principles, as our primary focus of activity. And secondarily, to modify the rules in the light of the principles as we revised them. However, it is interesting to note that when we work on the Rules, it is sometimes necessary to go back to the Principles and to change the text of the Principles as well. Sometimes it is a confrontation of an implication of the rules that leads you to have to reconsider something you have said in the Principles. Discussing specific Rules helps the primary task of drafting Principles. The Reporters completed the revision of the Principles and made substantial progress in revising the rules. As the Reporters have visualized the project, the strategy is to come to agreement on the Principles, then have those be the framework for elaboration in the rules, so that the rules, when they are finally done, will be consistent with and be an expression of the principles. Now, given that strategy, the Reporters have made very good progress on the Principles, but have not completed the task of revising the Rules so that they are consistent in all respects with the Principles. The meeting was successful.

Another important event was a two-day meeting in Mexico City, organized by Mr. Jorge Sánchez Cordero, from the UNIDROIT council and the Mexican Institute of Uniforme Law. The Mexican assessment of the project was very important. The Mexican Institute will shortly publish a book in Spanish, with the proceedings of that meeting.

In October 2001, the Reporters met for the first time in Beijing. The meeting was very interesting and positive, and we received both criticism and constructive comments that are reflected in continuing drafts. The Reporters spent virtually two full days, going through the Principles and the Rules. The participants were evidently people of great standing in the PRC legal regime: a member of the Congress, and one or two members of the Supreme Court, which is a very large court. It was a diverse group of around 50 senior professors, practitioners, and judges and 30 younger colleagues. Their reaction can be described as cautiously receptive.

Right after the meeting in China, we went to Tokyo, where we had our third meeting with our colleagues in Japan, who are of course, thoroughly familiar with the project and fully sophisticated in terms of legal concepts. The meeting was extremely interesting and valuable. Professor Ito was commissioned by our hosts to be the primary commentator. He began in a very gracious way by saying that as a Japanese read the project, matters could be divided into four categories: Things Japanese completely agreed with, things they mostly agreed with, things they somewhat disagree with, things they disagree with. The Reporters said that the part they were most interested in was of course the last one. He then very gracefully gave us a critique, centering on the matters concerning which they had differences. One illustration had to do with the question of

confidentiality of proceedings. Mindful that in some American and European traditions, it is possible to have closed files, and certainly that is the convention in arbitration. Mindful of our discussions here, we had recognized the possibility of confidentiality of all or part of the file of a proceeding. Our colleague in Tokyo said that the constitutional provision in Japan requires that judicial proceeding be public. This would mean therefore, that any requirement of confidentiality would be offensive to constitutional principles in Japan. That is not difficult to understand, it's a difference in approach. One could well understand the importance of that from the point of view of the Japanese legal tradition. So we listened very carefully, and we will have to take that into account in framing our Principles.

A few days ago, the ALI membership met in the ALI Annual Meeting in Washington DC, in which the ALI members discussed for several hours about the Project.

In the previous week, we had an intense one-day meeting in London organized by Mr. Neil Andrews and the British Institute of International and Comparative Law. It was a highly selective meeting, with the participation of senior members of the English judiciary and the quality of the contributions were excellent. The project was favorably received by most of the participants in a positive and constructive atmosphere. Among the most interesting discussions, were the expert evidence, the English pre-action protocols, rules relating to costs, and access to justice. The British Institute decided to publish another book with the proceedings of that meeting.

Regarding the future meetings, the Secretary added that in the following week, the Reporters will meet in Moscow, by invitation of Prof. Sergei Lebedev. The Russian translation is already available and it is possible that it will be published in a booklet or law review.

After the Moscow meeting, the Reporters will meet again in Freiburg for a couple of days, and will probably meet again in October in the United States.

For the summer of 2003, the Reporters are organizing meetings in Spain, Italy, Germany, and France, Sweden, Greece, and Egypt.

Finally, for the future ahead, the Reporters are trying to organize meetings in Brazil, Argentina, and another South or Central American country. However, they have not been successful yet.

8. The Group decided the Agenda and will discuss in that order: the Principles, the Rules and the relationship between them.

9. The Reporters reaffirmed their commitment to the conception of the Rules as an exemplification of the Principles. They have in mind that the rules may be most attractive to political regimes in transition, such as Russia, and some of the other post-socialist countries, and also the PRC. In a way, any modern legal system substantially corresponds to the Principles as they have now developed. It would not be a major undertaking, or indeed much of any undertaking in any such legal system. For a legal system such as China and Russia, more detail as expressed in the Rules would be helpful. The Group

referred to the Secretary's Report on the Second Session in the past year, on page 3, in the chapter about the "Relationship between Principles and Rules."

10. A concrete application of the Principle of access to justice is cost. Access to justice can be inhibited by excessive costs. If the process comes to be characterized by heavy costs, then the system of justice is to that extent repugnant to people who would want it. The consequence of that is that access to justice becomes a relevant consideration in the court's efforts to moderate costs or expense. For example, on the question of how extensive a hearing could be, many can go on for twice or half as long. There is no end to questions a lawyer can ask or may ask and a consideration that a court should keep in mind is as a hearing gets longer, it gets more expensive. Maintenance of time discipline is an aspect of access to justice.

PRINCIPLES

Principle 1

Purpose and Scope of Application

The definition stated here is about right, that is, "transnational commercial transactions." We have had many suggestions that the Principles should have broader application and be stated as applied to commercial transactions, even if they are not transnational. We have had more criticism that this is not specific enough and we need to have a more definite definition of what we mean. At least for the time being, until next year, and probably generally for the purposes of the project, we should simply leave it at commercial transactions, realizing that these are Principles and not Rules. That any national legal system that wish to implement the Principles would have to make a more specific definition of exclusion and inclusion in its enabling of provisions. It is up to each state to decide the scope of application of these Principles. Each nation would have its own domestic policy considerations that would influence where it would draw the line, and that the lines would not be drawn precisely the same in all legal regimes. Therefore, probably on balance it is desirable to leave it on the relatively general, concededly ambiguous basis on which it now is. We realize this is not fully satisfactory, particularly for a critical legal mind. Considering the matters we have mentioned, our estimate is that this is probably wise.

The scope of application can be considered as not being a Principle, but only a description of a possible scope of application. This scope also may be the consequence of the American debate, because Americans are afraid of an overbroad scope for the Project. They are afraid that those Principles could apply in personal injury cases. We should be soft and cautious because this is a very sensitive issue.

Maybe the word "transactions" is too limited. In the comments, and quite rightfully, there is reference to intellectual property matters. It would seem that one of the possible applications of these principles is indeed, transnational, international property matters. In fact, the European patent court is trying to draw out a procedure. Therefore, instead of "transactions", we should say "matters" because transaction suggests contracts

or some sort of consensual relationship. In the French version, for example, we used the word “operation.”

Another problem is what is “transnational”. The comment is excellent, but still unsatisfactory. Perhaps no satisfactory definition exists. What is “international”, in practice today, is left to the decision of the court. However, here, the case is different. It is a question of Principles of procedure.

A very similar, if not identical discussion, occurred within the UNIDROIT Working Group on Principles of International Contracts a few years ago. The basic assumption has always been, for obvious reasons, that the purpose was to lay down principles and rules with and without international commercial contracts. At an early stage of the deliberations, an attempt has been made to define international and commercial. Lengthy discussions took place and at the end it was decided, because no entirely convincing solution or definition could be found, that it was better and wiser to leave it open and not to touch upon that with the attempt to further define it.

Why should the principles themselves define their own scope of application if they are not yet a binding instrument? Why should this issue be put in the same level as the following operational principles and rules? We could have this issue stated in general terms as a preamble, and then start with Principle 1, which is presently Principle 2. However, we should not delete such framework. This would be counterproductive because, whenever we have to explain the purpose of this Project, the emphasis was to have in mind transnational, international proceedings. We should make sure that we do not intend to touch upon domestic common rules of procedure, although this might be an option for the local legislature.

In the preamble to the Principles and Rules, we could say that the main purpose of the project is to make principles for transnational commercial transactions, but those principles could also be the basis for other initiatives. In the Rules, we could afford an example of a possible implementation of our principles for commercial disputes and make a more precise definition of a possible application.

The preamble in the Unidroit Principles of Contracts, for example, indicates a number of options for any legislator, user of the product. That variety, catalogue, menu of options could address the question of whether this project will be used just for transnational litigation or also be useful for reform of domestic civil procedure.

The word transnational is good. However, this might be the first time that one uses this expression in a legal instrument. So far, the concept “international” has been used. If we use transnational, we can be sure that several people will ask what is the difference between transnational and international. We do not intend it as something different. Therefore we should be more explicit in the comments.

The difference between international and transnational is useful and the term “transnational” should be retained. In continental European parlance, as far as procedure is concerned, international takes the subject matter in the area of conflict of laws. Americans would say, international civil procedure in many jurisdictions is the law of determining jurisdiction to adjudicate competence, and the recognition of foreign judgments. In technical terms, in many legal systems, and therefore, in keeping transnational as something completely different and apart from these considerations of jurisdiction, competence, and recognition and enforcement, is a good idea and deserves to

be maintained. The word “international” applies much more public law, as distinct from law that governs private or semi-private transactions.

The introduction of the word “matter” has special significance to an Australian lawyer. Matter is a word used in the Australian constitution in connection to jurisdiction. A huge jurisprudence has grown up and some lawyers make a living out of the construction of the word matter in Australia. Should Australia become party to this code, then there will inevitably be Australian lawyers trying to introduce that jurisprudence into the construction of the Code. We could address this problem by saying simply “arising from transnational commerce”. This would solve the problem and avoid the problems that might arise in Australia.

Another member suggested that instead of using “disputes arising from transnational commercial matters”, we could say “adjudication of transnational commercial disputes.”

A member referred to last year’s Secretary’s Report, on page 71, which gives an example of the debate about having detailed or not detailed norms in the Project. This was done in connection with the discussion of Rule 2: a member considered that a project needs a general approach, we should say only transnational business and commercial litigation, because the list was too narrow. Another member said that we should go in the direction of simplification. In previous versions we used a very detailed rule. As a matter of fact, the whole comment where in the rules, and we put it in the comments. The suggestion would be to keep it short in the preamble to the Principles, and to use the Rules as a laboratory. In the rules, we had rules like that for a number of years as the project goes on. If we are satisfied, we can keep it, if not, then we take it out and go on.

There is great future for these principles as a substitute to international arbitration, especially because this is one of the fundamental practical problems of today for small claims. International arbitration is not going to disappear, it is expanding every where for important claims. The problem remains for small claims.

We need to have more fully developed comment that addresses some of the problems that have been discussed so far. First of all, the comment would be that any national system seeking to implement these principles must do so by a suitable legal measure, statute, or the like that has more specific definition of commercial and transnational and dispute. We provide in our Rules an illustration of that kind of organic provision, but every nation would be obliged to confront those set of problems. In that regard, doing so will necessarily involve careful reflection on the local legal tradition, and connotation of legal language. In Australia if one uses the term “matter” you will be kicked in a huge local jurisprudence, and if you uses the term “commerce” in the United States, it would do the same thing because Commerce Clause is part of our Constitution. It has to do with allocation of authority between the national and state government. There must be things like that in all countries. Therefore, we must leave this to the local decisionmakers.

All legal systems have multiple rules between which there are very difficult boundary problems concerning which there is a lot of litigation. The reason is very simple — any astute lawyer always tries to push diversity into the procedure or forum that will be most advantageous to its client. Any plaintiff’s lawyer who does not engage in forum shopping is guilty of malpractice, because you are trying to protect the interest of your client. Whether between litigation and arbitration, there is much jurisprudence in

every legal system on exactly what is the scope of an arbitration clause. If one can include it in arbitration, you get one approach, if its held to be outside the scope of the clause, you get another approach. In Islamic countries, there is a very important, indeed fundamental jurisprudence associated with the Sharia, which includes not only domestic and family law as such, but inheritance and so on. Every legal system should confront that and we should have more development of that in the future. We should recognize that the idea of having two legal systems that are parallel with one another is not only endurable, but it is a characteristic of every legal system.

Perhaps we want to mention that these rules may be thought to be, or rules conforming to these principles are especially appropriate in certain specialized tribunals, in which international disputes are more characteristically lodged, such as patents and insolvency.

A member observed that in Comment *P-IC* there is a reference to *société anonyme*. This was considered surprising because since this is an English text, it should only use English, because once you start reference to legal institution of a different system, why is not there a reference to an equivalent to Japanese, German, Italian law, etc? Perhaps this could be deleted.

In response, it was said that the word “*société*” is a French term that has moved into some English legal parlance, where we are trying to recognize that there are corporate bodies created differently from Anglo-Saxon corporate and partnership law. That is why the Reporters deliberately used the term to suggest that one has to understand the variety of organizations.

We should not make the concept of transnational dispute dependent on nationality, but in “domicile” or “place of business.” See Comment *P-IC*. The basic test is the place of business and this criteria is adopted in the Rules.

If we develop the comment in order to make the draft acceptable to all systems, we should keep in mind that what may be called comparative private international law, there are two opposite criteria, systems for defining what is international/transnational commerce. One is the usual conflict of laws criterion, with difference of domicile or place of business. Another, which has been created in the French courts, is a more substantive criteria, when a transaction involves the interests of so-called international commerce. So, we have to explain some way in the comment how we reconcile these two criteria with our own notion of transnational.

That idea, in those terms, is a little unusual for some Anglo-Americans. It may be similar to a problem in the US — the idea of interstate commerce as a zone of activities, that by virtue of them being directly or indirectly interstate, is appropriately the subject of federal government regulation, in contrast to purely local. One might think that we should at least refer to that in the comment, and perhaps refer to the possibility of defining scope in those terms. So that a nation adopting something like this, in its implementing legislation, could draw on its own domestic conception of international sphere of activity. That is, at the same time, to defer specific commitment but also to ask for thoughtful address in any national system when confronting the problem. So maybe the group would like to think about technical or verbal expressions that capture that idea.

A member could not understand the way the comments were numbered and thought that it was confusing. It was answered that the letter P was used in the comments to the Principles and the letter R was used in the comments to the Rules. Also, instead of

using 1.1 for the first comment, it was chosen to use 1A in order to differentiate from the way the Principles and Rules are numbered.

Principle 2

Independence, Competence, and Impartiality of the Court

This Principle has received a favorable reception. On the Principle itself nobody would disagree.

Perhaps, a controversial provision is Principle 2.4. The requirement here is that there be an effective procedure in raising the question.

It seems that independence and impartiality should go together and competence is something in a different category. At least we should put impartiality before competence.

It was asked why Principle 2.1 refers only to “other officials of the judicial system,” because a greater danger might be officials from the executive, prosecutors, legislature, economic powers, etc. It was answered that there is no such a restriction, because the Principle says “external influence.”

Regarding Principle 2.3, it was asked whether it was wise to limit the knowledge of the judge to legal matters. It was answered that it could be a mistake to require that a judge have special knowledge of commerce as such, but perhaps we should say in the comment that acquaintance with commercial matters is extremely helpful. There are many judges of legal systems with general knowledge of law but without special knowledge of commercial matters.

A member was concerned that the expressions “external influence” or “internal influence” might not be easily understood by others. We should be clearer in the comments.

Principle 2.4, second sentence is correct to limit to reasonable and substantial contentions of judicial bias.

Obviously one understands that the focus of independence is on judges, stricter sense. But the sentence in Principle 2.2 goes on to mention “other members of the court.” It is not quite clear what distinctions are being drawn there. In various legal jurisdictions there will be variant connotations.

Principle 2.2 also refer primarily to the notion of reasonable tenure in office, which is of course, the focus of article 6 of the European Convention on Human Rights. If one speaks about judicial independence, people will immediately think it means tenure. Then, of course, it introduces an alternative way designated by procedure ensuring their independence. The problem with that is that it could be read as an undermining of the notion of tenure. In other words, it invites a natural system to present the choice of reasonable tenure or something else that is vague, namely “a procedure to ensure independence.” If the latter is true, it would be in conflict with the European convention on human rights. On the other hand, in the United States, there is the problem of juries. This system does not contemplate juries, but is consistent with it.

It seems that the mistake in this Principle is to write about two different situations in only one sentence. We should use two sentences: one for judges and another for non-professional members of the court. It could read more or less like this: “in any case, and particularly in any case of selection of non-professional members, there should be some sort of procedure...” There are several non-professional members of courts all over the

world. There are juries in the United States, the Swiss and the Scandinavian civil procedure knows very particular figures, the German commercial courts have lay members and judges and the French commercial courts have lay members who are not judges.

Principle 3 **Jurisdiction Over Parties**

The discussion of jurisdiction in the Project has been complicated by the difficulties that have been arising in the Hague Conference on Jurisdiction and Judgments. They convened that conference about 5 years ago, with great hopes to have an international convention on jurisdiction and recognition of judgments. Then the whole thing got barred a couple of years ago with some differences between a number of European consultants, and the Americans. Europeans were worried about being subjected to American legal process, particularly in products liability. Americans had gotten worried about something else, so they had stopped. Americans had always assumed that would bear fruit and we wouldn't have to do very much. The practical problem is how would we address the problem on the assumption that maybe it would be a convention, or maybe there won't be. Apparently the word "substantial connection" was a hot button word, because it has something to do with this conflict. Ideally, we must have some reference to the problem of jurisdiction. And our thought was the idea of substantial connection is reasonable so that's our best effort. There is this background disputation over which we have no control.

In all the oral comments in the several meetings and the letters, the Reporters have received several comments about including issues of jurisdiction in this Project. Some of them say that we cannot have any jurisdictional rules in the project ... and as many others states that we cannot have a serious project without jurisdictional rules.

However, because we are drafting Principles, not specific Rules, we could have some Principles about Jurisdiction. The disputes in The Hague are about special Rules: there are no disputes on the fundamental principles. We should have some principles about Jurisdiction.

No one can seriously dispute the contents of this Principle. The idea of "substantial connection" is a response to whatever rules or principles of public international law about the right of a state to exercise jurisdiction.

It was asked why Principle use the words "should be exercised." It would be better to say "may be exercised." However, it was answered that the best formula would be "may only be exercised." The word "only" was missing.

Several people are concerned that we should not have any Rules or Principles about judisdiction. The definition of a "substantial connection" seemed very difficult for a member. In Europe, there are also the new EC Regulations about jurisdiction, recognition, and enforcement of judgments from December 2000. If "substantial connection" is not defined in the same way in the Principles and in the regulation, we will have two types of rules and we will not know which one to apply. We could not mention the idea of "substantial connection" and say only that it depends on what the international conventions decide."

That objection was not accepted by another member. A reference to international convention will not be of any help. The international conventions will be applicable or not applicable independently of being mentioned in this project. Principle 3.1 corresponds to the practice of public international law governing the difficult question of when does a state enforce its jurisdiction, its part of sovereign power of jurisdiction. Moreover, this Principle on jurisdiction is so general that a real conflict with the conventions could not be possible.

We should put in the comments a recognition that there are legal specifications of jurisdiction in international conventions. Some of them may use the term “substantial connection” and that a national state should be attentive to the problem of the comparative meaning of the term substantial as its used in this general principle, and as its used in positive law of a convention or statute or something. But that would not modify the Principle, it would be an elaboration in the comment. Does that make sense?

The jurisdictional problem is very important for the access to justice in the international context. It is very difficult to establish a multinational convention, because of the different kind of reasoning behind it. Therefore, it is very useful to introduce it in the principles here.

The issue of jurisdiction is not a question of access to justice, but it refers to public international law. A state cannot exercise jurisdiction of his own codes if there is not a substantial connection. This is the actual state of public international law.

No one can criticize that principle. It is not a question of access to justice, but it refers to public international practice of states. A small island cannot rule the world. A state cannot exercise jurisdiction of its own courts if there is not a substantial connection. This is the state of public international law. There is no possible conflict with international conventions. The same applies to 3.2.

We should develop it a little more in the comments. The language of the Principle seems correct, but if the same word were used in another convention, it obviously would have a distinct meaning in that context.

Principle 3.2 says “reasonably available.” This would also cover the concept of “forum necessitatis”—the forum of necessity, when there is no other jurisdiction possible whether reasonably or not reasonably. Many courts in Europe would find there is a state of necessity, which is a basis for jurisdiction. We should refer in the comments to the concept of jurisdiction of necessity. As though it is not known as such in the United States, there is a case involving divorce but also related property matters of a very wealthy American businessman, being sued by his wife in the US during World War II when his property was located and accumulated in the Philippines. Obviously no one could get jurisdiction in the Philippines and this became an issue of jurisdiction of necessity.

It was asked whether Principle 3.2.2 is directed towards the enforcement of a judgment contained in another jurisdiction and directed against property in the subject jurisdiction, or whether it has a wider import. It was answered that it would include that, but it would also include in rem jurisdiction, or determination of interest in property, concerning any claimant wherever the claimant may reside.

A member was not clear about what the relationship is between Principles 3.1 and 3.2, which is significant because 3.1 contains the limiting words “substantial connection”

and therefore one can understand 3.1 is limited in that fashion. 3.2 does not contain that limitation.

Maybe we need to be more detailed about it, but the idea is assumed that for whatever reason, there is no tribunal that would be able to act if limited by Principle 3.1, but they have jurisdiction over the person. There were some cases of that general sort in the US interstate. One that has risen on more than one occasion, is that a US citizen resident outside the country who comes temporarily into the country ... those two cases involved divorce and property division. Question, if the person was visiting friends in Maine, was not a resident of Maine or any place in the US, could Maine exercise jurisdiction to adjudicate a divorce and award separation of property? The holding was yes because of default of any other available forum. This is an interesting problem.

Principle 3.3 contemplates auxiliary jurisdiction, jurisdiction to grant provisional measures to assist the dispute adjudicated elsewhere. On one hand, there are provisional measures with respect to a person, and on the other, property in the forum state. In a freezing (Mareva) injunction, the jurisdictional nature is in fact the court is exercising in personam jurisdiction over the person. As a result of that, there is no fetter upon the scope of the assets that are subject to a freezing injunction. It is so because what counts is the court is able to exercise jurisdiction against the person, opening up the possibility that ancillary relief be granted vis-à-vis that person's assets wherever they are located in the world.

Maybe Principle 3.3 is written in too broad language. We should not decide in our principles the possible scope of a Mareva injunction. We should not say too much. A combination of Principles 3.2 and 3.3 could be very dangerous in the eyes of many lawyers in non Anglo-American jurisdictions. We have principles and it is not possible to make too detailed provisions about this.

The concept of Principle 3.3 is accepted in civil law countries, like Argentina. However, this principle may be too broad and dangerous because even a judge who does not have a reasonable contact or a substantial connection can award a provisional measure. Sometimes provisional measures are extremely important in practice and it can be decisive. Therefore, there are problems with this in Argentina because one can choose the judge and get a provisional measure.

Another member mentioned, however, that if a judge takes a provisional measure, even in the absence of any substantial connection, which seems to be implied in that Principle, the only result is the fact that these provisional measures would be limited to its own state. These provisional measures may only be trained and modified at any time and may not be recognized abroad. The member failed to see how this Argentinean bad experience would be an argument against Principle 3.3.

It was answered that it depends on the kind of provisional measure. Sometimes some measures are extremely important.

We could limit the word and say that full satisfaction or performance of an action couldn't be given on the basis of Principle 3.3. But it is sometimes very difficult to make a difference between provisional measure or protective order. In the comment, we could make a distinction between provisional and conservatory measures.

A case in which the courts of Germany has jurisdiction, but has reached property in Argentina...that is where it would be applied. A person would go to Argentina and ask a judge to issue a provisional measure. Maybe it is better to say in the beginning of 3.3,

that only “in extremely urgent cases”, provisional measures may be issued when the court has no jurisdiction.

We could make some cautionary observations in the comments about exercise of jurisdiction to give provisional remedies, when the court has no substantial connection to the transaction...essentially expanding the idea of jurisdiction by necessity. We need to help out the actual enforcement of the judgment.

This discussion yet another time showed an importance of the comments. As it was several times reminded, these are Principles and not operational rules. The comments play an essential part of this project.

In any event, Principle 3.3 cannot seriously be challenged, because that’s what happens every day for a number of centuries. It will go on consistently. Courts recognize that whether there is a substantial connection or not, will recognize a duty of protection through provisional measures in certain circumstances. Through conservatory measures, and sometimes this power of enacting provisional measures may be abused, or that the result will be that these measures will not be recognized. But that is what happens today, and what will happen tomorrow, and what has happened in Argentina is just an administration of that. It is not an objection to Principle 3.3, subject to what may be said in a comment.

We could say in the comments that a moderating influence is the discretion of a recognition court to give qualified or no recognition if it thinks the protective jurisdiction has been excessively exercised.

Principle 3.4 is a correct and universally recognized idea, although civil law systems do not recognize forum non conveniens as such, this idea might be compatible with civil law jurisprudence. However, according to a member, it gives broad discretion to the judge and it is too loose a definition of forum non conveniens, even for common lawyers. At any rate, it should be recognized that this is a very fluid notion that we have in this text at the moment.

According to a member, although there is no concept of forum non conveniens in civil law countries, like Argentina, and although this device is unknown in Latin America, this is a very interesting and useful device.

Forum non conveniens is well known in common law countries. In the American federal courts it is served by a simple procedure of transferring from one court to another. For international matters, federal courts, and matters generally in state courts, the doctrine is used to dismiss cases that otherwise would not have jurisdiction. In our discussions held in England a person made a reference to case that deals with the English way of applying the doctrine, which deals with it in terms of “appropriateness.” It does not involve a court deciding just on its own convenience, but is a more international approach to deal with the appropriateness of the forum. In a project where we are dealing with civil law countries, one wonders if it is necessary to import common law ideas purely out of “convenience” rather than “appropriateness”.

The focus in England is indeed on the weighing of relative appropriateness. There is also in the English jurisprudence, a presumption that the English court that initially receives the issue would continue to remain seized, unless it could show that the other court is manifestly more suitable or appropriate. There is that presumption, tendency, to prefer the local cause unless there is one that is manifestly more important. It is a question of policy, which perhaps we should address at some stage.

In Comment P-3C we say that “The concept recognized in Principle 3.4 corresponds in common-law systems to the rule of forum non conveniens.” It seems that mentioning in the comments that a rule is taken from a particular jurisdiction, from a political point of view, could be counterproductive. It also seems to be the case that this is not always true. The more general and open ended your language, the better you will sell the product.

Principle 4 **Procedural Equality of the Parties**

In the ALI Annual Meeting, a member suggested we had to include still other grounds of possible equality. Someone said that gender identification, and size. So we are beginning to think we are beginning to be too politically correct and maybe should limit this Principle only to nationality or place of residence. The problem we want to be sensitive to in these principles is discrimination against foreigners, and not all the other kinds. We might want consider reducing the specifications in 4.2, but to focus on the business of discrimination on account of nationality or national origin.

To include all different aspects of discrimination might be too much. This long enumeration gives rise to all sorts of problems, but we should not limit to nationality or place of residence. What we should do is make a general statement not even referencing nationality and put everything in the comment. We should try to do that instead of just choosing nationality. For example, in an Islamic country, we would have a problem if a woman just appeared in court and we do not want that in these principles.

Another member said that the list is long, but some examples are necessary. We say that the right to equal opportunity is avoidance of discrimination or illegitimate discrimination and make reference, for instance, to gender, sex, race, nationality. This long list creates lots of problems.

Perhaps matters are less simple, less easy than they might appear at a first glance. There are some doubts whether it is all the saying, nationality on the one hand, gender, race, language on the other. What is the main purpose of this Project? It is to establish a fair procedure irrespective of the fact that one of the parties is a foreigner. In essence, this is our task, to lay down and repeatedly stress it. Can we go further? In Islamic jurisdiction prohibiting women to appear before court, can we really go that far? We are entering now very deeply into public policy issues which have nothing to do with procedural law. We might find ourselves excluded from the outset from that region of the world, because our job should be, as conceived as one that is a fair procedure irrespective of whether the controversy is between two nationals or involves a foreigner.

A member said that had extreme sympathy for the case of women in Islamic countries, but do not think its correct to try to solve the national problem. This is a problem that the women of those countries must solve for themselves. We cannot impose to solve the problem. But this is a transnational product: do we want an American woman or an Italian woman to be discriminated against in the courts of that country? We can solve the problem because this project is for transnational disputes. If local women cannot go to court in that country, we don't want to change the local procedure. But we are concerned about the transnational procedure. But the CEO of a company may be a

woman, or jewish, or black, or japanese, or homosexual, or white, and I think this could be dealt with in this project. It falls within the main scope of this project, as long as we limit it to transnational litigation.

Another member considered this a good Principle, connected with human rights, and was in favor of keeping it. We could add the word “specially”: that the right to equal opportunity includes avoidance of discrimination, especially by reference to nationality etc. We cannot deny that this rule must be applied in countries where this principle is accepted.

Another member were against being too timid when devising this Principle. We are trying to provide a cutting edge, and what is hoped a liberal template in what is best in procedure. We would strongly advocate that we should identify the principle forms of outrageous discrimination, and supply our own weight to the avoidance of that. This very interesting and important principle is at least doing two main jobs of work. The first is it quite properly expresses the concept, which is a dynamic and important one of the court ensuring equal opportunity for the litigants during procedure. And then 4.2, goes on to prohibit various forms of discrimination, and it could be argued that there is a distinction here, and that in fact we are yoking together two principles. We should one principle of procedural equality and another one, which is the avoidance of discrimination.

A member wondered whether “conservatorship” in Principle 4.3 was not too technical a word. Perhaps an American concept not one readily recognized elsewhere. It was answered that the Principle is are simply indicating. Maybe “curator” would be a better term to appoint someone of full legal competence to act as a trustee or a surrogate.

Maybe it is better not to say “such as a conservatorship” because it seems very strange to us. So this example should be perhaps put in the comment but not in the text.

As to Principle 4.5 and venue rules, there is a slight ambiguity here, which is important. It expresses the requirement that the relevant national court, or the relevant national authorities when allocating the case within their borders, should take into account this question of geographic accessibility. There is an ambiguity here, and that in fact, the venue question arises at the supranational level, when we are considering a Japanese who is required to litigate in South Africa, for example. You can see that there are two levels of venue issue. One, within South Africa is this person’s case to be heard in Capetown or some other part. Second, whether or not on the transnational level, is it appropriate at all for this particular litigant to be required to attend in South Africa. The venue rule was concerned with the national location of the seat of the tribunal.

However, we can make this clearer. Obviously, the point about international would be covered in connection with discretionary decline of jurisdiction, *forum non conveniens*.

A member had doubts about Principle 4.4, because if you have a claimant who is not a resident, comes there, and then he feels he loses the case, he disappears, the cost which may be very great will have to be borne by the other party or the state/taxpayer. The very idea for security for cost has justification in certain cases.

It was answered that the Principle says that security for costs cannot be required “solely” because the party is a foreigner. The fact that the claimant has no property at all in the state may be a sufficient justification under local law for asking for security for costs, but not just because the person is a foreigner.

That topic was the object of a strong dispute in our last meeting, and within the Reporters. A reference was made to the Secretary's Report on page 9. Last year, some members were completely against any security for costs at all and other members wanted to add a provision on securities for costs. There are systems which it would be a discrimination of our own parties to take securities, and to have systems where securities are unusual. So we try to find a compromise, and say, that be a foreign party is no sufficient reason to impose securities for costs. There should be additionally, reasons for example, no good chance of enforcement abroad, of a cost order and so on. Naturally, the mere fact that a person is not a resident or domiciled in a place is not a necessary implication that that person does not have property in the place and should be treated different. We can imagine a very well established company, for example. If established companies are treated one way in the forum, similar foreign companies should be treated in the same way. That is why the word solely is essential to understanding this principle.

This compromise would not be enough, because it depends on enforceability of a cost order. For example, an American citizen brings an action to German courts, he has no property in Germany but there would be a good chance to enforce a cost order, which is against a big American corporation, and it would make no sense to order security for cost. The fact that this corporation owns no property in Germany, therefore, is not essential. This is a matter of enforceability of the cost order.

The European court of justice decided within the EU, that it was against equality of the parties, it is difficult to enforce a brief judgment in Portugal, its perhaps more difficult than to enforce a German judgment in the United States.

Principle 5

Right to Assistance of Counsel

This Principle did not raise any fundamental difficulty from the critics.

According to the second part of Principle 5.1, one would be required to have counsel admitted in the forum, but could also have counsel of the same nationality as the litigant. That seems to be generally accepted.

The reference to duty of loyalty in Principle 5.2 is not confined to the duty of loyalty, which may exist in the local forum. That is to say, what one is doing here, one is referring to as in England, a matter of substantive law. In a professional relationship between barrister and client, there rises a complex relationship, which includes as a matter of substantive law, an issue of confidentiality. The duty of loyalty we are referring to, is not, confined to any duty of loyalty that is respected in the relevant forum, but includes an obligation of confidentiality that exists as a matter of substantive law between clients and attorneys. This may be complex but perhaps we should make this clear in a comment.

It was answered that maybe we would add that the relationship typically would be governed by rules of the forum, and the law under which the lawyer has been admitted to practice. Without saying its substantive, it could be more than one set of rules out there.

Its this a huge issue discussed for ages in the arbitration institutions, what deontological rules apply. In an arbitration taken place in Geneva, both counsel, Argentine and Japanese were curious about what professional ethics should be the measure stick.

The second clause in 5.1, is it clear without further comment, that assistance does not necessarily mean that counsel admitted to practice in the party's home country would also be entitled to represent his party in foreign courts?

It was answered that that is why we use the term assistance.

There is some tension between the black letter expression of right and the first sentence of comment 5a, which is phrased in terms of what a forum may require. Expression of a right, which is sound, also connotes, at least implies, that the person could waive that right and have local counsel.

It was answered that this Principle gives the right of the party to be assisted but that does not mean one have a right to have a forum lawyer speaking to the court. And that goes far enough. But the court might permit something else.

We cannot say more than we did. We cannot be too detailed, and it depends on the customs of the forum whether an attorney has the right to make statements or whatever. Local law determines whether he needs specially admitted counsel. We should be more general.

Principle 6

Due Notice and Right to Be Heard

The last sentence in Principle 6.1 excited some discussion. Looking at some of the others, other people were somewhat concerned whether there was too much redundancy in this rule, that is, for example, 6.6 to some extent is duplicative of 6.3. Perhaps we could reduce the prolixity a bit. But we call attention to the business about possibility of default judgment, as we have discovered this is an important problem in international litigation.

A member agreed that this Principle was too complex and a number of details should be transferred to the Rules. A member suggested deleting Principle 6.5 because it was too detailed for a body of principles.

It was answered that this Principle was very important. A recent decision in the United States is an incentive to include such a principle. Some American courts think any communication other than writing and in-person exchange is unconstitutional. More and more, we are going to have international, we are going to have proceedings conducted by television. It is perhaps more detailed than we have. On the other hand we are trying to open people's eyes to new possibilities.

Principle 6.6 says that "The parties should make known to each other *in due course* the elements..." The words "in due course" are perhaps too generous. We should tighten that slightly and say "at an early stage". In other wise "in due course" results in casual informing. Due notion requires such communications to be up front as early as possible.

Another point arises in connection with Principle 6.7. In the last line it says the respondent can apply for a full consideration by the court. This is a question of procedural substance, whether instead of full reconsideration, we should substitute the word "review." That is to say, we do not know what the practice is in different jurisdictions, but the common law practice, a provisional order which is granted *ex parte*,

will always be subject to review. But on review, one is not necessarily reopening the entirety of an issue.

Another member would prefer the word “reconsideration” because review is a more technical term of the Anglo-american procedure culture. Traditional review is also reviewing the administrative procedure, it was told us it is a more limited form of control, but we wanted to say there should be a full and complete re-hearing. That is a difference. But it is with full attention, it was no lingual mistake or error.

But there are limits of the right to be heard, that is the question of course which is frequently occupying courts, for instance, with connection with arbitrary awards or opposition to recognition or foreign judgment/awards.

It has been decided in several cases in various countries that a right to be heard did not imply the right to require both the possibility of written explanations and oral explanations. In a number of cases, one was considered as enough, so this particular problem which is quite important to national arbitration should be kept in mind. The right to be heard does not necessarily imply the right to use all possibilities of presenting issues both written and oral. This issue is properly covered by the text.

Another member agreed. We have a special principle on orality, that’s principle 16. It is clear that the right to be heard gives no right to be heard orally. It may be right to hear someone by written presentation. We should make a reference to Principle 16 in the comments to this Principle in order to avoid misunderstandings.

A member asked whether the communications in Principle 6.5 referred to communications between the parties in the course of litigation, or was it something wider.

Assuming we keep this Principle, which we may not, the reference here is one of disclosure which could be made directly to the party, it does not go directly to the court. But, what we will do is look at 6.6 and 6.2 and 3, and see whether we can simply refer to, as it were, the right apart from how it is implemented.

The member reply that if communication is only between the parties, then if the parties agree, with or without the approval of the court, it would seem very difficult for one party later on to complain that that method had been used. In that case, there would be no need for Principle 6.5.

Another member disagreed that a party could agree among each other to use special means of communication.

On the one hand we say that this is a right of the parties and on the other, we say that we need approval of the court.

Another member considered that Principle 6.6 should be deleted because it is redundant, because we say the parties should make known to each other, elements of facts and so on, and we have that necessary in Principle 6.3, because we say a party should have the opportunity and time to respond to contentions of facts and law. That necessarily means she has been informed about what the other party wants to invoke. Principle 6.6. may be unnecessary because it is not very logical from a chronological point of view. In Principle 6.3 we mention the time to respond and in Principle 6.6 we mention the duty of a party to inform the other. This is not very logical.

Principle 6.6 could be put in the comments, as an explanation of Principle 6.3.

Principle 6.7 refers to provisional relief for provisional measures. One of the important dimensions of effective provisional relief, is that it should take the respondent

by surprise, when that is in the interest of justice. It's a characteristic of freezing injunctions and other types of provisional relief. They are granted *ex parte*, initially. We need to make the linkage between 6.7 and 3.3 in the commentary. Bear in mind that these principles will be absorbed by systems that are unfamiliar with sophisticated provisional relief and it has to be clear that provisional measures are awarded *ex parte*. This must be so if they are to be effective. But at the moment we have not made that cross connection.

The Reporters should stand by the text of Principle 6.7: temporary restraining orders and other forms of provisional relief without notice should be acceptable. In countries like the United States, it can be a constitutional issue, and we may not have the caliber of judges not be subject to abusive practices. Before some of the reforms of American federal courts and some state courts, getting temporary restraining orders without notice was an extreme abuse. And, it's common practice now and generally accepted that you make a strong showing you are entitled to such relief without notice to the other side.

There is another problem. In Principle 6.4, we say "significant contention." But in other Principles, we use other adjectives. For example, relevant. We should use the same adjective.

It was answered that there is a difference between relevant and significant. The courts should consider contentions which are in result not relevant. But it could be that they are really relevant. Those which are only possibly relevant are significant. It is a mistake if the courts do not take notice of the contention, which is in result not relevant. The court comes to the result its irrelevant, but the court must not consider all facts, it must only consider facts where there is a good chance of relevance. Therefore, we say "significant facts."

This issue is very important, especially because we have to think about the several translations and interpretations this project will have. In French, for example, there is only one word: pertinent.

A member was still hesitant about this provision. The member thought that half of this provision should be in the Rules rather than in the Principles. Principle 6.4 says that the court should consider each significant contention. It is the contention to confer the right of appeal to the party because it considers a point. If it is not significant, is it a ground for appeal? Is it really necessary to say that? The court will of course consider each contention and fact it considers significant in its own view, but the parties may well disagree. So what is the necessity of such a principle?

It was answered that in many countries, it is a constitutional right of parties to have significant contentions discussed by the court. At last significant in some constitutional court when there is an appeal. This is a difficult problem, but only that the court has to mention contentions being relevant...according to the court's judgment.

It was answered that we could discuss whether those contentions must or need to be mentioned in the judgment, for example, but the court should consider those contentions. The translation of significant should be, to say that when there is a good chance they are pertinent.

Suppose a claimant raises five contentions of law, and on the basis of only one, the court decides it must be dismissed. Why should they have to discuss in the judgment the other four contentions? There is a procedure of economy of judgments and procedure. One could say that they have considered the five and retained only one as the decisive

contention, but the fact they have not mentioned all the five in the judgment does not prove they have not considered it or have considered it. What is embarrassing is that this rule gives a right to a party to challenge any judgment because the court has not gone into all the details of the argumentation of the parties.

It was answered that this was a good example, but it does not defend the original thesis, because the claims were dismissed, and there were five or six possible basis for success that the court should consider for legal benefit. Only when the third legal basis is a very weak one, it may be the discretion of the court to say nothing. Therefore we say significant...there are two possibilities. We could be satisfied with the relation or we should strike out Principle 6.4. But it is the experience that it is an abuse of the judge's power, that the judge does not discuss the contentions of the parties. That is a very easy but not a good way. The Judge should discuss in short sentences little contentions of lawyers. When the court dismisses the action, the court should get a sense of fundamental rule, that there is a constitutional court in Germany, would overrule a judgment in those cases.

While one member was concerned about an abuse of the judge, the other was concerned about the opposite interests. It is an abuse for the parties to claim that the judge must consider everything, though on one basis, he comes to the conclusion for the solution. Well. Starting from the exactly opposite point of view. Both are legitimate.

We could consider using a neutral expression, like "serious." It is unfamiliar to legal usage, but maybe this is its advantage. Moreover, it would not be difficult to understand what it means.

Notice comment P-6C. We could elaborate somewhat, that it says now "does not require the court to consider contentions reiterated from and so on...it does not require the court to address contentions unnecessary to its decision."

The judge has to consider all serious contentions before rejecting the claim. Not only the claim, but also the affirmative defense. It could be that the defendant has one of these three defenses, and that we have changed Rules. Therefore it is not good to say in case of a rejection of a claim. It is clear that when the claimant is successful, it is not necessary to discuss the legal basis...it would make no sense. It's only application is in cases when claimant and defendant are unsuccessful with their claim or affirmative defense.

This point could be addressed by adding a short clause at the end of 6.4 in comma that is presented on a dispositive issue.

What is being said is that affirmative claims by any party should not be rejected without consideration of each serious contention of fact and law presented in support of the affirmative claim. And that it would not matter if that went in as a principle or a comment, but it must go in somewhere. A member said that several cases have gone to his highest court, where the claim has been that the intermediate appellate court omitted to consider an argument that could have affected the decision of the case. But the high court regularly accepts judgments where there is that omission. So the intermediate courts and the high court itself doesn't always follow its own rules.

When there is an argument that has already been presented that the court does not think really warrants very serious attention, simply mentions that the argument was made, then says it doesn't warrant serious attention, or gives a short reason for saying so. It

leaves a position in the end that a party that has presented an argument it thinks is serious, will know that the court has considered it however briefly.

A member failed to appreciate the different interpretations in connection with Principle 6.4, because he had understood the verb “consider” in 6.4 to refer to the process of the court exercising its mind, and attending to, and listening to, all of which follow from the heading “right to be heard.” It is clear, as already demonstrated, that it is possible to treat that word as requiring, that in addition under this present principle, there is a constitutional requirement that the judgment for the decision should include argumentation which refers to the relevant contention, threats, law. That possibility linguistically arises from our recent word “consider” had not occurred to the member because he understood the question of presentation of judicial reasons would be subsumed into Principle 20. It is very interesting to discover that question arises out of more than one principle.

Maybe we would like to transfer Principle 6.4 to Principle 20. Then we could say that the court should explicitly consider each significant or serious contention or fact of law presented. We might consider adding “before rejecting a claim or defense, be it affirmative or not.” This applies not only to affirmative defenses. Before rejecting a claim or a defense, if it is a significant defense it should be considered.

Another member disagreed because the first step is to consider the argument. The second step is to rise the judgment. The first step would be, to consider the argument is a question of the right to be heard. That judgment should be accompanied by reasonable explanation that would be a consequence. If we have Principle 6.4, it is normal that the judgment should mention informed, or contentions. But perhaps this issue is not totally important. If the majority prefers principle 20 as a right place, it would be a way to cope with this problem. But it would be good to mention this because many judges and courts are, or have a tendency to go with the judgment that way with less words, and that isn’t good.

Principle 7

Prompt Rendition of Justice

Perhaps here we should make expressed reference to the relation to access to justice. We can do that, so that may be the major point we should pick up that we do not have now.

A member did not understand the connection between access to justice and prompt rendition of justice. However, another member considered prompt rendition of justice one of the aspects of access to justice and suggested including it in the comments. Access to justice that leads to decisions that are never enforced or enforced after twenty years is no access at all.

This concept of right, indeed it is a human right according to Strassburg “speedy justice.” It has received a lot of attention in Europe, and some light has been shed on it. “The courts, including appellate courts, should ensure that a dispute once commenced is adjudicated or otherwise disposed of, and judgment enforced, would have a reasonable time.” This proposition which is longer than the current version of 7.1, echoes several of the points that have emerged in Europe. That is to say there are different segments of the

process, and certainly, to speak meaningfully of a duty of speedy justice could only start to apply once the litigation has been commenced. Perhaps there are other points there. Also, the duty extends to the appellate process. Perhaps therefore are various reasons not suggested...we could slightly relax the wording to cover these various facets of speedy justice.

This proposal was well received by a member, who considered it an interesting point to consider, that the objective of prompt justice includes enforcement. That is a very important and different, perhaps unconventional connotation, but it is worth including. Another member, however, reminded the group that there is a special principle of effective enforcement, rather than speedy execution.

A member did not understand why the term “may” was used in Principle 7.3. It may grant accelerated attention, it goes without saying. The court should whenever practicable grant ancillary addition, “May” seems to be practically meaningless. Another member said that we could say “should have authority to.” However, the meaning would be the same. It is better to keep the current wording.

A member wondered if the second sentence of Principle 7.2, when juxtaposed against Principle 11.1, we can excise that certain sentence. I think the core of the message is contained in the first sentence of 7.2, which is excellent.

Another member said that maybe we could condense somewhat the second sentence. On the other hand, a major problem of education that the English judiciary is going through is the relation between the objection of getting reasonable speed and having intermediate deadlines and schedules. The unfortunate experience is unless you take seriously deadlines and schedules, your system is not going to work properly.

There are two different systems in the world regarding deadlines. One has procedural rules with certain absolute deadlines. For example, 60 days after service of process. Other systems is the court who orders special time limits. And we mention both possibilities with the intention to make clear that civil procedure should realize one alternative.

Principle 8

Sequence of the Proceedings

A number of members of this Working Group has said last year that this was not really a principle. It is sort of an architectural description of the proceeding. We did not quarrel with that, but our thinking as we have worked our way through it, is it seems helpful to have it. We could have this language but without a number, so we simply say the proceeding should have a sequence. The Reporters did think it was helpful to have a description of the architecture we have in mind as we then proceed with the subsequent development of principles.

Should we keep it even though it is not strictly a principle? Should we keep it but not numbering it (calling it not a preamble but a post or midamble)? Should we put it in more general terms as a subcategory of another existing Principle? Should we put this all in the comments? There are different ways of coping with it, but the reporters felt its important to have some sort of architectural provision located about this place in the sequence.

A member repeated what she said last year, that she considered that this was very useful for people who are not accustomed to using these kind of rules, especially in developing countries. She stressed that we must keep it.

If we look at Principle 8 then Rules 18 and 19, they seem not to match up very precisely. Though this seems of much importance, perhaps, a view is held by a good many people, that commercial litigation for the kind we are contemplating here, to reach a successful conclusion with due speed and economy, it is necessary for an early conference to be held under the management of a distinctly managerial judge. Thus, the member suggested that the early conference referred to in Principle 8.3 should not be referred to in the interim phase, but should happen as early as may be.

Now, that will depend in the end rather, the rules will be framed later in the final sense, in accordance with what Principle 8 eventually says. And, one way of conducting these proceedings is for there to be preliminary document, which can be full or not so full, immediately followed by a managerial conference at which the judge decides what form the pleadings should take, and how quickly certain proceedings should be followed.

The difficulty with the managerial process is that a detailed set of rules can lead to over-management in cases that do not require it. Whereas, if the management is not undertaken, it can lead to under-management in a complicated case where it is required, and needs the supervision of an experienced judge to sort out just what needs to be done and what does not need to be done, in light of the early contentions of the parties. So, the sequence is important, it should be in the Principles, the role of the managerial judge should be introduced in the principles in some way, to emphasize that judge's importance in the overall proceeding, and the rules later that should be developed from the Principle as decided upon.

A member considered that that suggested a different way of coping with the concept we have, that is, to call this the principle of active management. Most of the material we have here could equally be described that way, and that is a principle. Maybe that is the best way to do it.

Another member, however, was not happy with this proposal. We have Principle 10 which calls for responsibility for direction of the proceeding, and that is a managerial principle. Therefore we should not mix up Principle 8 describing the structure as a managerial principle.

Looking at principle 10, which commences "commencing as early as practicable," I think that should be in the first phase. This does not mean that we should not have the structure as we like it, but part of the structure should include Principle 10 cutting in the first phase of the structure.

However, in Principle 12, effectively is the basis of the proceeding, principle 12.3, and therefore it is the first step that the parties give a claim as a basis of fact pleading, and defense. And then the second step that the court addresses to the party to improve their pleadings and so on. And now, it is a question of definition whether to put as a second phase or at the end of the first pleading phase. That could be discussed but we should not mix up managerial principle with structuring principle. We could say it is better to put early conference at the end of the bidding phase. That could be a good proposal.

A way of thinking about how to do that would be to extract from Principle 12, the standard of pleading. We have more general responsibilities here, but have that before

sequence, then we have pleadings, then we have how managerial responsibility, then sequence. That may be a way to do it.

A member, however, disagreed because Principle 12 is well composed and we cannot take one part of the principle, it would be a great disservice to it.

Another member considered that we should have Principles about pleadings before the principles of direction, but maybe not before the sequence. The sequence is that the pleadings entering phase in the final hearing. We cannot put the pleadings before the description of the sequence of the structure. We should put it before court responsibility, right after party initiative.

The members of the group seemed to have several different ideas in relation to one another, but there was no disagreement. That is, baseline, parties frame case with their pleadings; that must come first. Then the court must undertake active management. And active management contemplates essentially three phases: the introductory phase, the interim phase, and so on. Maybe what we need to do is to try various combinations of these to see whether we can get it more congenial to what the group thinks. Maybe the thing to do would be to assume that the Reporters would think about the time to do that, but readjust the order of Principles 8, 9, 10, and 12. And then spend our attention on discussion on any of the specific parts of those rules that anyone finds troublesome.

We need a principle, and a succinct statement of principle is what we should be striving here. The succinct statement of principle should not preclude on the Rules later on dealing or permitting in the case of small cases, a swift conference before the judge, before the pleadings, so that the judge can insist that in a case where there is not a huge amount at issue or a great amount of issues, whether the case would be disposed of more efficiently by abbreviated form of pleading, rather than going through the full panoply of pleading, before coming to the judge for his directions. In the longer case with greater issues in money and number is different. It was mentioned earlier that these Rules might eventually find favor for the disposition of smaller claims as well as the larger commercial claims. Some very successful judges are able to take a case early, and in the smaller cases deal with them as described above, and bring about a fast and just result. The Principle adjusted should not preclude a Rule, which even, an exception, would permit that abbreviated procedure.

On that regard, a member referred to the first sentence on Comment P8-A, where we say that the concept of phases of proceeding should be applied flexibly, according to the nature of the proceeding of the case. We could break the comment here and the “orderly schedule” could be a new paragraph, where we develop a little bit what was just discussed here.

It is not necessary to dive headlong into the comment. In any event, the third word of Principle 8.1 is “ordinarily”, and these comments are well taken, but this just reminded us of the need for flexibility, and to use the word “ordinarily” so that we are not, locked into an inflexible three fold procedure. We have already discussed these problems last year. See the Secretary’s Report, pages 15 to 17.

Principle 9

Party Initiative Concerning Scope of the Proceeding

In Principle 9, we have party initiative, and that is a very important point, because it is an important control on the scope of discretion of the court. Maybe it is written up too extensively here, but if this is what we have in mind, that is the way in which that definition of scope is effected is by the pleading, have the pleading take the form of affidavit. It is still a statement of claim.

A member was not sure that the title of Principle 9 is correct. There are two different questions in Principle 9. The first one is, who may or can initiate the proceeding? In most countries, it is only through the party's initiative. The second question is what can be the scope of the Proceeding? Who decides this? So if it is short, party initiative concerning scope of the proceeding is maybe a bit too confusing.

Maybe just a terminological remark, however, this appears when we tried to produce the French translation. A French translation is very complicated when we have vague notions like reasonably, unreasonably. This does not mean anything to French speakers and civil lawyers. Maybe we should try to avoid so many references to this. It is very difficult.

We have that problem because reasonable appears several times in the text and comment. Maybe we cannot do without it. But it seems like a Wagnerian motif...reasonably, unreasonably, what does it mean? What does it mean? It's a sort of standard. There is an abuse of this very practical term, which means everything and nothing.

The group tried to find a similar or functionally similar term. The reason that we use the term is to suggest proportionality. Not excessive. If that is acceptable, maybe we should go through and think of the term "not excessive" and "proportionality" in settings. This might be more congenial to the civil law mentality?

A member considered that the term "reasonable" does not mean anything neither in civil law countries nor in common law countries. The meaning is the same. It is not particularly in civil law countries it does not have an specific meaning. It has the same meaning in common law, which is nothing in concrete. The problem is it depends on the context. To make without the word "reasonable", we would have to express what is reasonable and what is not. But that is not within the scope, of the Principles. We should not feel that in the common law countries reasonable has a meaning. And this is not different in civil law countries. Reasonable means the same for all. But because those are Principles this should suffice, otherwise we will have to rule on what is reasonable or not.

However, that explanation was not considered sufficient. Unreasonable suggests that there are questions of proportionality, or disproportion. One uses the general idea of unreasonable to preclude hyper technical legal argument, which would be, in connection would delay the proceeding...the lawyer would say, "well, it does not say unreasonable, so long as it does not delay". This amendment is going to take two days of additional time and therefore it is not permissible." Well, the judge would say that is ridiculous. Disproportionate is not disproportion. The concept is designed to anticipate and neutralize hyper technical arguments concerning effects. Now, the question is what therefore is not disproportionate? That is why we need to look for a civil law term...that is not disproportionate or not excessive. Would those be more congenial? Reasonable means proportional, but it can also be fair in some contexts

A member said that we should not suppress the word "reasonable." It is just not possible. But we should explain in the comments what we discussed here.

Another member, however, said that we should choose each time a different word.

Another member, however, considered that we should keep the word reasonable, because we use that word several times in the project. It is better to explain what it means in the comment and use it several times than to use several different expressions. We use that word extensively in various contexts. If we use different words, it will be worse than if we use one word and we create an intelligence of what it means, which was already explained.

The word “reasonable” is something that had been introduced in Argentinean jurisprudence. It is good and is a word we must keep. We must maintain the same words as far as possible throughout the text. If not, it is difficult if in a Principle we put another adjective...it is difficult, the lawyer will say why in this Principle use this, and another one uses a different adjective. We should maintain the word. In Argentina, reasonable is the opposite of arbitrary for example. Moreover, the right to amend is extraordinary in Argentina. “Good reason” is a very weak expression for us. We should put “significant” not just “good reason”. We use “significant” in other Principles. It will be something better for civil lawyers.

Another member, however, considered that we should translate “reasonable” with different terms, depending on the context. It would be the right way. There is enough understanding to achieve this. And now, to say something on good reason, good cost, good reason. It is a very common term in Anglo-American language and we think we cannot change this. Perhaps it is not possible to make principles with intention to bind the judges down. Principles work only when the judges are reasonable.

Another member did not like the word “significant” because a bad reason may be significant. It is a question of language. Another point, there is a close connection between Principles 9.3 and 12.3; they should be better harmonized.

The discussion we are having concerning reasonable words, which are similar, prompts the question that is a more general question that we would like to direct to both the Reporters. In some of the Principles, we see explicit reference to the notion of proportionality. A very good example and an important one is Principle 11.2, controlling the application of sanctions. Contrast that with the technique adopted in some legal systems, preferably in England. In France, proportionality is a general principle and articulated as such, and is used to regulate the entire constitution and application of the federal rules. It becomes a leitmotif and controls the institution applying the process. We should contemplate the possibility that we could in fact articulate such a principle. Secondly, this is related. We have already discussed that sometimes, when we come across “reasonable”, we say that the reason it is there is to guard against unprotected application of principles and rules. I think this is obviously related to the question of proportionality, trying to avoid severe and excessive and unreasonably excessive application of procedural norms.

There are also two things here that are closely related. First, there is the notion of avoiding hyper-technical application of procedural rules. Second, which is of course very much a civil law notion, which England has embraced steadfastly, is the notion of proportionality. It is worth noting that modern systems actually articulate that as a separate and general principle procedure.

From a civil law point of view, this is exact. Proportionality is a general principle, but it is contained in the notion of good faith. This is applicable in both law and procedure. It implies that very much the idea of proportion.

The reference to proportionality is obviously connected with the idea of reasonableness of particular situations, like the relaxation of time limits, and other requirements of what will be the rules. Proportionality is manifested in many sets of court rules. By rule, it says “any one of these rules may be varied by the court when it thinks fit.” That is the practical manifestation of what is in recent times been adorned with the label of proportionality. As we understand it, the idea is implicit in the civil law codes. You can extract it in the good faith notions. The renowned draftsman of the Napoleonic Code, said no sooner has a code been announced, then a thousand unexpected questions present themselves to the magistrate. You need somewhere in any set of rules a method of elasticity to deal with these unforeseen situations. One wonders whether that thought is one that should be stated in the Principles, or should be left simply to be included somewhere in the rules.

Proportionality is very important principle. It is in some respects the basis of law. There is no good law that is not proportional. To write this very broad principle in our code of principles, is a bit dangerous. There is always the possibility that a judge could abuse the principle of proportionality. We have countries with very poor judicial tradition. Examples of a party applying for the taking of evidence, you may have countries where the judge says the claim is 5000 and expertise will cost 20,000..this is disproportional, we will not have this taking of evidence. This could be the effect that the principle is an overarching one, which could be used by judges to make very curious decisions. In Principle 12, we have a principle of fairness. Parties should conduct themselves fairly in dealing with the courts. Good faith, in the proceeding. We wouldn't say it is wrong to have it, but it is dangerous.

The other side is that there are some rules that a legal system must apply that work from one point of view injustice. Statute of limitations and *res judicata*—both of them say under certain conditions we will not consider the merits of a very meritorious contention. Statutes, it is too late. *Res judicata*, we already did that, we understand there might be more but its finished. Those are brutal rules, but we understand that every legal system must have them. So, we have to be thinking about the other side. We will however, think about alternative language to reasonable where the implication is appropriate. Such as disproportionate, or not excessive. We may consider having some general discussion whether we have a principle or not, but of the concepts of proportionality and of how, “totality of circumstances” which is another concept that must inform the whole business. So, we will also consider that the heading for Principle 9 needs to be more inclusive, because several subjects are addressed there.

The example about the statute of limitations was a very good one. In England, if it is a commercial claim, you have six years, and if you miss the deadline, that is that. If it is a claim for personal injury, because you have been injured by a machinery in a road accident, for example, you have three years. And if you miss the deadline, you can throw yourself on the mercy of the court, because it has discretion to relax the deadline. It is a value judgment made by the magistrate judge. It is a very interesting question. The entire question of strictness, and occasions when it felt justified to relax strictness... We should inject more procedural equity in the process.

In article 9, we have 3 sequences. We have the parties who have the right to initiate the proceeding (9.1—party initiative). The right of the parties to determine the scope of the proceeding with claims and defenses; and then we also have the right of the parties to notify and determine the proceedings. Maybe it should be expressed in the title again. Settlement, termination. We should express that in a better way.

In the last sentence of Principle 9.4, we talk about the unilateral termination of the action. A member was surprised by the very restrictive character of this Principle. The defendant may have very great interest not only a moral interest, in opposing the unilateral withdrawal of the claim, and obtaining that the claim be formally dismissed by the judge. And not only in cases where a court it would result in prejudice to an opposing party or one that could not be adequately compensated by an award of costs. The member suggested a case several years ago, in which the defendant had a strong interest, moral and commercial, in opposing the unilateral withdrawal when the claimant realized he would lose the claim, and wanted to withdraw without having moral blame of judgment against him. But the respondent has the right and here it was admitted only with the extraordinary restriction. It is not so much question of award of cost and compensation. There is a fundamental right of the respondent to obtain a decision.

It was explained that the reason for this broad and a bit unclear wording was that, time where the claim could be withdrawn, by the claimant, is in each country a bit different. It is now necessary to find a wording, which covers a common concept. There are countries in which the judge could decide if the action should be withdrawn or not. There are countries with strict time limitations, and we try to cover those systems with this broad wording. If the group would agree on a more strict interpretation, there would be no problem. But it could be that we will be criticized by members of countries where it is up to a court's discretion to decide on a withdrawal.

The theory is when a claimant introduces his claim, there is a procedural link between the two parties, and the claimant is not the sole master of that relationship. We have nothing against the discretion of the judge or not. But this restriction seems to be unfairly justified.

That is the reason why the French Code of Civil Procedure says, if the claimant wants to determine unilaterally the proceeding, he needs the acceptance of the other party. There is one exception—if the defendant has brought no defense or counterclaim. But, you theoretically need the acceptance of the other party.

We distinguish two situations in Argentina and in other civil law countries. When you voluntarily want to finish the process, you need the consent of the other party. But when you voluntarily waive the substantive right (the claim) the plaintiff cannot sue again.

Normally it is possible to withdraw the action in the first hearing in civil law countries without consent of the other party. And, there are some countries where the court can decide whether the action can be withdrawn or not. In most countries, there is a difference between withdrawal of the action. In common law systems this differentiation is unclear. It is sometimes up to the court's decision whether the withdrawal is permitted or not.

In Principle 9.3, there are a number of qualifying words, the essence of it this principle declares a right to amend our claims and defenses. And, that is fine, as a starting point. Maybe it is a little too strong because of a special problem prominent in the

common law system and maybe in others. When a party seeks to amend a claim, in order to raise a claim, which at that point has become statute barred, and systems grapple with that. The English compromise is that one can as a claimant amend the claim and introduce a claim even though it is statute barred at that point, provided it arises from substantially the same facts as those that underlie the initial claim. That is to say, you cannot pull out of your hats an entirely different colored rabbit, which has no connection with the original claim. Do we want to think about that principle at all? Does the wording in Principle 9.3 adequately cope with that difficulty? We are slightly worried about the use of the word “rights” you see, unless we qualify it. We can see that it is already qualified with the phrase “upon showing good cause.” One might respond to this point robustly and say if you try to introduce a new claim with the original facts there is no good cause or reason. Similarly, we have the qualification or otherwise result in injustice. You might say it would be unjust in those circumstances. This is fine if that is the understanding, but the working group should be attentive of this potential situation.

A member would prefer that Principle 9.3 said a party upon showing good reason, “may” amend, which is weaker than “has a right to.”

In some legal systems, there is a very strict attitude towards amendment. The idea is that otherwise the litigant can abuse the other side and empower the judge to enter into a kind of free-ranging examination, which is an abuse of process. So then the question is, what is a proper attitude towards amendment? Underlying the language here are important differences on the background attitude on that subject. We think that on the one hand there should be a right of amendment on appropriate circumstances, but on the other hand it should not be so liberal as to be abused. Question: how do you say both of those things? But we will take a look at it. We should say there is a right of amendment, but within reasonable scope and time, we will work on it. The point about the statute of limitations or prescription might be mentioned in the comment.

Especially in transnational civil litigation, it is very important to give freedom to amend the claims because it is not easy for the foreign litigant. So, it is wise to accept the possibility of amendment.

Principle 9.4 is covering a number of different situations, and there is one where the claimant party is determined to withdraw no matter what, and to suffer judgment if necessary. This raises the question of whether the judgment suffered should be res judicata or not. In some circumstances yes, in others, no. There is the other situation which used to be dealt with in England and in the US by a claimant party in the course of a trial realizing the party was not going to succeed because of lack of evidence that might later be obtained, then seeking a nonsuit from the court. This was usually in jury trial procedure. Then it was up to the court to grant a nonsuit or not. If a nonsuit was granted, the party would suffer dismissal of that claim, or the claim at that stage. But would be at liberty to bring the same case again, having suffered the cost of the loss of proceeding in the meantime. Principle 9.4 may need further explanation in the comment to make it clear it is dealing with a number of different situations, all related to res judicata, or the ability to come again.

It is true that the second sentence of Principle 9.4 is very different. Detailed rules in each country are very different. We should say something on the possibility of unilateral termination. Perhaps it would be a good proposal to make it short of text and a

longer comment. We should consider this. The text is now too long, too much, and too less together. Perhaps we should shorten it.

In common law, there is a primary distinction between the complete cessation of the claim, rather the action, and the partial dropping of the action, withdrawal. And, there are protections, especially through costs and control, to ensure this unilateral phenomenon is not abused. In some circumstances the court is prepared to entertain an action and to proceed to judgment, even though the other party is unwilling to participate. There are circumstances when that is right and proper, because of the special interests of the other party in obtaining justice. The essence of it is quite flexible.

Prejudice is a sufficiently “woolly” word to be acceptable in England.

Whether the text is long or short, or the comment is long, it should not be incorrect. And it is incorrect. In French law, withdrawal requires acceptance of the respondent.

The question of whether it is possible to reintroduce the claim, and whether the former decision is *res adjudicata* or not, and should not be handled, even be dealt with here. It is not the place to discuss whether there will be the opposition. You have withdrawn and you cannot reintroduce, might be covered in another provision of the text. We are having a very strict rule in Principle 9.4 second sentence. This strict rule is wrong in certain systems. As a matter of logic, and to the other question, what is not *res adjudicata* or not. It should not be discussed here, it isn't the right place.

Should we require the consent of the defendant? What is the proposal for a better wording of the text? We could say, that the literal termination of the action should not be permitted when it would result in prejudice to an opposing party. And make a comment that would cover the more flexible systems, and the more strict civil law systems.

No proposal were made.

There are two problems. One is the standard, governing unilateral termination, and we need to talk about that. We are going to be less permissive than this rule now provides. How much less permissive, remains to be seen. Another thing is *res adjudicata*, and I agree this belongs somewhere else.

Question of presentation. Principle 9.4 consists of two sentences, and it appears the second sentence is about to become shorter. How much so is unclear. At any rate, there are two sentences. On one reading there is a world of differences between the first and second sentence. That difference is the first sentence is concerned with a bilateral situation, and the second sentence is concerned with a unilateral. At any rate, that is a possible reading of Principle 9.4. If that were eventually adopted as the intended reading, you might say that 9.4 bifurcates, and in fact we should have a 9.5, which deals with unilateral termination or modification. Principle 9.4 would deal with consensual termination or modification of the proceedings.

What is the last point at which the parties have a joint right to settle their action? Is it the moment before the judge says I am now beginning my judgment? Or can they settle even after he or she has said in the first sentence of the judgment, “my proposal is there should be judgment for the defendant.” This is a live question in England, and the English courts have said it all depends upon the discretion of the courts. The court can if it wishes, withdraw its proposed judgment if both parties are prepared at that stage to settle the action. It is a discretion that the court has. In some contexts, public contexts, in public matters, the court should be less inclined to withdraw its judgment once it has

begun to stay that judgment. In England, it is common for the court to indicate its judgment, its written terms of judgment will follow in due course. This creates an opportunity for the court to say, that all oral judgments are provisional and tentative, subject to the possibility of a new agreement to settle.

Principle 10

Court Responsibility for Direction of the Proceeding

Principle 10 is the court taking responsibility over the proceeding. This is not inconsistent with what has been suggested before: how extensive is the court's first initiation or involvement depends on what it sees the case to be. If it is a substantial case, it goes one way. We say "ordinarily" because this does not mean one does it that way inevitably. We take it that all modern legal systems now recognize this principle. This applies to relatively complex litigation. At the same time that the extent of court direction should be proportional to the complexity of the matter.

A member considered that in the implementation of this project, the most important principle is the use of experienced and firm judges, and implementing this principle is absolutely essential to the practical and essential working of the litigation this project is intended to deal with.

As far as case management decisions are concerned, whether it is any rate in the commentary, we want to emphasize that these decisions should not be taken on appeal. One way of completely wrecking the process of case management is people going all the way to the Supreme court every time a minor decision, case management has been made. There is jurisprudence on that in England, that severely restricts, actually negates any process of appeal, and rightly so, on questions of case management.

Principle 11

Sanctions for Failure or Refusal to Participate.

We accept the idea that the principles addressing sanctions should come later in the sequence, so they cover everything. Also, they should draw a distinction between sanctions effective against a party and those addressed to nonparties. We must recognize that the extent of sanctions, and the variety of them vary in legal systems, at least formally. It is important to realize that common law systems, though they have powers of contempt, judges very rarely use them. And therefore, the system of sanctions in the common law is primarily that drawing adverse inferences leading to default, judgment or dismissal. That is effectively the strongest sanction. You simply say, if you do not play by the rules we will not allow you to use them, goodbye. That is the basic sanction used in the common law system.

A member wondered if it would be advisable or reasonable in the comment to say that the concept of court sanction is rarely used. From the point of view of civil law countries, it is extraordinary and a violation of the fundamental principle that no one should be judged in his own cause.

A member asked whether in Principle 11.1, we should not confine the source of these sanctions to the court, because in some legal systems, sanctions are actually prescribed in Rules, automatically applicable in certain situations. The task of the court is to receive applications for relief against such. It would be sensible and a principle to accommodate that possibility, and the suggestion would be to begin 11.1 to say that the court or rules can or may impose sanctions.

Maybe a way to do it is to write it passively, that is, “parties, council, and third parties are subject to sanctions for...”

A member focused on the word on Principle 11.1, second line, which is “directions,” the only one we have at the moment. The member would like to explore with the reporters the question of whether it is an adequate description of all the different types of procedural requirements that might exist.

A member suggested the term “obligations” which would be more general.

The idea of obligations and duties was considered an excellent one.

Principle 12

Responsibilities of the Parties.

Principles 12.1, 12.2, 12.4, and 12.5 are really standards of candor on the part of what we call “avoiding being frivolous.” We can view those as appropriate predicates for what is in Principle 11.

Looking at Principle 12, there is in the civil law a general concept of good faith. That is the term used to refer broadly to the obligation to participate responsibly. Maybe we will use that term because it is general, accepted, and is not difficult to translate the concept into common law.

We should use “procedural good faith.” So that we do not import all the business from contract law.

Fairly and acting in good faith under continental understanding is not the same thing. Fairly is broader, and good faith will say that there is no...unacceptable reason for an act...it is more and more...we should say both the parties to conduct themselves fairly and in good faith.

There is in some civil law countries procedural good faith. Just as there is a notion of public policy in substantive law and procedure. There is no doubt about that. The duty of the parties to act in good faith, between themselves, is clearly understandable. On the other hand, in our public law, there is a duty of the administrative authorities, the executive, and the court to act in good faith. For instance, by their attitude and statements, they have given rise to a valid or legitimate expectation of one party or another. They cannot change their mind for the benefit of the other party.

But fair is more...one could act in good faith but not be fair. Unfair, you need no inner intention to be unfair. Good faith describes intention; fairness describes a standard independent from an intention. Therefore, we should say both.

Perhaps we should consider, if you look at the comment, *P-12C*, we refer to the ethical duty to refuse to support an initiative that violates Principle 12.4. We should have a comment regarding responsibility of counsel that is more general in scope. We contemplate these would apply through the medium of advocate conduct. It is a universal

rule that the advocate has responsibilities for fair dealing with opposing parties, and also candor, as we say in the common law, to the court. We should have a more general statement about the responsibilities under ethical rules on the part of the advocates.

“Unjustified pleading” is when one party alleges the other has been guilty of dishonesty, or fraud, because this is constantly before the English courts. Understandably, the attitude of the courts is you should not plead an allegation of dishonesty or fraud unless you have reasonably strong evidence to do so. The lawyer who is ultimately responsible for signing this pleading should be able to satisfy a quantum of evidence to justify this particularly dangerous and troublesome type of allegation. We could incorporate that into some comments.

A member suggested to the reporters that Principle 12.1, was an extremely important, attractive and dynamic principle, although it has a novel quality in the common law. The suggestion was that to avoid the risk of this being misunderstood in common law circles, we say this is not some attempt to translate the concept of abuse of process. It includes, but is broader than the common law notion of abuse of process.

In some countries, however, the behavior of the attorney is submitted not to the court but to the leader of the bar, at a complaint of unethical conduct.

If you have a very long and good judicial tradition, one must not be afraid of Principle 12.4. If you have a doubtful and short tradition, it could be the court abuses the power given by Principle 12.4 to get rid of cases which the court does not want to decide. We should not say too much in Principle 12.4. It is a bit dangerous in appropriate circumstances. Failure to conform may be declared abuse of the court’s process. What would be the consequence? The dismissal of the claim, costs, sanctions, fines? Think of legal cultures all over the world, it could be an invitation to get rid of claimants.

We should consider to be more cautious with those possibilities. You think of the Anglo-American legal culture with few judges, well-elected judges, long legal culture, but there are also many countries with a shorter legal culture, and you should not give them too much power. There are two sides, with this Principle 12.4.

It was answered that in articulating generalities, which is what we are doing in principle, we are offering courts around the world the opportunity of interpreting these principles in different and varying ways. We should not treat that as a red flag which prevents us from doing what we believe is responsible, and producing a cutting edge and modern system of principles. And for that reason, Principle 12.1 is an extremely attractive but dangerous principle. It creates an obligation to behave fairly and in good faith, which is a very vague, broad, and nebulous concept. It is possible that in the courts of Mauritania, which is run on totalitarian lines, there will never be a litigant who gets beyond the first five minutes of litigation, because the courts turn around and say that parties violate Principle 12.1, and the sanction applicable is we dismiss your action under Principle 11.3. This is a possibility but we really do not think we can conduct our proceedings on the basis that this will be our situation throughout the world. This is capricious and unjust application of our principles. We must have faith that the majority of the courts will approach this in a responsible way. The only suggestion is in the commentary, the Anglo-American concept of abuse of process, is mentioned to make clear that Principle 12.1 is not an attempt by us to translate that into universal language. Principle 12.1 is a broader concept than abuse of process.

There is a difference between the possibilities of judicial abuse of Principles 12.1 and 12.4. In that Principle 12.4 being more specific, will give more encouragement to the arbitrary or totalitarian type judge, than will 12.1. And it may be desirable to redraft 12.4. One additional reason for saying that is comment *P-12B*, is dealing in part with the problem concerning what was said, but it is almost a contradiction of Principle 12.4. In order to make comment *P-12B* practically operative, it would need to apply to a less strongly worded Principle 12.4.

Principle 12.3 says that “in the statement of claims and defenses” the parties should present detailed facts. The rule of procedure of certain countries is to make it imperative to present all, facts, evidence, and arguments in the first statement. In many civil law countries, the usual procedure consists in two exchanges of written pleadings, followed by oral argument. In a number of cases, some party attempted to keep certain arguments for the second exchange, or keep certain evidence for the second... In that case, they may find themselves confronted with a rule that is too late. You cannot express any new fact or argument whatsoever. You should have done that in the initial statement of claims. And, as we read Principle 12.3, that may be the probable interpretation of the principle. A member wondered whether, in other procedures, one can produce new facts and arguments until the closing of the proceedings. In other words, you can present your case whether the claimant or the defendant, until that moment because your case is defined by your final submissions. Does that mean it confirms the rule of certain civil law procedures that everything must be produced in the first statement, or is it in harmony with the other rule that allows a party to define its case later, or at least in the final admission?

A case was reminded in which a Japanese company had made the mistake of accepting to appear before a judge in Bern, not knowing that the rule imposed everything to be sent in the first document. After that, it was too late. Of course, that foreign party had an understandable feeling of injustice. That is the kind of problem we need clarification.

A member asked whether this concern is not taken care by the following sentence in the Principle. It could be changed a little bit when a party shows good cause for an inability to provide sufficient specification of facts and evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the pleading phase or in the course of the proceedings. Is this enough?

The answer was no, for the very simple reason that the second sentence is limited to the question of evidence. There is nothing to do with arguments.

A member suggested a change to “facts or evidence”. We can add whatever we want.

However, there is still a difference, that in order to do what is permitted in many civil law procedural codes, you have to have a special proof to give. So it does not cover the problem, only very partially.

There are two different systems regarding amendments. One system is that...in a special stage of the procedure, there is a limitation to argue...with new facts, and to give new evidence. The other system is that each party should present the facts and the evidence as early as possible. When the party wants to amend the facts, and present evidence, it must show good cause. It is true that the French principles have a timely limitation. Once it exhausts, and decides to give a case up, and until this time it is

possible to assert new facts and give new evidence. This solution is a compromise between two different systems. We say that it is up to the parties to claim defenses, facts, and evidence as early as possible. When a party shows good cause, that could not do it in an earlier stage, it is possible to assert new facts, or give new evidence. The French system is now more the exception among the systems. The modern tendency goes towards the flexible system, that the judge decides whether parties are in good faith, when a certain fact is very late, or presenting new evidence is very late.

We could perhaps change the formulation, but if we want a principle that covers different systems... We cannot change one...as a principle we must be flexible. There is no preference for one system or another. We just wanted it to cover reality. The good cause system is all right provided it is extended to evidence, facts, and legal argument. Keep in mind the very serious practical problem that we find also in arbitration, that a party may have good reason, not to disclose everything in the first statement. Whatever we say here parties will continue to have these tactical considerations in mind. Or so perhaps the claimant does not want, in disclosing all his facts and evidence in the first written memorial, to help the other party. And would prefer after seeing what the respondent has to say, to disclose his best legal argument. That is a fact of life, whether we like it or not. And it will continue to be that. We just wanted to clarify the meaning, the possible effect of that principle. We think it is ambiguous as it is drafted now.

The concept is to play with open cards. We will not have tactics. And that is a modern concept, and it is doubtful to say that a party could bring evidence in later to proceedings. It was not our intention. Little argument, we can discuss it, there is no obligation for parties, for legal arguments to be asserted. They could do this, and to present a legal argument, it is never too late. It is up to the court to decide on the correct legal basis. It is not good to say that a party could wait to assert the facts.

Another problem is we have different civil procedures; ones where we have only two or three pleading stages...the statement of claim, defense, and the answer where our systems we have about four or five possibilities for response and so on. Therefore, it is difficult to formulate it in other ways. But we are open to better suggestions.

Our baseline is a requirement of, in the complaint and the answer, a statement in detail of facts reasonably available to the parties. And that additional assertions are permitted only upon showing good cause. We know that given those rules, parties always have some incentive to hold back, to see as how it were the lie of the land as the litigation proceeds. The risk of doing that is, if they then tried to make the second assertion, the objection will be they failed to follow the baseline rule, and their pretended excuse is insufficient. A lawyer always operates under considerable uncertainty and some risk, that this strategy will backfire, and you will not be able to present the additional matter. That set of possibilities is inherent in any system. We cannot perfectly refine the set of requirements to eliminate those, let us say, artifices of advocacy, but you simply say, if you hold this back, you are at risk that the court will find there is no good cause. Perhaps we could be more candid in our comment, to simply state that relationship.

A member would like to return to the question of the appropriateness of the drafting of Principle 12.4, the first sentence of which, essentially deals with two issues. The first is concerned with requiring the parties only to plead either by way of claim or defense, which might legally recognize matters. The second is, they should only make pleadings that have some reasonable factual basis. Important distinction there.

The second sentence of Principle 12.4 descends to detail. Maybe should not be deleted. It seems to me in this principle, we are trying to enumerate the various responsibilities of the parties. Some of those can be characterized as procedural duties or obligations. If it happens that one of the parties has breached his/her procedural obligations, then we know what will be the position. Where appropriate, the court applying its principles will turn to the available sanctions, and good luck to them. That will be an interesting exercise. Why should we, in the second sentence of Principle 12.4, get bogged down in the technicalities of the abuse of process doctrine, and actually dictate to the court what their response should be?

One point is, whether there should be a standard such as that stated in the first sentence of Principle 12.4. Assuming that there should be, if we relocate the sanctions provisions after this, it will not be necessary in the second sentence to talk about sanctions. It will be noted that sanctions may be imposed depending on circumstances. Proceeding on that basis, we get rid of the second sentence, or at most, we simply refer to the possibilities of sanctions without saying what they are. We leave that to be covered by Principle 11.

Then the question is whether standard stated in Principle 12.4 is appropriate. By way of background, that or something like that standard has been accepted in at least United States jurisprudence for 40 years. Historical note, the origin of expressly dealing with it was a reaction to the abuse, in some judge's early period of the civil rights movement, who would use their judicial discretion to dismiss cases that were making claims of denial of equal protection. The fact that a right has not yet been held to exist under the Constitution is not a reason why you cannot make that contention in a trial court, looking to the possibility of eventual appellate review...

Since then we have gotten back and forth in the United States on the question of what should the standard and sanctions be? The result is this standard recognizes the dynamic quality of law. In Europe, dynamic quality of law is your new life. Once you get this constitutional court, you have tension between the very general provisions of the constitution and that of local law. This is simply a fact of modern life, that the dynamic quality of law becomes evident within the experience of any given generation. It used to be something you noted historically. Now, it happens every ten or fifteen years so it is part of our life. You have to have some idea that it is allowed to make a novel conception so long as it is not absurd. So the question is, what is merely novel and what is absurd? That is the dichotomy that underlies the first sentence. If We could accept the first sentence, then we get rid of the business about sanctions and leave it to the general rule.

Another member, however, reminded that if we delete the second sentence, a judge would not apply such strong sanction.

An outsider, however, might not be able to understand the meaning of the first sentence of Principle 12.4

We refer to claims "reasonably grounded in law." By the way, which law? It is still to be determined? Well, we have the opinion that law countrywide will be applicable law while the current from the outset, thinks this is nonsense, therefore forget about this requirement. Which law by the way? It is a very broad concept. We are not dealing only in domestic settings. Community law has been referred to. Must it be implemented? Can we speculate on a direct effect? Once we require something reasonably grounded in law, is not that the first thing to argue, that your claim is not reasonably grounded in law

because it is very questionable whether the legal forces you refer to are already law, so on and so forth.

It is a matter of drafting, and of having consistency in the text. Either you would insert the applicable law, or refer to the comments that law is the applicable one by virtue of the forum's conflict rules. That is either domestic or some foreign law. Whether community law is part of any domestic law, would come under the review by the court, construction of the term "law", and whether the directive is encompassed, or depends on the nature, normally not, only in very few cases. Under the forum's private international law rules or its general approach to what law is, we would also find the answer to the question whether it be contract principles be applied. Of course, this was your prime concern.

The second test is "reasonably derived from a recognized legal concept". This is difficult to understand. Novelty yes, absurd no. Forget about any not recognized claim. You must have the basis of law, or at least reasonably derived from a recognized legal concept. What does it mean?

Let us focus on the language of the commentary, which is disproportionate but it is important. Namely *P-12.3*, second sentence, which begins with the three words, "in any event." This sentence is inconsistent with the common law purpose of striking out claims lacking of reasonable legal basis. This question has absorbed huge sums of money, and many legal hours in Strasburg over the last 3 or 4 yrs, because of a philosophical clash of common law technique and civil law tradition. As we understand it, this second sentence rejects the common law approach, and says, you cannot strike out or dismiss a claim or defense unless you have gone all the way through the full factual slog of investigating the facts, and giving someone their article 6.1 rights to a fair trial, at the plenary session, which may take years. Because it says the court does not have the power to dismiss the action without proper inquiry into the relevance of the facts. No, this is not what has happened in Europe. *Osman v. UK*, where the Strasburg court by majority decided this was contrary to art. 6.1, because you must always give the claimant an opportunity, on the basis of the facts of the case, the law must be considered. The House of Lords said that even if we are going to allow you to proceed to trial, there is no way we are going to change our mind on the question of law, which means you do not have a claim. And then, in the second case, *Zed v. UK*, European Court of Human Rights said we pushed it too far in *Osman*, we were too resistant to this common law device, we need to change our position. They misunderstood the nature of the procedural mechanism for dismissing a claim, which is based upon...that the claim was bad in law. Now it is possible for the English courts to dismiss a claim that is bad in law. It is plainly the opposite of what is said in the second sentence of the commentary.

Maybe it would be better if we said, "legal sufficiency."

The notion of abuse of the court's process is a general concept common to civil and common-law systems. That is an additional reason to delete the second part of 12.4. It would seem to be restricted to that particular case. The first part of 12.4 is difficult to accept as drafted. In a Swiss case involving divorce of Spanish citizens, the court went so far as to say it is legitimate for the court to depart from a long line of consistent precedents whenever circumstances, condition of society, present set of ideas had change. This was a revolutionary statement and would not be acceptable under the text of Principle 12.4.

We should make a difference between two cases, when the case lacks pertinence, it could be suddenly dismissed. When the facts presented or asserted by the claimant cannot justify a favorable judgment, the court could dismiss a case in civil law countries and common law countries. Even a change of the asserted facts would not justify a favorable judgment. The court could also dismiss the case. But that is no abuse of process, in the strict sense. We should make it clear that abuse of process does not allow a court to dismiss an action. This is in our comment, and perhaps it will be helpful not only to give reference to Principle 11, which could also give a possibility to a court to dismiss a case, we should perhaps say that an abuse of process could not justify a dismissal. Only more proper proportional sanctions would be applicable.

A member was afraid of abuse of process in the hands of many judges around the world. It might be dangerous.

A member thought that the discussion was mixing up the connotation of the abuse of process with what we are discussing here. Of course, it is not totally unrelated, but it is a different concept. The question is, what we are discussing is the question of recognized legal concept. If you make an argument, but which is not arguable, not reasonable, that is the point. There is nothing to do with abuse of process, which we have dismissed. We are confusing the ideas.

A member said that we do not have to say it is an abuse of process, because this is not the subject of a statute. We should let the commentators to do it. It is important to say in the second sentence, in appropriate circumstances, failure to conform to this requirement may be subject to cost sanction and fines for one simple reason. I understand Mr. Andrews said we don't have to mix up sanctions with the facts that are subject to sanctions. If we don't say here that I don't think a civil law judge will apply this sanction to a claim not grounded in law, I think it is good to make the sanction here.

First of all, we should get rid of the phrase "in any event" and "abuse of process" because it is a term of art in common law and it leads to difficulties. Second, at most in the second sentence, refer to the possibility of sanctions without specifying what they may be. At most we should refer generally to sanctions. We maybe ought not to refer to them at all. This is simply one of many duties of parties. With regard to them the general provision on sanctions makes sense.

It has been suggested that the standard concerning novel legal argument ought to be stated as, "reasonably arguable" as a matter of law, or subject to reasonable argument. But in the comment we could illuminate it by pointing out that all legal systems recognize or appreciate that some leading edge legal arguments are very legitimate, but there are other legal arguments that are absurd. The problem then is, am I crazy, or you crazy? Am I crazy to suggest the Swiss would abandon a legal tradition of 100 years? Or are you judges crazy because you do not see that it is necessary and we must abandon it? Extension of rights to women, foreigners, human rights. Human rights law is one problem of this sort or another. So, "reasonably arguable" is about as accurate as we can get. If the proposition is reasonably arguable, that determines the relevance of facts. Perhaps we need to be a little clearer about that relationship, at least in the comment.

Principle 12.4 makes no sense without a sanction, which is not the dismissal of the claim. If the sanction is a dismissal of the action, normal pertinence test is enough. Principle 12.4 makes only sense when there is a sanction that is not a dismissal of the action. What we discussed is not wrong, and that we discussed two different problems. It

makes no sense to say a party should not bring a claim to a court without reasonable, grounded law. It makes no sense. Normally this action would be dismissed because of a lack of relevance and pertinence. We want to say that we have additional sanctions, and now it is a question, is it enough to give common reference to Principle 11, where a possible sanction could be the dismissal without the pertinence test. For example, default judgment is a sanction too. The Judge could say he will give no hint for a better legal basis of your claim, and will dismiss your action because the parties are lazy. That is not our intention. We want to say that if the action could be dismissed, but there could be additional sanctions to the dismissal of the action. We should make it clear. Without this differentiation, the principle makes no sense. Or we must go back, and say that is not our consent to a broader understanding of abuse of process. It would allow a dismissal without a strict pertinence test in some cases.

This concept stated in Principle 12.4 seeks to differentiate between a legal position from plaintiff to defense, that is merely insufficient, but one that is so grossly inefficient, as to represent a violation of duty of fair dealing with the court. That is really the point. So, as a consequence, if it is worse than if it were, insufficient, but rather is abusive, and maybe that would help to escape abuse of process, it would follow that something should be done beyond dismissing.

Principle 12.4 first sentence, modified in the way already suggested. It has undoubtedly an important place within these principles, and certainly describes, usefully, a central aspect of obligation the parties owe to each other and the court.

We would like to trust the judges who are administering these principles to be able to apply the first sentence of Principle 12.4 in a sensible, rational, consistent way. And, if it so happens, that you have a frivolous or vexatious series of claims, or something terribly shocking and monstrous, perhaps it might be appropriate to apply costs or fines. The most common, reasonable, indeed necessary response to a gross failure to satisfy Principle 12.4, first sentence, is to get rid of the pleading. We do not need to fine people.

There probably is in the civil law, a term equivalent in common law, to frivolous or vexatious? We are concerned to use the term "abuse of process" because it is a technical term in common law that we might say can be fairly described as grossly frivolous, and in the sense it is off the charts. We do not want to be that undemanding. Let us think of a term...if we can think of one. If we could identify this in terms of something vexatious, that this draws the distinction we want to make between a claim that is the court will not recognize as valid, which is one thing, and one the court will perceive as so badly conceived, that is it an imposition on the court itself to have made it. We are in agreement on that. That is what we are talking about...distinction between a complaint that is merely demurrable, and one that ought to result in counsel being sent out with a dunce cap on. The question is: is there a phrase in civil law we can start this thing with, a party having an obligation not to engage in vexatious contentions, or something like that.

A member considered that Principle 12.4 is now adequately clarified because it is an example of the good faith stated in general terms in Principle 12.1. What is at stake here is not an ill founded, questionable claim, but a frivolous one, then why would we mention the possibility of sanctions only with respect to this particular case of behavior in bad faith, while all the others no. Having the first sentence would imply the possibility of sanctions.

The second sentence of Principle 12.4 should be deleted. It seems that Principle 11 should be a general section on sanctions, sanctions not only for failure or refusal to participate, but also for failure to conduct fairly the proceedings. It seems more logical and would avoid this consistent discussion about the second sentence of Principle 12.4, which would seem to solve much of the problem.

The danger of Principle 12.4 is that a judge could say “well, this action is so frivolous, that an exact pertinence test is unnecessary, I will dismiss it.” Principles 12.4 and 11.3, an appropriate sanction could be to dismiss a claim. That is against judgment of the European Courts of Human Rights, for example. We agree in many points, and therefore the proposal was to make it clear that there is no possibility of dismissal on the basis of 12.4, without strict pertinence test. If a claim seems to be frivolous, that could not be a basis for dismissal without a test. There is always a tendency to say the claim is frivolous, we can get rid of it. We should be clear that this is not the sense of Principle 12.4. Do we agree on this?

A member asked what was the “strict pertinence test” just mentioned. Is it in the Principles? Where is it? Where is the mechanism for summary judgment on factual issues?

It was answered that it was clear that the law is binding, and the judge could not dismiss an action without a clear test of relevancy and pertinence of the facts asserted by the claimant. That would be an infringement of human rights. It is dangerous that Principle 12.4 could be interpreted as a possible exception, to a judge strictly bound to the law...Principle 12.4 can be interpreted as an exception.

The pertinence test was explained as following. If the claimant goes to the court and says, “I want damages because I have become insolvent” because “you on the relevant day, were wearing the white shirt.” Now, the pertinence test would be made by the judge, and he would say, “just the assertion that the defendant wore a white shirt on that day, does not give any indication on facts, that the claim could be founded in law.” That would be the summary pertinence test.

Another example is slave laborer cases. Courts could say that it is unclear, the basis, possibility of limitation, the claims are unusual. The events have occurred 50 years ago and so on. A very broad and not exact statement of the court could give a basis to say those actions are frivolous, we will not deal with those actions, we will dismiss it. It is a form of a summary judgment without exact test of legal basis as relevant fact. It should be avoided. It is the same when a court decides on the permission for appeal. It sometimes is three or four sentences...the appeal will not be successful, we will not grant leave for appeal. The same is for those principles. We have discussed the problems, and we could have a lookout to go with this. Perhaps we should make a remark in the comments. A civil lawyer is not very happy on a too broad understanding of the possibilities of a judge to dismiss actions because of abuse of process.

It would be better to have a Principle dealing with sanctions in general, applying to all cases of unfair behavior and so forth, while here, 11 is structured to limit one circumstance.

The concept that we will struggle to arrive at for the first sentence of Principle 12.4, is the idea of frivolous or vexatious. Meaning, a claim which is stated so far as facts are concerned, with sufficient clarity that the court has no difficulty with understanding what is being contended as a legal right. For example, wearing a white shirt. As distinct

from a muddled statement, which unfortunately is a characteristic of a frivolous litigation. When the fact basis is clearly stated but untenable, that is the thing we are talking about and the proper term is one that is clearly untenable, meaning frivolous or vexatious. A party has an obligation to avoid inflicting that kind of contention on the court. Breach of that obligation justifies responses going beyond dismissal. So, assuming that we have understanding on that idea, the task for the reporters is finding a way to state them, thereby to relieve the working group of the burden of further thought on this problem.

Principle 13

Access to Information and Evidence

This Principle deals with essentially the procedure for access to facts. Everyone understands the parties can present to court their contentions of law. Those are legal arguments and the information is derived from legal sources. The more complicated problem is presentation of evidence. This rule seeks to have a reasonable accommodation between the concepts of a civil law, and those of the common law. It seems that we have done a fairly competent job of that.

It seems that slowly the systems of law, under the influence of international arbitration, are beginning to be more like each other than classically we considered them to have been. Namely, that the parties have important responsibilities for suggesting what evidence should be received, and suggesting the kind of questioning that should be done, and empowered to ask questions directly of witnesses. On the other hand, we recognize that the judge should have authority, which ordinarily would be exercised. Questions on the judge's own initiative designed to expedite the proceeding, because in any proceeding there are many matters that could be established, that are not seriously in dispute, but are necessary in order to understand or frame the matters that are in dispute. That is the general philosophic approach we have taken.

Is Principle 13.8 the only sanction we apply, of course its more subtly worded than that, it only mentions one sanction, or one consequence for failure to comply with this whole package of crucial provisions. That is, the civilian notion of drawing adverse inferences. Of course, elsewhere in the principles, currently Principle 11.3, mentions a whole raft of sanctions, some of which are very powerful and the first of which is drawing adverse inferences. The group should consider, whether an efficient and internationally respectable measure dealing with access to information and evidence, including the process of documentary disclosure, whether that needs more effective sanctions to deal with recalcitrant, slippery and devious parties and their lawyers.

Another member supported the previous comment. In particular, the discrepancy between Principle 13.8 and 11.3. Principle 13.8 is typical of the weak sanctions an international arbitrator can inflict, in contrast with that of a judge. So that seems the weak one should be redrafted.

Principle 13.8 is quite weak. It's normally the sanction. The normal sanction against parties in civil law jurisdiction is to lose the case. It is true that common law jurisdiction have direct compulsion. But it is also true that applicability of those sanctions is a consequence of a jury trial. If you prepare a jury trial, you need the real and complete truth, with no surprises. If you have a jury trial, and if you have fact pleading, it is enough

normally to draw adverse inferences against an incorporated party and it will lose the proceedings. But, the difference between civil and common law jurisdiction should not be overestimated. Principle 13.8 is quite more detailed, the sanction drawing adverse inferences, also mentioned in 11.3. It is also true it is the free choice of the court to take up sanctions described in 11.3. But on the other side, it is not recommendable. It is not a prevailing point of view, but it was the pervading opinion when we drafted Principle 13.8, that this should be the most usual sanction. We could make reference to connect 11.3 and 13.8, but in a proceeding without jury trial or preparation for jury trial, it makes no sense to enforce a party by contempt sanctions. For example, to discover a document when the court has a possibility to take authority of the contents of the document. That is punishment enough.

A member would like to consider the relationship between Principles 13.1 and 13.2. A possible relationship/structure is that we consider the question of access to information and evidence, first, which is held by the opponent, and then secondly, access to evidence not held by the opponent and must be held by someone else. Adopting such a structure, we can clarify Principles 13.1 and 13.2.

We should also focus a common question on what we mean by “held by.” We will find it in the Rules, that we use the terminology of “possession or control”. Are those not the words we need here? We wonder if even in the Principles, we should indicate that, for example, when the relevant evidence resides with a nonparty, we can go searching for that evidence provided it is in any rate within that person’s control. That might help.

It was agreed that the text should make clear there is a distinction between evidence under the control of the other party or not. Even that raises very serious problems. We think the well known example of a company and its subsidiary, whether the evidence is in the file of the subsidiary or not. If you read the text as is, people might think that the parties and the court may have the right to access information in the possession of third parties, which is not true as a proposition.

Perhaps we could focus on two points. It is useful to draw a distinction between evidence under the control of a party, then you get into a question of what does that mean when you are distinguishing between corporate subsidiaries. But we think that is a subsidiary question.

Let us start with the idea of party v. nonparty. That is an important distinction at least with the problem of sanctions. In the case of a party, the sanction in Principle 13.8, particularly if understood to include entering a default judgment, is pretty strong. Its true also in a jury trial; if the evidence is not produced the jury has no reason to make a finding based on it. That is pretty clear. Now, whether there ought to be power to go beyond making adverse inferences, vis-à-vis a party is a debatable question.

The other question is evidence sought from a nonparty, you cannot draw adverse inferences because a nonparty produces evidence. To what extent in a civil law system are the powers mentioned in Principles 11.3, and 11.4, that is, sanctions against a nonparty available? How does a civil law system court enforce an order of production, either of testimony or documents from a nonparty? Do they do so with power to enforce costs? They certainly have authority to issue sanction by penalty. Those differences can be made more sharply if you had clearer distinction if you had evidence sought from a party, and that from a nonparty.

On the question of sanctions mentioned in 11.3, and confining only to those sanctions as against a party, several recent cases have underlined the potential importance of default judgment that once was regarded as extreme circumstances, but are becoming standard circumstances. First case was a jury trial, where a plaintiff with lung cancer was bringing proceedings for negligence against British American tobacco in Victorian Supreme Court, Australia. And it emerged in the course of the hearing that long before the proceedings against the defendant had begun, the defendant had sought legal advice about the wisdom of retaining a great many scientific documents it had accumulated concerning the relationship of nicotine and lung cancer, and had systematically destroyed a great many of those documents. The judge held that the destruction of the documents had made it impossible for the plaintiff to have a fair trial of her claims. He entered default judgment for liability against the defendant, and then allowed the jury to assess the damages. That was a decision by the judge. It would have been the same sort of proceeding, and the same sanction would have been available to him, if the judge had heard the proceeding entirely alone. And then, we see in the United States, a somewhat confused picture emerging in the Enron litigations, which one assumes will lead to civil litigation, of various kinds, where there appears to be clear evidence of the destruction of relevant documentation. That may turn out to be a case where this extreme sanction is desirable, or the court may think it appropriate. However, the decision by the trial judge in the Victorian case will likely go on Appeal, and it could end up in the high court. And, when that court has spoken, and its noted for delivering lengthy, considerable judgments, law review kind, the law should be clearer about proper use of default procedure. This procedure appears to becoming more relevant, and it might be advisable not to stress its extreme rarity. Its an unusual procedure and an extreme procedure, but in the appropriate circumstances it is the right procedure to achieve justice in a particular case.

As for the sanctions against nonparties for failure to respond to a subpoena or subpoena-like procedure, in several jurisdictions there are severe sanctions against persons deliberately refusing to produce relevant evidence to the court. In several jurisdictions, that person can end up in jail if that person does not produce the document to the court, that it can be proved that person's possession or power.

The only available sanction in the French civil procedure code if the document is not given to the court is the *astreites*. This is the only possible sanction.

According to a member, it seems that an *astreite* is a very coercive and very effective sanction. What we are addressing here, and we are in danger of passing by ships in the night, are historical questions involving degrees to which the populace trusts the respective judges in different legal systems to apply sanctions that actually work. We should be above history at this table, and concern sanctions that actually work. It seems to be on a particular set of facts, the *astreite* is an excellent procedure to apply. It might be on other facts the only credible sanction is to threaten imprisonment. There are other sanctions been mentioned, such as entering default judgment. We should have to our disposal the full panoply of sanctions, and leaving it to the national courts to make its selection.

A member felt uneasiness by the fact we are discussing so much the sanctions. Of course it is a very important question, but first we should have discussed the distinction raised about evidence in control of the opposing party, and other evidence independent of

sanctions. In the second stage, discuss sanctions, which seem to mix up the two, and the thought in good method and theory, the distinction should have been kept in mind.

The basis of Principle 13 is that all evidence should be available for the courts and the parties. That means that evidence under control and the possession of the opponent and the third party should be available. Principle 13.2 is unnecessary because it says nothing new. In Principle 13.1, we say enough that we could strike out Principle 13.2.

In Principle 13.5, the principle that evidence in possession of the opponent or third party should be produced according to a court order. The only difference between evidence in possession of the opponent and third party is that the sanction at work is no sanction against the third party, because in theory it is ineffective.

Principle 13.2 is confusing, therefore it should be deleted. But all the other Principles make a difference between parties and third persons. It is unnecessary to say that negative in theory against third party is no sanction. It is common sense.

On commenting the above statement, a member said that this is an implied basis of distinction between Principles 13.1 and 2. When one says that all evidence should be available to the court, one would have thought in a private suit between two private parties, there is no legal basis for compelling the third party, to produce a letter from 2 years ago, unless the court has a specific, public law basis for ordering a third party, if they thought the private suit is a private matter. Unless we lived in a totalitarian state, we cannot see how one can compel a third party totally foreign to the private suit, to bring evidence, unless of course there is some sort of specific legal basis which empowers a court to order a third party to cooperate. Until we can prove that, and really there is nothing in the comment that explains that, and we are not living in a totalitarian state, we do not see how one can compel a third party to produce all evidence relating to a private suit which he is totally foreign to.

A member reminded that in Principle 13.2 the evidence from nonparties should be “necessary”. Which is a difference from principle 13.1. We should have a more stringent test, for requiring nonparties from producing evidence.

The starting point is that the production of evidence by third parties needs a court order. That is the fundamental idea. It is no automatic exchange of documents, for example. But now we have Principle 13.5, where we say the court orders the production of evidence in the possession of parties and nonparties. Therefore, Principle 13.2 is unnecessary. It is a bit confusing because in Principle 13.1 we see the parties in the court have access to all information. Then we say the court has access to evidence from nonparties. It would be impossible for the parties to have access to information from nonparties. We must strike out this principle. The question is now whether we should make more evident, differentiation between parties and nonparties. But there is no difference between them, except the sanctions. It is different because negative in theory is no reasonable sanction against third parties. And we have differences in the case of privileges. But they are dealt with in a special Principle. Therefore we should strike out Principle 13.2, and to make a reference in Principles 13.8 to 11.3.

We cannot avoid the gap between civil law jurisdictions and common law jurisdictions. Common law knows very strong sanctions against parties, hence strong sanctions against third parties. Civil law jurisdictions have more restrictive, but it is true that most civil law jurisdictions, where a strong development of full production of evidence of third parties...that’s evolution of French civil code, and in Germany, Spain.

It is the movement in Italy, that even third parties are forced to produce all evidence according to a court order.

We take it as common ground that the mechanism of sanctions has to recognize the difference between parties and nonparties. Then you get a difference in the type of sanctions, but that is a subordinate question. If we are committed to the point in Principle 13.5, that namely, even a party has obligation to produce evidence only upon court order, of course a party is going to agree to avoid an argument, but assuming that they do not agree, then it is a court order, and effectively, that is what the rule is in the American system: if a party does not produce it, then you compel to produce it. Parties usually agree because they know the court will order it if evidence is discoverable.

So we have that, then the question gets down to: should there be a distinction in the standard of disclosure for a nonparty compared to a party. At one point we were experimenting with the idea of “necessary” evidence from the third party. Perhaps the point in that respect is unnecessary. The very fact that the person is a third party, limits by necessary implication the responsibility to produce evidence. If you are a party you are resisting a claim of right on the other side. If you are not a party, you are engaged in an activity that could be considered inconsistent with your civic responsibilities. We take it that is the line of activity that we are suggesting and if so, then we might consider modifying the sequence of 13 subparts, to make this a little bit clearer. But aside from that, we can compress Principle 13.1 and 13.2 as suggested. We ought to say including evidence from nonparties. It is clear that it is covered. Having done that, the rest of it hangs together.

We should have a modest and clarifying change to Principle 13.6, dealing with protective orders. As that is now phrased (“a person who produces evidence”), the protection is conditioned and available only to a person who produces evidence. In some cases, the protective order would justifiably extend to not having to produce evidence at all. Example might be a highly confidential scientific or medical work in process, using information from human subjects that is identifiable to them and is highly confidential. So the possible concept or language change would be not to condition it to who produces evidence but who responds to the discovery request. That brings to the court’s attention the occasion and the reasons why the protective order should go to the point of not having to produce evidence at all.

That might be accompanied by some adjustment about the facts to be assumed by the tribunal. We might be able to say we will not be compelled to produce the evidence but the tribunal is going to proceed on the assumption that...

That is fair. Just that the protective order could be available to prevent production of any evidence upon a proper showing, rather than limited to someone who produces evidence. Limit it to the person who responds, that’s the concept.

However, a member reminded the group that a party will only produce evidence if ordered by the court. There is no need to protect against nonproduction. Moreover, when the evidence is confidential is covered by Principle 13.1.

A member had a question about the last sentence on Principle 13.5. This question may be related to the definition of privilege. But subject to that, and not knowing what are the limits of privilege according to this draft, it is surprising that according to the last sentence of Principle 13.5 its not a basis of objection to such disclosure, that the material may be adverse to the party making the disclosure. But again, a third party under the

system will be bound to make a disclosure if he receives a court order. Is that enough that there is a court order? What is the legal basis for this court order? In the system, it seems that any court can compel any third party to produce any evidence, subject to privilege, which is a limited and restricted concept. In a private suit, is that really enough? Is the court deciding this evidence from third parties, with no interest whatsoever in this suit. It seems like a totally alien concept of civil justice.

A member answered that at least in the Anglo-American tradition, there is a civic duty of a person residing in a political community to produce relevant evidence going to the merit of dispute among fellow citizens. In criminal cases, it is a constitutional right in the United States, and it is a right in most common law countries, that one has a right to compel third parties who has nothing to do with criminal prosecution, but not only compel production of evidence, but have them show up in court during trial.

In civil matters, the tradition has been in Anglo-American law, since the middle of the 19th century, that parties were required to give testimony. The classic common law was parties could not give testimony, the theory being they were necessarily biased and do not want to subject them to the risk of their soul going to hell. Change in the 19th century was parties became competent to be witnesses, it was always assumed that third parties if they had relevant testimony, were obliged to produce it.

The experience in Australia that is derived from the English, there used to be a written subpoena, which party could sue out against a third party, and the theory of that was, that itself became a proceeding between a party issuing a writ and the party the recipient of the writ, who became a defendant within the proceeding, and that defendant party could then raise such objections or defenses as that party could muster, against the obligation to appear, and give evidence that's required and produce documents that's required. It may be a very draconian measure against a party who has no interest in litigation, but it certainly has been the position in the common law jurisdictions for centuries.

There is civic duty, and perhaps on that there is no such difference between common and civil law. We should deal with principles and not deal with details of the civil and common law at all. Again, this is probably connected with the notion of privilege. I was concerned by what we called about the personality rights, and privacy in particular. Whether it falls under our concept of privilege or not, is debatable, but we still doubts about the extent of the power to compel a third party having nothing to do with the case. People have civic duties to appear as witnesses. One cannot refuse. But that does not mean exactly the same thing as the duty to produce any evidence you have, it may be a family secret, falling under the right of privacy.

It is true that two or three decades ago in civil law countries, the right to evidence, even by third parties, was very limited. But the French civil code and civil procedural code contain now a very broad clause that every person is obliged to give its contribution for the administration of justice. In Germany, the more limited point of view is, in the last year, we now have the full obligation of a third party to produce documents, handle things, tolerate examination, even of persons, and so on. So our principles reflect more modern point of view and standards. In Principle 14 there is an enumeration of possible privileges and there you can read confidentiality, professional of communications, right of privacy, and so on. Now, we must concede that the wording of Principle 13.5, the second sentence, is a very broad and severe one. We say that even a third party or person

must make disclosure when the disclosure is adverse to the third person. To be adverse is no privilege. Under German law, a third person could refuse to produce documents. Under French law, it depends on the decision of the judge. When discovery brings disadvantage for a third person. But we could discuss to strike out “or person,” that is a bit much. Just as a party cannot prior to discovery will bring disadvantage and therefore will avoid discovery, it is undisputed. For third persons, we could consider this. We must concede, members of civil law culture, even in civil law countries, this privilege will be abandoned step by step, in substitution. The future is the full production of documents and so on.

Privacy is recognized in the next section. Privacy and confidentiality are related subjects, but substantively two different concepts. The discussion might be advanced if in Principle 13.6 after confidential information we add something along these lines “or undue litigation of privacy.” So we can have it within the discretion of the court to protect both confidential information and privacy, particularly given in the next session privacy itself and confidentiality are considered to be potential privileges.

First of all, a French court may not in its own motion request the production of evidence she needs. It must be upon admission of the party. The court has no power alone. In the French law, the text is relatively broad, but the party who needs the document, under possession of a non-party, must precisely identify this document. It is not fishing for anything as evidence of course, it must be very precise, the court must give an order, and the court can control whether asking of the party is legitimate or not, justified by the case, or situation, and then the court decides if it is necessary to produce this evidence by a non party.

We are getting close perhaps, to a suitable accommodation. It occurs to me we might want to put in, you might want to say the court must “exercise judicious discretion in connection with requests from nonparties”.

It is true that civil law systems are going in the direction indicated. It is also true we are getting more decisions in the United States; in California we have a principle of personal privacy, that has began with a few decisions having to do with limitation on the extent of physical examination in personal injury cases. It has been gradually been removed to rights of discussion among co-plaintiffs. A peculiar kind of privilege that is rather amorphous. The point is it is gaining some recognition. Therefore, one wonders whether it might be useful to think about this idea, and second, to modify the last sentence in Principle 13.5 so far as it applies to a nonparty, need not apply to the law in the following because this is especially sensitive, because of the fundamental difference revealed in the outlook expressed in our discussion, compared to what is expressed in the common law. If the background rule is protective of nonparties, it is a different context if the background rule is one of civic duty to produce. Perhaps we should refer to the disclosure that we refer to the law of the forum. That might be a suitable adjustment.

A member disagreed. The prevailing tendency is discovery. It is true, and let us have a look at Principle 14, and they are all privileges. The enumeration of all privileges, and that is enough for a continental judge to balance the interests and for a common law judge to balance interests in the way of his tradition. We should not make a principle that “in principle that person has to produce evidence” that is true for each country and this is for all in principle 12.3. We say “and specifically refer to evidence to be offered in support thereof, when a party shows good cause for inability to provide sufficient

specification of evidence, and so on.” We say that under this principle, specification of evidence, therefore we shouldn’t overestimate the danger lying in this principle as civil law lawyers.

Principle 14 **Evidentiary Privileges and Immunities**

We recognize that all systems have privileges, immunities, protections and so on. Also, there are considerable differences both in the content and concept. Notably, the common law has a concept of attorney client privilege, whereas the civil law recognizes a duty of professional duty of confidentiality and so on. There are differences in others...the terms of these various restrictions. We simply recognize that they have to be taken into account. That is the point of the second sentence of Principle 14.1, namely, when a refusal to produce evidence is involved. The court must be alert to the possibility that the basis of the refusal is a right of refusal, immunity, whatever. That should affect whether the court think it possible to draw an adverse inference. You might say this person is being stubborn or recalcitrant...that is not true, they are claiming a legal right. That is the point of that sentence. The point about Principle 14.2 is the concept of implied waiver. That is, a party that does not make appropriate objection, when they have a right to decline to respond, may be deemed to have waived the privilege.

Principle 14.1, line 4, the verb “recognized” we could actually add the three words “by the court”...tack those three words. The essence would be Privilege/immunities should be recognized, or perhaps requested, then we can put a full stop and so we would delete when the court exercises...

A member considered it a difficult question. The concept of this principle is that when direct compulsion is exercised, the court should recognize, these privileges. And, but, the court should only take into account these privileges when it draws negative inferences. It is a problem because common law jurisdictions sometimes do not know this privileges for parties and nonparties. Civil law jurisdictions are very strict to have these privileges. Therefore, we made the compromise that if you exercise direct compulsion, you should recognize the privileges. This is accepting of common law countries too, you should only take into account privileges when you draw negative inferences. The difference between sentence one and two, is not reasonable if you do not make the difference between direct compulsion and negative interference.

A question about the method. Let us assume this all goes well, and a number of parties become parties to a convention. Is it then intended, say, Principle 14.1, would be a rule of law of the country that had adopted the convention?

It was answered that we might not have a convention, but principles that could be the basis of legislation.

If a rule is made, exemplifying the principle in Principle 14; is it envisaged that that rule will be made by the exercise of the relevant jurisdiction’s rulemaking powers, one way or another, so the rule becomes a rule of law, changing the law of evidence of that country?

It was answered that it can be a recommendation. It is difficult, because in common law countries, parties and nonparties have to give testimony. There is no

difference. Both can be witnesses, and must be. Therefore, common law countries know only few privileges, because it would be too much to give parties privileges. In civil law countries, normally a party cannot be compelled to give testimony. The court can only draw adverse inferences. In common law and civil law countries, there is a possibility that the court can draw negative inferences when a party refuses to give testimony, claiming privilege. If you use direct compulsion, it is unacceptable for civil law countries, that a party or nonparty can be forced to give testimony, even when the witness claims a privilege. That is a compromise with no direct compulsion. But the court can draw negative inferences from the refusal of the party.

A member had absolutely no quarrel with the contents of the principle but had two questions. The first, concerning Principle 14.1, second sentence: “the court should also take into account...” I wonder whether this is necessary, or worthy principle, because it seems to me a necessary consequence of the first sentence, which deals with production of evidence. If you say that privileges and immunities should be recognized, the consequence seems inevitable, which is expressed in the second sentence.

The second question was also a question of drafting. The second half of the first sentence of Principle 14.1, “when the court exercises its authority to impose sanctions...” Isn’t it unnecessarily restrictive? If you say that privileges and immunities concerning production of evidence should be recognized, with all their various consequences in various situations, why then be so restrictive, which might give rise to a mistake of interpretation. If you say that the beginning of this principle, that it should be recognized, applies only in one situation, some people will think it does not necessarily apply in other situations.

It was answered that to recognize privilege could also mean, not to draw negative inferences. And therefore the difference, the principle should be recognized when exercising direct compulsion. But you can draw negative inference from a party, to produce evidence. You must balance privilege, and obligation of a party to produce evidence. It depends on...balancing approach in common law countries and civil law countries. For example, when a party refuses to produce a document because it contains matters of privacy, it is up to the court to balance the parties’ interest, to keep right of privacy, and that of the other party to have a fair procedure. No hard and fast rule can be given. Each case depends on its own circumstances. We want to make sure direct compulsion cannot be used against a party claiming a privilege. The party has a free choice to lose the process, or to give discovery for private matters. But a party should be protected from direct compulsion. There is a difference.

Why mention it specifically, when it seems already implied in the first sentence? If we think it is not clear enough, should we make it more specific and clear? Do not you think there is danger there that you cannot apply the principle in other circumstances?

If we recognize for common law jurisdictions, that is much. If you say, privileges like confidentiality or right of privacy are recognized, normally a common law court would not recognize a privilege of right of privacy when a witness has to give testimony. We would normally have no real privilege. The proposal only to say should be recognized would not say what means recognition of a privilege.

Andrews: I think Sturmer has drawn...I think he has drawn to our attention a structural problem with the way Principle 14.1 is phrased. If we can identify that problem...the fact that different legal systems respect or recognize different sets of

privileges and immunities. And it is certainly true of English law, that confidentiality is not in itself classified as a privilege. It is not cut and dry; it gives rise to discretion. The structural problem is that grammatically begins with the assertion, relevant phenomenon of all privilege and immunities. In fact, that depends upon the content of each legal system, and of the forum. So, the suggestion to the Reporters would be to explore the possibility of using the terminology of recognize or respect. It incidentally is the language we use earlier, in Principle 5.2, when we speak about the professional independence of legal counsel should be respected. It is a nice choice of language. In Principle 14.1, we need a language that indicates a particular list of privileges and immunities, in a particular forum will vary depending upon the classification of the legal system in question. Otherwise, we are doing something quite different, imposing around the world a precise set of privileges and immunities, which would of course be a completely different activity.

The problem is we impose on the parties, very strict obligations to produce evidence, so ... if we want to have a common law solution for the taking of evidence, and the obligation of the parties to cooperate, we cannot have... the common law solution when we formulate our privileges, for civil law countries it is a bit much to say to a party, a strict obligation to produce evidence in your control, and to say you have no right of privacy. We discussed this problem already, and this Principle is a compromise. Principles 13 and 14 are a compromise between two systems. Civil law system make concessions to the common law countries in Principle 13, and perhaps the common law country should make some concessions in Principle 14, because it is true, we have an enumeration of principles which are in common law countries not fully accepted, sometimes only in a case by case basis.

A member suggested that we should say privileges and immunities “and other objections”. The sentence should begin with a list of three things, privileges, immunities, and other objections. That is to say, pursuing the logic of what was discussed above, if this question arises in a commonwealth country, and the party prima facie obliged to disclose the document objects on the basis of confidentiality or privacy, and is not within the relevant system of recognized grant of privilege or immunity. Nevertheless, it can be treated as an objection because de facto it is an objection. Whereupon, the matter can be taken into account, which enables the court to exercise the discretion and carry out the balancing operation that we contemplated.

The starting point is Principle 13.1. There is a general duty to produce evidence, and to give information. A member was particularly concerned for the general duty not only of the party but third parties. On the other hand, there are limits to the duty, and that is the purpose of Principle 14. Privileges and immunities are not absolute. There is a certain balancing act from the court; the difficulty is to express that clearly here. It is a matter of compromise.

Another point is that “the court should give effects to any procedural requirement of the forum that an evidentiary privilege remains to be expressly claimed.” What does that mean exactly? The emphasis is on “expressly”? Is “expressly claimed” to be recognized? Or should it be rejected? Of course it is to be recognized, to be given effect. Why not say it? Expressly claimed is ambiguous.

It was answered that the party must expressly claim the privilege, and the court is not obliged to give notice to the privilege on its own motion. The motion of the party is needed.

A member answered that if that was the meaning, the text does not say so. It does not say the court cannot on its own motion invoke a privilege. It says the court should give effect to a requirement that it should be expressly claimed in order to be recognized or accepted. We do not say that. We say it halfway. It is a question of drafting, of course, but I think it is very important.

The member answered that it was the same thing.

Another point is: what is the purpose of a rule stating that the court should give effect to any procedural requirement of the forum, that it must be claimed by the party. Why is it necessary to remind the court that it should observe its own procedural law?

There are privileges, immunities, protected ex officio by the court. There are other points where a party must claim expressly the privilege, and the sense of Principle 14.2 is to say that it is up to the local law to decide whether the privilege must be claimed. We can strike it out, it is not so important.

It is more an information to the parties than to the court. So we can educate the parties in the comment.

What do we want to say? That the judge cannot recognize a privilege if the party does not claim for it, that the court cannot act ex officio? Whatever we want to say, we will say it in a clear way.

The idea is that the principle is not violated by a requirement that a party claiming the benefit do so expressly. And perhaps it would be better set forth in a comment.

The rule is that privileges and immunities should be respected. But, in administering these rules, the court should appreciate the point made in the second sentence, namely that, which is the adverse of the point just made, that a refusal to produce evidence may represent an implicit claim of privilege. As distinct from a noncompliance with a duty to produce evidence, that is number 1. Secondly, in administering the rules, a court may, according to forum law, require that the benefit of the privilege be expressly claimed.

Principle 15

Joinder of claims, and parties

The text does not cover an important device in civil law procedure. Principle 15.2 relies a person to have a substantially connected interest to intervene...that is all right, sort of universal institution. But it says absolutely nothing of the converse situation, in which a party can force a third party to intervene. So called forced intervention, and it is tradition, and a fundamental institution of civil law procedure, that a party may compel, for instance, the insurer of a party from which he derives his right, by forcing him to intervene. There is no trace of that in article 15.

According to the traditional principles of civil procedure in civil law countries, there are two kinds of intervention: the main and subsidiary intervention. In the main intervention, we can apply Principle 15.3. There is no reference to another kind of intervention, which is a different institution, and the practical importance of these two

things, the forced and accessory interventions should be mentioned in that provision or another one. It seems to me a serious gap in the whole system.

It was answered that the third party practice in the different countries are very different. It is true that civil law countries know these two interventions, but we decided to take the most important forms of third party joinder. The first one is in Principle 15.1: that is the third party claim. The necessary intervention of a party is surely no form of third party claim. It is true, but there are many countries where necessary intervention is nonexistent. The party must bring a full claim against a third party or it has no other applicability. It is not necessary to make a difference between main and accessory intervention. Principle 15.2 covers both possibilities. It is true that the consequences are different, but we say nothing on the consequences. We had discussed this problem last year. If we decide to make a principle on joinder, we cannot cover all forms of joinder all over the world. Perhaps we could try to make a better formulation to say these forms of joinder or intervention, are those which are necessary in each procedure, and that each, local law may add other forms, but that should be a problem which could be discussed in the comments.

It is unnecessary in the text to deal with the different consequences of intervention. This is one point. The other one is the total absence of accessory intervention. This is a serious lacuna in the text. No one says we took the most important one. It is just as important as the other kind of intervention.

We should consider relocating Principle 15, placing it in an earlier stage in the principles.

The content of this Principle is very good, because it is a remarkably succinct and ingenious collection of propositions.

Principle 15.1, line 1, penultimate word, is “that” In other words, another party or third person subject to the jurisdiction of the court. We understand that “that” refers to the party or third person. In which case, it should be “who” on the basis that this person should be subject to the jurisdiction of the court, as oppose to the claim being subject to the jurisdiction of the court. There is an ambiguity there.

Principle 15.2 is very cleverly worded because it merely provides that a person having an interest may seek to intervene...it avoids creating a right of intervention. The only suggestion here is that perhaps in the text, or if that is too burdensome, in the commentary, that we give some clue as to how the court will exercise this process of controlling applications for intervention. Notice that elsewhere in Principle 15, we do give such hints. In Principle 15.4, we suggest that the test is the efficiency of management and determination. In Principle 15.5, it is a different test, a stricter one where it is necessary and just. We need a slight amplification of Principle 15.2, to provide guidance to the parties, and indeed to the court. It need not be elaborate.

What does the phrase “an additional party” in Principle 15.3 means? Is it being used in a civil law sense, in a technical sense. We do not believe it is. Principle 15.3 is very sensibly saying that, whenever a new person appears on the scene as a result of the application of this principle, that person then is placed in a situation as though he or she were one of the original parties. If that is the case, we can slightly clarify Principle 15.3. As a matter of presentation, we should bring it to the very end of Principle 15, because then it becomes a residual clause, describing what happens when a person is admitted as a newcomer. The suggestion is that the Principle should read “any party added in

accordance with this principle, has the same procedural rights and obligations as the original parties.”

Forced intervention in civil law countries. We should include the possibility of a forced intervention in Principle 15.2. If it is not right of a third party to intervene, (after all the Principle says only “the person may seek to intervene.”) So we can add a sentence, but a word for example “a party can seek to arouse the forced intervention of a third party if it is necessary for the case or his interests.” I do not see how we can have two different positions about the intervention, forced or voluntary.

There are many countries having no forced intervention, like Germany for example. In Germany, this device is unknown. In some countries, it is against the constitution that a party may be forced to intervene. Disputes of two other persons, the party must bear the consequences if it does not come to intervene. If it decides that each procedural law will provide for it, well, it is our decision. But that is not the point of view of many countries over the world.

Without a system of forced intervention, in a number of circumstances, you compel a party to have two separate suits instead of one. This formula does not work, because in Principle 15.2, a person having a substantially connected interest to a matter may seek to intervene, that is the intervention, but the idea of forced intervention is not based on the same interest, it is a totally different interest, the converse interest of a party to compel the insurer or another party to take part in the process. So it is difficult to put that in the same sentence and formula.

Compulsory or necessary intervention can mean two things. That the court can solicit by party or its own motion, order a third party intervention, or that the party has the duty to call on that other party if it affects its own claim, that party's position. Then again it may be up to that third person to intervene or not. This too is completely missing... If a party affects another person's legal position by claiming against the party, the sight of our litigation will affect our litigation. Am that party not under duty to call on the other to extend to say the claimant: that depends on substantive law.

There are sometimes rules in substantive law that says you must intervene. The problem is we have in some countries the possibilities of watching in, and other countries have forced intervention. To be true, there is no good possibility to give a principle on this varying possibilities...though we should be very detailed, or we should say nothing on this, and may perhaps a reference to first possibilities in local laws.

A case of forced intervention is a liability case, when a party wants some money, and he wants to call his insurance company to come to the courts because he does not want to face it alone. Another example, because a person is just the employee of an corporation and the company is liable and not the employee. Forced intervention is to force someone to be a defendant. There is nothing unusual about this.

The insurance example, however, is not a good one within the common law because of the peculiar adoption of subrogation. That is to say, as a matter of substantive law, under the contract of insurance, the insurer gets the procedural rights to stand in the place of the insured. But generally speaking, it is incumbent upon the claimant to constitute the claim properly. In those situations when you have triangular relationships, A is suing B, and C is also a relevant person so far as liability between A and B is concerned. Such for example is the situation when you have third party rights on a contract. In those situations, it is a requirement that the claimant join all the relevant

parties to the action. And in that situation, we would not classify it as compulsory intervention, we would say there must be more than one defendant. The claimant must name defendant one and two, who becomes the codefendant.

It is not a complete explanation, that it is the claimant's duty to show all the...the claimant may not know exactly what the relationship are. It is of the great interest of the respondent to say he is not the responsible person or was engaged in some contractual relationship or so forth, which the claimant may not know.

There are difficulties of considering that, considering that some countries do not know that, and perhaps the solution is either in the comments to deal with that, or to refer to the law of the forum, which allows for the differences. What is unsatisfactory in your text is it seems to exclude the possibility of forced intervention which is a very important institution fundamentally in many systems of law. And that is the objection to that.

There does not seem to be any substantial difference between the civil and common law systems. In the case mentioned with the defendant wishing to assert some other party would bear all or some of the responsibility of what is alleged against the defendant, that defendant has procedures which are definitely described in different common law jurisdictions but which can be called third party claim procedures, by which the missing party can be brought into the proceedings, and have any claims made against that party, that any then existing party to the proceeding wishes to bring.

It may be that in Principle 15.4 it would be better for us to state the baseline on more general terms. Something like "parties and claims may be added for convenience of administration of justice and consistent resolution of the dispute in accordance with the rules governing joinder of parties and claims of the forum." Now, we can see the first part is where you are giving a general direction, or you might even say "in accordance with" "so far as permitted by" or something like that. The second part of that phrase reflects that the technical formulation of joinder provisions, varies considerably from system to system. Some systems, like the American system favor inclusive joinder. In general they invite joining in any claims that are connected out. And indeed, our rules of res adjudicata and collateral estoppel put pressure on parties to do that, or otherwise they may be penalized by being unable later. But maybe many legal systems take an opposite view, that let us keep it narrow and get rid of it. They have compensatory or complimentary rules that prevent preclusion, or permit reassertion. They do not leave the absentee in a position made worse in the proceeding. And that is so all of these are rules, are sets of rules, that look both ways. We have more discussion in the comment that talks about different levels of intervention, the idea of a necessary party which is a compulsory joinder concept in common law. We just elaborate that these are various types. And then Principle 15.4 is a proper rule in any event, because it says you can make administrative orders that in general, in Principle 15.3, we would have to say ordinarily because there can be some situations where it is not so. In a sense that is more general in approach but also take account the variability of legal systems. Basic approach. And, within that fundamental difference, the technical differences. That is a different way of approaching this, but maybe that would respond to the kind of concerns that have been expressed.

Principle 16 Oral and Written Presentations

In Principle 16, we have a set of specifications concerning submissions, both of legal argument and evidence. The question of legal argument is not very difficult. The basic vehicle is writing supplemented by oral. That is in most legal traditions. The more important provisions are those concerning testimony. It really goes in two directions. One, to affirm the appropriateness of oral testimony, but also to provide for its receipt of witness testimony, in writing followed by oral questioning. This procedure is followed in many civil law systems, and is followed by many American administrative proceedings. The initial testimony comes in writing, and the oral proceedings consist of supplemental or cross examination. This conveys our sense of the appropriate way we expect a tribunal to receive information about the dispute.

In Principle 16.1, the word “motions” possibly is too technical, and it is difficult to suggest an alternative. Perhaps the Reporters can think about that.

Principle 16.6 has a rather intriguing process of receiving written submissions concerning legal issues, and indeed matters of background fact from nonparties. This is permissive, it is not imposing an obligation. This is going to be an exception, not a matter of routine. This should not be misinterpreted as creating an expectation that the court would go roaming for a legal argument or encourage members of the public to write in or present new legal submissions or issues of fact. That is not the correct emphasis. We should flag that by the use of the word “exceptionally.”

The importance of Principle 16.6 may not include commercial cases, but in more political cases, can be of considerable assistance to the court or one of the parties. These submissions from outsiders will only be allowed upon consultation of the parties. This seems to suggest that even if the parties do not agree, the court will decide to accept the outside suggestion. If that is not intended, it ought to be made clear that it is not. If it is, then the comment should emphasize that it is not likely to be very often that this will be of real assistance in litigation of parties of a commercial nature.

Matters of background fact may be interpreted as allowing anyone to submit legal submissions of anything on earth, for political or personal reasons, which is certainly not desirable.

A member made a reference to comment P-16C, which explains what the background fact is.

However, still, background information relevant to the case seems to be extremely vague.

This is an attempt to write a principle on *amicus curiae* practice. That is all, and now we have countries without *amicus curiae*, and therefore we try to have a very soft, text. We discuss to strike it out, or have this possibility now. Background fact addresses, will say, cases for example, a trade organization, will give notice of special trade customs to the court. If you have better proposal to describe this practice, this could be the government, apprentice letters, trade organization or foreign state. For example, in American courts, European governments intervene as *amicus curiae* of European corporations when there is dispute in court with American claimants.

Some people think that the judge plays the main part in any oral questioning of witnesses in civil law proceedings, and the part played by the legal representative of the parties was quite small. However, at least in some cases, the part played by the legal

representatives is quite significant in matters of questioning witnesses both for your own party and the other parties. Would it be a good idea to include some elaboration along the lines of what happens in many cases in the comment? This is the area where the comment comes in most easily and it would be useful material for common lawyers reading these principles.

Principle 17 **Public proceedings.**

There are two different traditions at work. We were strongly advised in Japan about the importance of publicity as a constitutional matter in their adjudication. On the other hand, we were well aware that many legal systems consider that the file is public but the proceedings might be confidential. We considered adopting the Japanese approach, which is consistent with that in the US...ordinarily it should be open to the public. Now that is a little guarded, but we understood the Japanese to say that they could accept that idea in Japan, but then go on to recognize that there may be circumstances in which confidentiality is important.

For civil law countries, public documents are sometimes very unusual. Records and documents are not public. You need special permission of the courts to look at these documents. We have the possibility to exclude the public in Principle 17.3 as a compromise. It could be that civil law countries will not accept this very broad principle, it could be dangerous.

A member considered that we should address the subject. It is a constitutional issue in Japan. It is in the United States in general. On the other hand, it is important to the level of being almost constitutional in some civil law systems. Our problem is we have to address it but recognize there are two strongly contradictory voices on the subject.

The duty to supply reasons in Principle 17.4 might be slightly overstated. The court should supply the main supporting reasons.

Principle 17.4 speaks of right of public access. No doubt the Reporters have in mind that documentary judgments will indeed, electronically retrievable documents will be accessible to the public. Within Europe, there is a further requirement that the judgment be publicly announced.

It would be important to find a compromise. The comment does not really harmonize with the text. The text, if it is supposed to be a compromise, seems to lean heavily in favor of publicity. You have the principle of publicity. Then you have only the possibility the court may grant, or give an order. One really wonders whether this will be acceptable to civil law countries. One day presumption is the other way around. Just that the judgment has no effect for the parties. Not only in family law. Therefore, we can argue just as well, that in another system the presumption would be lack of publicity, and the exception would be constitutional pronouncement in certain countries. For certain documents, but not everything for the judgment and the reasons, but not for all documents. It is extremely difficult to accept Principle 17.1, or 17.2 ordinarily. But Principle 17.1 for other documents for the court, will create very strong objections and oppositions in many countries.

Another way to do it would be to essentially defer to constitutional requirements, and if we did that, it certainly would put it on the agenda for anyone thinking about this problem, and would invite fresh consideration.

What's just been said maybe the best solution, but, simply sticking to the present test would solve that concern, if 17.1 began "ordinarily and subject to 17.3, pleadings etc."

A member disagreed because this would still require a court order. The presumption, the basic principle in a number of civil law countries, is the absence of publicity for third parties. Just as, by the way there is a complete diversity in certain parts, the public has the right to go and consult the tax registers, which is a kind of reward for nosy peckers. In others it is strictly forbidden, and then you can justify a legitimate interest for that kind of information. More or less, diversity is found with regard to court proceedings. So, Principle 17.3 is not a satisfactory answer for those civil law jurisdictions where the principle is the absence of publicity unless a third party has justified a legitimate interest. Not a future loss or malice, or intention to blackmail.

A compromise would be to split the principle. We all agree with Principle 17.2, open hearings, especially those where judgment is pronounced. It is true in civil law countries there is a constitutional right to privacy. When Americans say it is a constitutional right to open records, many Europeans will say it is a constitutional right to keep them secret. We could consider only to give a principle on the publicity of hearings, and on the possibility to have hearings without publicity in Principle 17.3, and we could also have Principle 17.4 without further changes. But Principle 17.1 is a bit of a problem. Civil law countries will not accept this rule even when we make the exception in Principle 17.3. It was often discussed and is a fundamental problem.

In Japan, there is a very difficult question because in the Constitution, there is a strict requirement of the publicity of the hearings and final judgment. We had very difficult work for our review of civil procedure court in past years. At the time, in reality there is some conflict of constitutional rights. One is that publicity of the constitution, the other is there is some kind of privacy, fundamental rights which are also provided in the constitution. So, legislators made...of course it is not possible to restrict the publicity in hearings. But, document, as to them, there is no provisions in the Constitution. So we restrict it, that way.

A member reminded the group that the group is merely repeating the discussion from last year and cited the Secretary's Report. Principle 17.1 is a great problem mainly for arbitration, because normally, enterprises go to arbitration because they don't want to be public with their discussion. These Principles are for the judicial system and may be used for arbitrators too. Principle 17.1 is a problem. It is not a problem to say that judgment, must be accessible to the public. Judgment, of the government, since judges are part of the government, and all of the acts in a country are public. But to say also "other documents" is more dangerous. Pleadings in general, in some cases, are of public interest. In some cases, like banks, there is a public interest in the case. In this case, we can say it is public for everyone. Normally, they are not. We can delete 17.1. Maybe the others are acceptable everywhere.

We should combine Principles 17.2 with 17.4.

Principle 18 **Burden and Standard of Proof**

In principle 18, there are essentially three points. First, the standard of what is proof. We put in this formulation reasonably convinced of their truth. It is functionally equivalent of the rule in common law. The difference in words does not indicate a difference in fundamental meaning. On Principle 18.2, we recognize that formulation is circular. We cannot have a general proposition concerning the elements of the claim versus affirmative defenses. Every legal system works it out on various standards. For example, statute of limitations usually is an affirmative defense but not always. Finally, in Principle 18.3, the more controversial provision, which is a way of adjusting the problem of proof in a way to moderate the justification for discovery. If you can change the burden of proof somewhat, you reduce, if not eliminate the necessity for discovery. You create an incentive for a party to produce evidence, which otherwise it might not be obligated to do so.

A member asked why have the Reporters adopted the formula in Principle 18.1, “regardless of who presented the evidence.” Are these terms really necessary?

It was answered that “regardless of who presented evidence” is not an important issue. It could be left to the comments or simply deleted.

In Principle 18.2, the rule does not seem to conform with the old Latin principle that who alleges something has to prove it, whether it is essential to the party’s case or not. What are the particular reasons for adopting another formulation?

Principle 18.2 is a version of burden of proof, because it is not decisive which party alleges or asserts that the facts should be proved by the party, which needs to set for its case. The claimant has the burden to prove the facts necessary for the claim and the defendants, the facts necessary for the affirmative defense, and so on. And, the claimant again, for the facts to the exceptions for the affirmative defense. It is really a worthy translation of the codex.

Principle 18.3 seems to meet just the normal consequence of the duty of good faith or fairness, which is explained in the comments, but should be simpler and clearer in the text itself.

Principle 18.3 is a fully correct principle, but it is true that there is some connection to Principle 13.8, where we say “when a party fails to cooperate, the court may draw negative inferences.” That is nearly the same as saying the party not producing evidence has the burden of proof to prove contrary, for example. Connection between 13.8 and 18.3 should be reconsidered, perhaps.

A member asked what was the meaning, in Principle 18.2, of the expression “to prove the facts regarding an issue essential to the party’s case.” It is difficult to translate it. Maybe we can clarify this notion.

It was answered that the burden of allegation follows, is a consequence of the burden of proof, which depends on substantive law. It is a first step. Consequence is a burden of allegation. Therefore, it is not good to say burden of proof is a consequence of burden of allegation. But it could be that essentially, it is not enough, perhaps we should say, necessary or favorable.

A member assumed that if a party considers an issue essential to its case, that person will allege. But, what seems so unusual in drafting, the formulation of it too.

When you read that, you conceive the possibility that a party may say “I don’t conceive that as essential to my case” but the judge or other party does. This is an entirely new dimension, and it has nothing to do with the codex, but this new formulation inserts the possibility of distinction, different judgment or opinion on what is essential to a party’s case.

A member suggested that Principle 18.1 should read simply, facts are considered proven when the court is reasonably convinced of their truth by evidence before the court. There may be admissions of fact of which the court will be empowered to act. The Reporters should consider whether there should be some adjustment to Principle 18.1, to exclude the possibility that it might be rigged to enable the court to be reasonably convinced of something, in the absence of either admission or evidence. Simply, to stress that, admission or evidence is necessary before a fact can be found proved by the court. Not too many people would be deceived by the formulation as it presently stands, but one can see how some people may get the wrong impression from it.

In Principle 18.2, we say “issue” because facts being not disputed, need not be proved, and must not be proved. And if we say “issue” essentially, it could be a correct word, but we should consider saying, issue, essential is consequent. If we say fact, favorable or necessary would be consequent, but then we do not make clear that undisputed facts need not be proved. Therefore, our text seems not to be too bad. And it is up to the court to decide, which issue and fact is favorable and essential. It is up to the court to discuss all essential issues with the parties. That is another principle. The court should not surprise another party.

Perhaps we should add in the comment, that the requirement stated in Principle 18.2 is often expressed in terms of the formula, “the burden of proof goes with the burden of pleading”. But recognize what was said, that the allocation of the burden of pleading is itself specified by law, ultimately reflecting a sense of fairness and allocation. In the civil law, that this is regarded as substantive. In American common law, it is a subject of enormous confusion, as to whether the allegation of a particular question is regarded as an element of a plaintiff’s case that must be alleged or proved by the plaintiff, or is a matter of affirmative defense. Just to compound our confusion, we have propositions like the following, “allegation of compliance with a condition precedent” is an essential element of a plaintiff’s complaint, but it is assumed there has been such compliance in the absence of a suggestion in the answer that there has been no such compliance. That is some of the high jurisprudence we get in the US and have been subjected to over the years. We might add in the comment the connection between pleading and burden of proof, but the text has it right, the fundamental question is who will have the burden of proving it if its disputed. The question is brought into focus by the pleadings. Maybe that will go some direction to clarify the thing.

Perhaps we could change the order, and have first “ordinarily each party has the burden to prove the facts essential to that party’s case.” And then say facts are considered proven when the court is reasonable...”

Principle 19

Responsibility for Determinations of law and fact.

We would want to split out for a separate principle, the topics in Principles 19.6 and 7, that is expert testimony. It is very important and on a somewhat different basis than Principles 19.1 and 19.5. Perhaps if that is a welcome thought, let us assume that will be a minor restructuring, so it will be a separate Principle.

Principle 19.1 sentence 2 says “before giving judgment” and then it continues “while making an important intermediate decision”. We will find it elsewhere, when the principles and rules refer to judgment, the phrase used is “judgment, final or otherwise,” which is rather neat.

A member reminded the group that this was discussed before, and people asked: is that principle applicable to any intermediate judgment? We decided that the judge would not have to invite opportunity to comment on any intermediate judgment, just important ones. If we say, “judgments final or otherwise” courts may think that all intermediate decisions should follow this Principle, which is not true. That is how we came to this drafting. If we say final or otherwise, we would have to say some word that the otherwise would be an important judgment, not anyone. Or we limit it to a final judgment. But we wanted this to apply for important intermediate decisions.

The difficulty is that 19.1, second sentence, is an expression of the instance of the principle of contradiction of the principle of due notice. Surely that is a general requirement, and we would be in difficulty in saying, the reason we did not bother to contact the parties is the court regarded this as a minor matter. It is a subjective issue.

In Principle 19.4, second line, the court may invite the parties, to amend their contentions of law or fact, and offer additional evidence accordingly. If the invitation includes contentions of law, then evidence is not sufficient, and we would suggest additional legal argument or evidence.

According to Principle 19.3, “the court may on its own motion order the taking of evidence not previously advanced by a party.” How does this relate to the principle in 9 concerning the scope of the proceeding?

It was answered that the court cannot introduce new facts in the procedure. But if the facts are introduced by the parties, and are disputed, no party has given evidence, especially the party with the burden of proof. The court has two possibilities: the court could invite the party with the burden of proof to produce evidence, or the court could order to take evidence on its own motion. But the court is not permitted in all civil law jurisdictions, to introduce new facts into the picture.

A member understood the analytical distinction, between evidence and fact. But, Principle 19.3 perhaps might not be the perfect wording to delineate that distinction. It refers to the taking of evidence, and on an issue not previously advanced by a party. That could be interpreted to include new issues of fact. We are extending the perimeter of the legal dispute, and would create tension with Principle 9.2.

A member tried to clarify this confusion, explaining that the Principle 19.3 is now well written. We will have to delete “on an issue”, because what it means is “on evidence not previously advanced” not “on an issue not previously advanced”. We put the word on an issue just to clarify, but we made it more obscure.

According to Principle 19.1, “the court should give the parties an opportunity to comment on any part of law or fact the parties already have not addressed in the

proceedings.” We may have gone too far. In arbitration there is a long experience on that very point, and here perhaps, there is a certain degree of opposition between the common and civil law systems. We start from the Latin maxim, “you give me the facts I will give you the law.” It is for the courts and for the arbitrators to decide the law.

This sentence would be acceptable if it meant, and is general practice in arbitration, if when we are deliberating and are about to decide, we see, that the decision will be based on a point which has not been addressed by the parties. Then it is recommended as good arbitral practice, to offer the parties an opportunity to comment. But not on any other point of law or fact which will not be the basis for a decision. The sentence is all embracing, and goes much too far. It is the responsibility of the judge and arbitrator to decide the law. The parties have absolutely no right to require that before any decision they be given the opportunity to comment on any single ground of which the court will retain. So, it is perhaps a question of drafting, and when we see the comment, principle 19.1 is universally recognized not in that form.

The maxims are wisdom of the 70s and 80s. The new development in many civil law countries, and other jurisdictions, is that the court should avoid surprising decisions. Therefore, the court has an obligation to discuss the legal basis of a decision with the parties when the parties did not address important legal issues. It is true that the wording is a bit broad, it is clear that the court has no obligation to discuss points of law which are not the basis of the final decision. German courts in the last 10 years, would not recognize arbitration awards when we see that the arbitrator did not discuss important legal basis of their award, and this decision with the party that would be an infringement of the right to fair trial. This is the point of the new English rules that have been published. It is true that 10 years ago there was another point of view but now the development goes in this direction.

A member read the previous version of this Principle: The court may rely on legal principles, facts, or evidence not advanced by the parties, only upon giving them opportunity to comment or amend their contentions.” There were some mistakes, but it is important also to take in account this. We separated the original idea because in 19.2, we say the court may rely on evidence that has not been advanced by the party. I think we should change the wording in light of this.

The group agreed on these points of law having to be the legal basis of the decision, that should be mentioned, and we should search a better formulation. Now, to effect, our first draft was far too broad, because the court should not be permitted to base its decision on facts not introduced by the party, but the meaning of the present draft, is perhaps not too good, but we wanted to say, as its difficult to say, no real new facts, but it could be that the facts... introduced, presented by the parties, could be interpreted in a very different way. Sometimes the court construes, on the basis of the facts introduced by the party in a very peculiar and surprising way to the parties, and that should be avoided. That was the sense that we were not introducing new facts, but wanted a discussion between court and parties, when the story was interpreted in a very different and surprising way.

A member highlighted that the interpretation of facts is an important point. However, it is not covered by this text.

The difference between a matter of fact and law is not very clear. Although this is a difference that sometimes is unclear, we know that courts cannot change or introduce new facts.

A member said that as a judge, she was not accustomed to inviting a party to comment on her decision before making it public. It is strange to call a party to say, "I do not agree with the matter of law you have introduced, please introduce new argument". That is something Latin American judges do not do because the judge knows that law and is responsible for applying it to the facts. Latin American judges are not used to doing that. However, it is a fair proceeding and we can always learn new habits. We always learn bad habits, so we can also learn the good ones.

In Principle 19.2, the court may rely on evidence not advanced by a party. By whom was it advanced? By the court and its own motion? Then it is a question of the taking of evidence and the power of the court to order on its own motion, you know, taking of evidence.

Perhaps we can make merge Principles 19.2 and 19.3. It could be, there is for example, document or evidence, within the records, and we would need no special court order. If the court takes those means of evidence as the basis of decision, the parties should have fair opportunity to discuss these documents and be well informed. In Principle 19.1, we should perhaps say that the parties have not already a fair opportunity, or a sense to address, the parties should have a fair opportunity to discuss the legal basis. The interpretation of the facts, which were introduced by the parties.

Principle 19.1 and the question of the extent of the duty of the court to satisfy the principle of due notice when it considers new legal argument. In *Hoy Chung* against *Cargill*, in the English Privy Council, it was decided in terms of the responsibility of the court after the argument has closed, to refer to legal points including new legal material that had been taken into account, refer it back to the parties if necessary obtaining from the parties, advocates, written comments. The important thing is it is not confined to legal basis, but includes new legal material, such as new case law, it could even be periodical literature, textbook authority, etc. The important thing is the court's reasoning is being influenced significantly by new materials, and triggers this responsibility to refer, not to reopen the hearing but at least to have written submissions. The Reporters should consider *Hoy Chung* because it is an important examination of this issue.

We already have in our Principles something of this nature in Principle 16.6, when we were looking at the possibility of outside submissions, including important legal issues. There, we went on into the second sentence to say the parties should have the opportunity to submit written comment, addressed to the matters contained in such a submission. That is the mechanism and the precedent within our own Principles.

A member wondered whether we would facilitate clarity by some reorganization of Principles 19.1-19.5. The first sentence of Principle 19.1 stands. Then we say whether in a new section or subdivision, "the court may address an issue not previously addressed by a party, subject to the principle stated in 9. Now, the use of issue is designedly ambiguous, whether an issue of fact or law. Sometimes it is difficult to characterize. Also, if it is a new issue of fact, it otherwise has some different legal significance, otherwise you would not pay attention to it. Relevance is a function of governing law. Subject to the requirement of Principle 9, the court may address an issue not previously addressed by the parties. Then you say, however, the court should thereupon permit the

parties to make submission of legal argument in reference to legal sources. In appropriate cases, should permit the parties to amend their contentions of fact and offer additional evidence accordingly. Then, finally, you have the thought expressed in the second sentence of Principle 19.1, which is, in light of whatever changes have thus been made, the courts should give the parties opportunity to comment on anything not previously addressed.

We must draw the attention to a possible contradiction of Principle 19.1 with Principle 7. If we compel the court to reopen, anytime they are coming to a decision that is based on something not fully addressed by the parties, you are inevitably going to slow down the decision.

On Principle 19.5, the adverb “directly”—the courts ordinarily show here all evidence directly, and then of course the position continues. What is the force of directly in this context? It seems there are two possibilities, and the intention is to cover both of them. The first is that the court ordinarily should hear all evidence in a concentrated and continuous hearing. The second, is that the court should hear all evidence, with the qualification that this process might be delegated.

This is a strong and serious issue, because in most civil law jurisdictions, with tradition like Italy and France, we have appearance before an instructing judge, with a member of the panel, but if sometimes not deciding body. And, we cannot say too much because many countries will not change their tradition. We have to be very soft and reluctant to say too much. This is the Anglo-American version and is today the Spanish and German version, but it is not the version of procedure for many countries, therefore we should give leeway.

Sometimes for a judge to know foreign law is not as easy as to know your own law. Lawyers do not deal with foreign law as they do with their own. With their own law, the judge and everyone know that you do not call anyone to apply your own law. When you must apply your own law, you call the judges. In the Supreme Court of Mendoza we have a special office for foreign law. And, we have a special office with a special employee that helps us with foreign law. For the lawyer, this is very useful, because sometimes they do not know the foreign language.

This is a very important issue. This is a transnational civil proceeding, and it is likely that in a particular case, a foreign law needs to be applied which is the scenario not necessarily common in domestic. Now, your first sentence, in this respect, in the light of what is the current attitude with respect to foreign law, whether we like it or not. We are very ambitious in the first sentence. You say the court are responsible for determining the correct legal basis for its decision. Which means, if it were going to be a foreign law, even if parties stand by and say it is your job, it is the responsibility of the court. In the United States, courts are a bit more prepared to step in on their own and try to find it out. In the civil law jurisdiction, the modern trend is that courts may call on the parties to provide whatever they can do in order to show the actual content of that foreign law. As it stands now, the wording of the domestic civil procedure law, you are of course dealing with something quite different, very special. Why not address this aspect, which after all is one of the essential features of the transnational procedures.

It is common when the issues of domestic law are complex that the court need some guidance in the form of expert witness in the law. The court sometimes cannot know the law in complex cases.

The court may accept expert opinion in technical issues of law, including foreign law. It is permissive, not obligatory. Some areas of the law, like the trade law, environmental regulations, these days are extremely complex. If that would be admissible, we could put this business about issues of foreign law in more general terms.

In our model is not only the responsibility of the court, but also the parties. We say, in a statement of cases and defense, the parties should present fact and contentions of law. It is also true for foreign law. Then it is up to the court to find correct legal basis. It is clear that contentions of law by the parties are important. In German courts, it is completely normal that its up to the court to define foreign law. We have the same development in England. Therefore, we have rights...we should not go back to the old days where it was up to the parties to deliver foreign law, and the courts really did nothing.

It is true that in most countries today there is an essential office where in the Ministry of Justice, and with telecommunications today it takes a few hours to have information about foreign law. But there is a question of costs of these inquiries and so forth.

The old presumption that foreign law is presumed to be the same as local law is farcical. If there is a presumption, it is that it is likely to be different. Some people may think the sentence that “the court is responsible for determining the correct legal basis” goes too far. In certain modern codes, it is added on the question of foreign law, that the court may request the assistance of the parties, which also deals to some extent the cost of that.

The judge may request some information from the parties about foreign law, because the parties most of the times are better informed because they come from those foreign parties. It is not impossible to request from the parties. Maybe we should address these principles, about working together of the court and the parties. That is the point—collaboration between judge and party.

In Principle 12.3, we write, that it is up to the parties to make contentions of law in their pleadings. It is true that judges can invite parties to make contention of law. What will be the sanction when the courts do not work properly? To be true, you can do really nothing. You cannot say you did not deliver a helpful basis of foreign law, and therefore you will lose the procedure. That is not allowed normally. Therefore, you have to make a motion to have an expert.

It is up to the parties to make the first kick and to produce sufficient legal arguments, based on a foreign law if claiming its application. It is absolutely legitimate for that party to have a partisan view of that foreign law. If the other party opposes the very idea of applying that law, the other party cannot be expected under Principle 9 to produce contrary argument based on that foreign law, whose application that party fiercely opposes. At that point it would be good to have something in Principle 19, which encourages the court to call on the parties in our case, on that first party, that you need something more than that statement of claim, you need something more reliable.

There is a well-known American case, which the Supreme Court of Arkansas, was addressing the question of the law of Tennessee. In the United States that is regarded as foreign law. The Supreme Court said the judge could determine the law of Tennessee. The dissenters said, “you are thinking of the library sources of Little Rock.” We have problems of regional limitations, perhaps even some in Mendoza.

Principle 19.6.2 says that a party may present additional expert testimony. May does not mean necessarily can. If that is the case, it seems to me we have a very interesting departure from many common law systems.

It was answered that what was meant was “has a right to.”

Principle 20

Decision and Reasoned Explanation.

Some Americans do not regard this as inconsistent with the idea of jury trial. In some judgments, the jury returns a verdict, and then the judge drawing upon the law given in the instructions to the jury, presents a summation or overview that incorporates the findings in the verdict but with a legal explanation that meets the standard. There is nothing inconsistent in my opinion with the use of a jury here. The basic point is the parties and the appellate court should have the benefit of an explanation by a trial court as to how it got the result it got.

A member asked on the meaning of comment *P-20A*. When a judge determines less than what is claimed and the defense is issue, it should specify the matters that remain open for further proceedings. What is the meaning? Would it refer to the court deciding *infra petita*?

It was answered that a familiar situation might be that the court determines damages down to date and reserves deliberation for an injunction concerning future conduct. That would be an illustration. But often cases involve claims that can be differentiated, and you can adjudicate one aspect. There may be practical reasons for rendering judgment on that part of it, then you go on. If it would help, we could put an example.

Principle *P-20B* says that in the case of a default judgment, the reason can be stated in simplified terms. A member proposed that the first five words of that comment be deleted. That is to say, in all circumstances the reason can be stated in simplified terms. Two reasons, because it is consistent with European jurisprudence where art. 6 requires a reasoned decision. Immediately you encounter the difficulty of having to calibrate the degree of specificity of the judgment. It is an old question, but the Strasbourg court is quite relaxed on that. Parties can determine the essential basis of the decision, and on central questions, there is an explanation of how the court reached its decision. That of course is the gist of Principle 20.2. We should not be too ambitious, and the comment should emphasize economy and simplicity of reasons.

In England, in default judgment the parties do not get any reasons at all. Nor could you ever receive to expect any reasons in the context of a default judgment.

Maybe it is wise not to establish separate status for default judgment. One could say that in the case of default, all the more reason for explanation. Then we get the separate point that we do not want to make a judgment vulnerable to capricious attack on the ground that it did not go into everything. Maybe we need a standard such as “essential basis.” Another approach would be to say the basis could be discerned by an Appellate court, which gives a standard of communication, not to say to suggest there must be an appeal. But to say there is a level of explication that would make the basis of decision intelligible if there were an appeal. Those are two different ways of doing it. The essence

of the decision, or to make it functional, an explanation, reasonably sufficient or proportionally sufficient for an appellate court.

A member made a reference to Principle 6.4: “The court should [explicitly] consider each serious contention of fact or law before rejecting a claim.” According to our rule of default, the judge has to give explanation: in a default against the defendant the court must determine the claim is reasonably supported by the evidence and legally justified. We should write a first sentence saying that as long as Principle 20 is respected the court should consider significant contentions. The judgment should not be very complex or detailed. In case of default judgment, the reasoning can be stated in even more simplified terms or something like that.

Principle 20.1 the court should promptly give the judgment ... Any award of interest to be paid on a money judgment. Is it necessary to specify it? The main concern is we are well aware that in large parts of the world, interest is fiercely rejected. It is worse, to say, erase these kinds of objections, in a number of countries that may well be candidates for your principles.

Principle 20.1, suggests the process of giving judgment as its condition precedent, by written suggestion. In the comment we could say it is often the practice of commercial courts around the world is to indicate their judgments orally, with their written decisions to follow. We are thinking of the question of timeliness, often the interval of reaching the decision and formulating it, we want to ensure expedition of the process of reaching judgment. That is quite important when one considers the importance of enforcement of justice.

Some times, the amount should be decided by experts. Then we have a judgment, and the expertise is sometimes soft, and we have no clear definition what is some. That creates many difficulties if you want to enforce those judgments. Therefore, it is helpful to say that a judgment should make clear what is really the debt that could be executed and paid. For example, Italy, there is a tradition in Italian courts to give a judgment. Expert should, for example, give expertise, on the exact amount that should be paid. Then you have a judgment by the court and an expertise, which is added. The expertise has no special form. Each expert does it how he or she wishes to do it. It could be very difficult to decide the exact amount that could be executed.

Perhaps in the comment we should say that “specification includes explication of the amount of a monetary award.” Saying something that in some systems would be applied by subsequent determination by an auxiliary official. We should delete the business about interest. It depends on what kind of claim. Contracts is determined differently sometimes than torts. Whether it is regarded as procedural or substantive...we should pass on that question. Acknowledge that questions of interests prior to judgment are subject to various rules to which we make external reference.

Principle 21 **Settlement**

A member asked the Reporters what is exactly the meaning of the term “while respecting the parties right to participate in litigation.” Is it really necessary in that principle and what does it mean?

It was answered that it was not necessary. However, some critics – including several members of the ALI/UNIDROIT Working Group – have said that if we do not refer to that expressly, then we are giving encouragement to some judges, who use strong-arm pressure tactics to coerce the parties to settlement. One might say that is an example of bad judicial behavior, and you cannot negate that in every respect. We do not feel obliged to keep that provision, but we do offer it as an explanation of where it came from.

A member suggested deleting it because it adds obscurity, but it was remembered that this was suggested by the Working Group. See Secretary Report, p. 47-49. It was suggested that the obscurity be eliminated in a comment.

There is a strong tendency in many countries to replace civil litigation by mediation proceedings. We want to make it clear that civil litigation should not be replaced by settlement and mediation mechanisms, and therefore we would prefer to make this remark in the principles.

The mediation wave is a very strong one. It is a business for many lawyers. Sometimes you can be afraid of its consequences. Perhaps we should try to use other words. We would say that our intention to include it in the Principle is a good one.

A member preferred to keep it. Sometimes people think that alternative measures are the main ones.

A member asked a question: When we say, “while respecting the party’s right to participate in litigation” do we mean it is not possible for a court to oblige the parties before the pleadings, to go to a mediation or mediator? Is this practice prohibited?

It was answered that it is not prohibited, but, there is always the possibility to go on, and the parties should be free if there is a choice between a mediation proceeding. It could be obligatory and mandatory before the commencement of a proceeding. Is it always clear there is a full right to a normal procedure?

We want to change the concept somewhat, signal it in the blackletter. An alternative way of making the point is to juxtapose the term encouraging with coercion. The court may encourage the parties but not coerce them to seek settlement. Maybe coerce is too strong a term, but that is the sense advocates have. It is one thing to be strongly invited, something else to be subjected to psychological pressure or worse if you disagree. We would be delighted to have comment on how different ways of approaching expression of the idea we are talking about.

This is very important because there are many different tendencies to settlement or mediation, especially in Asian countries. There, you can see strong tendency to the mediation. We must be very careful.

However, we should hesitate before creating further rights. A right to participate in litigation is already a dangerous concept. A right to judgment is an even more dangerous concept. Also, there is a structural question whether this very important provision should appear as far down as Principle 21. Most legal systems might prefer it to be closer to the front. The English have embraced this notion that if you do not negotiate in good faith, you might get covered in costs in due course because you have been a naughty boy, and you have not played ball and you have dug your heels and all these reprehensible things. The counter-argument to this is you only get people to discuss things freely around a conciliatory table, or mediation table, if they are not looking over the table worrying about possible sanctions. The essence of ADR is to encourage candid

and free and open discourse, not to encourage defensive postures by threats of defensive postures. There is a real choice to be made here.

We should not suggest the parties have a right to judgment, because of case management and possibility of summary disposal, agreements and all sorts of qualifications that might exist.

A member was surprised by the idea that there is no right to obtain a judgment. In all civilized countries there is a right to court subject to other conditions, and right to get a judgment which may be favorable or unfavorable. Parties have a right to prefer a judgment or decision, then any mediation process, or any conciliation. So, there cannot be an objection against the words “right to obtain judgment.” It is subject to all sorts of conditions, from the constitution down to the court of civil procedure, but it is a fundamental right of citizens to obtain a judgment from a judge.

The word we should consider is “access to justice” which is a very familiar and now recognized term. Recognizing a party’s right to access to justice as administered by the courts...

A member, however, thought that this is not a matter of access to justice. You are already within the court. You are already participating in litigation, so the question does not arise. The court should encourage, it means there is already litigation and that access to justice has been granted. The only thing that remains is how it will go on, and whether it will end in a judgment or whether the parties will be sent to ADR. The only possible solution is the right to obtain judgment.

However, it was said that access to justice is a very broad term, and it could be, that even mediation is a form of access to justice. Therefore, it is better to say “while respecting a party’s rights to obtain an initial decision or judgment”. That makes it clear.

In the second part of Principle 21.1, we thought of pre-action protocols techniques. We thought of payment to the court. We wanted to encourage all jurisdictions to provide costs sanctions for behavior that hinders the parties from settling the case. There are similar prohibitions in other jurisdictions. Example, if you have documents and you do not produce them before commencement of proceedings, it could be the other party gives full acknowledgment to the claim and you have cost sanctions. That is a good mechanism, and this sentence covers this, prohibitions and practice in many jurisdictions.

In Principle 21.1 there seems to be two entirely different scenarios envisaged. The first one is in the first sentence, where it is the court which takes, or may or should take the initiative, to have parties settle the dispute. Then we have in the second sentence an entirely different situation where, by the way, properly use a different language, it is not any longer should encourage or enforce, but should ‘facilitate’. Facilitate what? Alternative means outside the court. These two ideas should not be mixed in the same paragraph.

Moreover, a member showed some hesitation in agreeing on the wording on “alternative dispute resolution” procedure. It is fair to say that the common understanding of ADR includes arbitration. Are you really prepared to have in your principles a statement according to which, even once, before the court did not come into play, once you are before a court, it should facilitate to go elsewhere, to have the dispute settled by means of arbitration? This can be a very far reaching principle. Think of a defense raised by a party of an agreement between two, which is pretty frequent defense. Sometimes based on loose arguments.

In many countries, even civil law jurisdictions, providing for alternative dispute resolution,

The French, German codes have the possibility to stay the procedure, and to recommend the parties to choose a mediator, often of a mini court trial, and so on. This principle wants to cover this possibility.

The language is too broad because ADR procedure includes arbitration. Do we intend to go that far? Courts should do their best to facilitate the resolution of a dispute by arbitration? Why not think of the possibility that before commencement of the proceeding, the party has a dispute on the validity of arbitration clause. During the procedure, the judge recommends making the attempt to go to the arbitrator and to take the arbitration clause as a basis, and the arbitration is successful, it will be content. If the parties agree, the court can stay the procedure, and the arbitrator can always work. It is flexible in its principle. There are so many forms of ADR, we should have a more broad principle.

In order to satisfy these concerns, we should take the word “voluntary” from voluntary settlement and put it before: voluntary participation in ADR.

ADR has been practiced in Europe since the Middle Ages. Whether it is alternative to court decisions alone or to arbitration is a disputed question. A member had no objection to the clause itself except that one point must be kept in mind, using that fashion for ADR, as we see, also in arbitration, is an ideal dilatory method for a defendant to gain time. That should be kept in mind. We know that most judges everywhere are very much in favor of this for the understandable reason that courts everywhere have a heavy load of work and cannot cope. We should avoid entering too many details.

The notion of a right to pursue court proceedings is broad enough to include the situation when you have already obtained judgment. The question now is whether the appeals court can encourage the judges to settle. We were told by some of the Appeals court judges in England, that from time to time when they are deciding whether or not to grant permission for a case to go on appeal, it is now a practice in England, to require permission. They say this case is a classic one for ADR, or for the consideration of settlement.

We could use the formula “respecting the party’s opportunity to pursue litigation” conveys the right balance between right and deference. We will consider that, and maybe we will think it useful to integrate the first provisions of Principle 21.1 and the first sentence of 21.2 into a set of dependent clauses. And then make the second sentence of 21.2 into a separate rule.

Principle 22

Costs

This is a rule quite contrary to the one in the US, but we think it appropriate, particularly attorney’s fees. There have been intense arguments about whether it has deterrent or inhibiting effect, and it does in some cases. On the other hand, it facilitates prosecution of some claims, such as when Plaintiff believes he has a very good case, but it would be relatively expensive to prosecute. It changes the balance of advantage or

strategic advantage, but not in a way you could say is unfair in transnational commercial litigation. We think this is a reasonable rule.

Could we combine the second sentence of Principle 21.2, and 22.2 which more or less covers the same subject? Principle 21.2 says the court may adjust its cost award to reflect reasonable financial fault. In Principle 22.2 the court in making cost decisions may take it into account and so forth. It more or less is the same thing. Could not we combine that in the same provision?

Principle 21.2, second sentence. The basis is failure to cooperate or bad faith participation and settlement. 22.2, second sentence, parties procedural misconduct. This is the same idea. Why do we have two separate sentences?

It was answered that it is similar, but not completely the same. Procedural misconduct is different from not being ready to further settlement. We could combine the two ideas, and perhaps put the second sentence of 21.2, which would be a changed version, to Principle 22.2, that could be helpful.

In Principle 22.1, the insertion of the word “substantial” adds uncertainty. Proportionality that the substantial word was aiming at was sufficiently achieved by reasonable. The party should get its reasonable costs of the proceedings. If there is to be some kind of assessment or taxation procedure in determining the amount of costs, the officer who decides that should be able to determine what is reasonable. In some cases, a wealthy party will probably have double the amount of lawyers appearing in the case. What is reasonable, should only be able to get costs for the reasonable amount of lawyers for the conduct of the case.

It was answered that this is a long story. We say “substantial” because in most countries not all of the reasonable costs are shifted, just part of it. That is the reason for the word “substantial”.

Most members were in agreement with Principle 22.1 in its entirety.

The first word in Principle 22.2 is “exceptionally”. It means exceptionally, and also qualifies the general rule in Principle 22.1. Does it apply to all the provisions in 22.2? It would be a reasonable interpretation. We should make clear that these various qualifications on Principle 22.1 are indeed exceptional ones.

Principle 22.2, second sentence, arguably contains two propositions. The first, the court may limit the award to a proportion that reflects expenditures for matters of general dispute. That one could have a full stop at that point. Then, the court could award costs against a winning party who has been unreasonable disputatious. As far as the word disputatious is concerned, those are good words, but perhaps not the best language we can find. The way we would approach that question in the common law jurisdiction is not ask the big question, whether someone was unreasonably disputatious, but that could be misinterpreted in various jurisdictions around the world. We should be precise. This is a very extraordinary cost award indeed. We have made one against the party who has won the main case. It can be whether that party has raised unnecessary claims, defenses, or issues. That is a reasonable interpretation of what we mean by unreasonably disputatious. We can strengthen this if we want, but the main case is when a person has raised unnecessary claims, defenses, or issues.

In most common law jurisdictions, that a claiming party will put forward, say, three bases, upon which it hopes to succeed in obtaining the particular judgment it wants, and may win on one of those basis. Then you have the situation when the other two basis

of claim may have been reasonably arguable, or unreasonably disputatious. The courts are quite accustomed to dividing the costs by reference to issues upon which the party has succeeded. So a successful plaintiff in this example, would be awarded the general costs of the proceedings and that relating to the issue it succeeded, and either be deprived of costs on the two issues it failed, or in some cases, may be ordered to pay the costs on the issues on which it failed. And then there will be a set-off sometime, so the ultimate cost order is there will be no one as to costs, leaving each party to bear its own. In any complicated litigation you will have situations like that, where the court ought to have discretion to decide costs reference to issues. Though there is a strong tendency in a number of judges to say, well, a claimant has succeeded in getting what it set out to get, and I'll take that into account when deciding how I am going to allocate costs to issues. How the Principle as stated encompasses that set of ideas?

Another member disagreed that we should substitute “unreasonably disputatious” and make it more precise by adding claims, defenses and so forth. It may not cover all the situation. We have this problem often. In an international tribunal last month we had a long discussion in awarding costs because one person in the minority wanted to diminish the costs of the winning party because it had raised 10 different arguments and won only the first two. His argument was in raising 8 arguments, the party increased the length of the arbitration proceeding. But after a rather long and interesting discussion, we decided to award the full cost. After all, it is not the question of the number of arguments, provided they are acceptable or arguable. We should prefer a general formula. The basis for that is one party's bad behavior has increased the length of the proceedings, thus increasing costs.

There are two different systems: we have lump sum systems, and we have those giving a more detailed overview on costs. And, for lump sum systems, it is a bit difficult to make differentiations on issues, be disputed or not. Therefore, we were a bit reluctant to say too much. We should prefer a more vague version, because not all systems are the same. Unreasonably disputatious, because it could be that the dispute is neither a claim, nor a defense. For example, if a party writes, ten pleadings instead of one or two. You could say those costs are unreasonable, and its covered by Principle 20.1. But it could also be a case of Principle 20.2.

We could explain what unreasonably disputatious is in the comment, using everything that has been discussed here.

The final sentence of Principle 22.2 is a sweep up provision, a residual one, because it does overlap with some of the things that go on earlier. We can say that in some legal systems, raising unnecessary points or being unreasonably disputatious is a form of procedural misconduct. What lies behind this observation is whether we are guilty of unnecessary language or are we clear in our own mind what the relationship is between different sentences in Principle 22.2.

It was answered that it could be, for example, that the party demands translations of documents, and after all you can see that most documents are not helpful, or that the party is unable to understand the documents. There are many forms of misconduct not covered by previous sentences.

By different roots, two systems arrive at much the same position. The strict theory of costs in some common law jurisdictions would require a detailed assessment of a costs assessing officer of some sort, who would look at all the details of all the expenditure.

But the judge has power to say in effect, that is a very costly and unnecessary procedure, looking overall at what has happened here. It is appropriate that such and such of a proportion of the costs be paid by one party or another, which sounds like what was described above. That kind of consideration can be given effect by the opening sentence of Principle 22.1 under the heading “reasonable” when in the ordinary case the prevailing party gets its reasonable costs. That would enable the court, or the preparation of rules, which would enable either of the two systems to be incorporated in the rules, the better one to be used by the judge in his discretion according to the facts in the case.

One other issue of costs, which is not addressed in the Principle. That is the question of the court’s duty to provide a reasoned explanation for its decision. The court of appeal last month in England addressed the issue of what circumstances, if any, must a court in compliance with article 6.1, produce a reasoned decision for its costs award. It adopted a very sensible and pragmatic solution to that. It said most of the time the reason for a cost decision does not have to be mentioned at all. The general rule is that when you have won, you are entitled to costs. The only problem that arises is when the court does something exceptional, Principle 22.2, at which point the court is required, under art. 1, according to the English court of appeals, to provide a short, short explanation for why it is departing from the general rule. That is an important point to tuck away in the commentary.

Principle 23

Finality and Enforceability

We ought to take out, in Principle 23.2, take out the phrase “reasonable clarity”. We should just say “defining finality” period. Because no legal system could define finality that would put it beyond argument in various circumstances.

The comments to Principle 23 are excellent.

On Principle 23.3, we say a judgment upon becoming final should be immediately enforceable. But in certain cases, the judge and the same applies to the international arbitrator, made a final decision, but for instance, giving three months to the losing party to adjust, take certain measures or comply. By the way, in different circumstances that was the decision by Dupre in the famous Texaco award. Is this kind of situation excluded by Principle 23.3? After all, the judge may say this is final, but this can be enforced only after two or three months for some good reasons.

A member said that this is a matter of logic. If the decision is that the loser has time to adjust, how can someone enforce it before the time has passed? It is immediately enforceable, but the winner can only enforce what is in the decision, which is “pay when the time comes”. It is a question of logic. When the judge gives a period of grace either the decision is immediately enforceable and the defendant does not have to perform until the time has expired or it will become enforceable after the time has expired. However, to avoid problems of interpretation, we should state in the comments that this rule does not foreclose the possibility.

Another member suggested that we could add “the judgment, upon becoming final, should be immediately enforceable in accordance with its own terms.”

Principle 23.1 says “subject to the right of appeal”. It is suggested to say subject to any right of appeal. Principle 24.1 says that, opportunity for ample review should be in fact governed by the law of the forum. In some forums, there is no unqualified right of appeal. So, that is a drafting point, but also part of substance. Principle 23.4 says “trial court” and should say first instance courts. Principle 23.5 says “a suitable bond or other,” why not just say “security” and leave it at that...security may be required. Also, why in the next line “respondents” was in the plural?

We may not really need Principle 22.3 at all. If the judgment is final, it will be so on its own terms. And enforceable on its own terms, which will include any delay or postponement to the satisfaction of the judges. It may lead to clarity.

The concept of immediately enforceable of enforcement is much broader than just to pay if there is something to pay. There are legal rights, positions defined. You can no longer dispute about my leading position with respect to situation A. In addition, you have to pay in 3 months time.

What is a final judgment? A judgment that decides the whole dispute or part of it which can be immediately enforced. It is not to be the whole dispute, but some kind of problems. This judgment must be able to be enforced at once. Is it the same for final judgment?

We should connect, in the comment, the point we just made with the one made earlier, about the judgment dealing only with part of the controversy. We should connect that, and the correct way to do it would be in the comment, point out you can have finality with respect to a judgment determining part of the claims. So, we will link that, and refer to...page 20.

However, in 23.5, a reference to a suitable bond or other security is a better formulation because it indicates the kind of security we have in mind. And, if you simply said security, some legal systems would wonder what you were talking about. Securities such as a bond would be alright.

A judgment that contemplates responsive conduct on the part of the losing party. In the future, it is a common problem in injunctions...We should address it in the comment. Technically, when a judgment is entered that says you must do something in three months from now, it entails the obligation not to do anything from now until then that would obstruct the fulfillment. We have had very extensive and lamentable experience with that in the United States during the period of desegregation, because there were lots of governments that resisted in various ways for a long time. It is a problem we run into for decrees requiring change in the way institutions operate. We should address it in the comment.

On the business about enforceability, we should to have this, because he said some legal systems are somewhat equivocal about the idea that once a judgment is entered, it opens opportunity for further discussion. One should be very clear that a judgment is immediately to be complied with, and not made the subject of further dispersal. We should keep that provision, even though in some sense it is redundant.

It might strengthen the Principles in a general way if some reference were made to a general principle of law, within the meaning of article 38 of the statute of international court in The Hague. A general principle used in arbitration, but to the surprise of the parties because not one lawyer out of a one hundred knows about it, curiously enough. It has been proclaimed several times by the permanent court of international justice, the

principle that does not only apply to parties after but also before the judgment, that each party to a dispute has the duty to abstain from any conduct which might make the enforcement of the award more difficult. Which might aggravate the dispute. This is now a recognized general principle of rule, within the sense of the ICJ statute. It is a part of public international law. It has a definite interest for the principle of transnational procedure.

Judgments upon becoming final are immediately enforceable. We have some form of decisions, which are not clear provisional measures. And, they are not clear final judgments. For example, entering payment orders in Italy, it could be that a judge, when he or she has enough evidence, gives judgment, you could say a provisional judgment, which could be enforced. After a year, the judgment becomes final when it is given no evidence against his judgment. It is no real provisional measure; it is a form of provisional judgment. We should make it clear that Principle 23.3 cannot be read in a way that excludes the execution of those non-final judgments. They are more usual. In France, they can be given during the main proceeding, not only before. You could say it is...but, in other countries, it is no real provisional measure, it is a judgment given in a provisional way after a first taking of evidence.

It was asked whether this comment refers to a partial judgment, when the judge considers that a part of the claim is proved the judge will give a partial judgment. It is a sort of advanced judgment on that part of the claim, which is indisputable. Of course, it is not a final judgment because it does not end the controversy.

It was answered that it is not a part of the claim, but is the full claim. The judge says we have taken evidence by examination of witnesses, and there are other two witnesses...if one is here we can hear, but we are convinced now that the result of the taking of evidence will not change. So we give a provisional judgment, and after a year we will see, that is enough. We have similar provisions in other countries.

In France, there is a dispute, and the court says it can decide on one point, and then for the rest, order the taking of evidence. The court can decide, a very important point. Then it is a mix of final provision and taking of evidence, then this decision is subject to immediate appellate review. It belongs to the final judgment.

Does these kind of decisions could be placed under the heading "final decisions"? Don't you think it is equally important, in addition of what you say in Principle 23.2, that the court should have a rule defining finality, defining also, cases where a decision is immediately enforceable? This is what we are discussing, and it might not be the same.

It might not be the same because in France, we do not have this rule of immediate enforceability for other judgments. It would be an exception for us. When you have an appellate review, you do not have to enforce at once.

In Italy, the best example is the judge takes evidence, and his impression, that he has a good basis for decision but no final basis. Then he gives a provisional judgment. Or take another example where you have countries with special proceedings for documentary evidence, and those judgments are immediately enforceable, but next time, other forms of evidence can be given in the courts, and the judgment can be overruled in the same instance. And, that is no provisional measure, it is no final judgment because the same instance could overrule the judgment.

This problem is difficult and important. In those complex cases that last for several years, and there is a need for partial or provisional decisions with the risk that a further decision will contradict a previous one. These days, it is fairly frequent.

The concept of judgments should be governed by a rule defining finality and enforceability. Rules to that effect can take into account provisional, interim, and injunctive awards. The baseline rule is finality and enforceability. Some of these variations would be appropriately addressed in any legal system.

A member made a comment that put together 23.1 and 3. Subject to a right of appeal. A judgment should be final. This means a judgment in the first instance. Upon being made final, it should be enforceable. Some civil law countries, does not enforce first instance decisions. That is the importance of Principle 23.3. All this discussion of it not being important, or just sending a political message is not correct. This is a strong departure from some civil law countries that only enforce decisions after they become final. What they consider final is after final appeal. This is a strong departure from some civil law countries.

The notion of finality is of course an important concept, not just in the first instance, but also in the various levels of appeal. And, this is an admirable provision we have here, and with great embarrassment, in England we have had some difficulty as far as finality on appeal is concerned. In the Pinochet decision, there was a decision in the House of Lords, which had to be unpicked, because of certain problems that we had. Principle 23.2 is very interesting, because the forum should have a rule defining finality. We did not in England and had to make it up as we went along.

In 2002, the English court of appeal, in a case called "Taylor v. Lawrence," decided that there are circumstances where there is no prospect of appeal from the court of appeal to the house of lords. In those circumstances, the decision from the court of appeal is the final judgment. But what happens here, new facts emerge which render the court of appeals judgment no longer safe, there is a danger of a miscarriage of justice. According to Lord Wolf, and two other members of the court of appeal, exceptionally, the court of appeal can rescind one of its previous judgments in order to receive justice. That is to say, Principle 23.2 is an excellent provision because it allows domestic legal systems to be somewhat fluid and nuanced around the edges when defining the question of finality.

When new facts emerge in most civil law jurisdictions, that is a case for revision. The institution of revision, you must first have the provision to open the proceedings. So whether the decision is final or enforceable is subject to the exception of procedure, when new facts emerge, which could not have been invoked by a party emerges. Clearly, in all countries, in these exceptional circumstances a court in these exceptional circumstances may revise or reopen a final judgment.

The important question asked was the enforcement of first instance decisions is revolutionary in civil law countries. Do we want to do that?

Is it really important to address here the issue of so called finality, or is it sufficient to refer to the forum, while our main concern is, is it or is it not immediately enforceable.

In European jurisdictions, you can say it is a rule that judgments given in the first instance are normally enforceable. A member have never heard of a European case, where there was a dispute in the enforceability of a judgment of first instance. During the

last ten or twenty years, nearly all European jurisdictions developed provisions to make final judgments enforceable. It could be, that it is up to the court of the first instance, to make a special declaration of enforceability, and it is the duty of the court, and it is the exception, that the final judgment be not enforceable. There is no case where the parties had a dispute on the enforceability of the final judgment in the first instance.

It seems that Principle 21.1 was difficult to understand and translate into French. It makes no sense.

Could it be that it is enough to say something of enforceability and nothing on finality? Perhaps we should say nothing on finality. It is a curious phenomenon, of Anglo-American jurisprudence. We find no continental term, no well working continental term. We could avoid the term finality, and say something on enforceability. We should say, first instance. It is true, that at the Brussels convention, also had a term definitive and final. But we had the same problems there...but the purpose is another one. There is a problem that interim judgments could not be enforced. But, in my understanding, it would be helpful to abandon finality. We could say, judgments deciding on the claim, or a part of the claim may be immediately enforceable. So, interim judgments, deciding on not a part of a claim, are not always enforceable.

According with the rules of civil procedure of the court of justice in Luxembourg, and the court of first instance whose judgments are subject to appeal by the courts of justice, the judgment should be binding by the date of delivery and not enforceable.

Binding, we will first say that the court cannot change the judgment once given. Binding can be a form of *res judicata* or claim preclusion. It can be both too, countries make a differentiation...normally, binding judgments are enforceable. But when the judgment is only binding for the courts, it is also true for interim judgments. The court is not permitted to change an interim judgment, which is...but, we could say that judgment deciding on the claim or part of the claim, should be immediately enforceable, subject to right of appeal. Is it a very serious problem to abandon the traditional concept of finality?

The problem is there are multiple legal consequences we are bringing to mind. One is the authority of the court on its own motion, or in request of a party to re-examine anything it has done. Another is whether the judgment determines everything that has been presented. Another is whether it creates immediate obligations to abstain from obstructive activities. Another is does it commence the time within which to seek an appeal. Another is, can parties seek to collect on these judgments, from this time, or from the time for appeal has expired. In the United States, we have a further very complicated problem, when a court reaches a decision on an issue, not a judgment, and the issue is very important, for example, implicating a right of free speech. Is the fact they have held this is not protected by the first amendment is so important that, it should trigger an immediate right of appeal, even though the normal rules do not permit that. No doubt, we were too naïve in thinking we could use the word finality, when it has possible connotation of all these possibilities. Assuming that is the real set of difficulties, maybe we need to do something more general. There should be a principle of finality that addresses, implemented by rules that address partial judgments, authority of courts to reconsider, right of appeal, obligation of parties to observe the judgment, and rights to seek material enforcement. That is very complicated but has the virtue of cataloguing implications that are associated with the idea of finality.

A way to deal with this is that Principle 23.3 will be deleted, because we will put that information in Principle 23.1. Principle 23.1 will be the judgment is immediately enforceable, so we don't need 23.3.

The problem is that Principle 23 deals with 2 different phenomena. There is the phenomenon of enforceability. The other one is of a binding character, to the court and to the parties in the sense of *res judicata*. Perhaps we should not do this all in one principle. We should make one principle on enforceability. It is true there are many judgments, not final. But giving a decision on a claim or part of a claim, which are enforceable and should be immediately. The other is to say something on the binding effect of judgments and decisions. That, there is more connection to *res judicata*, and we should not mix up both in our principles. We should say something on enforceability on Principle 23.1. And say nothing on finality in 23.

A member was not sure if binding in the sense described is the same as *res judicata*. There may be appeal, and the decision is binding. The member suggested to write 23.1 like this. First, it is not necessary to say "subject to a right of appeal" as an information, because Principle 24.1 says there is a right of appeal. We could write this "the judgment of first instance, total or partial, judging part or all of the claim, is binding and immediately enforceable."

However, it was answered that there are judgments that are not binding and can be overruled in the first instance. They are enforceable, too. Take judgments on the basis of documentary evidence only, which could be overruled, but later on, witnesses can be heard. Therefore we should not say binding.

It was answered that it can be binding until it is overruled.

A member defended Principle 23.2. The interrelated point above mentioned are very important and can be grouped under a broad heading of finality. It is not an exhaustive list. It seems to us our primary focus is the question of the immediacy of enforcement. It is a practical question and quite properly we have addressed that. It is a good thing, and would encourage legal systems to reflect upon this. If we were to keep Principle 23.2, supplemented by the reporters comments, those offer guidance as to some of the issues just mentioned. Just as earlier in our principles we were talking about judicial bias, we very sensibly said the forum should have a rule or procedure, governing the question of bias. It was a very sensible and positive type of provision. We should keep Principle 23.2 and, as far as detail is concerned, the primary thing is to talk about enforceability.

Principle 24

Appeal

The most controversial provision is perhaps Principle 24.3. Because the question is whether it should ever be permitted, and if so, what the standard should be to justify receiving additional contentions, particularly concerning new facts for evidence. In the common law tradition, that is rarely permitted as evidence. In many civil law systems, it is routine to have new evidence on appeal. And perhaps, the approach to that would be simply to defer to forum law on that point because the differences are too great.

It is true that in theory, many civil law countries know a full trial in the second instance. In reality, new evidence is only taken when the court of appeals has the impression there are errors and mistakes in the first instance. In Europe, there is a strong movement towards the limitation we mentioned in Principle 24.3. Only France and Italy, have a code, which takes full new trial as a basis, but it is rare. It could be, but it is rare. We could live with the compromise because in civil law jurisdictions where the taking of evidence is possible, it is only taken when the court of second instance discovers procedural errors in the first instance.

One thing is of course certain discretion on the court not to admit it. And another thing is to state on the rule only exceptionally this should be done, as it is laid down here. There is still a considerable difference between such an approach and what is a current approach in countries like Italy. In Italy there is a movement for reform, and it has been strongly opposed just because this has been one of the cornerstones. But apart from that, what about new contentions of law? In this respect, this is clearly the rule that you may bring new legal arguments. In your principle, it would be the exception. In other words, your appeal would be the last instance.

In Germany we had the French system. One year ago there was a reform. After long discussions we made a compromise, very similar to Principle 24.3. It is similar to the Austrian solution, too. There is a similarity to the Spanish solution, too.

However, it is true contentions of law should not be in this Principle. If you say in Principle 19 that the court is responsible for determining the correct legal basis, it makes no sense to say the court of appeals should be limited to find new legal basis for the decision. It is too much a starting point for the old common law, that the parties introduce the legal basis, and that the court is not responsible for the legal basis. Perhaps we could discuss, to say nothing on legal contentions, or contentions of law. If the court of appeals decide to resolve the case on a new legal basis, the parties should be free to argue on the basis of new legal contentions.

In Principle 24.1 we query the necessity of the words “suffering adverse judgment”. It is perhaps a pedantic point, perhaps it is not and an issue of substance. But it seems that normally speaking, a person only goes on appeal if disgruntled with what happened on the court below. It is an unnecessary statement. Another point underlies this comment. There are circumstances when the person is victorious in the first instance, and has an interest in appellate review. That is a point for the reporters to consider.

What is the relationship between Principles 24.2 and 24.3? There is an argument that Principle 24.3, which has its problems, might in fact be superfluous. Principle 24.2 seems to contain the main principle, the gist of what we wish to say. As we can see, its providing that if you do succeed in taking one of these judgments on appeal, and that question is subject to one of the ordinary rules of the forum, then the scope of that appeal will ordinarily be limited to, and then various things are specified. Principle 24.3 is the corroborate of that, and in some circumstances new bits of information will be included. Principle 24.3 received quite a bit of discussion in London. Each legal system has its own sophisticated rules, dealing with the circumstances in which new facts, questions of evidence and law will be received. This has been the subject of decades of case law and legal experience. It is a bold and perilous thing for us to define this, unless we have a clear idea of what we want to achieve. We should have a limited statement along the lines of Principle 24.2, that is to say, on appeal, you cannot, the essence of it is you cannot start

de novo. You are subject to the constraints of the delineation of the dispute that was fought over by the first instance. Finally, just dealing with the wording of Principle 24.2, it was suggested that the present wording is somewhat cumbersome. Appellate review should be limited to...and then you have a list of things. We can follow that with “issues or evidence raised before or considered by the court below.”

This principle has no chance of acceptance in civil law countries. Even not in Germany, though we might compromise. To the French and Italian orientation it would be unacceptable. If we say something on the scope of an appeal, we must have a compromise. There are two possibilities to say...nothing on the scope, and then we could strike out the full principle. If we say something on the scope, and we think it could be desirable to limit the scope, the compromise would describe in Principle 24.2, and 24.3, is the best compromise we could achieve with civil law countries. Our comment at the appellate level should be permitted in unusual circumstances. It is a very Anglo-American comment and unacceptable to civil law countries because the starting point of civil law countries is a full new trial of the case. Experience of practice, and normally, appellate courts are not enthusiastic to have a new full trial, when it seems unnecessary in the interest of justice because of mistakes done in the first instance. If only something, on the limited scope, that would not be enough, you should see that in common law legal tradition, it is necessary to limit the scope of the Appeal, and to describe exactly the scope of your burden. But in many civil law systems, this is unnecessary, you give only your appeal and the court makes full control. From this starting point, we could not have it go away. Therefore, we suggested this compromise.

A member said that on the basis that this is a compromise acceptable to the civil law jurisdictions, it seems a suitable compromise for common law countries too. Looking at Principle 24.2, that expresses, not exactly in the language use in common law, but substantially what the position is. The word ordinarily would be interpreted at home in light of our case law, as permitting some new matter to be raised, if it were necessary for the decision of the case, and a very important qualification, if it is fair to allow that point to be raised on the materials that emerged from the trial. On the other hand, if it can be seen by the courts that the successful party below conducted the case differently if the point was raised at the trial, the court usually will not permit the new point to be raised. Though the rules are flexible enough for this to happen. In a new case once where a new point was raised which seemed important to the court, not dealt with at the trial, our court's powers were wide enough to permit the successful party, now in the court of appeal, to bring whatever evidence it wished to bring, on the new point, that it had not been able to bring, or not seen fit to bring because of the way the case was conducted below. We would not let this happen very often because it was very irritating to have a long trial develop what might have been a short appeal. Nevertheless, the court's powers were wide enough. Similarly, in Principle 24.3, a common law court would interpret “when necessary in the interest of justice” in light of the case law. First, the language is flexible enough to accommodate the existing practice in Australian appeals court. Secondly, and this would probably happen in all forums. The words, if embodied in rules, or even if they were interpreted as part of the Principles, would be read in light of the Australian experience or case law. They should not cause undue difficulty in Australia, though we do imagine some lawyers would argue strongly against them. Nevertheless, most Australian lawyers would find them appropriate for Australian circumstances.

Principles 24.2 and 24.3 do not correspond to the French civil procedure code. But it does not matter. The problem is the expression “in the interests of justice”. French courts will think it is necessary in the interests of justice in every case and every situation in which the contentions of law, fact, evidence are relevant to the case and for its solution.

There are strong common law echoes in Principles 24.2 and 24.3. This is an aspect in transnational procedure, where the group has displayed excessive timidity, and has failed to grasp the mettle. Clearly, we come from different traditions, but one can guarantee this is a stimulus to forum shopping. If ever there is a reason to get into a forum, it is the prospect of obtaining judgment that is virtually final and which you can then go about enforcing. If instead, the prospect is a chain of everlasting appeals, this becomes immediately an unattractive forum. The reality is one advised claimant is looking to see just how labyrinthine and lengthy the process of appeal is in different forums.

It could be that the claimant loses the case and is very pleased to have an appeal. It is always a risk, and if your case is doubtful, this will be a very difficult question. A member proposed to take the text of the principle, but to have a look at the comment. It is too Anglo-American, and unacceptable for civil law countries. Even French courts normally, will tell the parties, we found no mistake, in the taking of evidence by the lower court. Normally, evidence is taken when the court is convinced, or when the parties are very stubborn to have the second taking of evidence. There are many judgments where they use the taking of evidence in the first instance.

In the French code of civil procedure, there is theoretical possibility for the parties to bring new contentions of law, to produce new documents of proposed new taking of evidence, or new evidence. If you discover new evidence you bring before the courts, you have this possibility. We could also mention the cases where taking of evidence by the courts is wrong or so on. The courts have the possibility to bring new evidence.

This compromise might be acceptable. In the interests of justice, the exception can become broader in France, so there is no difficulty to accept that.

The first object of this project must be to get a code that is accepted. It may be, that timidity is the only way of getting a code that will be accepted by a sufficient number of countries. Having a code in place will be a very important factor in the eventual success of the project. It is an indispensable first step. Most claimants, if they investigate the comparative virtues of the different jurisdictions to which they resort, will look to those which they perceive will give them the fastest and most efficient result. That will mean, that the particular forum that affords the best procedure within the arrangement of the code will attract the majority of the cases. Other jurisdictions will likely follow suit, if they wish to have cases in their courts in this kind of litigation. We have had instances in Australia of competition between federal and state courts in these matters. Australia has adopted a system where commercial cases may be heard, almost equally, easily in federal as in state jurisdiction. It is noticeable that the courts which furnish the best procedure attract the most work. Therefore, returning to the first point, although these provisions represent a compromise, it is one that is essential to getting this project off the ground, and give it acceptance by an appropriate number of jurisdictions.

We discuss here the first appeal. It is true that even countries with first appeal in law have a second appeal, too. Nearly all systems have three instances. One part of the

world has two instances of fact and the last one is only on law. The principle has as a basis the intention to limit the first appeal, and to give a guideline, even to countries with a very broad basis for appeal, not to do too much without it. The modern tendency even in states with a very broad ability to have an appeal, and therefore it is not so revolutionary as it looks. A French judge could work with this principle.

Some civil lawyers think it would be a good thing to reduce the possibilities of bringing new evidence, new contentions of fact and law, and so on. A French judge could work with that. Rule 33.5 says further appellate review of the decision of the second instant court may be permitted. There is no guarantee; it depends on the country, which constitutional measures and so on. Principle 24 only deals with the first appeal.

It is easier to accept the rule when it is the same as the one we have in our own country. But Latin Americans are not happy with our justice, or our judicial system. So, we should discuss about the advantage and disadvantage of the system. We try to have a good system for everybody, even if we recognize that for a common lawyer, it is easier to have the same rule for the moment. But it is not our job to do the same.

In Principle 24.1, what is exactly the meaning of substantially the same terms of other judgments and the law of the forum? This seems obscure to many readers. Is there another way to express the same idea, intention of the reporters?

The answer was that we could say it is to be followed on the same procedure, but the problem is the underlying procedure would in many instances be somewhat different of the courts of first instance of the national system. We want to say you should follow appellate procedure so far as you can, as prescribed in your domestic law. We should add that point in the comment.

The formula in the interest of justice is a good one. There may be a gap between our text and the comment. The comment is too narrow, and in civil law countries it is. We should adapt this comment to Principle 24.3, that will say that if you see new facts or evidence, very important and it is understandable if not introduced in the first instance, it is in the interests of justice to give enough freedom to the parties to introduce...means of evidence or new facts. This covers practice of most civil law countries, and common law jurists could work with this.

A member considered that “necessity in the interest of justice” is acceptable because it is vague. Every court can put what it wants to with it, that is why it is acceptable.

One would assume that everything that the judge does will be in the interest of justice. Why say it in one particular case and not the others? To some extent it would seem to be some sort of tautology.

It was asked whether the civil law participants would be more comfortable in Principle 24.1 if we said “substantially similar.” The French word would be similar, and is the functional equivalent. Would similar be more congenial than “the same.”

It was answered yes but instead of “substantially” we should say “essentially”.

However, there is a difference between “substantially the same” and “similar”. Similar means from the outset, you might be content with a similar approach. Substantially the same means should be the same unless there are reasons to deviate. Also in French and Italian, one might be able to render this idea clear.

Another member had a slightly different than the previous one. Substantially the same terms would mean they are, in substance, in the result, similar in the same and not the form. That is the difference. It is not quite the same interpretation.

The Latin expression “mutatis mutandis” probably expresses what we are grasping for, but it is bad draftsmanship to use that term, because when you try and translate it into your vernacular, you strike the difficulties we strike now, and emphasizes the need for clear and accurate thought to the draftsmen.

The problem is that if we in positive terms state “on the same terms as other judgments”, this means forget about transnational civil procedure rules, once you are in the appellate, this is a domestic court proceeding, end of story. At this point you run the risk to pretty much jeopardize the practical result of our project. In the second round you have to forget about transnational civil procedure.

It was answered that this is not the aim of this Principle, which refers only to the opportunity to appeal.

We could consider, either substantially the same, or substantially similar, or essentially similar, or essentially the same. We will deliberate about those differences. Any court confronted with this situation in the future would probably be aware they were dealing with this procedure under transnational rules. When the opening brief was submitted. We understand, and we will change the comment in what we hope we turn out to be suitable ways. We should say that the concept of necessary in the interests of justice is expected to be interpreted in terms of the national tradition of the system applying the rules, which would reflect in subtle ways the different balance between responsibilities of the first instance and appellate courts. Classically, the common law looked at the appeal as a prosecution of the lower proceeding, an examination for error. The civil law tradition viewed it as an opportunity for collective justice. Those differences perhaps still linger on.

Principle 25

Lis Pendens and Res Judicata

Perhaps we might want to withhold the proposition stated in 25.3. This is a fundamental difference between American and more generally common law, which recognizes the idea of issue preclusion. The civil law in general does not. The American law of issue preclusion itself has an exception to the effect that it should not be applied, if the rendering forum/procedure contemplated that it would not be applied. The idea that an adjudication of issues should be for the purpose only for the immediate proceeding is an idea that does find recognition on the American common law on the subject.

It was asked what issue preclusion mean. These terms will be difficult to understand for most civil law lawyers.

It was answered that in the blackletter, we should have a more elaborate definition of what it is in the comment. Let us begin with the idea of res judicata, or as the American usage has become, claim preclusion. The idea is that a party to a legal adjudication is concluded by the terms of the adjudication, so far as the claims involved are concerned. That applies to a defendant who cannot later dispute it, if he has lost, and against a plaintiff who cannot seek additional remedy if he won. Obviously, a plaintiff

who lost is also barred. Those are the basic concepts. Claim preclusion is universally recognized.

The idea of issue preclusion is this, when in the course of adjudicating a claim, the court is called upon to determine an issue, whether a contract was signed or whether an application had been made to the corporation, the tribunal determines that issue, actually decides it, addresses it. Then, the rule is, the same issue, if it arises later on in some other litigation, may not be reconsidered. A classic case, is one that was in the Supreme Court of the United States, in which a government agency, in this case the SEC, brought a proceeding against a company, in which the government sought an injunction, on the basis that financial statements issued by the company had been incomplete and misleading. The government agency prevailed, and they got the injunction after a determination by the court that the financial statements were indeed misleading. Then, some investors sued the company to obtain damages for injury they sustained for relying on what they said were false and misleading statements. The Supreme Court held that the determination in the first proceeding by the SEC was conclusive against the company because it had full opportunity to litigate that issue against the government issue. It was conclusive against the company and favorable against the investors in the second suit, where they were seeking damages. The first determination was not in the administrative agency, it was in a court in a lawsuit brought by the agency. According to ordinary judicial procedure, decided by a judge.

So in this case, there is a binding effect, not only between the same parties, but between the different parties in the US in this case. That is less liberally applied. There is an insistence of full opportunity, and implicitly, that the second litigation was foreseeable. Of course, in the SEC enforcement proceeding its perfectly foreseeable, because it is a very common occurrence that there be both proceedings, a government enforcement and private damage claims.

In the case, issue preclusion was in favor of investors. However, if the decision was against investors, they would not be bound because they did not have opportunity themselves to participate in the litigation. It would be binding on the losing party because it had full opportunity, but not binding on an absentee.

The so-called rule of issue preclusion in the US is a spongy rule. It has many qualifications and exceptions and doubts, including in the case mentioned about the SEC, there was a very strong dissent, thinking this was not fair.

A member said that the French translation of this idea was not easy. However, it was suggested the following formula: “the res judicata of preliminary issues” or “the binding effect of preliminary issues”. In Spanish, it would be “la cosa juzgada recaída en cuestiones incidentales puede ser invocada...”

In most civil law jurisdictions, decisions on preliminary questions, or issues of fact and law, have no res judicata effect. Under American and English law, it is a common law tradition. Our former European tradition too, issues being decided as a preliminary basis of the final order, have res judicata effect. This is named issue preclusion. Claim preclusion, that is our understanding of res judicata. Issue Preclusion is part of preliminary decision of fact and law on the res judicata. We have in France, in Germany, there is a clear point of view that preliminary questions will have never any binding effect with the other side. In Italy and France, there are sometimes some movement towards res judicata effect for those preliminary questions. Those standards

are not clear, and the modern tendencies in those countries run towards a clear claim preclusion, and have no issue preclusion.

Our rules are based on the continental understanding of *res judicata*. Only claim preclusion, and no issue preclusion. But issue preclusion in cases where it would be against good faith, that a party argues in the second proceeding, in the contrary way it did from the first proceeding. It is a concession to the Anglo-American understanding. In cases where parties act in bad faith. In the common law tradition, this concession not to have issue preclusion is not too much, because in international cases, it is very difficult for the judge who does not know the forum law exactly to decide on this code of a possible issue preclusion. The decision on acknowledgment of a French judgment, and an American federal court of appeals decided that the French judgment should create issue preclusion, and this decision was very much criticized in the states because it really is not possible for American courts to characterize the scope of issue preclusion, therefore this compromise could be accepted by, in my opinion, by civil and common law countries.

A classic case of issue preclusion where the same parties are involved is where an injunction is sought to prevent impairment of a property interest because of water or air pollution. It is found that the defendant's activities were a violation of the property interests of the plaintiff. Then, later on, there is a lawsuit for the damages suffered thereafter. It would be said that, the previous cases not claim preclusion, because it was limited to an injunction, but the determination there was improper effluent would be a matter of issue preclusion. The idea can apply when the parties are the same. Another kind of case is when, a series of contractual obligations are involved. A famous case involved promissory notes where the claim was the issuing party had no authority. Later, someone sues on the next issue of notes.

This notion addressed in Principle 25.3, an idea that is essentially similar, namely, judicial estoppel is the term used in the United States. It is the idea that you cannot contend in a subsequent case, a proposition contradicted by what you were contending in another case. It is a branch of an idea of good faith. This is what we refer to as a concept of judicial estoppel in common law systems. In civil law systems, perhaps known as requirement of good faith. The idea is the same.

The sole concern is that we want the Principle and comment understood by readers in common law countries. The comment as they are will not meet the requirement. We need more convincing examples.

The international relationship and the problem of foreign law is a familiar problem in international law, and is well known. What is the law applicable to the preliminary question? It is extremely difficult. The main question is governed by another law. The concept of issue preclusion, apart from the sole example we have in mind, the SEC determination. Maybe the civil equivalent would be the situation of a judge who has to decide a question of estate, and in order to find the solution, he has to determine as a preliminary question, the question of affiliation, father and son and so forth. He has to determine first whether the parents were married or not, and you can go on that way with the connected questions in the reasoning. It is quite possible that the decision of the judge in the preliminary issue is not binding. If the same question arises in a claim, in a suit, it may be decided in a different way. In other words, the *res judicata* principle does not apply to the determination which is absolutely necessary to reach a final result, but one that is made on one or several of these preliminary questions. This seems to be different

from the idea of judicial estoppel. This determination is not binding for the parties or the judge. The same judge having to decide it as a main issue in another proceeding, may have to come to a different decision, subject to principle of good faith.

In Australia, it is called issue estoppel, but is applied strictly between parties. It can only apply as between parties in subsequent proceedings. There is also a doctrine of estoppel, which is based on an English decision, but also precludes a party from raising an issue in a later issue not raised in a previous proceeding between the parties, and could have been raised, which the court feels should have been raised. The opening part of Principle 25.3 would be regarded adversely by most Australian lawyers, but most Australian judges would find their way via the exception to apply their notions derived from previous experience.

The same can be seen in Japan. In Japan, we accept the German legal system, so in provisions, the fact of the *res judicata* very narrowly prescribed. But, some scholars developed the so called issue preclusion, like in the United States. In a case, our Supreme Court declared that it would not accept that doctrine, but afterward, in a case, the Supreme Court of Japan decided on the so-called good faith, to reject the same kind of cases. But in each case, the point was not decided by the former tribunals, but it was the potential issues, not decided. In this case, the Japanese Supreme Court said this was against good faith, and it was rejected.

What is considered “preliminary issues” in civil law system are called “necessary steps” in common law systems. Necessary steps for the final decision can be binding. This is what is called issue preclusion. Last year, we discussed this under the example of a bus accident where passenger A brings an action that would be binding to B. This example and more information about it is in the Secretary Report on pages 58 and 59. We also discussed about the incidental declaratory judgment, where the party expressly asks for incidental declaratory judgment.

The idea of issue preclusion can be understood in Argentina. Professor Diez Picasso talks about estoppel in substantive law, but we apply the same concept in procedure. If this is my own act, I cannot go against myself. This is very understandable for us and we use this concept a lot.

We all understand now the differences in *res judicata* doctrine. Principles 25.1 and 25.2 are acceptable. Principle 25.1 is a concession of the common law countries, because their understanding of claim preclusion is broader. And, in the civil law countries, 25.3 is acceptable. Maybe we should not say estoppel, even in the comments. In the English language, instead of issue preclusion, you have issue estoppel, and collateral estoppel and so on. That can be too broad understanding. For civil law countries, Principle 25.3 is a concession and acceptable when you say one person, one word, good faith. That is a more narrow understanding of the estoppel doctrine, and not so broad. We should give reference to the doctrine of good faith, that would be more acceptable.

We should state affirmatively in 25.3, the concept of good faith or estoppel. We should explain in the comment that this is not the same as common law collateral estoppel or issue preclusion. Though, there is some overlap, under the civil law concept of good faith, you would conclude the parties should not be allowed to dispute the family relationship. Though, that conclusion addressed in terms of issue preclusion, would arrive in the same result. So, if we put it affirmatively then put something in the comment to explain about issue preclusion, we would have some discussion.

Coming on to the vexed question of Principle 25.3, I think I would support Hazard if I understand his suggestion, which is that we've heard so much, not necessarily hostility, but skepticism, and lack of understanding and comfort with the notion of issue preclusion from civil law representatives, that it might be sensible in fact to retreat, and to place the concept of issue preclusion in the commentary, so far as the principles are concerned. I think this concept of issue preclusion is a valuable one, and I predict in 30 and 40 years time, it will be regarded as an indispensable aspect of a civilized system. The notion of issue estoppel can be connected with the concept of good faith. We can also refer to this notion in the context of finality or it can be introduced to the commentary, because it is closely connected to the notion of *res judicata*. We could also have a Rule concerning issue preclusion. We could legitimately formulate a rule governing issue preclusion.

It would be important to have it in the Principles, however, because it is an important issue in international litigation. The fact that it cannot be understood easily is not a reason not to address it. The fact that people do not understand means we have to educate them, not that we have simply to delete the proposal.

We should work to try to express a notion of good faith, or estoppel arising from positions taken in litigation, in one litigation as being determinative or influential at any rate, on a party's rights in a second litigation. That problem is very common. We should try to work out something in the conceptual, terminological approach of the civil law.

In Principle 25.1, in the second line, we can delete the word "claims"; it seems to be superfluous. The core of it is in the reference to pleadings. In Principle 25.2, line two, if we could delete the words claims and defenses, the reference would be to the pleadings.

A member, however, was against this proposal of deleting the word "claims".

Principle 26 **Effective Enforcement**

This could eliminate the reference to enforcement from finality. We should leave the question of enforcement addressed only here and not earlier. Secondly, this is a very generally stated provision. We should not be more specific than this, because the mechanisms of enforcement are distinctly historical and specific to legal systems than other aspects.

On a question of terminology, do we really need effective and efficient, or do we keep one of these terms? It's difficult to translate into French.

It was said that in Spanish, they are not the same word, because effective is that have consequences: effect. Efficient, on the other hand is the effect, and in the more economic way. They are not similar words.

We can get rid of efficient, because if it's prompt, speedy, effective it will be efficient.

There is a small difference between Principle 26, which speaks of provisional remedy, judgment for money, judgment for injunction. Whereas in Principles 27.1 and 27.2 we only have final judgment or provisional remedy. No reference any longer to judgment for an injunction. Is that difference intentional or not?

It was answered that this was not the intention and “final judgment” means for money or for injunction. We do not need to make any distinction in any of these Principles, but it may be useful to keep reference to injunction. Classically, there was reluctance to recognize injunctions, and there should not be.

A member sought clarification that the scope for Principle 26. This Principle is concerned with the situation where the transnational dispute is adjudicated in one country, then this country, is required to make available effective enforcement. The question of the recognition and eventual enforcement of the judgment in another country, as I understood it, was a question we addressed slightly later in these principles. Last year, we dealt with the question under Principle 27, whether we should have in our principles a principle governing recognition and mutual enforcement of transnational judgment. The question is whether Principle 26 contemplates domestic enforcement of a transnational judgment or is it broader than that?

It was answered that it was primarily domestic, but of course, whatever your domestic rules are will influence the capacity to enforce someone else’s.

Principle 27 **Recognition**

Does Principle 27.1 mean that the judgment given or pronounced under these principles will really be treated like the other judgments or provisional remedies of the forum? It would go very far, further than the European Community regulation at the Brussels convention. There would be no restriction of public policy, or the other ones in Principle 27, of the Brussels convention. It seems very liberal, even in the European community, and this is very surprising.

Principle 27.1 says in the forum and other states, what is actually intended by that? Why should it not be recognized in the forum provided recognition of your domestic award...it is a domestic award and therefore. Anyway, you may of course address the forum. The state, forum situated in a state that has adopted these rules, but if you then go on and say “and other states” how can I, State A, by adopting the Principles, find the behavior of other states that have not adopted it?

To get rid of the last 3 words would make no sense whatsoever. With the 3 words added the idea is perhaps not very clearly conveyed, that the mere fact you have rendered the judgment on the basis of your principles may not constitute the ground of refusal. Here, this goes, a bit far because it says “if you adopt, render a judgment under these principles, forget about any possible defect of procedure that may well occur under these principles.”

Why in 27.2 did we make special reference to denial of recognition on procedural grounds? It seems anomalous.

It was answered that it would be good to say that a procedure which was led under this principle has the advantage that it meets an international standard, so that the exception of infringement of public policy on procedural grounds could not be made because this principle covers all necessary standards. That was the idea.

Is correct the interpretation of Principle 27.2 in thinking that the intention is to say you should not deny recognition to a final judgment of a provisional remedy for the reason that it has been conducted in accordance with these principles, rather than on the basis of some national or other system of procedure? Is that the intention? In order to protect judgments given on the basis of the transnational principles, you found it necessary to add this, which might otherwise seem to go without saying.

It was answered that that was not the correct interpretation of Principle 27.2.

The formulation of Principle 27.2 could be better, and we should improve it. We must say that, if a concrete procedure has fulfilled all requirements of our principles, there is no good cause or reason to refuse recognition and enforcement. But, in a concrete procedure there are errors. There may be a very good chance of this. The refusal of recognition, etc.

We are trying to give to a judgment under these principles the same judgment rendered by the normal state procedure. This is not difficult to accept. If that proposition is expressed, we take out the word "and other states." Then the next question is, is it nevertheless appropriate for a national state to refuse recognition of a judgment rendered under these Principles where the subject matter of the judgment is one that offends national policy? One that is very hot these days in the United States is a judgment declaring validity of a same-sex marriage. Is that required to be recognized in Utah? European law permits a state to refuse recognition to something that is contrary to public policy. It is the obverse of the point that we were getting at. The fact it was rendered by a procedure under these principles that is not the same as domestic procedure is not a reason of public policy. But, that does not exclude the possibility that there might be other questions of public order that might be legitimate.

There are two reasons that are exceptions to public policy. Procedural mistakes, and reasons based on substantive law. And, if a procedure fulfills all requirements of our Principles, there should be no reason for a state not to accept a judgment because of procedural reasons.

Maybe a way of putting that is "it should not be denied recognition on the ground of public policy or order".

There seems to be a certain amount of misunderstanding. It seems that everyone had agreed that the mere fact the decision was rendered by application of the transnational principles could not constitute reason for refusing recognition. Different question is the one of public policy. In that context, the experience of the Hague conference of international law is useful. It has always been a discussion in private international law, if there is no mention of public policy in a treaty, like the Hague conference treaties, a state could invoke public policy or not. Most of the Hague conventions refer to public policy in order to restrict the concept, manifestly against public policy, and so and so forth. Even if there is no mention or restriction of public policy in an international treaty, public policy must be interpreted in a more restrictive way in light of the existence of the treaty, and its more restrictive. The same reasoning should apply to the transnational principles. In other words, even if there is no restriction of public policy in the transnational principles, we cannot exclude the possibility that the given state may invoke its procedural public policy. But if that state has accepted the Transnational Principles, its public policy must be interpreted in a narrow way in keeping with the general principles.

We could say that public policy should be interpreted in the light of the Principles. That would be a better wording.

It is universally agreed in comparative public international law, that the concept of public policy is two fold. One is substantive and the other is procedural. But there are no two different procedural public policies. In treaties or adoption of model law, it is clear practice that the concept of public policy should be interpreted in a particularly narrow manner, in keeping with the objective of the treaty or model law, or in that case, transnational principles.

The substantive or public issue is outside the scope of these rules, and cannot but be outside. While, reference was made to decisions recognizing, marriage between two men or women, even if such a judgment was rendered under your principles, State B may propose that this decision is not recognized.

We agree that the wording of 27.1 should be improved, and that recognition is the wrong term, for the standing of the judgment, its forum. But we should not strike out "other states" because our principles are broader than the European Convention. All states, not just the forum, should give the judgments the same standing, as other judgments.

It may not be a good thing to put in the same paragraph "in the forum and other states." It is not the same problem or question. You can speak of recognition in the forum, then you must speak of recognition and eventually enforcement in other states. So it is not the same provision. It cannot be the same provision. Secondly, we mean we should have a broad recognition of these judgments, and the principles. But lets set an example. You have a dispute regarding Italy, Germany. What do the courts of these countries will do? Will they apply the EC regulation, or Brussels convention, to have a look at the recognition and enforcement conditions? Will they apply a principle 27.1, and if they apply the Brussels Convention, then you have the reservation of the other republics.

The point was well taken. If you keep in mind the object of these provisions, which are supposed to help the general recognition of the transnational principles, there is no reason where we should make it clear where the problem of recognition will arise. Why not delete the words "in the forum and other states" all together? The problem of recognition may rise in different countries and circumstances. The purpose of this provision makes it necessary to make it precise where the problem will arise.

This would be a very elegant solution, however we would still exceed our powers. How can we, in drafting these Principles, which are intended not to be adopted by treaty, among states, but unilaterally among states, how can State A bind the course of action of States B, C, D. Since they may well not adopt ou Principles. It is more or less useless. If a country adopts these principles, and say all the states in the world must recognize a decision rendered here, state B and C may well say you can put in your act what you wish, I will treat your decisions...perhaps an objection refers to the word "must." One should say should or it is desirable, or that sort of thing. But "must" is rather strong.

It was answered that the way this provision has been interpreted is the mirror image of the way it is supposed to be interpreted. It is not that a country that adopts this Principle will say that other countries will accept my decision as they accept their decision. It is the opposite. When a country accept this Project, it accepts your decision as it accept its own decisions. It is the opposite, not one country will have binding affect to

others, but will accept what you are doing abroad. We have to write in a different way to make sure that this misunderstanding will not continue.

Let us take a look at Principles 26 and 27.1 together. Principle 26 makes requirements of efficient enforcement. Principle 27.1 is a principle of equal treatment. Both are principles of domestic law concerning judgments rendered under these principles, and they ought to be together, rather than separated. We are talking about effective and equal recognition. Then we get to Principle 27.2, which is the question of the extent to which a judgment of forum A is to be given recognition in forum B. The recognition, may be denied, but not on the ground that the procedure, was discrepant from the domestic procedure if it was in accordance with these principles. That is a maladroit way to express it, but that's the substance of it. That does not exclude recognition, denial of recognition for some other public policy reason. I would avoid the term "substantive" because we do not know the characterization. If the rendition procedure conformed to these Principles, that is a basis to immunize it from non-recognition on the ground that the procedure differed from the domestic forum. If that is correct, we will have some serious work to do in expressing these ideas, but we are clear on what the ideas are. We should recast Principle 27.1 and move it up in parallel with Principle 26, under a separate provision headed "recognition" that addresses the problem we handled in 27.2.

The question arises with what is one comparing this process of recognition. Clearly, at the moment we have not got the wording right, because it refers to recognition in the relevant forum. When it generates one of its own decisions, there is not a process of recognition of one of its own decisions. The process of according equal treatment must refer to recognition of a decision made outside the relevant forum.

There are two kinds of equality. One is equality of domestic judgments rendered under this procedure, and that under the nation's normal procedure. The second problem of fair treatment is that of a foreign state judgment. We are saying something here about the fact the foreign state judgment was rendered according to these Principles, as having effect as to the extent or basis of recognition in a second forum. So, we might want to say rendition of a judgment rendered in another state in a procedure conforming to these principles, is, or may not be denied recognition, in the forum.

Principle 28

International Judicial Cooperation.

In the second to last line, "provisional relief or assisting" ought to say "and assisting." It is a very general provision, it expresses the same policy as the Hague convention on cooperation, and recognizes that further work needs to be done, but it is going to be slow going given present sentiment. In the long run there has to be better cooperation. One of the encouraging things is a very encouraging cooperation between the insolvency proceedings between Mexico, US, and Canada. Including Canada Ontario, Anglophone, Canada Quebec, Francophone. It is a consequence of what started out as a private project by the ALI. The Mexican bankruptcy law has been amended to reflect an authority to engage in cooperation. The American law on that subject has been interpreted more liberally as a result of the encouragement of that project, and the

Canadians have been terrific. Perhaps piecemeal we are getting in the direction we should be.

We say in line 1, “courts of a state that recognized these principles.” Are we clear in our own minds as to what recognition means for these purposes? Should not we broaden it to say “the courts of a state that has adopted, recognized or employed these principles”? Any state that has had anything to do on its own soil with the application of these principles is then stuck, it has to cooperate. Given the vagueness of this principle, that is a not unreasonable obligation for that state then to assume.

In the last line, we say “production of evidence”. We should make clear that evidence is not confined to any particular type of evidence; it includes documentary and any other type. Perhaps that is unnecessary because it was taken care of in Principle 13. The word “must” is a bit strong and there is no possible sanction if it does not happen. It is a wish and we do not know if it will work or not.

We should also add that judges are allowed to talk informally with other judges in other countries, such as a phone call, for example. I think we decided to have such a principle. Maybe this is the place to have it.

Maybe we can make that statement in a comment, but when we do, we should say something like “consistent with rules concerning communication outside the presence of parties or the representatives.” This business of ex parte communications is very tricky, and so if we just put it in those general terms, we can put it in the comment.

RULES

Given the fact that there would not be enough time to go over all Rules, the Working Group decided, under the invitation of the Reporters, to identify specific Rules that the members found particularly troublesome to give priorities to those for the guidance of the reporters.

Another member suggested that we should look quickly through all the rules, without going through the depth of the problem, just to indicate to the Reporters, preliminary reactions in a superficial, rapid, preliminary way. We should discuss any important point, but we should not discuss minutiae at this opportunity. A corollary is that the speaker is the one who decides its an important point or minutiae.

Rule 1

Standards of Interpretation

The first Rule is the standard of interpretation. It makes two basic points. First, that the rules, which are an example, should be interpreted in terms of the Principles. Also, otherwise the rules of the forum obtained. Perhaps it would be useful under the heading of these Rules to state explicitly that they are an example, so that our purpose in that respect is very clear.

It was suggested that the designation of the Rules as an example of the Principles should be a preamble.

In this Principle, we are providing an interpretive mandate. The first part of the English procedural rules is essentially an interpretive mechanism, with certain procedural aims.

The verb to fulfill the purposes is very strong. They are incapable of achieving it, except in a perfect, ideal world. A member suggested “promote.”

Rule 2

Disputes to Which These Rules Apply

We could have a very general statement of scope, something like, “these shall apply to disputes arising from transnational commercial transactions defined as follows:” so we are only indicating the general subject matter in this rule, and restricting every adopting jurisdiction to provide specification in terms of local law. We have found a lot of difficulty, in any formulation of specification, for obvious reasons. And, one way to avoid that problem is to simply say, to predict that every national system will want to make small adjustments, therefore we can do it that way. We could delete Principles 2.1.1 and 2.1.2.

However, the idea of 2.2 is an important one and we need to have to explain how one would deal with that problem and we could incorporate Principle 2.3 into that section. The first section would be transnational commercial transaction, including the following but excluding the following. The second section would be Principle 2.2 as approximately as it is now.

The comments could provide some examples of possible scope definitions. We could also give scope to the possibility that parties themselves may opt in, and whether this should not be explicitly indicated as a possible criterion in the comments.

A member agreed with that suggestion. One of the main practical uses of these rules is precisely based on the idea that parties to international arbitration are generally free to choose whatever kind of procedure they want.

Another member however was against. It is possible to take these Rules as the basis for arbitration procedures, but in no country you can elect procedural rules over state courts. It is a strange idea to do this. Therefore, we should reconsider this.

We should consider deleting the word “transnational” from the second sentence of 2.3, so as to maximize the opportunity for the forum to apply these Rules in an expansive way.

Rule 3

Forum and Venue

The word “venue” is extremely difficult to translate.

We should avoid the term “venue.” We could use “territorial competence” and put in the comment that this is the equivalent to common law, the concept of venue. The reason to do that is otherwise, some American lawyers would read territorial competence

equivalent to subject matter jurisdiction, with all the ugly consequences which follow from that.

Another member, however, was against the change. The word in English is venue. We should use the correct word in English and in the comment explain what it is. The word should be adequately translated as “territorial competence”. There is no problem in translating it.

However, some other common law countries use the word competence too.

Rule 4

Jurisdiction Over Parties

Jurisdiction over parties gets us into disputes at the Hague Conference. It was suggested at the ALI that we should not address that subject at all. We should simply refer to forum law, including conventions and treaties, and just skip it, because it will get you into difficulties that we do not need. If we did this, that is, essentially, avoid the problem of jurisdiction, it would be a much shorter rule and would refer to domestic law. Those are alternatives. It would mean wiping out all this, perhaps putting some of it in a comment. It would leave the additional problem addressed in Principles 4.5 and 4.6. So, it would have very short provisions.

It is possible to avoid these provisions, but it will be very helpful for realizing harmonized procedures, if not this one, and only the suggestion of the treaties or foreign law, it is very difficult to realize. The jurisdiction is the fastest, the problem is the first step to litigate in foreign countries, and it is very useful to give information here, but there are many different positions on this matter. Maybe there is no provision in many countries relating to jurisdiction, and it is helpful to say something here. Many countries, for example in Japan, we do not have provisions relating to jurisdiction. We only have law, based on the case law. So, it must be very helpful to establish some kind of general provisions.

Maybe there is a misunderstanding in this respect. Should we just withdraw here, lay down autonomous rules of jurisdiction on the understanding that it can hardly be your task to interfere with existing law and practices of each in any case. This, however, would not be understood to the effect that once State A enacts these rules, it will not have to be explicit about these Principles and Rules it considers to be appropriate. If Japan adopts these Rules, it is very likely that Japanese legislature will indicate these Rules and not refer to existing law, so a foreigner will still be a bit in the dark. We here on an international level will refrain from interfering with this subject matter.

A member considered it not convincing to make a Principle on jurisdiction, and also say nothing on jurisdiction in the more detailed Rules. The present draft could be accepted by every one, including by the Americans. We have no double convention, only Rules, these forms of jurisdiction are very acceptable and there is no exorbitant or extraordinary jurisdiction. We could say it is up to the States to add other forms of jurisdiction. But this can be the more fundamental forms of jurisdictions.

On the level of general legal theory does the group or the Reporters consider it is necessary for these Rules, and their success, to have an article or provision on

jurisdiction? If it is not really necessary or indispensable for the success of these Rules, a preliminary reaction would have been it is politically safer to say nothing.

It would obviously eliminate a subject of controversy. It brings in mind a famous American movie where they are negotiating a contract. The parties start with this long contract, and one says this is a bit controversial the other says it is a little controversial and they begin cutting parts of the contract that are controversial. Pretty soon the contract had only the names of the parties.

A member would rather have this Principle in the project. It is controversial, but maybe we could say, in the comment, there is ongoing work in the direction of an international convention and so on. These are sound principles, and they are better than American decisional law has arrived at in the course of our history. The Supreme Court has made the law, and it shifts back and forth and is usually badly written. This is good stuff. We should rather leave it as is and get to a dispute later on. In the comment, we refer to the endeavors through the Hague Convention.

In a number of systems, questions of jurisdiction, and especially international jurisdiction, do not belong to the narrow feet of procedure.

However, it was answered that while international jurisdiction is not part of the traditional civil procedure, we are dealing in this project with transnational procedure. In the transnational litigation, it is necessary to consider the jurisdiction, first of all. We have to say something for realizing the harmonized procedures. Maybe some suggestions will be very helpful for lawyers if that lawyer wants to litigate in the following countries. In many cases the lawyer cannot have information relating to the jurisdictions of other systems. It will be helpful to say something here. On the other hand, of course, the Hague convention is going on, but we do not know what the future of that is. It is one of the things to consider, but not all. We have to consider separate reform at that point. We have to consider how to realize, harmonize the procedures.

When the governing council first discussed the possibility of such an exciting joint venture, of which the ALI's interest was extremely great. Immediately the question was raised, "what about the relationship between this project and the work going on, process to be accomplished by the Hague conference?" As an international organization, UNIDROIT is very sensitive to this policy issue. As far as I can remember, it was made very clear that this was so to say intended to fill in the vacuum between two cornerstones: jurisdiction on the one hand, recognition and enforcement on the other. In other words, in between lies your field of action, while these cornerstones have two sides and should be left to the Hague conference or other similar organizations.

We should worry about the political acceptance of our project. If we have too many rules, it can be dangerous and not useful. If the Hague convention is going to be adopted, it will not be useful anymore. In Europe, we already have EC regulations. We are not sure whether it is politically indicated to do it. The European Commission too, is very worried about Rules and Principles about jurisdiction about recognition in our project.

At the time the proposal was made to UNIDROIT, we were quite optimistic about the results in the Hague negotiations and that optimism has come and gone. We can leave essentially these Rules here. Or we can delete it, and simply say we defer to the Hague. We could print these either with a bracket or let us say, in italics or both, say these were

developed in the project but we recognize the alternative processes, etc etc. It is a little unusual but it is an alternative.

The group agreed that the Principle on Jurisdiction will continue in the Project conditioned to the development of the negotiation in the Hague.

A member suggested to put in Principle 4.6.1 the following “should decline to accept jurisdiction unless they have a compelling reason not to do so if another forum was decided by the parties”. We should put something with validity. For example, in consumer cases, some countries do not allow such agreements.

A member considered that we should delete the word *societe anonyme* no one will understand that this is now becoming a term of art in the United States.

Principle 5

Joinder of Parties or Claim; Intervention

The group already had extensive discussion of the problems of joinder of parties, and, recognized that there that particulars of Rules, of various systems are somewhat different, we should begin, with perhaps a comment that makes that even more clear than we thought we did.

Concepts of joinder need to be stated generally to recognize the fact that somewhat different terminology is used in various systems. The operative effect of the provisions in various systems is quite similar. The idea of right of intervention, and the obligation to bring in a party whose participation would facilitate resolution of the main dispute. Those are two basic ideas and we would be pleased to have any suggestions.

It was said that this Rule is almost a copy of the Principle. There should be a division of labor between the Principles and the Rules. There is no need for repetition here.

A member answered that it is true that that part of the text may be nearly the same, but in the Rules, when we say something on summoning or so on, it is more detailed in my opinion. It is no argument against a Rule on joinder that it is in some parts the same as the Principle. It is more detailed, and technical, here. But, that is a general problem. You could say that always when we have a Principle we should not repeat it in the Rules. But, it is not possible to draft Principles without repeating them in part in the Rules.

Another member echoed the criticism to the overlap between Principle and Rule. Another reason is that it will be extremely difficult to synchronize changes. We had made a lot of changes in Principle 15. If for some reason we forget and do not make them in the Rule, things might get complicated. The division of labor, this is important for the discussion of the relationship between principles and rules.

Also, the aesthetics of the entire project is compromised. Repetition *prima facie* is wrong. One can make that more positively. The Principles represent the higher level of abstraction. The Rules represent the concrete, more detailed implementation of these Principles. Whenever possible, we should avoid verbatim repetition. It will spoil the eventual product.

This is surely a test case. It is the first time we are confronted with the problem of the relationship of the Principle and the Rule. Therefore, it warrants serious discussion. It

would be wrong not to say anything in the Rules. It would also be wrong to repeat. This point is important, and it is more than aesthetics. The Rules should be much more detailed and practical. The question of level of abstraction is extremely important. It is a difficult task, but we have to be extremely careful, here and later on. The whole credibility of the project is at stake here. If we just repeat the Principles, it will diminish the credibility and acceptability of both the Principles and the Rules.

This is a broader concern of the utmost importance. The first part of the Rules mean the same, more or less, as the Principles. Only when we describe the sequences of the proceedings, for example, we have new viewpoints and Rules. We have a lot of repetition in the disputes to which the project apply, jurisdiction over parties. Joinder, for example, is totally the same. Amicus curiae submission is also a repetition. The first part of the Rules is not necessary at all. The Rules are a description of the ongoing procedure with some details. For example, at the beginning, venue. We do not have it in the principles. And then details about the notice, because it is not as detailed in the Principles as they are in the Rules. Then, general authority of the court, we already have it. We must think of the question of relationship and content of the Rules. This is a very important issue.

The rules on joinder should be more detailed, because it is clear that a judge could not work on Principles on joinder. The judge would not know what to do as parties do, and the consequence should be the Rules should be more detailed describing the differentiations between third party claims, intervention and so on. We could discuss this, but to say nothing in the Rules, which should be the more detailed code, as an example to implement the Principles, that would not be very helpful. To strike all out in the Principles would also be a bad solution because the Principles have a better chance to be accepted in the more detailed rules. The consequence would be to make a more detailed ruling on joinder and intervention.

A member said that this is not the point. What has been the focus of the debate so far was that there should not be repetition in the Principles and Rules.

There are Principles that can be directly applied. We do not need some more detailed Rules. It depends on the case. For joinder, for example, while we have a principle that states many important issues, the judge can decide how impractical he will apply these principles. It does not mean necessarily we need more detailed rules. Principles and Rules are a pact. If you need more details on this or that point, you can have the Rules.

To understand the Rules is necessary to go back to the Principles. It is a question of understanding. You can say the Principles are the more common, and all over the world acceptable basis, and the code is an implementation in a sense that it is a complete code. Therefore, the Rules should be understandable by itself, and that would say indeed, be some repetition. The French Code are repeated always in each chapter. There are always rules, special rules repeating. We cannot avoid this.

We are not here to make a complete code of procedure. In the particular case of joinder, there is nothing against detailed rules. However, in certain other cases, there is no need to elaborate a certain Principle or Rule. Interpretation by judges will certainly be possible and useful.

We are really discussing the relationship between Principles and Rules. Under the suggestion that the code must be standing alone, and autonomous, we should know what

we should repeat and what we should not repeat. Should we repeat every Principle in the Rules? What rule should we repeat and what does it mean when we do that? People will ask, why is this rule about joinder repeated. Why was it literally repeated? And why other rules, like prompt rendition of justice, or due process, or due notice, are not repeated? What is the message we are sending?

We should think about two things. One, the political or constitutional mechanism of adoption. For the Principles on the one hand and the Rules on the other. If a national state could well adopt the Principles, but without adopting most of the Rules, what would they be doing? What they would be doing is essentially saying as a matter of internal administration, we need to check out our code to see whether there are discrepancies in it from the Principles. For example, the idea that third persons could submit background information, the *amicus curiae*. Some legal systems say we do not have that. But, the Principles say we probably should, so maybe we ought to consider adopting that rule, because in that respect we are discrepant. In international litigation, we are not realizing the benefits that could result from this kind of procedure. The court does not have to read or accept it. It is a mechanism that might help. So, we then think about the next thing. On the relations of Principles and Rules, that is an illustration of the fact that some of the Principles call for mechanisms that are either unfamiliar or are alien to a local system. Let us take an example of the court responsibility of management of a case. That is the essence of the civil law system—the judge runs the case. Advocates have rights and contribute, but that is how it works. That is now the rule in England. It has become effectively the rule in most American states. Not so much because of any formal direction, but rather, out of sheer necessity, particularly with urban dockets with thousands of cases. You have presiding judges who are managing complex traffic systems. You have complex cases that simply need direction.

The Principles, if they are adopted in some of the states of the United States, the court will say, you should have a more explicit recognition of the responsibility to manage. We have some judges who still think all they are supposed to do is sit there and wait for the advocates to do something. That rule as applied to that locality is a novel rule. From the point of view of a system that did not have that, it means they have to go beyond the Principles and look at their rules to have a specific adoption. That is possible here for any civil law mechanism that they are recommending, such as the appointment of experts by the court. That is a fundamental rule in civil law, but it is unusual to put it mildly in American common law. The right of parties to appoint an expert, even though the court also appointed an expert is another example. Or if you have a concept of the common law that is somewhat unusual in the civil law.

We cannot generalize between the relationship of Principles and Rules because the Principles are absorbing concepts and approaches from two legal systems. Anytime it absorbs something from the civil law, it will require implementation of rules in the common law system, and reverse. What is the relation? It is complicated. You cannot state any generally applicable proposition. It is also for the same reason useful to have a code of rules from the point of view of this project, as an implementation of this principle. So that a legal system that acknowledges a principle has some place to go in terms of language of a rule. So, now, we have to visualize it in this complicated way, that on the joinder thing, once we have revised the principle to more general terms, this rule will be about the right level of generality for a rule.

The consequence should not be that we make so general principles that they are worthless. If we say the Rules are the more detailed work, and for example here, we have a more detailed relation within the code of rules, and we generalize the Principles, it could be that the Principle, which has a good chance to be adopted, could be so general that it is nearly worthless. That will be the consequence.

There are two possible problems, due to the close relationship of procedural joinder, and substantive civil law. And, that is quite a delicate problem, which we all can appreciate. In Rule 5.3, we say in the second sentence, if the intervention does not unduly delay or if the intervention will not prejudice the determination of the rights of the parties”. This, however, may seem to lead us to, within the substantive private law. We could conceive cases in which intervention necessarily will prejudice determination of the rights insofar as the applicable substantive law so provides. We can make a somewhat similar remark about Rule 5.4 and this remark borders on an objection. An additional party has the same rights and obligations. Is that in full harmony with the distinction of the two kinds of intervention we mentioned in the debate about Principle 15? There is the main intervention and the accessory intervention, it may well be that the intervenor does not have the same procedural and substantive right. That is just the question to which we do not know the answer. But we should discuss that.

The idea behind the prejudice to the determination, in a sense, the whole point of allowing another party in is it may shape the way the adjudication would proceed, but for his participation. To the extent that it will result in less advantage, you could say it is prejudiced. We then get to the question of “unfairly prejudiced” —which is oxymoronic because if it is unfair it is prejudicial. It is fundamentally insoluble, if you have an additional party that of itself makes some difference. And on this business about same rights, we have to, maybe something like within the, scope of the intervention, so to suggest it could be done...

We can certainly conceive of situations in which the additional party has limited rights of participation.

It could be that it is not possible to describe in a more general way, the rights of a party for different forms of third party participation. It could be, for example, the third party defendant should have the same rights as each party has, but a person voluntarily intervening at a late time cannot have the same rights, for example. That is the difference. We should consider, whether we should say nothing in our Rules, or to say in a more detailed way.

It should be correct.

Perhaps we cannot deal with this problem in ten sentences, perhaps. We should do it in a more detailed way when we do it.

Rule 6

Amicus Curiae Submission

A member disagreed that any person may submit a written submission to the court. Is not this going a little too far for civil law countries? This is demanding something too much, it is a great subject of debate in civil law countries, whether any person may bring an action without an interest. Mutatis Mutandis, the same consideration

applies here. Do we mean any person without any real interest may present an *amicus curiae* brief? We would think in certain systems this would be totally unacceptable. Unless those systems do not have this Rule, this problem has evolved a lot in the decades.

This Principle is a mere repetition with different words of Principle 16.6. We should try to find one version. Here we have the problem of what is a Principle and what is a Rule. There does not seem to be any difference, only one with more details. It is really the same. Do we really need this Rule, or shall we be satisfied and content with Principle 16.6? We should have this debate.

A member preferred the wording of Principle 16.6.

We need to have a preamble or something that is much more explicit about the relationship of the Principles and the Rules. Speaking to the point above, one way to solve the concern is to make the first sentence in the passive voice, a written submission may be submitted, leaving it very vague. Maybe in the comment we would say this is not commencement of the action, but rather an intended or purported contribution to the subject matter of an action to which the parties have a proper legal interest, which would negate the idea of creating a new opportunity for parties to seek declarations from the court.

It is possible for a country to accept the Principles and not the Rules. It is not possible to do the reverse. This either is a Principle or a Rule, and it is not possible to be both. Why to repeat? The *amicus curiae* in the Rules and in the Principles are more or less the same. If we think this formulation is better, we put this in the Principle, and that is all. We do not repeat this in the Rules. A lawyer cannot understand the repetition.

Starting from a particular instance, the level of abstraction increases and we end up where we were before. Should it be possible, to adopt only the Rules without the Principles?

It was answered that, in theory, a sovereign country can do anything. However, it is not advisable to adopt the Rules without the Principles, while the opposite is quite acceptable.

A developed legal system might want to embrace the Principles, then asks what do we do with our code of civil procedure given our adoption of Principles. How you as a legislator of Argentina would proceed. What would we do if you were in China, and you were confronting a recommendation you adopt a civil procedure system that would be regarded with favor by Western business interests. What would you do? Well, you would like to have the Rules, because they are more detailed.

There are several mechanical ways to deal with it. One, we need to have an essay by the Reporters about this problem of implementation. Another way to do this would be to have the Principles has the basic format, and to have Rules, particularly when they are different in detail and content, as it were, located in the same position as the comments now are, and saying, a way to implement these Principles would be as follows.

Rules are necessary, but Rules must say something different from the Principles. For example, with *amicus curiae*, Principles are enough. We do not need Rule 6, because it says the same thing. But we need Rules for other matters because Principles are not enough to be applied. But, we cannot repeat it, because, either it is a principle or it is a Rule. It cannot be both in the same time in the same words, as it is in this case.

What is the significance if we state the Principle of *amicus curiae*, and then you state a Rule in different language? What do you make of either one?

It seems there are two different points of view. Our own points of view as quasi-legislators: we are proposing Rules and Principles. That is one side. The other one is that those states that may accept either the Principles or the Rules or both. Their position is entirely different. We are not enacting a treaty or legislating in our own way. Our own point of view tries to take into account the possible reception or point of view of the other side. We should not confuse the two. The beneficiaries, the states, courts who may decide to accept or not are totally free to do whatever they like with that. They may even accept rules without the principles. We cannot change any of that. To come to a concrete conclusion, there is no difficulty. The fact we would propose Rules that repeat the Principles in more details seems to be more or less inevitable. However, there must be more details, nor simple repetition.

We must accept the fact that in certain countries, they may abstain from formally accepting the Principles, or Rules, or vice versa. There is nothing we can do against that. Our problem is to propose Rules and Principles which are consistent, coherent useful, and practical.

It is inconceivable that a state could act responsibly by adopting Rules without adopting Principles. It is not impossible to do that but would be intellectually strange to do. But we can say that in our Project, the Principles are an intellectual and logical step and basis for the Rules. If a country does not understand and adopts only the Rules, we cannot avoid that.

What we mean about repetition, we mean substantive repetition. It is a question of detail. We should, if we repeat the contents of an individual Principle in the Rule, we should avoid verbatim repetition.

The Rules should precisely follow the ongoing Procedure. Maybe it would mean we need a new sequence and structure. We can begin with the first part on preliminary conditions as application of the role, scope of applicability, forum, venue, jurisdiction, then we should follow, inference stage, final hearing. Why do we have *amicus curiae* submission in Rule 6? It belongs elsewhere in the proceeding. We need more practical rules with the structure of the proceeding. For *amicus curiae*, it should go in the part where it belongs.

Principles are the general matters, which can be accepted in many countries. But *amicus curiae* is something very special device...we think it must be very useful for the transnational litigations. There are many countries that do not have special civil procedure codes. In these countries, it is very useful to say something like that. Of course, many countries do not accept that, they may have freedom to choose, but in our Rules, if we think that *amicus curiae* is very useful for the transnational litigation, we should make some detailed provisions leading to that. But, in some countries, we have to consider some countries, in which the third person or party, outside powers have very strong influence on civil procedure. We have to avoid certain influences.

The principles should state generalities and the rules would implement the working out of those generalities in both substantive and mechanical ways.

Therefore, the *amicus curiae* rule would go on to say how the person would present the written submission, when should it be filed, notice to parties, how someone wishing to object receiving the written submission would make a notice of motion to the court to have it decided on an interlocutory basis. It is a much more complicated business

than that. The matter is a complex one for determination, and very material for the success to the entire project.

Another member did not think that the Rule should be limited to the mechanical implementation of a Principle. The use and purpose of a Rule goes much beyond the mechanics. It may welcome several substantive conditions. It applies to this particular case. Maybe Principle 16.6 should not be a Principle but a Rule. That is a question. In fact, the idea in Principle 16.6 that written submissions concerning written submissions may be received. If we turn to Rule 6, we wonder if a distinction should be introduced before the concept of important legal issues, and the interests of a person who should be allowed to present an *amicus curiae*. In the comment we make the distinction between intervention, which requires a legal interest. But, one wonders whether *Amicus Curiae* should be allowed only for people with an interest, short of a legal interest to intervene. But at least an interest, in the public sense, or something, connected with an important legal issue. We should not allow busybodies to present as a matter of principle an amicus brief.

What do we have in mind when talking about principles of transnational civil Procedure? Our understanding has been our Principles are certainly not intended to be only Principles only if generally accepted throughout the world. From the first day of our deliberations, we claim to be much more ambitious despite the ambiguous tone by the way it is becoming less and less ambiguous. There are perhaps existing national codes much less detailed than our Principles. We always stated Rules in our Principles, fairly detailed rules, even if they are a novelty. This was our intention and we can count on strong support from the Institute, though at the end of the day perhaps being still a set of rather broad rules, let us put the emphasis on Rules rather than Principles. Let us try to build into the Principles as much as possible. And the Rules we consider as just a possible version of implementation of the Principles. This too should perhaps be kept in mind, or otherwise inadvertently or not one might feel obliged to cut what is here and there, what you have carefully discussed in your Rules, to be more coherent. The Principles, whether only Principles or Rules should be kept in as much as possible as they exist now.

If we feel the Rules have to say more details, we should make special Rules. If we see that the Rules cannot say more than the Principles have already said, we can decide whether to repeat it in our Rules or not. This is a question that can be decided at the very end, whether we will repeat Principles within the Rules so they can be read right away or do we only give reference to the Principles. Sometimes our rules do not have enough detail. Take the joinder rule, for example. It may be that it is not possible to give a Rule, together on third party claims, the third party defendant should always have full possibility to defend, like a normal party. For voluntary intervention of a third person, this person has no full rights when it intervenes very late. Let us go on to discuss the contents of the Rules, and if you notice that the contents are not detailed enough, we should go on to work. If you notice there should not be a more detailed rule, we could repeat it or not, that is a question of aesthetics.

A member suggested to put *Amicus* later on in the project, in another Rule. However, a member disagreed because *amicus* is closely connected with intervention. It is not the same, but it is closely connected. Another member considered it different because it is closer to evidence. However, the discussion was out of focus. In the

common law practice, an *amicus* is not an intervenor, but also the brief is no evidence, but just information.

A more general question—do we in our Principles and Rules want to use Latin or not? That is a difficult one, but we could be accused of perpetuating an old fashioned terminology. There are very strong views in England where we have swept away a lot of latin. *Les Pendens* and *Res adjudicata*. But we could say that *amicus curiae* is an English word that tracks the Latin term. It seems that the recent English attempt to change its legal vocabulary of centuries is doomed to failure. Judges have said often the term *res ipsa loquitur* should be abandoned but every casebook and judge uses it. Now, many terms may have once have been Latin but are now also English, such as subpoena, *prima facie*. Innumerable terms are imbedded in the language, and we should not try to extract them like thumbs out of a pudding.

Judges and lawyers should not abuse Latin. It is not good for people because they read the judgments or contracts and they do not understand anything. But here, sometimes, Latin helps us because it is a common word we have. For example, *res judicata*, we all know what this is. On the other hand, there are some English words that are difficult for us. We need an equilibrium; when a word in Latin helps us, we must maintain it.

Rule 9

Composition of the Court

The idea of the composition of the court may be decided by the country. Each country will decide the composition of the court. This is the idea.

Rule 10

Independence and Impartiality of the Court

A member wondered if in the comment more detail should be given to the distinction and the disputed distinction between independence and impartiality, which has given rise to lots of decisions and articles, especially in connection with arbitration. Generally speaking, the prevailing view is that independence is more objective and impartiality is more subjective, but the two are closely connected.

There is a case before the Court of Human Rights in Strasburg, among many arguments, a chamber of the Swiss Supreme Court, decided on its own challenge, is criticized. It will be interesting to see what the Court of Human Rights will say. We launched a case against the government.

One is also brought in mind the Bush v. Gore controversy. But no one can think of a way to challenge the impartiality of the Supreme Court.

Rule 10 may be unnecessary. But if it supplies technical detail on the process of asserting a challenge concerning impartiality, then it is fine. It has such content. We said in the Principles that it will be the forum that devises such a rule. So, perhaps what we are now doing is slightly contradicting what we said in the Principle, because we are

ourselves providing a Rule. Prima facie unnecessary unless useful, technical detail is provided. Just check for correspondence between the principle and rule.

It looks like Principles 10.1 and 10.2 are clearly principle. The rest that is a matter of dispute. The rest is rather a rule in applying the principle.

Principle 11

Commencement of the Proceeding and Notice

What would be the right place for commencement of proceeding? The structure is first to discuss the competent court, then possible parties, then beginning of the proceeding. We have some rules as language, which could be postponed. Would we say this order of the sequences, is not the right one, or what should we do?

We are not committed to any particular sequence. We could do it differently.

Rule 12

Statement of Claim

Rule 12.3 seems to be made up of two sentences having different nature and purpose. The second part may not be useful or necessary. It seems obvious as it is drafted, it makes the ordinary reader smile.

It was answered, instead, that this is an important compromise with the American system of notice pleading.

Another question is whether this Rule repeats a Principle we have. Our Project is based on fact pleading, and we, say that the court needs detailed facts. For Anglo-American lawyers, that is unusual. Therefore, it should be possible to amend the factual assertions in a later stage of the proceeding. The court should not tell us the possibility to reject a claim because of a lack of detailed facts.

This Rule says that parties are sometimes allowed to assert very general facts, and in the course of the proceedings, they may deliver more detailed facts.

Perhaps to make clear we could bridge the point by saying something like, in connection with an objection that a pleading lacks sufficient detail, the court should consider the possibility... This shows what the connection is between this consideration and the requirement of detailed pleading.

We are reinventing the wheel. Principle 12.3, 2nd part, says when a party shows good cause for inability to provide sufficient specification of evidence, the courts should give due regard to the possibility that necessary facts and evidence will develop during the course of the proceedings. We are discussing what we had discussed before. This is one of the problems about repetition that we do not want to repeat here.

We can see our problem is not the rule says too much. It is it is not detailed and technical enough. We have more work than we thought we should have.

It may also mean that the Principle is too detailed, and part of it should be put in the Rule.

Rule 15 **Default Judgment**

When we discussed this issue in London, in the English procedure when a judgment can be calculated simply by inspection of the documents on file, typically a promissory note, the procedure is then carried out by a court official, not a judge. They wondered whether this was not a problem to require that this be done by the court. Maybe this is a problem, but at least the Reporters thought in international situations, to require the judge to look at the thing and to sign it was not unreasonable. If you could calculate it, by inspection of a promissory note, it would be simple. Judge would say to the clerk, calculate the interest, then calculate it, would look at it and sign it. It is important to have the judge accept responsibility when entering default judgment. We could say that where the amount of a judgment can be calculated, it is a matter of simple calculation from evidence on file that the judgment may be written by a court official rather than a judge, without serious disruption of this system.

In civil law systems, Rule 15.3 is a general rule, not only for default judgment, but for all situations. A judge cannot give greater amount than requested in the claim.

That is right for nearly all systems, but we want to give a rule for the case that the claimant in the hearing applies for a higher amount not described in the original complaint. In this case, the judge would not be allowed to give a default judgment for a higher amount, because the defendant was not well informed once the amount. The complaint, served to the defendant, claims for \$20,000. In the hearing, the defendant does not appear, and now the claimant says he wants \$50,000. That should not be possible because the defendant was not informed of the amount that should be the subject of the judgment.

We should say in the comment that the civil law system imposes this requirement in the proceedings even when they are contested. And, many systems are very restrictive in allowing amendments that would increase the amounts even in the case of a contested matter. If we explain that, that means in any event, in the default case you cannot have a higher judgment, in the non-default case the ability to get a larger amount asserted in the original complaint depends on being permitted to be an amendment. That in turn depends on local policy concerning liberality of amendment.

It was reminded that such comment already exists. See comment *R-15B*.

A member suggested splitting Rule 15, to have a specific rule concerning the question of entering default judgment against plaintiffs. Secondly, we have a specific default rule concerning defendants, when the claim is pecuniary. Thirdly, when the claim is nonpecuniary. Fourth, we consider the question of the procedural rules setting aside default judgment, according to whether the challenge is based upon some procedural irregularity, or according to the challenge which goes to the merits of the default judgment, where the defendant is asking for a second bite at the cherry. Of course, all of these points are contained in this rule, but for the sake of clarity, ready understanding of this, in systems adopting the Rules, such a structure would be more simple and easier to apply. It is difficult to distinguish the various situations in the draft, especially the question of setting aside default judgment, which seems has to be dealt with separately.

A member disagreed with making a difference between non-pecuniary default judgments and pecuniary default judgments. There is no such a difference in continental understanding. What would be the need for such a differentiation?

The comment should explain in perhaps a little more detail the notion of abandoning the proceedings. That is a very important, as practical aspect, which is not very clear.

In national relations there are quite a number of cases of people who fail to take part because they challenge the jurisdiction. They do not accept the idea of coming to challenge the jurisdiction. Even to challenge is considered to having recognized the jurisdiction of the court. In some cases this default is justified in some applicable law but not in the law of the forum.

In regard to Rule 15.5, it was asked. In some jurisdictions applications can be made to set aside a default judgment when procedures have been fully complied with by the plaintiff. It is intended that, procedurally correct default judgment should not be the subject of an application for it to be set aside?

We have to draw the distinction between an application made in the court that rendered it, another court in that same national system in what we would call a collateral attack where the person defaults and resists enforcement of the judgment when it is pursued in his home territory. At least in the comment we should identify these possibilities.

In civil law systems, the possibility for an appeal does not require that the court did not comply with the requirements of the default judgment. In most countries, an appeal could be brought against the default judgment in the same manner as other judgments. We have different requirements for setting aside default judgments. It is a bit narrow to say that you could bring an appeal against a default judgment in cases where the court did not comply with the requirements of the default judgment. In France, Germany, Italy, it is possible to bring an appeal in the court of second instance and the defendant can ask for a full trial in the second instance.

Default judgment is considered a protection for the defendant in some countries and as a sanction in other countries.

It is the case in some countries that notice is sufficient to an absent defendant, if one notifies the public attorney's office. That legal fiction is equivalent to notice. Where would you place the judgment following notice not to the defendant in person but to the public attorney's office because the defendant has no known domicile or has disappeared.

In Rule 15.2.2 we say that the court must determine that notice to that party has been properly transmitted. Did the use of transmitted was deliberately preferred to received?

It depends on the form of service of process. It could be also a fictitious service, in case of public service, for example. It should be fulfilled as a requirement of the service rules.

Rule 16 **Settlement Offer**

We created this rule in considerable detail at the admonition of Canadian and English colleagues, who said we should be more detailed, because it is the tightness of the structure that makes it work. But the idea of procedure whereby any party can make an offer and have the rejection of it relevant to determination of costs is the basic idea here.

In Japan, the way the settlement is made is totally different. It is very difficult to understand this way, especially for practitioners. In Japan, the prevailing way to settle is to ask the judge to say or hear something from each party, and the judge gets some other information from parties. In this case, that judge does not hear the information from both parties. So, it is linked to Rule 10.4. The court may not accept communications of either case from either party. Sometimes, during the settlement, the judge hears one side first and then the other party. So, especially the foreign lawyers say Japanese way of settlement is very unfair. But, that is the Japanese tradition. The judge shows some plan for the settlement. This may not be a real settlement, but some kind of mediation. For Japanese, such in a way of settlement, is very unfamiliar. It must be one of the ways to encourage a settlement, but not only in Japan but in many Asian countries, it is difficult to accept certain ways.

Perhaps we need to modify both the rule about ex parte communications and this one, maybe with another rule, essentially which would say, in a legal system in which it is recognized to be appropriate for a judge to assume role as mediator. It is proper upon the judges indicating he or she is doing that role, to receive communications from each side, and to make settlement recommendations. In the US, there are judges specially assigned to conduct settlement conferences. It is acceptable so long as the parties and judge understand what is going on.

A member considered it to be an excellent general scheme and, clearly, if it is going to be practicable in the real world it needs to be detailed. The level of detail is optimal here.

The crucial connection between the application of a sanction in Rule 16.5 and the specification of that sanction in Rule 16.6 does not quite work because the settlement offer contemplates an offer being made either by the defendant or by the plaintiff, and it is not dealing with both situations adequately.

The English rule, contained in Part 36, is notoriously the most convoluted and problematic aspect of pre-trial procedure. The most problematic of all is costs but is post-judgment.

A member was slightly puzzled by the first sentence of Rule 16.5, perhaps it can be explained why we need that or what its purpose is.

A member agreed with Rule 16.8, mentioning that it was obviously added at an abundance of caution. Another member, however, considered that Rule 16.8 should be put in the beginning of the Rule.

This Rule is unknown for continental lawyers. It is a good mechanism to further settlement.

We say that “unless by consent of both parties an offer must not be made public or revealed by a court.” The problem could be parallel settlement efforts of the court, who does not know that there was an offer. Now, when the judge discusses the possibilities of the settlement, the offering party will perhaps make the same offer during the settlement hearing to the other party. So, the court has notice, and knowledge of the

parallel offering under Rule 16. Should we make a remark on relationship between court settlement efforts and this payment in the court office? Normally, English courts knew no efforts of the judge to have a settlement. It was not a problem in Anglo-American culture.

We may need to have three separately designated mechanisms. One is costs peremptory or something. Second, informal. Third, ones informal with ex parte communication. The main thing is there be understanding as to what procedure is used. Maybe we should have three settlement procedures.

Rule 17 **Provisional Measures**

A member mentioned the issue of full indemnification due to unjustifiable injunctions. The discussion is between the liability, strict liability, or liability only when the party is guilty of this injunction that finally are not correct. Is the word “unjustified” sufficiently accurate? In Argentina, there is no strict liability, whereas there is strict liability in Brazil. What is the system we adopt in the Rules?

Just a drafting point. It might avoid unnecessary discussion on interpretation if we can combine provision with conservatory. There are several situations when two different notions are one and the same notion. Strictly speaking, not all conservatory measures are provisional, and not all provisional measures are conservatory.

It was answered that there is the intention not only to have conservatory measures. We thought that provisional has a broader scope. It is more than conservatory. We would say that...but we agree with the necessity of a broader scope.

Grupo Mexicano is a very narrow majority decision which denied on the federal level that there should be a US equivalent to an ex parte freezing injunction. Obviously, that excited a certain amount of foreign comment, mostly critical. We have to focus on the level of competence of the judge or court that is required to consider such extraordinary and draconian relief. It is a valuable and comparative point. When we draft our rules governing provisional and protective relief, in the comments and text we should say this type of relief should be confined to the highest level of first instance court available. In England that would be the commercial courts, and it is a type of relief only available in the high courts. We do not trust the county courts to hand them out, do not trust their professional competence to deal with this very powerful type of remedy.

A member wondered whether the Reporters have, when drafting that Rule, considered the possibility or advisability of a difference in situation according to whether the provisional measures is ordered by a judge having jurisdiction on the merits, and the different case when a judge not having jurisdiction on the merits is nevertheless entitled to order provisional measures.

In the Principles, we had a special provision on jurisdiction for provisional measures. A Reporter answered that it was the intention, to make a rule on the scope and the requirements of provisional measures, being which could cover provisional measures of a court with jurisdiction from the main proceeding, and of a court that has only jurisdiction for protective measure. Now, we discuss whether to limit the power of the court that has no competence for main procedure, but, maybe we should limit it. The other Reporter argued that we should be open for the first development, and indeed, even

courts with no jurisdiction over the main procedure could issue orders being not limited to the jurisdiction of the territory, territorial jurisdiction of the court.

Precisely, having regard to this, we should say something in the Rule or in the comment because we cannot leave that in the dark, especially considering the two reporters had two different views on precisely that question.

Rule 18 **Case Management**

Irrespective of the substance of this Rule, there is a strong argument to move it to somewhere to the front of our rules. The central and most important feature of an effective system of transnational litigation is the judge early on should take control of the case and there should be active management from day one when necessary, even from day minus one. Postponement of case management to Rule 18 does not quite convey the right message.

A member agreed and suggested that we should transfer it to part D, in 33, composition and general authority of the court right before the pleading stage. One question is that currently case management is close to Early Court Determinations. Should we also, bring Early Court Determinations to the beginning, which is rule 19, or should we leave it here?

Another member suggested that the approach that might try to accommodate these objectives would be to move the general principles stated in Rule 18.1 further up, and then leave the rest of it here. That might do it. It forecasts a general responsibility but has these more specific provisions here, and that would make sense to have it followed by rule 19.

Rule 18.7, says terms limits should begin to run in consecutive days from the date of notice. There is nothing in the comment referring to the fact that many codes of civil procedure, and this is extremely practically important for attorneys, subtract official holidays, and have special rules on how you calculate the consecutive days. The only concern is that we would like this rule to interpret that including official holidays while the code of civil procedure may say something different. It is a detail but of considerable practical importance.

Maybe we should say here, time limits should be calculated according to the rules of the forum. That is essentially repetitive because we have already stated this general deference to the rules of the forum. Time limits are so important from practice, and they are different from system to system, the idea of having two systems of time limits in the same legal system would be very stressful to lawyers. Even at the cost of redundancy that might be a better way to do it.

Rule 19 **Early Court Determinations**

A member asked a question about Rule 19.1.3, second sentence, the court must have regard for the opportunity under these rules for offering contradictory evidence. The

first reaction is the term is extremely weak. Is not it more than an opportunity, but rather, a duty? Before a complete impartial decision can be made on the basis of evidence immediately available, the court must have regard and there is a duty for offering contradictory evidence. Opportunity strikes me as rather weak.

It was answered that this matter is difficult and depends on the circumstances. There is no strict duty when the party was inexcusable. It is normally at the discretion of the court, to say that it is a strict application is much. But we could reconsider this. In any event, Rule 19.1.3 has the word “must,” which is strong enough.

Rule 19.1.3 contains an important procedure, which would be categorized in common law systems as summary judgment. And that identification is important because, first, it is arguable it can become a separate rule. Secondly, it is distinctly arguable that we need to say more about it. It needs to be more detailed. Thirdly, we need to provide some sort of test as to when summary judgment can be entered appropriately. The test should be does the claim or the defense have a real prospect of success?

We should make clear that rule 19.1.3 corresponds to the concept of summary judgment in common law procedure. It also corresponds to a similar approach in civil law systems, when a judge can identify an issue whose resolution can be dispositive. When we say “no real chance and success,” it translates into that the evidence then available, that which reasonably can be foreseen to be available, is determinative. We need to tighten that up a bit. That is why the party does not have a real chance, because there is no evidence.

Is there a procedural mechanism in the rules to enable a claimant to obtain an interim payment of money in a debt or damages claim? It was answered that we do not have it, but we could develop one. If we say it is a form of provisional measure, we could do it under Rule 17. We could perhaps make a special provision. The right place would be Rule 17, interim payment order. It is a provisional order, on the basis of a limited scope of the taking of evidence. It might be also more than that. It might be clear that some amount is certainly due, and there is uncertainty as to whether an additional amount is due.

In the understanding of another member, it is related to Rule 19. It is a final decision on the part of a claim. Interim payment is a provisional decision on the limited basis of evidence, because the judge is convinced there could be some other evidence, but its improbable.

There is a great deal of discussion as to the scope of provisional protective relief, and that discussion is not particularly illuminating. We can make intelligible distinctions on the one hand, interim relief which is concerned with the merits of the decision, and that takes two forms. It takes the form of an injunction, and also can concern money claims. The other type of pre-plenary hearing intervention is when you are trying to prevent the defendant from destroying evidence, dissipating or removing assets, and that strikes as a different kind of thing. When we are structuring the rules, it would be an advance for procedural clarity to make that distinction, and jettison any language which has different connotations because of the accumulation of professorial comment.

For example, plaintiff is suing defendant, claiming plaintiff is the victim of personal injury as a result of the defendant’s negligence. Question, whether after one month of litigation, is the plaintiff entitled to an interim payment based upon the prediction that at the trial the plaintiff will win on the substance of the matter? Plaintiff

has an immediate need of this money because plaintiff does not have access to social security and is a poor person. In a civilized system, you need a mechanism to ensure that subject to procedural guarantees, that person can receive accelerated interim payment on the understanding, that if the case is eventually won by the defendant, the money will be paid back to the defendant. Ditto a debt claim. It is for a sum of money, but until the plenary session has been concluded, it is not absolutely clear the claimant is entitled to the debt. There is a very decent chance the court is reasonably convinced the plaintiff is entitled to judgment. Award a fraction of the total claim in advance. Contrast with that a situation where the need for accelerated justice is to protect the plaintiff against the risk the defendant will destroy evidence, or dissipate the defendant's assets, or remove them to a distant and inaccessible jurisdiction. Those are two different types of activity.

The problem is that in some jurisdictions, they make no difference between provisional measures, provisional judgment, but we could mention it separately, it is clearer.

Rule 21

Exchange of Evidence

We already discussed whether we need to reiterate specific sanctions vis-à-vis different principles. Rule 21.8 seems to contain a list of sanctions very familiar to us. What is our technique when it comes to Rules. Do we need to specify them again or not?

A useful way would be to have one provision on sanctions but have a cross-reference here, simply to remind that it is in connection with this rule that it would be more likely to have a situation where sanctions are warranted. But cross-references will do it.

Rule 21.6 is a fairly strong provision. In other words, there is no possibility of invoking the 5th Amendment in this case, against self incrimination. Is not it is going rather far?

It was answered that this matter is dealt with in comment *R-21L*. We have a special principle on privileges and immunity. According to Rule 21.6 a party could not refuse the production of information or evidence under the argument that it is adverse to the interest of a party in this procedure. It will not say that the privilege against self-incrimination would not exist. It is true in some jurisdictions, a party need not deliver the weapons to the other party to win the case, but this is a very old rule and the European court of justice stresses that this is no rule in European civil procedure. The normal privileges, not mentioned in Rule 21.6, they could be claimed.

The various cases of refusal to cooperate or give information are not exactly on the same level. To say in other words, some are more understandable than others, therefore the sanctions should be differentiated. The refusal to cooperate, to give evidence, because the information is adverse to the interests of the party is to some extent may be more excusable than other refusals, with the result that the consequence, the sanctions, should not be as strong in that case as others. This proposal is not trying to justify uncooperative behavior.

It was answered that the only reason not to produce evidence in favor of the other party is that the production of this evidence is not good for the party. That is the main

reason. We say, if the claimant asks for production of a document, or demands it from an opponent, and he says he will not do this without claiming a special privilege, self-incrimination, right of privacy and so on, it is a normal reason this document could be bad for the party producing it. That is no argument against production of the document.

The refusal in that case will of course enable the court to draw adverse inferences. Perhaps it is not justified on top of that to award a monetary sanction. There is no differentiation between the cases.

By formally rewording the provision in Rule 21.6 to “the mere fact the document is detrimental to the party requesting to produce it is not a valid concern.” If the party have an additional grounds, say privilege or something like that, then of course this does not apply.

It was answered that this rewording would have the same problems of the original text. The person who did not understand the original text would not understand the rewording. This problem is adequately dealt with in the comments. In addition Principle 11.2 says that sanctions should be reasonable and proportional. Principle 13.8

Rule 22

Deposition and Testimony by Affidavit

As the heading suggests, we should split the rule into 2. Rules 22.1.2 to 22.3 are a set of rules concerning the process of taking depositions. Rule 22.4 is something else, a procedure concerning testimony by affidavit and can be separated as a matter of presentation.

Why Rule 22.4, line 1 only refers to nonparty witnesses, and therefore does not include the possibility of a party itself supplying one of these affidavit statements? Unless there is some deep explanation concerned with civil law practice, or reverting to the position in England before 1854, we should not adopt such a restriction.

That is where civil law countries, normally the testimony of the party, but we could consider written depositions of parties are possible. We would not say the testimony of a party.

In Rule 22.1, the second sentence says deposition may be presented on the record on the same basis. That is unclear. Taken in isolation, the sentence is somewhat meaningless.

In Rule 22.2, and 4, we use the word by affirmation, which is something like an oath. That word means nothing at all for a civil law lawyer. It should be explained or another word used.

A way in some common law systems is to say “oath or affirmation” thereby indicating the idea.

Does it mean that the deposition can only be taken by order of the court, and presented as evidence by order of the court?

Rules 22.1 through 22.3 is distinctly American. We should have no problem with that, because this process, properly regulated and controlled, and there are controls here, notably the fact you need judicial permission, is a very useful procedural mechanism indeed.

The practice of sworn statements from witnesses has already deteriorated into something farcical in England. The judges say how articulate and precise the witness statements are, then the cross-examined witness turns out to be uneducated and laconic. The explanation is that the witness statement is doctored by the lawyers. Since we are trying to offer the best possible set of regulations, do we indicate which of these modes we prefer, or at least, do we encourage the national courts to exercise greater control in the way in which this type of information is procured?

On the continent there is a tendency towards more written testimony. In France, and also Germany, we have all sorts of possibility of a preliminary written testimony similar to witness report and so on. It is true there are many arguments against this, because it is prepared. We would be against the mainstream, if we would say there should be more control.

The deposition device is very helpful, particularly for long range businesses. If there are witnesses, the standard is you can take someone's evidence by deposition than introduce the deposition if it is difficult for the witness to be in person, which is especially useful if the person is long distance. One would think that the English practice of these, overlawyered affidavits will in time correct itself, precisely because the cross-examination of someone who is speaking only the lawyer's words can be so devastating. The solicitors will have to figure out they better anticipate how this witness will look in cross-examination on the basis of affidavit. My guess is they will realize that this overcooking is not useful, but that may be optimistic. Lawyers learn from experience, it does not help.

The deposition procedure is likely to be extremely useful, where it has not been used in the past, the substitute for it has been the preparation of written interrogatories, which the person interrogated has to answer in writing. That has some of the same defects as the affidavits because they are prepared by the lawyers. We have had the system of the affidavits been used by lots of non-jury proceedings for many years. It is very counterproductive of a party who wants to make use of the evidence of a witness to make it read too well, notwithstanding that time after time, witnesses are cut down, and their credibility gravely affected by cross examination upon such affidavits. The people preparing the affidavits seem to persist on the illusion they got some benefit out of it. It presents its own remedy when appropriate cross-examination is applied.

We say, just to help English and Australian lawyers to get it right, "containing plain statements about relevant facts." This would be a hint about the adequate use of this procedure.

Rule 23 **Confidentiality**

A member asked what the Reporters had in mind, in saying in Rule 23.1, "information obtained under these rules, but not presented at the final hearing." There is no explanation in the comments for that, which strikes as strange, *prima facie*.

We should say something to the effect, information not presented in open court, or something like that. We have exchanges of information between the parties, but for one reason or another are not offered into court. It is not in connection with the final

hearing, but presentation into court. Assuming we have the correction, is this an appropriate rule? Our thought was if it is not, even though it is obtained between the parties in connection with the litigation, if it is not presented to the court, otherwise it will not be subject to inspection by someone else.

Presumably, one needs to say therefore, that according to Rule 23.1, prima facie, information which is disclosed under compulsory process of exchange of evidence during the proceedings, shall be kept confidential by the recipients and by the court, unless presented in an open hearing.

We just hit the other principle which is publicity. Someone we interpret, well then when you present into court, it is open to the public, and will collide with the principle we might or might not adopt about publicity of hearings.

This rule was based on an American and English understanding of public records. We discussed the change of our principle of public records. If you insist, we should change the text of this rule, too. We should change the text of the principle.

Rule 23.3 is very broad, and needs to be connected with the principle of publicity.

Rule 24

Relevance and Admissibility of Evidence

In Rule 24.2, the formula may strike non-English speaking reader as strange. We should adopt the use of the passive form. Relevance is determined in accordance with something like that. If we say facts determine relevance; pure logic it is incorrect.

Rule 24.4 is precise “the production of which is subject to the court’s authority.” Should the same precision be introduced in other rules? A member totally agree with the idea. A condition is that the production of a certain document or testimony is only possible if that production is subject, that document is subject to the court’s authority. In other similar situations we did not take the same precaution.

We should take the language out because it is an implicit condition of all the rules, and somewhere in the comment recognize that implicit condition has special significance in this connection.

How would the common law should cope with the proposition in Rule 24.4? The background to this is Principle 13, which attractively speaks in terms of a general right of each party to have access to information and nonprivileged evidence. Rule 24.4, which is providing greater detail, speaks of a party having a right to proof, through testimony, of any person whose testimony is relevant, admissible, etc. Under the traditional adversarial mode of presentation of witness evidence, one does not in common law systems have a right in a civil case to call a witness, unless that witness supports your case. This point has been recently confirmed, even after the Woolf reforms by the Appeals Court in England. If it turns out that the witness you thought was going to support your case has changed is or her mind since your interview before trial, then there is an elaborate and seldom invoked procedure whereby you get the court to declare that witness hostile. Prima facie, the witness each party calls, are witnesses whose evidence is intended to support the case, which is being presented by the relevant party. Through the process of cross-examination, the opponent obtains the opportunity to undermine or destroy the other side’s witness evidence. So you can see, that when one looks at Rule 24.4, this is a

curiosity to put it mildly, for common lawyers. It seems that one of the interesting collisions between our principles and the common law tradition of trial testimony.

Another common law member of the group did not understand the point because, in at least, some versions of the common law, witnesses are presented by parties rather than being called by the court, but the court may do so if it feels necessary. Given that, party's strategic interests are to call witnesses whose evidence is favorable. Of course there are problems and sometimes it is a mixed bag. Third, it may well be that a particular witness is anticipated by the person calling him to be a source of favorable testimony, but it will be pulling teeth because the person is strategically in a position of opposition. When that situation is presented in the US, and also in other common law systems, a lawyer may request the authority to call the witness as a hostile one. The significance of this is the lawyer is permitted to conduct cross-examination, meaning the scope of leading questions is much broader. We have this rule that one cannot ask legal questions which is not a mechanical rule, one can ask them to get the ball rolling, but when you get closer to the heart of the matter it is regarded as improper, not only in jury but also judge cases, because the judge wants to hear the witness and not the lawyer. If the witness is identified as hostile, either by prior advertisement of the lawyer, as when he says "I wish to examine so and so as a hostile witness," or, having called the witness on the supposition that the witness may not be that hostile, the witness' answers are evasive or obstructive, the lawyer at that point may ask permission to proceed with the interrogation on the basis this is a hostile witness, and the questions may be leading. That is a fair summary of the American approach. There is no inconsistency with the Rule. Perhaps we should mention in the comment that special leave may be required in the rule of some systems, that gives the right to ask leading questions, something like that. Otherwise, we would have thought the practice described would somehow or other be followed in any system depending on adversary presentation.

A civil law scholar also failed to understand why Rule 24.4 was a curiosity or an example of a contradiction between civil and common law traditions.

The issue was dropped.

Rule 25

Expert Evidence

The court should be able to appoint an expert, and the parties even so should have a right to submit their hired guns, who may be better witnesses, who are beyond the imagination of the court.

In the article by Justice Baumont in the Uniform Law Review, he sets out in page 969, a recent set of federal court deadlines on expert evidence that has been adopted in Australia. It seems all jurisdictions in Australia, having problems with partial or biased expert witnesses, all courts in the course of evolving rules, designed, or were aiming at getting impartiality from expert witnesses, and requiring them, in effect, to swear to the impartiality of their expert evidence. It may not be directly material to Rule 25, but may be something useful for the Reporters to look at.

In the international arbitration this is one of the most practical questions, the independence and impartiality of the expert, and the possibility to challenge the expert of those firms.

In those situations in a civil law system where the court is assisted with a court expert, is there a practice, or a legally enforceable obligation, that the court should articulate its reason to have points of expertise in a certain fashion? It is quite important and also increasingly in England, interest in the question of the court's duty to supply brief reasons for applying one expert to another. It is an obligation, to say "I prefer that side's expert because he or she struck me as more persuasive, better qualified, answered the points more convincingly, etc." There is a connection between expert evidence and the principle of judicial reasoning.

Rule 25 does not completely harmonize with civil law jurisdictional practice. In civil law jurisdictions we have a court appointed expert. It is the right of each party to introduce its own expert. But the expertise of the party expert is a form of party pleading as a first step. It is up to the court to control the court expert's expertise, on the basis of this form of special party pleading. It could be that the court decides to call a party appointed expert as a second or third court appointed expert, and that changes the quality of the expertise of the original party expert. It is the solution of the common law countries, as a consequence, because to say a party can designate an expert who has the same status and obligation, and duties as a court expert is a dangerous thing. We should discuss possible difficulties. Continentals try to avoid difficulties by special techniques to treat the expertise of the party expert in the first step only as a special form of a party pleading, then to decide whether the expert could be called an expert or not.

In French law, the court appointed expert has to respect most of the duties of the court, such as the principle of contradictory, giving both parties the opportunity to make observations, and there is no mention in this rule about the duty of the expert, it is very important in practice.

There is a vast number of judicial cases about arbitration, and the role of expert in arbitration. One aspect is the principle of contradiction, which is basic. The right of a party to have an expert is considered by many cases part of the right to be heard. It is fundamental, that is one thing. One aspect of the question related to another point, which is the reasons why the judge would prefer the testimony of one party's experts rather than the other. There is no doubt it must be accompanied by reasons.

There are many judgments of federal courts in Germany overruling judgments of courts of appeal because of lack of convincing arguments for low one expertise, and to review the other one. Or even when there is one court expert and two party experts, the lack of convincing reasoning by the court does not hear to the arguments of the party experts. But we should discuss, it is the English solution here, it is true that common law lawyers are not very happy to this solution to make party experts to court experts. To say that a party expert has originally the same duties as a court expert, that is a bit too much perhaps.

A common law member said that common lawyers are not resistant to the increasing professionalization of experts and the insistence of objectivity. They are fully supportive of that, but the real controversy is the question whether the court should appoint an expert who will monopolize expertise in the litigation. What the common lawyers, rather the litigants, have jealously tried to preserve are hired guns.

The idea of considering party experts an aspect of the pleading, stating claim, framing issues of a more technical sort is a very interesting one and we can develop that. Perhaps then we would consider differentiating between a partisan expert and one who accepts responsibility, the obligation to be neutral. For example, to accept payment from both side. Maybe we will have a richer variety of possibilities with differentiated governing standards.

Rule 25.1 says ‘when required by law.’ In the comment we might take into account the cases in which it was said that the judge or the arbitrator, must appoint an expert if he has to decide a matter which is obviously beyond the knowledge of the average judge because of its technical nature. So he is in fact violating fundamental principles.

A member asked for reference to that cases.

Rule 26 **Evidentiary Privileges**

The attorney client is fundamental, and the patterns in various countries, are similar in many respects but in detail are quite different.

When are we going to have something inside the square brackets of 26.1.3?

Rule 33 **Appellate Review**

Essentially, the following rules are dealing with matters subsequent to the main aspects of procedure. The baseline rule is the right of appeal would be governed by forum law. Once we say that, you make adjustments accordingly.

Relationship Between Principles and Rules

As already decided, the Rules would be an example of the implementation of the principles. Not necessarily officially approved, but officially accepted. Moreover, the structure of each Rule does not have to follow the structure of the Principles.

The Secretary General made a personal suggestion in his article. This suggestion was not submitted to the Governing Council and is strictly a personal suggestion. Since the Rules is an example of the Principles, it would be physically feasible to then supplement the Principles with still another example of how the Principles might be implemented in a totally different legal context. A legislator who would think of taking the Principles, and having a look at the rules and see whether it is a good idea for its domestic procedural reform would have several options in terms of Rules, not only a second, but also a third or a fourth. Then to leave it to that legislator and to others around the world, to autonomously and maybe with less intellectual interest and knowledge of the background, proceed to draw up a second set of rules. Would not be a better idea to have that done by the Working Group?

A member accepted the idea and proposed to have a French version of the Rules, specifically fit to the civil law approach.

Another member was against anything that would confirm the sort of cliché of opposition between civil and common law and would hate to have examples presented as a reflection of the common law.

The idea of having two sets are to have the principles as a common denominator, absolutely undisputed, ready for implementation throughout the world, and then the rules as, one example, an example, of how the principles might be implemented in a defined, legal context. One would not have a document and say these are the principles and rules as implemented in a common law jurisdiction, in France, etc. One would not mention the origins of the two sets of rules. The reader would just look through them, would see in many instances that there is already commonality, and no need to branch out to the left and right, but the reader in Lithuania and Estonia would look at, now currently in the process of drafting, would look to the right and left and say that this fits a little easier into the general framework of how we are conceiving our new code of civil procedure. The legislator in Botswana may look to the left and say this is a little more akin to what we are used to. It is material as the comments and the illustrations in the contract, the principles are material. Guidance for the user of the product.

Another approach would be to offer a few alternative rules, not a whole project. For example, rules on default judgment, maybe amendment, or settlement, some crucial provisions of course, maybe another version or a more restrictive or liberal version.

Another member was against the idea and considered that our job, is to try and harmonize the Principles and the Rules. So, when we think that some rule is not very important, but a mere instrument, we leave it to the forum rule. Our job will be weak if we say, this rule can be this one and maybe it is this one. A member could not see our job in this way. The Rules are very important. If they are not really important, we leave to the rules of the forum. If not, we must harmonize. We have made already several compromises. That is our work and we should not have two or more set of Rules that are not the joint effort of compromise.

We are here with an aim to produce uniformity to the largest possible extent. If this is so, and this was always our understanding, it is just a question of technicalities, whatever it means, of different approaches, influenced by a different legal background, but not so sharply contrasting civil and common law. Considerable differences between the common lawyers in the group, and the same thing happens with respect to the civil law branch.

So, on the assumption that the principles remain the core system. That the principles should be as everyone here seems to agree, considered, debated inasmuch as large extent on linguistic level. Why not do the same with the rules on both sides, the existing version and the envisaged new ones.

Another member remarked that we could not possibly do this. The task of one set of Principles and one set of Rules is already too burdensome for the group. Adding a new set of Rules would be physically impossible. This will be a dissipation of time and effort.

Another complicated aspect is that if we have to sets of rules, we need two drafts, English and French, always. There is the danger of complication and perhaps of more difficulties.

Each member of the group is invited to offer compromises. We should also consider possible distribution of the work so we can have groups working on special parts of the Rules. To split our strengths, that would not be a good idea, it would create more burdens than help. The organization of this project, or those doing the work, and until now for the members of the group, was relatively burdensome. If we would go on in this way, to have two drafts, it would not be simple. We should be aware of this. Instead of two different drafts, we should have a better and more perfect cooperation.

A member suggested that a second draft could be prepared by a group of research assistants.

However another member raised that we should not underestimate the technical difficulty of any kind of drafting. This is not a task for research assistants. In this group we have some pretty experienced proceduralists who have worked very carefully through every semicolon. And the product is still imperfect.

The Reporters suggested that members of the working group write suggestions to the Reporters in the next two weeks. The ideal type of suggestions are “please change this rule to read as follows” or “please read this comment to read as follows.”

It was decided that the Reporters would exchange drafts and suggestions among themselves by correspondence and then meet in October in the United States for a further revision and discussion. By the end of the year, they will submit a new draft to the Working Group and invite written comments and suggestions. After receiving the comments, they will prepare a further revision for discussion in the next ALI/UNIDROIT annual meeting.

The subject matter of this group’s meeting next year will still be a not completely final product. We will have significant revisions of the Principles, and Rules, for consideration of a meeting of this Group, about this time next year. Following that discussion, the reporters will assume responsibility for a Final Revision, that would then be available to the UNIDROIT and ALI council, sometime in the year following next May’s meeting. When it is to be considered by those bodies and how is a matter of local procedure for those two organizations. The ALI council will address that draft probably in December, 2003. That is, it will be after this Working Group meeting next year and after the Reporters’s revise in the light of this discussion, they will present to the ALI council in Dec. 2003 and to the annual meeting of the ALI in May, 2004. That Parliamentary sequence should be congenial with UNIDROIT, so UNIDROIT’s Governing Council, as distinct from the Working Group, would address the text in Sept/Oct 2003, or April 2004.

The Working Group decided to meet again in Rome in the Unidroit headquarters on the week of May 19, 2003.