



**GOVERNING COUNCIL**  
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**Item No. 8 on the agenda: Transnational Civil Procedure –  
formulation of regional rules**

(prepared by the Secretariat)

<i>Summary</i>	<i>Developments relating to the joint ELI/UNIDROIT project on the development of regional rules based on the adaptation of the ALI/UNIDROIT Principles</i>
<i>Action to be taken</i>	<i>The Governing Council is invited to take note of the progress made since its last session</i>
<i>Mandate</i>	<i>Work Programme 2014-2016 renewed for Work Programme 2017-2019</i>
<i>Priority</i>	<i>Medium</i>
<i>Related documents</i>	<i>UNIDROIT 2016 – C.D. (95) 8; UNIDROIT 2017 – C.D. (96) 2</i>

**PROJECT HISTORY**

1. The ALI/UNIDROIT Principles of Transnational Civil Procedure, prepared by a joint American Law Institute(ALI)/UNIDROIT Working Group and adopted in 2004 by the UNIDROIT Governing Council, were intended to help reduce the impact of differences between legal systems in lawsuits involving transnational commercial transactions. Their purpose was to propose a model of universal procedure that follows the essential elements of due process of law. They were accompanied by a set of "Rules of Transnational Civil Procedure", which were not formally adopted by either UNIDROIT or ALI, but constituted "the Reporters' model implementation of the Principles, providing greater detail and illustrating concrete fulfilment of the Principles". The Rules might be considered either for adoption "or for further adaptation in various legal systems," and along with the Principles can be considered as "a model for reform in domestic legislation".<sup>1</sup>

2. With the aim of resuming work in this area, UNIDROIT focused on the promotion and implementation of the ALI-UNIDROIT Principles through the development of regional rules based on

<sup>1</sup> Reporters' Study, *Rules on Transnational Civil Procedure, Introductory Note*, in ALI/UNIDROIT Principles of Transnational Civil Procedure, Cambridge University Press, 2006, 99.

them. In this respect, the possibility of a joint project on the development of European rules of civil procedure was discussed within the framework of an institutional co-operation with the European Law Institute (ELI), founded in 2011, the main task of which is to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development. The joint ELI/UNIDROIT project was considered to be the means to provide a useful tool to avoid a fragmentary and haphazard growth of European civil procedural law. At the same time, from the point of view of UNIDROIT, it was seen as a promotion of the ALI/UNIDROIT Principles and as a first attempt towards the development of other regional projects adapting the ALI/UNIDROIT Principles to the specificities of regional legal cultures, leading the way to the drafting of other regional rules. The first joint ELI/UNIDROIT Workshop entitled “*From Transnational Principles to European Rules of Civil Procedure*”, in cooperation with the American Law Institute, was held in Vienna on 18 and 19 October 2013. Speakers were invited to provide an initial analysis of a series of different topics, ranging from service of process to enforcement, with a view to identifying the most promising issues and the most appropriate methodological approach for the project. For more information on the events that took place in 2013 see Annual Report 2013 (C.D. (93) 2, para. 5).

3. The project was authorised by the UNIDROIT General Assembly at its 72<sup>nd</sup> session (Rome, 5 December 2013) and inserted in the Work Programme of the Institute for the triennium 2014-2016 (see UNIDROIT 2013 – A.G. (72) 9, 8, paras. 26-28). At its 73<sup>rd</sup> session (Rome, 11 December 2014) the UNIDROIT General Assembly, upon proposal of the Governing Council at its 93<sup>rd</sup> session (Rome, 7-10 May 2014), decided to increase the priority of the project from low to medium (UNIDROIT 2014 – A.G. (73) 9, para. 30). The UNIDROIT General Assembly, at its 74<sup>th</sup> Session (Rome, 1 December 2016), upon proposal of the Governing Council at its 95<sup>th</sup> Session (Rome, 18-20 May 2016) approved the continuation of the project within the Work Programme of the Institute for the triennium 2017-2019.

#### **ARCHITECTURE OF THE PROJECT AND ACTIVITY TIMELINE**

4. In 2014, UNIDROIT and ELI agreed on a Memorandum of Understanding specifically related to the project on civil procedure, which clearly identified role and responsibility of each party. A Steering Committee was set up, co-chaired by ELI President Diana Wallis and UNIDROIT Secretary-General José Angelo Estrella-Faria and composed of representatives of both organisations.<sup>2</sup>

5. The Steering Committee discussed the general goals and architecture of the project and entrusted the drafting of the Rules to Working Groups (WGs), one for each main topic covered by the ALI-UNIDROIT Principles, led by two Co-Reporters nominated by the Steering Committee. The WGs would start functioning in successive waves (to keep the project manageable and to permit to some members of the earlier WGs to join the newer ones, in order to make full use of their experience). As to the composition of the WGs, the Steering Committee recommended their members do not exceed six and encouraged participation of former European members of the ALI-UNIDROIT Working Group. A wide representation of different European legal systems in the Working Groups as well as input from judges and practicing lawyers was strongly suggested. The presence of at least one native speaker in English and in French was also recommended. The Working Groups were asked to provide rules both in English and in French as early as possible in the drafting process. In fact, most of the Working Groups have already produced multiple draft linguistic versions of the black-letter rules.

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<sup>2</sup> In addition to the Co-Chairs: John Sorabji (Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls), and Remo Caponi (University of Florence), for ELI; UNIDROIT Deputy Secretary General Anna Veneziano and Rolf Stürner (University of Freiburg and former Co-Reporter for the ALI-UNIDROIT Principles) for UNIDROIT.

6. The Steering Committee further decided to invite to the Annual Plenary Meetings a number of institutional Observers<sup>3</sup> from Intergovernmental Organisations (Hague Conference on Private International Law (HCCH)), European Institutions (the European Commission, the European Parliament and the Court of Justice of the European Union), Professional Associations and Research Associations and Institutions as well as the American Law Institute (ALI). Finally, it was decided to set up a list of advisers drawn both from academia and the legal professions.<sup>4</sup>

7. Reporters for the first three Working Groups that were established ("**access to information and evidence**",<sup>5</sup> "**provisional and protective measures**",<sup>6</sup> and "**service of documents and due notice of proceedings**"<sup>7</sup>) were invited to participate in the preliminary meeting of the Steering Committee and Co-Reporters (hosted by UNIDROIT in Rome on 12-13 May 2014). Two further groups ("**lis pendens and res judicata**"<sup>8</sup> and "**obligations of the parties**")

<sup>3</sup> Association for International Arbitration (AIA); International Association of Lawyers (UIA); International Bar Association (IBA); Hague Conference on Private International Law; American Law Institute; European Commission; European Parliament (JURI Committee); Court of Justice of the European Union; Council of the Notariats of the European Union (CNUE); IBA Judges' Forum; Max Planck Institute Luxembourg; International Association of Procedural Law; European Network of Councils for the Judiciary (ENCJ); International Union of Judicial Officers (UIHJ); Asociación Americana de Derecho Internacional Privado.

<sup>4</sup> The current list includes Teresa Arruda Alvim Wambier (Pontificia Universidade Catolica, Sao Paulo (PUC-SP)); Stefania Bariatti (University of Milan (Italy) - UNIDROIT Governing Council Member); Núria Bouza Vidal (Pompeu Fabra University, Barcelona - UNIDROIT Governing Council Member); Loïc Cadiet (University Paris 1; President of the International Association of Procedural Law (IAPL)); B. Bahadır Erdem (Istanbul University – UNIDROIT Governing Council Member); Peter Gottwald (University of Regensburg); Richard (Rick) Marcus (University of California, Hastings College of the Law); José Antonio Moreno Rodríguez (Professor of Law, Asunción - UNIDROIT Governing Council Member); Thomas Pfeiffer (Heidelberg University); Judith Resnik (Yale Law School); Jorge Sánchez Cordero (Director of the Mexican Center of Uniform Law - UNIDROIT Governing Council Member); Marcel Storme (University of Gent); Nicolò Trocker (Emeritus, University of Florence); Samuel Issacharoff (New York University); Raffaele Sabato (Judge, Italian Supreme Court); Eduardo Oteiza (President of the Instituto Iberoamericano de Derecho Procesal); Anna Engelhard-Barfield (Attorney in Germany (Hamburg) and the US); Stacie Strong (University of Missouri); Andras Osztoivits (Károli Gáspár University of the Reformed Church in Hungary, Budapest); Elizabeth Stong (Bankruptcy Judge for the Eastern District of New York, Chair of the New York City Bar's Alternative Dispute Resolution Committee and Vice Chair of its Judiciary Committee); Marco Antonio Rodrigues (Rio de Janeiro State University); Paul Matthews (Master of the High Court, Chancery Division, in England and Wales; King's College, London); Christopher Hodges (Oxford University); Bob Wessels (Emeritus, University of Leiden); Alexander Arabadjiev (Judge, Court of Justice of the European Union).

<sup>5</sup> Neil Andrews (Clare College, University of Cambridge, Co-Reporter; Fernando Gascón Inchausti (University Complutense of Madrid, Co-Reporter); Laura Ervo (University of Örebro); Frédérique Ferrand (University Jean Moulin Lyon 3); Victória Harsági (Pázmány Péter Catholic University, Budapest); Michael Stürner (University of Konstanz).

<sup>6</sup> Neil Andrews (Clare College, University of Cambridge, Co-Reporter until August 2016); Gilles Cuniberti (University of Luxembourg, Co-Reporter until August 2016); Xandra Kramer (Erasmus University, Rotterdam, Co-Reporter since August 2016; Remo Caponi and John Sorabji (supporting members since September 2016); Mr Torbjörn Andersson (University of Uppsala); Fernando de la Mata (ESADE Law School Barcelona, Baker & McKenzie); Alan Uzelac (University of Zagreb).

<sup>7</sup> Astrid Stadler (University of Konstanz, Co-Reporter); Eva Storskrubb (University of Uppsala, Co-Reporter); Marco De Cristofaro (University of Padua); Emmanuel Jeuland (University Paris 1 Panthéon-Sorbonne); Wendy Kennett (Cardiff University); Dimitrios Tsikrikas (University of Athens).

<sup>8</sup> C.H. van Rhee (Maastricht University, Co-Reporter); Alan Uzelac (University of Zagreb, Co-Reporter); Emmanuel Jeuland (University Paris 1 Panthéon-Sorbonne); Bartosz Karolczyk (DZP, Warsaw); Walter Rechberger (University of Vienna); Elisabetta Silvestri (University of Pavia); John Sorabji (Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls); Magne Strandberg (University of Bergen).

**and lawyers**<sup>9</sup>) were set up at the first plenary meeting of the Steering Committee, Working Groups and Observers (hosted by UNIDROIT in Rome on 27-28 November 2014). For more information on the activities which took place in 2014, and in particular on the preliminary meeting of the Steering Committee and Co-Reporters (hosted by UNIDROIT in Rome on 12-13 May 2014), on the presentation of the project at ELI's General Assembly (Zagreb, 25 September 2014) and on the first plenary meeting of the Steering Committee, Working Groups and Observers (hosted by UNIDROIT in Rome on 27-28 November 2014) see Annual Report 2014 – C.D. (94) 2, p. 14-15 and UNIDROIT 2015 – C.D. (94) 7.

8. A second meeting of the Steering Committee and the Co-Reporters of the Working Groups was hosted by ELI and held on 16 April 2015 in Brussels. On the same date, the project was presented at a hearing of the European Parliament. A discussion of the ELI-UNIDROIT project was also featured at the 2015 ELI Annual Conference (Vienna, 2-4 September), both in the general presentation of the project and during the session of the Member Consultative Committee (MCC) created by ELI on this project.

9. The second plenary meeting of the Steering Committee, Co-Reporters, Working Group members as well as Observers took place on 26-27 November 2015 at a joint ELI- UNIDROIT conference in cooperation with the Academy of European Law (ERA), entitled "From Transnational Principles to European Rules of Civil Procedure", at ERA's Headquarters in Trier (Germany). The conference was attended on behalf of ELI and UNIDROIT by ELI President Diana Wallis, UNIDROIT Deputy Secretary-General Anna Veneziano and Steering Committee members Remo Caponi, John Sorabji and Rolf Stürner. The conference was organised in five different sessions, each featuring presentations by the five active Working Groups of the project. About 70 participants, from diverse legal and institutional backgrounds, attended the event. At the November meeting the Steering Committee held a meeting and formalised the creation of two further Working Groups (respectively on "**Costs**"<sup>10</sup> and "**Judgments**"<sup>11</sup>). For more information on the activities that took place in 2015 see Annual Report 2015 – C.D. (95) 2, p. 13 and UNIDROIT 2016 – C.D. (95) 8.

10. The third Steering Committee and Co-Reporters meeting was held at UNIDROIT in Rome on 21-22 April 2016. Co- Reporters from the working groups Access to Information and Evidence, Res judicata and lis pendens, Service and due notice of proceedings, Provisional and protective measures, and Obligations of parties and lawyers presented their progress reports for discussion with the Steering Committee. The meeting proceeded with the introductory presentations of the new working groups, Costs and Judgments, and addressed the functions and future work for a Working Group on "**Parties**."<sup>12</sup> The meeting also considered ways to ensure the substantive and linguistic coordination of the finalised instrument. To this end, it constituted a transversal Working

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<sup>9</sup> Frédérique Ferrand (University Jean Moulin Lyon 3, Co-Reporter); Burkhard Hess (Professor, Director of the Max Planck for International, European and Regulatory Procedural Law, Luxembourg, Co-Reporter); Neil Andrews (Clare College, University of Cambridge); Alexander Arabadjiev (Judge, European Court of Justice); Marco De Cristofaro (University of Padua); Tania Domej (University of Zürich); Fernando Gascón Inchausti (University Complutense of Madrid); Kalliopi Makridou (Aristotle University of Thessaloniki); Jarkko Männistö (lawyer in Finland); Karol Weitz (University of Warsaw).

<sup>10</sup> Paul Oberhammer (University of Vienna, Co-Reporter) and Eva Storskrubb (University of Uppsala, Sweden, Co-Reporter). The Co-Reporters are finalising the composition of the Group.

<sup>11</sup> Chiara Besso (Judge, Italian Supreme Court), Christoph Kern (University of Heidelberg, Co-reporter), Thomas Sutter-Somm (University of Basel), Laura Ervo (University of Orebro), Natalie Fricero (University of Nice), Andrew Higgins (Oxford University).

<sup>12</sup> Emmanuel Jeuland (University Paris I Panthéon Sorbonne; Co-Reporter); Astrid Stadler (University of Konstanz, Co-Reporter); Vincent Smith (British Institute for International and Comparative Law (BIICL)); Ianika Tzankova (Tillburg University); Istvan Varga (ELTE Faculty of Law), Stefaan VOET (Leuven Centre for Public Law).

Group to address the structure of the Rules, entrusted with the task of better coordinating the outputs of each of them for the final publication (“**Structure Group**”).<sup>13</sup>

11. On 5-6 May 2016 UNIDROIT was represented by the Deputy Secretary-General at the first IP Case Law Conference organised by the European Union Intellectual Property Office (EUIPO) in Alicante (Spain), with a presentation on “Generally recognised principles of civil procedural law”. The developments of the joint project were the object of further presentations and discussions on 30-31 May 2016, where the Deputy Secretary-General represented UNIDROIT in a Conference on the “New Hungarian Civil Procedure Act and the Development of European Rules of Civil Procedure”, co-organised by the ELI, the Hungarian Ministry of Justice, the Hungarian Academy of Sciences, Institute for Legal Studies and the National Office for the Judiciary. The event took place in Budapest (Hungary) at the Hungarian Academy of Justice, and introduced the ELI-UNIDROIT project “From Transnational Principles to European Rules of Civil Procedure” to Hungarian lawyers. The structure of the Conference was organised along the five initial topics of the ELI- UNIDROIT project and featured presentations of speakers representing the ELI-UNIDROIT working groups.

12. The project was also presented at the ELI Annual Conference and General Assembly, which was held in Ferrara on 7-9 September 2016.

13. A plenary meeting of the Steering Committee, Working Group Co-Reporters and Members as well as Observers was then hosted by ELI in Vienna on 21-22 November 2016, to discuss the advanced drafts of the three initial Working Groups, ‘Access to information and evidence’, ‘Service and due notice of proceedings’, and ‘Provisional and protective measures’. The ELI President, Diana Wallis, and the UNIDROIT Deputy Secretary-General, Anna Veneziano, opened the two-day meeting welcoming the participants of the meeting, Project’s Reporters, Working Group Members, Advisers and Observers. The Representatives of the European Commission, European Parliament, the Council of Bars and Law Societies of Europe, the Hague Conference on Private International Law, Members of the UNIDROIT Governing Council, private practitioners, and academics, attended the event and contributed with valuable remarks and comments on the presented draft rules.

14. As regards the activities which took place in 2017, Steering Committee Members, Co-Reporters and members of the Working Groups of the ELI- UNIDROIT joint project convened on 5-7 April 2017 in Rome to discuss issues pertaining to the finalisation of the drafts of the first three Working Groups and progress drafts and reports of the other Working Groups. On the first day, the Working Group on “Structure” discussed, together with the Steering Committee and representatives of Co-Reporters of the Working Groups, the consolidated text of three final drafts on ‘Service and due notice of proceedings’, ‘Access to information and evidence’ and ‘Provisional and protective measures’, as well as general points regarding project coordination. The Steering Committee also decided to set up a ninth, and last, Working Group mainly composed by existing members of other WGs and dealing with Appeals, so as to provide coverage of most of the issues addressed in the ALI- UNIDROIT Principles and for which European rules were considered to be both useful and feasible.

15. The Joint Steering Committee Meeting with Members of the Project took place in the next two days, under the chairmanship of the Secretary General of UNIDROIT, José Angelo Estrella Faria, and the ELI President, Diana Wallis. All Members of the Steering Committee were present as well as Co-reporters and numerous Members of all of the Project’s Working Groups (‘Access to information and evidence’; ‘Provisional and protective measures’; ‘Service and due notice of

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<sup>13</sup> The core composition of the Structure Group is the following: Loic Cadiet (University Paris 1; President of the International Association of Procedural Law (IAPL), Co-Reporter); Xandra Kramer (Erasmus University, Rotterdam, Co-Reporter) and Steering Committee members John Sorabji and Rolf Stürner, working in close contact with Working Groups’ Co-Reporters.

proceedings'; 'Obligations of parties, lawyers and judges'; 'Res judicata and lis pendens'; 'Judgments'; 'Parties'; 'Costs'; and 'Structure').

16. The project will be presented again at the ELI Annual Conference and General Assembly, which will be held in Vienna on 6-8 September 2017 and will focus, in relation to the ELI-UNIDROIT project, on the consolidated draft of the first three Working Groups.

17. The fourth plenary meeting of the Steering Committee and the Working Groups will be held in Vienna on 16-17 November 2017, where the consolidated set of rules on 'Obligations of parties, lawyers and judges', and 'Res judicata and lis pendens' are expected to be finalised, and there will be a discussion of the draft rules of the WGs 'Costs', 'Judgments', and 'Parties', as well as a first round of comments on the topic of "Appeals". Observers and Advisers will be also invited to attend.

18. The Working Groups, including the most recent ones, are expected to hand in their draft Rules and Comments within 2018, with a view to submitting an advanced draft consolidated version of the entire work by the Governing Council meeting in 2018 and producing a finalised instrument by early 2019.

#### **THE STRUCTURE OF THE RULES AND THE DRAFT CONSOLIDATED RULES AND COMMENTS PRODUCED SO FAR**

19. As noted above, an overarching Working Group in charge of the structure of the project was created, with the mandate to "*coordinate the emerging draft rules within a functional whole*" and to provide "*oversight of linguistic issues*". Across the nine WGs, it is in charge with ensuring coherence in terms of scope and content, a coherent drafting style and maintaining a comparable level of detail throughout the Rules, taking into account the difference in their subject-matter. The "Structure Group" will also ensure the coherence of the French version of the black-letter rules, with the support of the French members of the existing WGs.

20. Since its initial discussion with Working Groups in Vienna (November 2016), the Structure Group has produced and shared with WGs a set of Template rules and comments. It has thereafter consolidated the English version of the drafts of the first three WGs, providing comments and suggestions and working in close contact with them. In terms of scope, the Structure Group, in its most recent meeting of 5 April 2017, confirmed the scope of application of the Rules to civil and commercial matters (excluding, in principle, family and succession law), and to both domestic and cross-border scenarios. The possible adjustment of the existing draft rules that have emerged so far in the project have been on matters concerning how to deal with issues common to more than one Working Group, case management and structure of the proceedings as well as the desirability to offer alternative rules in cases where systems show a marked divergence or in order to accommodate different domestic policy goals.

21. **Annexe II** to this document contains the draft consolidated Rules and Comments on "Service of documents and due notice of proceedings", "Provisional and protective measures" and "Access to information and evidence". They are presented here in order to provide an example of how the Rules will look like in the finalised instrument. Further adjustments both in content and language are likely to occur, also in view of developing a coherent whole when the work of other Groups will be included. **Annexe III** and **Annexe IV** contain the draft French version of the black-letter rules of, respectively, "Service of documents and due notice of proceedings" and "Access to information and evidence". It is important to note that the French version of the Rules has not been looked at, so far, by the Structure Group and will be subject to a thorough review in order to produce a coherent consolidated whole.

22. The Structure Group, upon request of the Steering Committee, has also provided a skeleton structure of the Rules declined in: Preamble, General Part, Special Parts, Cross-Border Issues, which is contained in **Annexe I** to the present document.

**ACTION TO BE TAKEN**

23. *The Governing Council is invited to take note of the progress made in the implementation of the project on transnational civil procedure – formulation of regional rules, and of the draft set of Rules attached hereto.*

**ANNEXE I****ELI-UNIDROIT EUROPEAN RULES OF CIVIL PROCEDURE*****Explanatory Note***

This outline is intended as a provisional table of content for the European Rules of Civil Procedure. Some of the present 8 Working Group (draft) rules can be included in their entirety, whereas those of other Working Groups will be included in different parts of the final work to ensure a logical order following the general structure of proceedings.

In the preliminary rules the scope and some key concepts will be clarified. The Rules cover both domestic and cross-border disputes relating to civil and commercial matters, with the exclusion of a number of specific matters, notably the law of persons, family law and insolvency law.

Part I will contain overarching principles that underlie the Rules, including settlement endeavours, cooperation and proportionality. These will be based on the WG Obligations of Parties, Lawyers and Courts, and in part from other Working groups.

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Part II will include rules drafted by the WG Obligations of Parties, Lawyers and Courts and the WG on Parties.

Parts III and IV will primarily include rules drafted by the WG Obligations of Parties, Lawyers and Courts and the WG on Res Iudicata.

Part V includes the rules drafted by the WG Service and due notice of proceedings [*final version draft rules*].

Part VI includes the rules drafted by the WG Access to Information and Evidence [*final version draft rules*]; some general the rules drafted by this WG will be included in other parts.

Part VII will include rules drafted by the WG on Judgments and the WG on Res Iudicata and Lis Pendens.

Part VIII will include basic rules by the group members on Appeal and a rule drafted by the WG on Res Iudicata.

Part IX includes the rules drafted by the WG on Provisional and Protective Measures [*final version draft rules*].

Part X will include the rules drafted by the WG on Costs.

Where necessary the WG Structure will draft general and gap-filling rules.

### **Draft Outline**

#### **PREAMBLE**

**[Rule 1. Scope]**

**[Rule 2. Definitions]**

#### **PART I – PRINCIPLES**

**Part II: Parties, Lawyers [and Court]**

##### **SECTION 1. Parties**

**A. General Part**

**B. Multiple Parties**

**C. Collective Redress**

**[D. Cross Border Issues]**

##### **SECTION 2. Lawyers and other persons who assist parties**

##### **SECTION 3. Court**

##### **SECTION 4. Roles**

**A. Management of the procedure**

**B. Determination of facts**

**C. Findings of law**

**D. Amendments and preclusion**

**Part III – Preliminary procedural duties**

**Part IV – Pleadings**

**Part V – Service and due notice of proceedings**

**Part VI – Access to information and evidence**

**[Part VII - Judgments/Res judicata and lis pendens]**

##### **SECTION 1. Types of Judgment**

##### **SECTION 2. Effects of Judgment**

**Part VIII – Means of review**

##### **SECTION 1. Appeal**

##### **SECTION 2. Motion for revision**

**Part IX – Provisional and Protective Measures**

**Part X – Costs**

**ANNEXE II****ELI-UNIDROIT EUROPEAN RULES OF CIVIL PROCEDURE****Consolidated drafts of the Working groups on Service and Due Notice of Proceedings; Access to Information and Evidence; and Provisional and Protective Measures*****Explanatory Note***

This document includes the final drafts of the first three Working Groups. The Rules in square brackets are still under discussion on the content, or are likely to be moved to other parts of the final work or merged with other rules or have to be coordinated with other rules relating to the same topic.

The proposed rules on Service and Due Notice of Proceedings are intended to be included in Part V, (most of) the rules on Access to Information and Evidence in Part VI and (most of) the rules on Provisional and Protective Measures in Part IX, in accordance with the proposed Draft Outline of the Rules.

**SERVICE AND DUE NOTICE OF PROCEEDINGS**

Co-reporters: Astrid Stadler, Eva Storskrubb

Members: Marco deCristofaro, Emmanuel Jeuland, Wendy Kennett, Dimitrios Tsikrikas

**PART I - GENERAL PART [DUE SERVICE AND RIGHT TO BE HEARD]**

Rule 1. Requirement of service and minimum content

Rule 2. Due information about the procedural steps necessary to contest the claim

Rule 3. Defendant not entering an appearance

**PART II – RESPONSIBILITY FOR AND METHODS OF SERVICE****Section 1. General Provisions**

Rule 4. Responsibility

Rule 5. Applicability of rules

Rule 6. Priority of methods guaranteeing receipt

**Section 2. Methods of Service**

Rule 7. Service guaranteeing receipt

Rule 8. Service on legal persons by physical delivery

Rule 9. Service on representatives

Rule 10. Refusal of acceptance

Rule 11. Alternative methods of service

Rule 12. Service of documents during proceedings

Rule 13. Service in case of unknown address or failure of other methods of service

Rule 14. Cure of non-compliance

**PART III – CROSS BORDER ISSUES****Section 1. In the European Union**

Rule 15. Language requirements

Rule 16. Non-application of Rule 14

Rule 17. Modification of time periods

## **Section 2. Outside the European Union**

Rule 18. General rule

Rule 19. Relationship to the Hague Service Convention

### **PREAMBLE**

The project includes rules on the service of judicial documents for domestic and cross-border cases. Parts I & II provide rules which are generally applicable, no matter whether the addressee is domiciled or residing in the forum state or abroad. Part III sets out special rules for cross-border cases and distinguishes between cases in which documents must be served on an addressee domiciled within the EU and cases in which he or she resides in a third state.

In order to effect cross-border service of documents within the EU smoothly Member States should in general allow direct access to their service providers. In order to allow electronic service as described in Rule 7 (1) (b) in a cross-border situation it is necessary that Member States provide direct or indirect access to their designated electronic information system or guarantee, if necessary, the interoperability between the national platforms so that Rule 7 (1) (b) can function. The development of standard forms for the acknowledgement of receipt (Rules 7, 10, 11) – available in all official languages of the EU – will be necessary for cross-border service of documents.

The ALI/UNIDROIT Principles of Transnational Civil Procedure are the starting point for the following rules, but they do not provide detailed provisions for the service of documents and were designed for cross-border litigation only (ALI/UNIDROIT Principles Art. 5). The following rules were drafted based on a comparative approach taking into account the European Acquis, such as existing EU law on service of documents, particularly the European Service Regulation (ESR), specific provisions relating to service of documents in the European Enforcement Order Regulation (EEO-Regulation), the European Small Claims Regulation (ESC-Regulation), the European Payment Order Regulation (EPO-Regulation) and the “Preliminary set of provisions for the Rules of Procedure of the Unified Patent Court” (Draft Rules UPC – publishes Oct 2014, Rules 270 et seq.), and domestic rules on service of the Member States, but also Switzerland and Norway, domestic case law and the relevant case law of the European Court of Justice (ECJ). Parallel to the ELI/UNIDROIT project, the European Commission has indicated that a revision of the ESR is expected. As the European acquis is not set in stone, EU provisions have influenced the rules to some extent, but they present a set of new model rules. The aim has not been simply to identify the minimum common ground of the Member States domestic service rules, but to provide a functioning and modern model for service rules despite the structural differences in the domestic systems of service of the Member States.

**PART I – GENERAL PART [DUE SERVICE AND RIGHT TO BE HEARD]****[Rule 1. Requirement of service and minimum content]**

The documents instituting the proceedings or any other procedural documents amending the relief sought or seeking new relief should be served in accordance with Rules 7-11 and 13-14. Such documents should as a minimum identify the parties, the relief sought and the grounds therefore.

**Sources**

ALI/UNIDROIT Principles Art. 5.1 with modifications

**Comments**

*"Claimant" is used as a general expression for the party initiating civil proceedings. It includes other designations under national procedural law, such as "applicant" which is for example often used in proceedings for provisional relief (or special types of civil matters including matters that can also be characterized as non-contentious). The term is ambiguous to some extent as it may refer only to the first documents filed with the court, but it may also be interpreted as to include a counter-claim or the situation of an interpleader or third-party notice which have different procedural consequences under domestic procedural rules in Europe. Therefore the text of the rule extends the requirement of service to other procedural documents which amend the relief sought or extend the proceedings to persons other than the original claimant and defendant. As a consequence, the term "parties" as used in this rule also includes third-parties.*

*There is no explicit requirement for the service of annexes to a claim. With respect to the ECJ's Weiss decision (case C-14/07, ECLI:EU:C:2008:264) and as the rule provides only a minimum standard details can be left to national legislatures. From a comparative perspective there seems to be a widespread consensus as to the basic principle that annexes must be served on the defendant. But there can be exceptions if the annexes are not necessary for the defendant's understanding of the subject matter of the claim.*

*National rules vary considerably with respect to the question whether claimants must submit not just the facts but also the legal grounds relied on in the claim filed. Again, as Rule 1 provides only a minimum standard, further specifications are not necessary.*

**Rule 2. Due information about the procedural steps necessary to contest the claim**

The following must have been clearly stated in the document instituting the proceedings, the equivalent document or any summons, if any:

- (a) the procedural requirements for contesting the claim, including the time limit for contesting the claim in writing and/or the time for the court hearing, where applicable, the name and address of the court or other institution to which to respond or before which to appear, as applicable, and whether it is mandatory to be represented by a lawyer;
- (b) the consequences of a failure to respond or to appear in court, in particular, where applicable, the possibility that a judgment may be entered against the defendant and the liability for costs related to the court proceedings.

**Sources**

Art. 17 EEO Regulation

## Comments

*The text is in principle based on Art. 17 EEO Regulation instead of ALI/UNIDROIT Principles Art. 5.1. which seemed too broad. The information listed in Rule 2 must be provided to the defendant in order to fulfil the obligation to provide a fair hearing.*

### [Rule 3. Defendant not entering an appearance]

Where the defendant has not responded or appeared in court judgment shall not be given until it is established that:

- (a) the documents instituting the proceedings were actually delivered to the defendant or served by another method provided for by these rules, and
- (b) that delivery or service was effected in sufficient time to enable the defendant to arrange for his defence.

## Sources

Art. 19 (1) ESR; Art. 19 (1) EEO Regulation; Art. 18 ESC Regulation

## [Comments]

*The rule provides special safeguards against an early judgment by default against the defendant. Details will be provided by the rules on a judgment by default.*

## PART II – RESPONSIBILITY FOR AND METHODS OF SERVICE

### SECTION 1. General provisions

#### Rule 4. Responsibility

Responsibility for service of documents lies with the court/parties (*delete as applicable*). [If responsibility lies with the court, upon application the court may entrust a party with service of documents if appropriate] [Where responsibility lies with the parties the court retains supervisory control which may include the power to set aside service.]

## Sources

National rules

## Comments

*Comparing the procedural law of the Member States did not reveal a clear solution. In most Member States responsibility lies with the court in general (e.g. Austria, England & Wales [with various exceptions, notably commercial cases and insolvency proceedings], Estonia, Finland, Germany, Greece, Italy, Lithuania, Romania, Spain, Sweden, and also Switzerland), some Member States leave it to the parties with respect to particular documents (e.g. judgments, provisional orders) or as a general rule (e.g. Slovakia). In the minority of Member States where court proceedings do not start by filing a claim with the court, but where the claimant first sends the documents to the defendant, responsibility normally does not lie with the court but with the claimant/a bailiff (France, Belgium, Netherlands and Luxembourg). Against this background the rule does not make a decision in favour of one option over another. Rule 4 leaves the question open and thus allows for maintaining traditional systems and divergences. It does not seem necessary to harmonize the responsibility or initiative for the service of documents as this question can be decided independently from the methods of service to be applied.*

*If a Member State opts for the court's responsibility for service in general, there might, however, be good reasons to entrust the claimant with the service of the documents (particularly those*

*instituting the proceedings). Sentence 2 thus allows an exception to be made by the court (a similar rule can be found for example in Estonia, Finland, Latvia, Romania, and Sweden). If, on the contrary, a Member State decides to leave responsibility for the service of the documents with the parties, the court should in any case be able to exercise a supervisory control and to set aside service if appropriate.*

*In a cross-border setting within the EU, access to national service providers and national designated electronic platforms may be difficult, particularly if the parties and not the court are responsible for service. As pointed out in the Preamble all Member States should be obliged to grant access to service providers and their platform. For technical reasons it may be necessary for access to be provided only indirectly via institutions of the state that operates the platform.*

### **Rule 5. Applicability of rules**

The following rules on methods of service apply to the documents referred to in Rule 1 and to any other documents required to be served including court decisions.

#### **Sources**

#### **Comments**

*In principle the same rules on service should apply to all kinds of documents to be served during civil proceedings according to national law or the relevant set of rules. However, service of the documents instituting the proceedings is particularly delicate and important with respect to the defendant's right to be heard. Therefore Rules 1-2 provide a minimum standard at least for the content of these documents and protection against an early judgment by default.*

### **Rule 6. Priority of methods guaranteeing receipt**

Documents shall be served using a method that guarantees receipt (Rules 7-9). If such service is not possible, alternative methods of service may be used as specified in Rule 11. Where the address for service is unknown or the other methods of service have failed, methods of last resort may be used as specified in Rule 13.

#### **Sources**

ALI/UNIDROIT Principles Art. 5.1; Art. 13 ESC Regulation; national rules

#### **Comments**

*ALI/UNIDROIT Principles Art. 5.1 can be interpreted to mean that the Principles do not require personal service on the defendant in all cases. In a European context, principles or rules are not restricted to commercial cases and should therefore take a different approach in order to protect consumers and natural persons adequately. A considerable number of Member States (e.g. Austria, Belgium, France, Germany, Italy, Lithuania, Luxembourg, Netherlands, Poland and Romania) have put in place a sort of hierarchy of service methods giving priority to personal service or to methods with some form of confirmation of receipt. In some countries there is no hierarchy, cf. for example England & Wales, Italy, and Switzerland, others such as Sweden and Finland have put in place very flexible rules. In order to provide the best possible protection of the defendant's right to be heard, it is particularly important to guarantee that the documents instituting the proceedings have reached the defendant. The rules therefore put the focus on a method of service which guarantees that the court receives a receipt signed by the addressee or her/his (legal) representative. This corresponds to Art. 13 ESC Regulation which gives priority to postal service attested by an acknowledgement of receipt.*

## SECTION 2. METHODS OF SERVICE

### Rule 7. Service guaranteeing receipt

(1) Service guaranteeing receipt includes

- (a) service by physical delivery attested by an acknowledgement of receipt signed by the addressee and/or by a document signed by a court officer, bailiff, post officer or other competent person who effected the service stating that the addressee has accepted the document, and the date of the service;
- (b) service via a designated electronic information system using appropriately high technical standards attested by an acknowledgement of receipt automatically generated by the system where the addressee has a legal obligation to register for the system. Such an obligation shall be imposed on legal persons and on natural persons engaging in independent professional activities for disputes relating to their trade or profession;
- (c) service by other electronic means if the addressee has previously explicitly agreed to this type of service or is under a legal obligation to register an e-mail address for the purpose of service and service is attested by the addressee's acknowledgement of receipt including the date of receipt, which is returned by the addressee;
- (d) postal service attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the addressee.

(2) Where in the case of (1) (c) or (d) no acknowledgement of receipt is received within a designated time, service according to (1) (a) or (b) if available should be attempted before alternative methods of service can be used.

#### Sources

Art. 13 EEO Regulation; Art. 13 EPO Regulation; Rule 271 (1) Draft Rules UPC, national rules

#### Comments

##### I. General comments

*This rule lists all methods of service which generate proof of receipt by the addressee or the person effecting service. Whereas the EEO and EPO Regulations are based on the concept of receipt of an acknowledgment of service, the Draft Rules UPC, particularly Rule 271, do not require any receipt as proof of service. Service of judicial documents without a receipt is, however, not a common standard in the Member States for regular civil litigation.*

*Electronic service (lit c) or regular postal service (d) are very speedy methods of service by which the documents are sent directly to the addressee, but an acknowledgement of receipt can be obtained only if it is sent back by the addressee voluntarily. Therefore this method is appropriate only if there is a good chance of obtaining a receipt. If the addressee, however, does not return a receipt, there is no valid service of the documents and service according to lit. a or b must be attempted.*

##### II. Permitted methods of service

###### 1. Service by court officers or other person designated under national law

*Paragraph (1) (a) refers to service effected by court officers or employees, bailiffs or any person who is competent to do so under national law. This type of service is widely accepted in Europe: cf. Austria, Belgium, England and Wales, Germany, Greece, France, Luxembourg, Netherlands, Romania, Spain, Switzerland.*

*In order to provide a rather flexible handling of the rule, it is not necessary to specify the time or place where documents may be served on the addressee. Para (1) (a) allows service wherever the addressee is lawfully encountered although in some Member States there are specifications such as residence, workplace, place of business.*

###### 2. Service by electronic means

*Electronic service is already available in many Member States nowadays, but with a number of different safeguards (Austria, Belgium, England & Wales, Estonia, France, Germany, Greece, Italy, Lithuania, Luxembourg, Romania, Spain, also in Switzerland). Some Member States exclude*

*electronic service for the service of the documents instituting the proceedings because an explicit previous consent of the defendant directed to the court is necessary for this method and is often not available before proceedings have started (this is the case e.g. for Germany, Finland and Sweden). Some specific features of electronic service must be taken into account when implementing such service rules: (1) normal e-mail service cannot always be considered a safe technical method of delivery of judicial documents, (2) the sender of the documents must be clearly identified, and (3) the holder of one or several e-mail accounts can be expected to check them regularly only if he or she is aware that judicial documents can also be served by using an electronic address.*

*Electronic service should therefore be allowed only if appropriate high technical standards are used which guarantee the identity of the sender, safe transmission and a strong possibility that the addressee will receive notice of the documents. These are also the requirements set forth in Rule 271 Draft Rules which provides an Annex with a list of secure identification and transmission standards which are applicable for the Unified European Patent Court. For the rule proposed here, it is not necessary or helpful to provide a uniform technical standard although it might be desirable for cross-border service of documents in the long run. For the time being there are many different methods of electronic service in the Member States and therefore it seems neither possible nor advisable to identify specific "electronic means" for the purpose of this rule. Art. 13 EEO Regulation says for example "fax or e-mail", but there are also some Member States which require the use of special electronic platforms or officially approved transmitting agencies (e.g. Austria, Estonia, Switzerland). As a consequence it seems sufficient to emphasize the necessity of high technical standards.*

*Rule 271 (1) Draft Rules UPC allows service to an "electronic address which the defendant has provided for the purpose of service in the proceedings" and thus requires the defendant's consent. Art. 13 EEO Regulation does not mention the requirement of the addressee's formal consent to this type of service, but it seems necessary to distinguish between legal entities such as companies or persons engaging in independent professional activities on the one hand and natural persons on the other hand. Private companies, public authorities, and lawyers can be expected to check their accounts on a daily or at least regular basis. Rule 7 suggests implementing such a legal obligation if Member States have not done so already and as a consequence allows use of the registered e-mail address, electronic account or registration on a specific electronic platform or system for the service of judicial documents. In these cases a receipt automatically generated by the system seems sufficient.*

*For persons not mentioned in lit. (b), especially consumers and natural persons, a different approach is necessary. The majority of Member States does not currently impose any obligation on them to make an electronic address available for official purposes. In the absence of such a legal obligation the addressee's prior consent to use an electronic address seems necessary to protect their right to be heard with respect to documents instituting the proceedings and in order to prevent the court from using an e-mail address or electronic mailbox which is no longer used and not regularly checked by the defendant.*

### **3. Postal service**

*Postal service is allowed in a number of Member States (Austria, Germany, England & Wales, Estonia, Finland, Greece, Poland, Spain, Sweden - the exception being France [where it is allowed only in certain situations]) and in the form of registered mail is a standard method allowed by Art. 14 ESR. In fact the term "registered mail" depends to a large extent on domestic postal regulations which use different types of receipts and differ with respect to the group of people to whom the documents may be handed over if the addressee is not encountered personally. Lit. (d) requires an acknowledgement of receipt signed and returned by the addressee within a specified period of time. Once it has expired, the court may proceed under Rule 7 (2) and make a second attempt at service. "Normal" post service where letters are simply deposited in the letter box without the return of a receipt is not sufficient for Rule 7 (1) (d), but if a post officer delivers the documents to the addressee personally, lit. a will apply.*

#### **4. Acknowledgment of receipt**

*The rule does not explicitly stipulate that a particular standard form must be used as "acknowledgement of receipt" and that the documents sent by post or electronic mail must include such a standard form to be filled in and send back by the addressee. However such a standard form will help in effecting service and the use of it is strongly recommended.*

#### **Rule 8. Service on legal persons by physical delivery**

If rule 7 (1) (a) or (d) applies, service on a statutory representative of a legal person can be effected at the business premises. Business premises include the principal place of business, the place of the legal person's statutory seat, the central administration, or a branch, agency or establishment if the dispute arises out of the activity of that branch, agency or establishment.

#### **[Sources]**

#### **Comments**

*For legal entities it is necessary to specify where documents can be delivered to a legal representative. Whereas some national rules allow service on the legal representative at his or her private dwelling or residence (e.g. Italy, Sweden, Finland), it seems more appropriate to require service at the companies' business premises. Rule 271 (5) Draft Rule UCP takes a similar approach, but allows service at any permanent or temporary place of business.*

#### **Rule 9. Service on representatives**

(1) If a minor or a party who lacks legal capacity has a legal custodian or guardian, service on him or her is equivalent to service on the addressee.

(2) Service on a person nominated to receive service by the addressee is equivalent to service on the addressee.

#### **Sources**

Art. 15 EEO Regulation; national rules

#### **Comments**

*Rule 9 (1) applies if minors lack the capacity to participate in civil proceedings on their own and need to be represented according to substantive law. Rule 9 (2) is based on Art. 15 EEO Regulation. Also national rules offer similar provisions (e.g. Estonia and Germany). "A person nominated" can be any person and is not restricted to attorneys.*

#### **Rule 10. Refusal of acceptance**

Service according to Rule 7(1) (a) also includes service attested by a document signed by the competent person who effected the service stating that the addressee refused to receive the document, provided that the document is deposited at a specified place for a certain period of time for the purpose of collection by the addressee and that the addressee has been informed where and when to collect the document.

#### **Sources**

Art. 13 (1) (b) EEO Regulation; national rules

#### **Comments**

*Rule 10 corresponds to Art. 13 (1) (b) EEO Regulation, but goes beyond this provision as it requires that the addressee still has the opportunity to collect the documents. The domestic rules of some Member States also provide that where the addressee refuses to accept the documents, the documents must either be left with the addressee or must be deposited for collection: e.g. Estonia, Germany, Greece and Romania.*

**Rule 11. Alternative methods of service**

(1) If the addressee is not available for service according to Rule 7, the following alternative methods of service effected by a court officer, bailiff, postal officer or other competent person are available

(a) service at the addressee's home address on persons who are living in the same household as the addressee or are employed by the addressee, and who have the ability and are willing to accept the document;

(b) in case of a self-employed addressee or a legal person, service at the addressee's business premises on persons who are employed by the addressee, and who have the ability and are willing to accept the document;

(c) deposit of the document at a post office or with competent public authorities and the placing in the addressee's mailbox of a written notification of that deposit. In such case the notification must clearly state the character of the document as a court document, the date by which the document must be collected, the place where the document can be collected and the contact details of the relevant person effecting service. Service is only effected when the document is collected.

(2) Service pursuant to paragraph 1 (a)-(b) shall be attested by:

(a) a document signed by the competent person who effected service, indicating:

(i) the method of service used; and

(ii) the date of service; and

(iii) the name that person and his/her relation to the addressee, or

b) an acknowledgement of receipt by the person served.

(3) Service according to paragraph 1 (a) and (b) is not allowed if the recipient is the party opposing the addressee in the proceedings.

(4) Service pursuant to paragraph 1 (c) shall be attested by:

(a) a document signed by the competent person who effected service, indicating:

(i) the method of service used; and

(ii) the date of collection, or

b) an acknowledgement of receipt by the person served.

**Sources**

Art. 14 EEO Regulation with modifications; national rules

**Comments**

*The text is based on Art. 14 (1) (a)-(d), (3) EEO Regulation with some modifications.*

*It seems appropriate to allow alternative service only on persons who are willing to accept the documents (or agree to deliver them to the addressee). The rule does not imply that the person in the addressee's household or the employee has an obligation to accept the documents. Such an obligation might have far-reaching consequences, such as a liability for damages if the documents are not delivered to the addressee or are given to him too late to prevent a judgment by default. It is up to the substantive law of the Member States to decide on such an obligation and on the consequences of a failure to forward the documents.*

*Rule 11 allows alternative service if personal service is not possible and does not require a second attempt e.g. of postal service as is necessary in some Member States. However, Rule 7 para (2) must be taken into consideration.*

*Alternative service is in many Member States restricted to "family members". As it may be difficult to determine who is a "family member", this being anyway a matter of national law, it seems preferable to allow alternative service on all persons living in the same household (similar solutions have been adopted e.g. in Finland, France, Greece, Poland). This indicates a close enough relationship to the addressee to assume that the documents will be forwarded to him/her.*

*Alternative service on children is less reliable. In some states there are clear rules on the necessary age of the child (Belgium [16 yrs], Finland [15 yrs,] France [12 yrs], Italy [14 yrs],*

*Luxembourg [15 yrs], Spain [14 yrs], Switzerland [16 yrs], others use a more general wording and leave it to the courts to decide it more or less on an individual basis (Germany, Greece, Romania). For the sake of legal certainty a clear threshold could be defined, but a more flexible rule seemed appropriate for this rule and it therefore requires the "ability" to accept the documents. In any case, considering his or her age the person must give the impression that s/he can reasonably be expected to forward the documents. A case-by-case decision by the person effecting service will be necessary.*

*Alternative service on employees of a company which is a party to the proceedings is a common standard. The employee must have a position according to which s/he can reasonably be relied on to forward the documents to the addressee. Therefore there is also a general reference to the employee's "ability". Handing over the documents to cleaning personnel should, for example, be excluded in a large company, but the situation may be different in a private household. Thus, a case-by-case decision by the person effecting service will be necessary.*

*Depositing the documents in a mailbox is allowed in a number of Member States, albeit only as a subsidiary method. But depositing the document to be served for the collection of the addressee at the local post office or the bailiff's office seemed a better option and is widely used in Europe (e.g. in Austria, Belgium, France, Greece, Italy [town hall], Luxembourg, Netherlands and Slovakia). For the addressee's information a written notification should be placed in his or her mailbox. If no mailbox is available, the person effecting service may use other suitable means of informing the addressee (e.g. pinning the notification to the addressee's door). These rules avoid fictitious service as an alternative method and therefore Rule 11 (1) (c) states that in this case service is only completed if the addressee actually collects the documents. If s/he does not collect them, service can be effected according to Rule 13.*

*The rule proposed in para (3) is also widespread across Member States (Austria, Germany, Lithuania, Switzerland), sometimes without an explicit provision in the code of civil procedure.*

## **Rule 12. Service of documents during proceedings**

- (1) During proceedings, if a party is represented by an attorney or other legal counsel, service of documents may normally be effected on the attorney or even from attorney-to-attorney without the intervention of the court. Attorneys and any other legal counsel are obliged to provide an electronic address for service that can be used for service under this provision.
- (2) During proceedings, if a party is represented by an attorney or other legal counsel, the attorney or other legal counsel has the obligation to notify the court and the attorney or other legal counsel of the opposing party or parties of any change of postal or electronic address.
- (3) During proceedings, the parties have the obligation to notify the court of any change of residence, of place of business or of their postal or electronic address.

### **Sources**

National rules

### **Comments**

*A number of Member States allow service from attorney-to-attorney once proceedings have commenced and the parties are represented by an attorney (Belgium, England & Wales, Estonia, France, Germany, Greece, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Spain). Such a rule should therefore be adopted for reasons of efficiency. As some countries allow persons other than registered members of the local bar (attorneys) to appear in court, the rule includes "counsels".*

*Some Member States have already imposed an obligation on lawyers to provide a registered electronic address for the purpose of service of legal documents (e.g. Estonia, Germany). This is*

*adopted here as a general rule. For the sake of clarity 'during proceedings' means the relevant civil proceedings not any subsequent enforcement proceedings.*

*Paragraph (2) imposes an obligation on the parties to notify the court with any change of their address etc. in order to facilitate service of documents if necessary. Similar obligations can be found in the law of some Member States: Austria, Poland, Spain, and Sweden.*

### **Rule 13. Service methods of last resort**

(1) If service by methods that guarantee receipt (Rules 7-10) or alternative service (Rule 11) is not possible because the addressee's address is unknown or service has otherwise failed, service of documents may be effected as follows:

(a) by publication of a notice to the addressee in a form provided for by the law of the forum state, including publication in electronic registers accessible to the public, and

(b) by sending a notice to the addressee's last known address or e-mail address, if applicable.

For the purpose of subparagraph (a) and (b) "notice" means information which clearly states the character of the document to be served as a court document, the legal effect of the notification as effecting service, information as to where the addressee can collect the documents or copies thereof, and the date by which they have to be collected.

(2) The address is unknown if the court or the party responsible for service has made every reasonable effort to discover the present address of the addressee. Efforts to find the present address must be documented in the court files.

(3) Service shall be deemed to be effected within two weeks after publication of the notice and after having sent the notice to the last known address or e-mail address. If there is no last known address or e-mail address service shall be deemed to be effected within two weeks after publication of the notice.

### **Sources**

National rules; case law ECJ

### **Comments**

*Rule 13 applies where the address for service is unknown, but it also applies in a situation where other methods of service have failed. This includes the case where service according to Rule 7 has failed, and furthermore neither the addressee nor any other person to whom the documents could be handed over for the purposes of Rule 11 have been encountered, nor did the addressee collect the document deposited according to Rule 11 (1) (c).*

*In order to protect the defendant's right to be heard, reasonable efforts to find the defendant by those responsible for service must be required and should be documented where the address is unknown (cf. similar rules in Finland, France, Latvia, Luxembourg, Spain).*

*Service by publication of a notification on the court door, in official journals or a publicly accessible electronic register is available in many states. In Member States which have adopted the system of "remise au parquet" a public notice is not always necessary, but this form of fictional service has not been accepted by the Hague Service Convention or the ESR. Rules in the Member States vary as to the place where public service is allowed: place of the court seized, place of the addressee's last residence. It doesn't seem necessary to harmonize the rules in this respect as a publication in publicly accessible electronic registers will be the future anyway. The wording of the rule is also broad enough to cover giving notice via text message, "Facebook" or other social media if appropriate and accepted in the forum state, although it is not a "publication" in a narrow sense.*

*Service at the last known residence/place of business is possible in England & Wales, France, and Luxembourg. In Belgium and the Netherlands, the documents are left with the royal prosecutor. In 2011, in *Hypotecní banka a.s.* (case C-327/10, ECLI:EU:C:2011:745) the ECJ also accepted service at the last known address, if the defendant had a contractual obligation to notify the claimant of any change of his residence or domicile (see also ECJ in *Cornelius de Visser*, case C-*

292/10, *ECLI:EU:C:2012:142*). There should not only be the publication of a notice under Rule 13 (1) (a) but the notice should also be sent to the last known address in order to provide a realistic chance for the addressee to collect the documents where service according to Rules 7 or 11 have failed.

*Paragraph (3): Some Member States have similar time limits: Austria (14 days), Romania (15 days), Italy (20 days), Switzerland (7 days for downloading electronically served documents). In a cross-border setting, a longer time period seems appropriate. Therefore Rule 17 provides an exception.*

#### **Rule 14. Cure of defects in service**

If service of the documents did not meet the requirements of Rules 7-13, such non-compliance will be cured if it is proved by the conduct of the addressee that he has personally received the document to be served in sufficient time to arrange for his defence or to react in any other way required by the nature of the document.

#### **Sources**

Art. 18 EEO Regulation; national rules

#### **Comments**

*The text is based on Art. 18 EEO Regulation, but it seemed necessary to choose a broader scope of application as the rule applies not only to service of documents instituting proceedings, but also to a summons for a court hearing.*

*Similar rules on the cure of defective service can be found in many Member States: Austria, England & Wales, Estonia, Germany, Greece, Poland, Romania, also in Switzerland. No such rules are applicable in Belgium, France and the Netherlands where defective service must sometimes be a tort in order to be cancelled; similar principles apply in Spain.*

### **PART III – CROSS BORDER ISSUES**

#### **SECTION 1. In the European Union**

#### **Rule 15. Language requirements**

- (1) In the case of natural persons not engaging in independent professional activities the documents referred to in Rule 1 and the information referred to in Rule 2 must be in a language of the proceedings and, unless it is evident that the addressee understands the language of the forum, also in a language of the Member State of the individual's habitual residence.
- (2) In the case of legal persons the documents referred to in Rule 1 and the information referred to in Rule 2 must be in a language of the proceedings, and also the language of the legal person's principal place of business, its statutory seat or of the principal documents in the transaction.

#### **Sources**

ALI/UNIDROIT Principles Art. 5.2

#### **Comments**

*The text follows the principles laid down in ALI/UNIDROIT Principles Art. 5.2. The modifications in paragraph (1) and (2) are based on the understanding that consumers or natural persons need better protection. The proposed rule differs from the solution in the European Service Regulation (ESR), but at least the protection of consumers should not be sacrificed for the sake of costs of translation. With respect to b2b-litigation the exception in para 2 helps in reducing translation*

*costs, if the language of the forum and the language of the transaction correspond: Should the negotiations and the business transaction have been made in English, but the court seized is for example in France, a translation from French to English would still be necessary unless French courts allow the proceedings to be conducted in English.*

*Although the languages and translations required do not in all cases guarantee that the addressee really understands the documents, they constitute an acceptable presumption: the place of habitual residence and the place of the principal place of business refer to a factual link between the addressee and the place of service.*

*The ESR 2007 takes the position that it is up to the defendant to react if he or she is not able to understand the documents served. As Rule 15 reverses the ESR solution and goes back to an "objective approach", the court should not simply rely on the allegations of the claimant as to the defendant's language skills. Rule 15 refrains from providing a list of criteria for language skills. The rule must, however, clearly express that an exception from the translation requirement is acceptable only in rare cases, e.g. if the claimant can produce a document written by the defendant in the respective language or has evidence proving that the defendant's profession involves such language skills (teacher, interpreter), or that the defendant formerly lived in the forum state for some time and that it can therefore be presumed that he or she knows the language of the forum. The same can apply if the defendant is a national of the forum state but is presently living elsewhere.*

*By contrast to the ESR it is not necessary to provide a formal right for the defendant to refuse acceptance or reject the documents, if service of the documents does not comply with the language requirements of Rule 15. Such a right would need further specifications with respect to time, place and form of the refusal and can be a potential source of further error. If the documents do not comply with Rule 15, service is not effective and cannot be cured based on Rule 14. The defendant can invoke the ineffectiveness of the service in the courts of the forum.*

#### **Rule 16. Non-application of Rule 14**

If service of the documents does not comply with the language requirements of Rule 15, Rule 14 does not apply.

#### **[Sources]**

#### **Comments**

*If the documents do not comply with the language requirements established in Rule 15 there is no effective service of the documents. However, Rule 15 does not provide a formal right to refusal for the addressee as provided for example by Art. 8 of the European Service Regulation. Such a formal right is not necessary as long as the addressee can object to the service of documents in the litigation pending. In order to preserve that possibility, no cure of the defect should take place if the addressee actually received the documents (but in a language which is not consistent with Rule 15).*

#### **Rule 17. Modification of time periods**

If the addressee is domiciled in a Member State different from the forum state the time periods provided in Rule 13 (3) are four weeks instead of two weeks.

#### **[Sources]**

#### **Comments**

*In case of cross-border service of documents a longer period of time seems appropriate in order to make sure that the addressee has a fair chance of collecting the documents from his last known address or taking notice of the publication.]*

## **SECTION 2. OUTSIDE THE EUROPEAN UNION**

### **Rule 18. General Rule**

The preceding rules also apply when the addressee has no domicile or habitual residence within the European Union, subject to Rule 19.

#### **Sources**

#### **Comments**

*These rules can also be applied for the service of documents if the addressee does not have a domicile or habitual residence within the EU. For a Member State that is a contracting state to the Hague Service Convention, the Convention must prevail. The text avoids the ambiguous wording "service abroad" of Article 1 of the Hague Service Convention, replacing it with the "domicile or habitual residence requirement".*

### **[Rule 19. Relationship to the Hague Service Convention**

Where there is occasion to transmit a judicial or extrajudicial document for service abroad outside the European Union, the application of the preceding rules is without prejudice to the application of the HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (Hague Service Convention).

#### **Sources**

#### **Comments**

*For a Member State that is also a Contracting State to the Hague Service Convention, the Convention will prevail.]*

## PROVISIONAL AND PROTECTIVE MEASURES

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## PREAMBLE

Provisional and protective measures are important both in domestic and cross-border litigation to ensure enforcement or otherwise preserve rights and prevent (further) harm pending the resolution of substantive proceedings or prior to such proceedings being initiated.

<sup>1</sup> Until August 2016; former co-reporters: Neil Andrews and Gilles Cuniberti.

The types of measures and the requirements for granting them as well as the general approach differ substantially per country. The present rules are intended to act as guidelines for better law-making and good practice. Not all types of measures covered by these Rules exist in all countries, while others are only available in a limited number of countries, e.g., evidence preservation measures and interim payments. The present Rules may inspire legislators or courts to introduce new rules or utilise existing rules if they so wish.

The starting point is Rule 8 of the ALI-UNIDROIT Principles of Transnational Civil Procedure. This Principle includes three basic rules on function and proportionality (8.1), *ex parte* measures (8.2) and compensation and security (8.3). In addition, the present rules have been inspired by EU law, in particular the EAPO Regulation, the IP Enforcement Directive, and the case law on provisional and protective measures under the Brussels I (recast) Regulation. Other important sources of soft law that have been considered include the UNCITRAL Model Law on International Commercial Litigation, as amended in 2006 (Article 17-17G), the ILA Principles on Provisional and Protective Measures in International Litigation of 1996, and the draft of the Storme committee published in 1994 (Part 10). In addition, the different national approaches have been studied and considered.

To bridge the differences between the Member States the Rules take a functional approach, as is clear from Rule 1. Where appropriate, different approaches have been accommodated by including different options. This is, for instance, clear in Rule 8 where different types of sanctions are incorporated that all have the common goal of providing an effective enforcement mechanism. In other rules flexibility is created to facilitate tailor-made solutions for the specific situation as there is a wide variety of provisional and protective measures. An example is Rule 5 on the initiation of proceedings on the substance where courts can set the appropriate timeline (in absence of which a default rule applies) and determine the appropriate consequences of non-compliance. Rule 6 facilitates both systems on provisional measures that rely on the principle of party autonomy and those where the court has certain *ex officio* duties.

These rules intend to balance the interests of, on the one hand, the applicant in safeguarding his rights and, on the other, the respondent in minimising the risk that the measures causes unnecessary harm. This is also expressed by the principle of proportionality, laid down in Rule 2.

The Rules consist of a General Part (Part I), which includes rules that apply to all types of measures, unless otherwise provided. The Special Part (Part II) includes rules on Asset Preservation, Regulatory Measures, Evidence Preservation and Interim Payments. The brief part on Cross-Border Issues (Part III) only includes general references to existing legislation as it was not the aim of this working group to improve the existing rules or establish a whole new set of rules on the complex and multifaceted issue of cross-border provisional and measures.

These Rules apply generally to civil and commercial matters. However, it does not include rules that are specifically suited for family cases including measures of child protection.

## **PART I – GENERAL PART**

### **Rule 1. Provisional and Protective Measures**

(1) A provisional or protective measure is any temporary order that has one or more of the following functions:

(i) to ensure or promote effective enforcement of final decisions concerning the substance of the case, whether or not the underlying claim is pecuniary, including securing assets and obtaining or preserving information concerning a debtor and his assets; or

(ii) to preserve the opportunity for a complete and satisfactory determination of the claim, including securing evidence relevant to the merits or preventing its destruction or concealment; or

(iii) to preserve the existence and value of goods or other assets which form or will form the subject-matter of civil proceedings (pending or otherwise) on the merits

(iv) to prevent harm from being suffered, to prevent further harm, or to regulate the disputed matters, pending final determination of the issues.

(2) The provisional or protective measure ordered should be suitable for its purpose.

#### **Sources**

ALI/UNIDROIT Principle 8.1; Article 17 UNCITRAL Model Law on International Commercial Litigation (2006); Storme report Part 10.1; ILA Principles on Provisional and Protective Measures in International Litigation, Principle 1.

#### **Comments**

*Rule 1 provides a description of what is to be understood by provisional and protective measures under the present Rules. A provisional or protective measure is a temporary measure given by the court. Its temporary nature is inherent to provisional and protective measures, which will cease to have any effect at the latest when a judgment on the merits of the case has been rendered. The Rules do not require that the main proceedings have already been initiated, but include an obligation to start proceedings on the substance within a specified period of time or a period set by the court in Rule 5. With the exception of the special provision for interim payments under Rule 18, 'urgency' is not a specific requirement as may be the case under other (domestic) rules. However, it is inherent to the aim of provisional and protective measures that there is a necessity to grant this measures before initiating the main or during the pendency of such proceedings.*

*Different terminology is used for provisional and protective measures, including provisional relief, preliminary measures, preservation measures, interim relief and interim orders. The term provisional and protective measures is, however, used in the Brussels Regulations and goes back to the Brussels Convention of 1968 and is thus an established terminology in European law.*

*A wide variety of provisional and protective measures exist in the laws and practice of the Member States. Rather than giving a strict definition of what these measures entail, this Rule describes the various functions that these measures fulfil. In comparative procedural law doctrine, including in the Storme report (published in 1994), provisional and protective measures have been divided in three broad types. First, conservatory or preservation measures to secure enforcement on the merits. Second, regulatory measures that covers a broad range of measures intended to maintain the status quo or to make a provisional arrangement between parties, e.g., measures to perform or to abstain from certain acts. Third, anticipatory measures that can – on a provisional and temporary basis – award (part) of what is claimed in the main proceedings, in particular, interim payments. The four categories included in the present rules describe in greater detail which functions provisional and protective measures can fulfil and also specifically include evidence preservation measures. The Rule is intended to provide the court with the power to ensure that the applicant's interests are capable of being protected until final resolution of the main dispute.*

*Category (i) entails measures that promote or secure the enforcement of a judgment, and typically include but are not limited to asset preservation measures as regulated by Part II, Section 1.A.*

*Category (i) includes measures that aim to preserve the possibility to secure a complete and satisfactory determination of the claim, including measures to secure evidence required to support the claim as regulated by Part II, Section 2 of these Rules. Category (iii) are measures intended to preserve the existence and value of goods or other assets that are or will be the object of the pending or intended proceedings on the merits. These include, but are not limited to orders to secure safe custody of assets, ensure that income is generated from assets, or to require sale of perishable goods. Category (iv) covers a broad range of measures aimed at preventing (further) harm to the applicant or to make other arrangements until a final decision on the merits is given. These include interim performance (for instance providing goods, giving access to premises, continue contract performance) and restraining orders (for instance in the area of intellectual property) as regulated by Part II, Section 1.B. These may also include interim payments, subject to the Rules of Part II, Section 3. A specific measure can fulfil more than one of these functions.*

*As expressed by Rule 1(2), provisional and protective measures can only be granted if and in so far as they are suitable for their aim. In addition, the granting of these measures is subject to the proportionality principle laid down in Rule 2.*

*It should be noted that a provisional or protective measure does not include a summary procedure (summary judgment) which finally determines all or part of the substance of the dispute. This type of judgment is dealt with by the Working group on Judgments.*

## **[Rule 2. Principle of proportionality]**

A provisional and protective measure ordered by the court should be one which imposes the least burden on the respondent. The court must ensure that measure's the effects are not disproportionate to the interests which the court is asked to protect.

### **Sources**

ALI/UNIDROIT Principles 8.1 and 5.8

### **Comments**

*This Rule expresses that the granting of provisional and protective measures is subject to the principle of proportionality, taking into account the interests of both the applicant and the respondent. This principle is also laid down in Principle 8.1 of the ALI/Unidroit Principles for provisional measures and in Principle 5.8 for ex parte orders. The latter are further regulated by Rule 3(2) of the present Rules. This principle is also influential in the law and practice on provisional and protective measures of the Member States.*

*The principle of proportionality is of particular importance in the assessment of provisional and protective measures as the procedures for obtaining these measures and the required urgency will often not enable a full assessment of the law and the facts. While the court must order the measure that is considered suitable for its purpose, as prescribed by Rule 1(2), it should also ensure that it orders the measure that is least burdensome on the respondent and that the effects of the measure are not disproportionate to the applicant's interests. The court can, for instance, limit the scope or the time period of the measure or set other conditions that make the measure less burdensome for the respondent.*

*While the applicant has the burden of proof of relevant facts in line with rules 10, 14, 16, and 18 to support his application, the respondent may have to prove alleged potential negative consequences over which the applicant cannot have knowledge. The general burden of proof is a matter of substantive law (see Rule 2 of the Rules on Access to Information and Evidence). The proportionality principle is of particular importance in regard of ex parte measures as regulated by Rule 3. To enable to court to make an assessment of the respondent's interests, the applicant is required to give full disclosure in line with Rule 3(3) while Rule 3(2) requires that the respondent is given an opportunity to be heard at the earliest practicable time. In addition, Rule 6 enables the court to review the measure – ordinarily on the respondents request –, whereas under Rule 7 the*

*respondent is liable if a provisional or protective measure is set aside, lapses, or if the claim is dismissed in the proceedings on the substance.*

### **Rule 3. Ex parte procedure**

(1) A court may order a provisional or protective measure without notice ('ex parte') only if, in the circumstances, proceedings with notice ('inter partes') would frustrate the prospect of the applicant receiving effective protection of his interests.

(2) When granting an order without notice (ex parte) the court shall give the respondent an opportunity to be heard at the earliest possible time, that date to be specified in the ex parte order. The respondent should be given notice of the order and of all the matters relied upon before the court to support it as soon as possible.

(3) An applicant must fully disclose to the court all facts and legal issues relevant to the court's decision whether to grant relief and, if so, on which terms.

(4) The court must make a prompt decision concerning any objection to the granting of the provisional or protective measure or to its terms.

### **Sources**

ALI/Unidroit Principles 8.2 and 5.8; Article 17B, C(2) and F UNCITRAL Model Law on International Commercial Arbitration (2006)

### **Comments**

*While provisional and protective measures are preferably granted inter partes in order to secure the rights of the respondent and line with the principle of proportionality, in some instances the measure can only be effective if the respondent is not notified prior to the granting of the measure. This is the case when actions of the respondent are expected to frustrate the protection of the interests of the applicant, for instance goods to be seized can be disposed of when preservation of evidence is urgently required. In most systems and particularly in relation to certain protective measures, such as asset preservation orders, the ex parte granting of such measures is allowed and may be common practice. This is, for instance, the general rule under Article 11 of Regulation 655/2014 on the European Account Preservation Order, and enabled in relation to intellectual property infringements measures in Article 8 of Directive 2004/48/EC on IP Enforcement. The present rule is particularly inspired by ALI/UNIDROIT Principles 8.2 (provisional and protective measures) and 5.8 (general ex parte proceedings), as well as Articles 17B and C(2) UNCITRAL Model Law on International Commercial Arbitration (2006).*

*The court should set a date within which the respondent shall be heard to exercise his right to a full consideration of the facts and legal basis. This should take place at the earliest possible time and the date has to be specified in the order in accordance with Rule 3(2). It was decided to not set a specific period as the time limits differ per regime and some flexibility is required depending on the nature of the case. To this end the respondent must be notified of the measure immediately after the order is granted and any steps necessary to give effect to the order obtained on an ex parte basis have been taken. Notice includes providing both the order and any documents relied on to support the application to the respondent. An inter partes hearing will result in a full new assessment of the facts and the requirements for awarding measures laid down in these Rules.*

*To protect the respondent's rights and enable the court to assess whether relief should be granted, and in line with the principle of proportionality laid down in Rule 2, applicants and their lawyers have an obligation to fully disclose all relevant facts and legal issues as of Rule 3(3). A similar rule is laid in Article 17 F UNCITRAL Model Law. Where appropriate, an applicant should also disclose any probable defences the respondent may have, including the existence of a time-bar or the possible right to set-off. This enables the court to make a preliminary assessment of the respondent's interests.*

*Rule 3(4) offers protection against court delay. It is inspired by Article 17 C of the UNCITRAL Model Law.*

*In relation to interim payments, Rule 18(3) makes an exception to the rule that a measure can be granted ex parte.*

#### **Rule 4. Security**

(1) When assessing whether to grant or continue a provisional or protective measure the court may consider whether security can be provided by the respondent in lieu of the making an order.

(2) As a condition of granting or continuing a provisional or protective measure the applicant may, depending on the circumstances, be required to provide appropriate security.

(3) The court should not require such security solely on the basis that the person is not a national or resident of the forum state.

#### **Sources**

ALI/UNIDROIT Principle 3.3; Article 17E UNCITRAL Model Law on International Commercial Arbitration (2006); Article 12 EAPO Regulation; Article 9(6) IP Enforcement Directive

#### **Comments**

*Rule 4 expresses that granting a provisional or protective measure may be subject to the provision of security. Security may, for instance, be a bank guarantee, a guarantee by a third party or any other type of guarantee that secures the claim of the applicant (para 1) or repayment by the applicant (para 2). In the case of para 2 it may also take the form of a formal undertaking to be made to the court.*

*Rule 4(1) concerns the situation where the respondent can offer security before or after the measure has been granted. If the respondent offers sufficient security to protect the applicant's interests, it will not be necessary to grant the court order, or an order granted already may be discontinued. In case the order has been awarded already, Rule 6 enables the respondent to request the court to modify, suspend, or terminate a provisional or protective measure.*

*In accordance with Rule 4(2) security may be required as a condition for the court to grant the measure requested. It secures the provisional character of the measure and backs up the liability provision included in Rule 7. Providing security may be of particular importance in case of interim payments (see also Rule 17(3)) and orders to perform or abstain, but it is not limited thereto. This Rule is particularly inspired Article 17 E UNCITRAL Model Law on International Commercial Arbitration (2006). It is, for instance, also included in Article 9(6) of the IP Enforcement Directive. In Article 12 of the EAPO Regulation, the provision of security for an amount sufficient to prevent abuse of the procedure and to ensure compensation for any damage suffered by the debtor as a result of the order is made compulsory. Under the present rule, subject to obligations following from European or other laws, provision of security or an undertaking is at the discretion of the court.*

*Rule 4(2) includes the non-discrimination principle that is part of European law and also laid down in ALI/UNIDROIT Principle 3.3 Non-nationals and non-residents should be treated equally to nationals and residents.*

#### **Rule 5. Initiation of Proceedings on the Substance of the Matter**

(1) Where the applicant has been granted a provisional or protective measure before initiating the main proceedings, such proceedings must be initiated before the date set by the court. Where the court does not set such a date or it is not specified otherwise by the applicable law, the applicant shall initiate such proceedings within 14 days of the date of the issue of the decision granting the remedy. The court can extend the period on request of the parties.

(2) If the main proceedings have not been initiated in accordance to paragraph 1, the measure shall lapse, unless the court provides otherwise.

#### **Sources**

Article 10 EAPO Regulation; Article 9(5) IP Enforcement Directive; Article 50(6) TRIPS Agreement

## Comments

National systems differ substantially when it comes to the obligation to initiate the main proceedings. In some countries this is a general obligation (for instance, Italy, Spain, and Romania). In other countries there is no such obligation (for instance, France, Germany, and the Netherlands). As regards conservatory protection measures, such an obligation generally exists as these are ordinarily granted *ex parte* and directly relate to securing enforcement in the main proceedings. In respect of the attachment of bank accounts, this obligation is also embedded in Article 10 EAPO Regulation. In addition, an obligation to initiate main proceedings in IP infringement cases under Article 50(6) was considered obligatory in the EU context (*Hermès International v FHT Marketing Choice*, Case C-53/96) and it also included in Article 9(5) IP Enforcement Directive. In ALI/UNIDROIT Principle 8 no such obligation is included.

The time for initiating the main proceedings differ. Article 10 EAPO Regulation prescribes a period of maximum 30 days after lodging the application or 14 days after the issue of the order, whichever date is the later. Article 9(5) IP Enforcement Directive and Article 50(6) TRIPS provide that the measure ceases to have effect if the main proceedings are not initiated within a reasonable period, to be determined by the judge, or in absence of such determination, maximum 20 working days or 31 calendar days, whichever is the longer. The EAPO Regulation explicitly provides that the period may be extended at the request of the debtor, for example to pursue a settlement.

According to Rule 5(1) the judge can set an appropriate period for initiating the main proceedings, depending upon the circumstances of the case. The obligation to initiate such proceedings only arises when the measure has been granted. In line with the EAPO Regulation the default period is 14 days after the order has been issued. This rule applies unless a specific rule of (EU) civil procedure provides otherwise. Parties, and ordinarily the applicant, may request the court to extend the period in both scenarios, for instance in view of ongoing negotiations to reach a settlement. It is important to allow parties sufficient time to pursue a settlement and to avoid making unnecessary making costs preparing for the main proceedings.

Rule 5(2) has a default rule that the measure shall lapse if proceedings on the substance of the matter have not been initiated in accordance to paragraph 1. However, to accommodate situations and systems where such effect is not considered desirable, the court can provide otherwise.

## Rule 6. Review

The court may modify, suspend, or terminate a provisional or protective measure if satisfied that a change in the circumstances so requires.

## Sources

Article 17 D UNCITRAL Model Law on International Commercial Arbitration (2006)

## Comments

Rule 6 expresses that, ordinarily at the request of the respondent, the court can amend or terminate the provisional measure. This rule enables to take account of a change in circumstances and gives a tool to the defendant to protect his interests. The exercise of review has to be in line with the principle of proportionality (Rule 2). The possibility to request the review of awarded provisional or protective measures is common in the Member States. The present rule is particularly inspired by Article 17 D UNCITRAL Model Law on International Commercial Arbitration (2006). An extensive rule on remedies on various grounds is also included in Article 33 of the EAPO Regulation.

Where a request to modify, suspend or terminate the measures is made by one of the parties, the other party will be heard where necessary, and in any case, the other party is informed.

Where the court is convinced that an *ex officio* review is necessary, the present Rule does not prohibit this. In civil and commercial cases this may generally be considered to run against the principle of party autonomy and party initiative (see also ALI/UNIDROIT Principles 10.1 and 10.3). However, in exceptional cases where third party interests (for instance those of shareholders) or

*the public interest requires it, the court may modify, suspend, or terminate a provisional or protective measure on its own motion. This is in line with Article 17 D of the UNCITRAL Model Law.*

### **Rule 7. Liability of the Applicant**

(1) If a provisional or protective measure is set aside, lapses, or if the substantive claim is dismissed, the applicant must compensate the respondent for such loss or damage caused by the measure.

(2) The applicant is liable to compensate a non-party for any damages, and expenditure incurred as a consequence of complying with the order.

### **Sources**

ALI/UNIDROIT Principle 8.3; Article 13 EAPO Regulation; Article 9(7) IP Enforcement Directive; Article 17 G UNCITRAL Model Law on International Commercial Arbitration (2006)

### **Comments**

*Rule 7 concerns the applicant's liability for damages caused to the respondent or non-parties affected by the measure. This Rule and in particular Rule 7(1) is inspired by ALI/UNIDROIT Principle 8.3. Similar rules on compensation of the respondent are included in Article 13 EAPO Regulation, Article 9(7) IP Enforcement Directive, and Article 17 G UNCITRAL Model Law on International Commercial Arbitration. Article 13(5) EAPO Regulation expressly provides that it does not deal with the question of the possible liability of the creditor towards any third party. Many countries have specific rules on applicant liability in the rules on civil procedure or use the general rules on tort liability to reach similar results.*

*Rule 7(1) deals with the situation where the measure is set aside, lapses (in particular when the applicant did not initiate main proceedings in accordance with Rule 5) or the main proceedings are dismissed. The applicant will be required to compensate the respondent for loss and damage caused by the measure on the basis of strict liability. This includes losses and damages directly resulting from the measure, for instance not being able to utilise goods or sell products, as well as legal costs and expenses made during proceedings.*

*Rule 7(2) relates to damage caused to or expenses incurred by non-parties. This provision is not limited to the cases where the measure is set aside, lapses or where the main proceedings are dismissed. Such compensation will usually relate to expenses made in implementing the measure, for instance administrative steps necessary to comply with the order. However, other expenditure incurred as a consequence of complying with the order may have to be compensated by the applicant.*

### **Rule 8. Sanctions**

(1) Except in respect of interim payments, where there is non-compliance with a provisional or protective measure the court may impose, as appropriate, any of the following sanctions:

- (a) a fine payable to the State;
- (b) compensation to the applicant;
- (c) committal for contempt;
- (d) administrative sanctions, as provided for in the jurisdiction.

(2) In assessing the nature of any fine or compensation under this rule, the court may require payment on the following bases: a lump sum; an amount per period of breach; or, and amount per offence. In the latter two cases the amount may be subject to a maximum as determined by the court.

### **Sources**

ALI/UNIDROIT Principle 17

## Comments

*Rule 8 regulates the possible sanctions for non-compliance with provisional and protective measures within the meaning of these Rules, with the exception of interim payment orders. Different systems of sanctions exist in European national systems relying on different traditions, experiences and expectations concerning the authority and reliability of civil courts. The present Rule does not aim to harmonise these methods and therefore provides a possible choice of methods for the consideration by courts which administer provisional and protective measures. Interim payments are excluded from the present rule as the provisional payment order will be enforceable upon the respondent's assets.*

*The fine or compensation, to be paid in accordance with one of modalities under paragraph 2, should either be paid to the state or to the applicant. In addition, a respondent that does not comply with the measure can be subjected to committal for contempt or administrative sanctions.*

*The appropriate sanction will be included in the order upon the request of the applicant. The sanction should be an effective means to secure its aim. The sanction is subject to the principle of proportionality under Rule 2.*

## PART II – SPECIAL PARTS

### SECTION 1. Protective and Regulatory Measures

#### A. Asset Preservation

#### Rule 9. Types of Asset Preservation Measures

(1) A court may grant, on application, any of the following orders for the purpose of protecting a claim:

- a) an order authorising provisional attachment of the respondent's assets ('attachment order'); or
- b) an interim order preventing the respondent from disposing of, or dealing with, his assets ('asset restraining order').

(2) A court may also grant an order that the respondent's assets shall be in custody of a third party ('custodian'), which is an asset preservation order under Rule 9(1).

#### Sources

Article 1 EAPO Regulation; ALI/UNIDROIT Principle 8.1; Article 17.2.c) UNCITRAL Model Law on International Commercial Arbitration (2006)

#### Comments

*This rule assumes that the orders mentioned at Rule 9(1)(a) and (b) may normally be granted as surprise forms of protection and hence operate at first in an ex parte manner (see Rule 4).*

*As for the distinction between Rule 9(1)(a) and (b), attachment orders under (a) confer rights on applicants with respect to assets, as opposed to merely creating a personal duty for the respondent not to dispose of, or deal with, those assets (asset restraining orders made under (b)).*

*Asset preservation orders have the purpose to protect any claim in substance that is or may be subject to proceedings at the time of the application. It follows from Rule 5(2) that an order will automatically cease where an applicant fails to bring the main proceedings protected within the prescribed time from when the order is made.*

*The expression "a claim" used in Rule 9(1) means that an asset preservation order may be decided for the protection of all kinds of claims, i.e., pecuniary claims and claims for specific property, when such an order is suitable for the protection of the claim. There may be situations, though, where an asset preservation order will not have the effect of securing the substantive claim; e.g. a claim for declaratory judgment on the existence of a debt will be hard to protect by way of issuing an asset preservation order. Whether or not an asset preservation order may or may not be*

*considered to be suitable to protect specific kinds of claims will inevitably vary between different jurisdictions.*

*It has been considered helpful to explicitly include within the scope of Rule 9(1) custodianship orders, even though these may be treated in certain national systems as a separate type of order. Such an order, like an attachment or an asset restraining order, should be understood in a broad sense to encompass the safe-keeping and preservation of any type of property, whether physical, intangible or electronic. "Custodian" is used to cover any third party (whether a court officer or not) which may be authorized or instructed by the court to carry out this type of intervention under the law of the place where the relevant assets are to be safe-kept and preserved. It should be noted that technology has expanded the range of custodial intervention which is required, for example, safekeeping electronic data, or preventing passwords, metadata etc. from being altered or concealed.*

#### **Rule 10. Criteria for Awarding Asset Preservation Orders**

A party seeking an order under Rule 9 must show that:

- a) it has good chances to succeed on the substantive merits of the dispute if the claim is finally adjudicated, and
- b) it is likely that, without such an order, enforcement of the judgment against the respondent after the claim is finally adjudicated will be impossible or exceedingly difficult.

#### **Sources**

Article 7 EAPO Regulation; Article 17 A.1 UNCITRAL Model Law on International Commercial Arbitration (2006)

#### **Comments**

*These criteria protect the respondent against the injustice of being subject to an order despite the lack of sufficient substantive merit in the main claim (criterion (a)) or despite the absence of any pressing need for his assets to be subject to this severe type of order (criterion (b)).*

*The two criteria (which are widely used in most jurisdictions) are cumulative. This means that a high degree of possibility that the applicant will succeed on the substantive merits of the dispute should not influence the assessment of whether there is a real risk that the enforcement of the judgment will be impeded unless the order is issued by the court.*

*It should be noted that, in addition to the two cumulative criteria, a third criterion must be met and that is the requirement of proportionality under Rule 2, which demands that the measure ordered by the court should be one that imposes the least burden on the respondent and, furthermore, that the measure must not be disproportionate to the applicant's interests. This means that even if the requirements under Rule 10 are met, the court may not make an attachment order or asset restraining order, in case such an order imposes a greater burden than the least on the respondent or if the order is disproportionate to the applicant's interests which the court is asked to protect.*

*The standard of proof in rule 10(a) must be met at both an ex parte and any subsequent inter partes hearings in which the ex parte order must be reconsidered. When granting an attachment or asset restraining order without notice another additional requirement set forth in Rule 3(1) must be met: it must be concluded that proceedings with notice ('inter partes') would frustrate the prospect of the applicant receiving effective protection of its interests.*

*It should be observed that the applicant has strict liability in case an order is set aside. This follows from Rules 6 and 7.*

#### **Rule 11. Limitations on the Asset Preservation Orders**

Asset Preservation Orders must ensure that the respondent is not deprived from receiving these allowances, provided the amounts are reasonable: (a) its ordinary living and/or (b) its legitimate

business expenses, or (c) from funding legal advice and representation necessary to enable him to respond to the order, including seeking its variation or discharge under Rules 3(4) or 6.

### Sources

Article 31 EAPO Regulation; national laws

### Comments

*Without these limitations, asset preservation orders would be oppressive. Limitation (a) applies only to individuals, but (b) and (c) apply equally to individuals and legal persons or entities, that might event have to file for insolvency if rendered incapable of meeting their business expenses as a result of the Order. Similar rules are included in Article 31 EAPO Regulation and exist under most domestic laws (although it should be noted that whilst some systems opt for the concept of non-seizable assets or quantum limitations, others use the concept of respondent's allowances).*

### Rule 12. Notification of Asset Preservation Orders to Respondent and Effects

(1) At the earliest possible time after an order has been made under Rule 9(1), the respondent and any third parties who are the addressees of an order must be given formal notice of the order. Where it is necessary for ascertaining the enforcement of the order, third parties may be given formal notice before the respondent.

(2) The applicant is at liberty to inform a non-party of an order before the respondent is given formal notice.

(3) The respondent or any third parties who are the addressees of an order made under Rules 9(1) and 9(2) must comply with it as soon as they are notified of the order. In the event of breach, they will be subject (without limitation) to the sanctions listed in Rule 8.

### Sources

ALI/UNIDROIT Comment P-8C; Article 17 C UNCITRAL Model Law on International Commercial Arbitration; Articles 23-24 EAPO Regulation.

### Comments

*Rule 12(1) aims at ensuring that respondent's right to be heard can be properly exercised, without jeopardising the effective enforcement of the asset preservation order.*

*The means of and rules on notification and service of orders vary between jurisdictions. Therefore, Rule 12 does not specify any particular means of notification, but acknowledges that notification must be determined by applicable domestic law. Generally, asset preservation involves third parties, often banks, in control of the assets of which preservation is sought. The requirements on how precise an application must be in pointing out the assets vary between jurisdictions, as do the requirements on whether an order should, could or must be explicitly addressed also to a third party to have the capacity of creating obligations on that third party to respect the order. Therefore, Rule 12(1) covers the situation where orders are addressed to third parties (including situations where such orders under the law must be addressed to a third party to be effective against that party), and provides that as a starting-point that all addressees must be given notice in prompt, but opens up for an exception where immediate notification of the respondent would make the enforcement of the order ineffective.*

*Rule 12(1) is of greatest relevance where asset preservation orders are applied for in ex parte-situations. In rule 3(4) it is provided that the respondent should be given notice of an ex parte order as soon as possible, which covers situations where, due to the effective enforcement of the order, it is necessary to give formal notice to a third party first.*

*Rule 12(2) covers situations where non-parties (of relevance for the assets sought preserved) are not addressees of an asset preservation order but where they still, under domestic law, would be under obligation to respect such an order when concerned by it. The rule acknowledges the practical reality, especially in the context of Rule 9(1)(a) and (b), that in certain jurisdictions the applicant will be concerned to ensure that a non-party, such as the respondent's bank, should be*

*immediately informed of the existence of the order so that the respondent cannot in practice evade the order by acting inconsistently with its terms.*

*Rule 12(3) makes clear that compliance is required from the moment that respondent or any third parties are formally notified under Rule 12(1). Depending on the jurisdiction, formal notice will be served by the court, by the applicant, or by independent enforcement bodies. The rule also clarifies that the sanctions listed in Rule 8 are not the only remedy available to applicant in the event that any addressee of an order breaches the order (depending on the jurisdiction, civil or even criminal liability may also derive from disobeying the court order).*

## **B. Regulatory Measures**

### **Rule 13. Measures to Perform or Abstain**

A court may grant the applicant a measure to regulate the relationship between parties in relation to a non-pecuniary claim on a provisional basis, which requires the respondent to act or to refrain from acting in a manner specified in the court's order.

#### **Source**

Article 17(2)(b) UNCITRAL Model Law on International Commercial Arbitration (2006); national laws

#### **Comments**

*Rule 13 describes the scope of orders to perform or abstain. It enables a court, on the request of the applicant, to order the respondent to act or refrain from acting in a manner that has to be specified in the order. It primarily fulfils the one of the functions described by Rule 1, sub (iii) and (iv). On the basis of this Rule the court can regulate the relationship between parties, including maintaining the status quo, until such time that the decision in the main proceedings is given or the case is settled otherwise. A similar rule is laid down in Article 17(2)(b) UNCITRAL Model Law on International Commercial Arbitration.*

*Rule 13 covers only regulatory orders in relation to non-pecuniary claims, but it may be observed that asset restraining orders under Rule 9(1)(b) may compel respondents to act or refrain from acting for the purpose of protecting any claim, including pecuniary claims.*

*Provisional measures to perform or refrain cover a wide range of orders, including for instance an obligation to perform a contractual agreement, the rectification of a media publication or to abstain from acts of unfair competition or that infringe an intellectual property right. Such measures are subject to the Rules included in the General Part, including in particular the principle of proportionality and the liability provision. The granting of the provisional measure is subject to the criteria of Rule 14.*

### **Rule 14. Criteria for awarding a Regulatory Measure**

A party seeking an order under Rule 13 must show:

(a) it has a good chance of succeeding in the main proceedings; or  
(b) where there is a significant risk that damages to the respondent will not be capable of providing adequate compensation for any interference with their rights if the main proceedings are dismissed, there is a very strong possibility that the applicant will succeed in the main proceedings;

and

(c) the order is necessary to regulate the substantive matter in dispute pending final determination of the main proceedings.

#### **Sources**

National laws

#### **Comments**

*This Rule lays down two cumulative conditions for awarding a measure to perform or to abstain within the meaning of Rule 13 can be awarded.*

*Under (a) the general requirement is that the applicant must show that he has a good chance to succeed in the claim on the substance of the matter. For instance, when the applicant seeks a restraining order in relation to intellectual property rights such measure may only be awarded when there is a good chance that in the main proceedings it will be decided that the acts of the respondent infringe an intellectual property right held by the applicant. However, if there is a significant risk that the damage that such measure would cause to the defendant (e.g. loss of reputation or of perishable goods) cannot be adequately compensated, the standard of proof is higher and there should be a very strong possibility of succeeding on the merits. While measures causing damage that cannot be adequately compensated should in general be voided, in specific circumstances such measure may be required to avoid irreparable harm to the defendant. Such measure can only be awarded when the applicant can show that there is a very high chance he will succeed on the merits.*

*In addition to one of these two criteria, the applicant must show that the measure is necessary to regulate the matter pending the final determination of the claim.*

*This rule should be read together with Rule 2 on proportionality.*

## **[SECTION 2. Evidence Preservation]**

### **Rule 15. Evidence Preservation Orders**

(1) The court has power to secure evidence on the application of a party to proceedings through the following interim measures:

- (a) hearing witness evidence or taking of witness evidence by a third party acting on its behalf;
- (b) requiring the preservation or protection of evidence by the parties or by requiring it to be placed in the custody of a neutral third party;
- (c) appointing an expert to provide expert opinion evidence.

(2) Evidence preservation orders may, where necessary, authorise access to the evidence. Access may be subject to such conditions as the court considers just.

### **Sources**

ALI/UNIDROIT Principles 8, 16

### **Comments**

*This Rule underlines that evidence preservation can take a variety of forms, and that courts should be ready to grant the most appropriate form of order under the circumstances.*

*Preservation may be necessary for a variety of reasons i.e., to protect evidence from perishing, to protect it from being tampered with, damaged, destroyed, or hidden. It may also be necessary where a witness is unlikely to be available at trial i.e., due to ill-health or due to the likelihood that they may not be in the jurisdiction at the relevant time.*

*In accordance with the principle of proportionality (Rule 2), the court should use the form of order which will achieve its purpose in the least invasive manner for the respondent.*

### **Rule 16 Criteria for awarding an Evidence Preservation Measure**

A party seeking an evidence preservation order must show that:

- (a) there is a real risk that unless the order is made the evidence will not be available for determining the proceedings on its merits; and
- (b) if the order requires access to a party or non-party's property the applicant has a strong prima facie case in respect of the merits of the applicant's claim or proposed claim.

## Sources

ALI/UNIDROIT Principles 8, 16

## Comment

*Where access to evidence in order to effectuate an evidence preservation order requires access to a party or non-party's private property i.e., business premises, land etc., there is a heightened threshold for granting the order given the interference with their property rights it will entail.*

*In certain circumstances, it may be necessary to make a preservation order in urgent circumstances or where secrecy is required in order to ensure that the order is not capable of being frustrated before it has been granted, if granted. As such a preservation order may be made before substantive proceedings have commenced i.e., where the evidence is in danger of being destroyed, of perishing or, of not being available due to a witness's imminent departure from the jurisdiction (see Rule 5). Such an order may also be made on an ex parte basis where there is, for instance, a risk that notice to the respondent to the order will frustrate the order i.e., because it will inform them of the application and enable them to take action to destroy, hide or otherwise remove the evidence from the jurisdiction of the court. In such circumstances, once an ex parte order has been granted, the general provisions under Rule 3 apply.*

## SECTION 3. Interim Payment

### Rule 17. Interim Payment Measures

A court may grant the respondent an interim payment order in relation to a monetary claim, either wholly or in part to satisfy the claim in the main proceedings in anticipation of the expected outcome.

## Sources

Storme Report, Part 10.1.2 and 10.13; national laws

## Comments

*Interim payments are not common to all legal systems, but can be regarded as a measure to prevent further harm within the meaning of Rule 1, sub (iv). Interim payments are intended to wholly or in part satisfy the claim in the main proceedings in anticipation of the expected outcome of the main proceedings on a provisional basis. The generally long duration of main proceedings and the non-availability of other tailor-made procedures, including an order for payment procedure, may jeopardize the financial position of companies or individuals. It is provisional in the sense that there is an obligation to repay the amount if the main proceedings are unsuccessful.*

*In those systems where interim payment are allowed as a provisional measure, in about half of the Member States, the granting of these measures is often subject to more stringent requirements than other types of provisional and protective measures. The present Rule does not oblige to make interim payments available, but aims to provide criteria for this type of measures considering the interests of the applicant and respondent, should these be available.*

*The interim payment should be distinguished from orders for payment as exist in domestic law of many countries and in EU law (Regulation creating a European Order for Payment Procedure). The latter one are final orders given in specific, usually one-sided, summary procedure in relation to uncontested claims. These orders are excluded from the scope of these rules pursuant to Rule 1.*

### Rule 18. Criteria for awarding an Interim Payment

(1) A party seeking an order under Rule 17 must show that:

(a) the defendant has admitted liability in the main proceedings to pay a monetary sum to the applicant or a judgment on liability has been obtained by the applicant, or it is highly likely that the applicant will succeed to obtain at least the amount sought on the merits; and

(b) payment is needed urgently from the defendant.

(2) In assessing whether to make an interim payment order the court should consider all the circumstances, including any potential or actual hardship to the applicant or the respondent as a result of refusing or granting the order.

(3) An interim payment order can only be made after hearing the respondent.

(4) Where judgment in the main proceedings is for a lesser amount than that paid, any over-payment must be repaid.

(5) An interim payment order will ordinarily be made subject to giving security.

### Sources

National laws

### Comments

*Interim payment measures within the meaning of Rule 17 can be granted subject to two conditions. The first is that the respondent has either admitted liability to pay, has already received a judgment on liability of the respondent, or – in the absence of these – it is highly likely that the applicant will succeed on the merits. In addition, the application will have to show that payment is urgently needed from the defendant. These requirements secure as much as possible that the interim payment, which anticipates the final judgment, is justified. The urgency requirement is common under the domestic laws allowing interim payment orders. In assessing this requirement it may be taken into account how long it would take to obtain a final judgment, what the financial needs of the applicant are, and whether the applicant has made serious and expeditious efforts to collect the money otherwise from the respondent.*

*Paragraph 2 expresses that both the interests of applicant and the respondent should be considered and should be understood in conjunction with Rule 2 on proportionality.*

*Paragraph 3 makes an exception to Rule 3 on ex parte procedures. While in relation to other provisional and protective measures the 'surprise' effect or other special circumstances may justify an ex parte measure, this is different for interim payment orders. The close relation to proceedings on the substance of the dispute and the anticipatory nature of this measure require that the respondent is heard.*

*In accordance with paragraph 4 any over-payment made must be repaid. This provision is in line with Rule 7 on liability, but extends to the situation where part of the interim payment granted is awarded in the proceedings on the merits.*

*While Rule 4(2) provides that the granting of a measure may be subject to the provision of security by the applicant, paragraph 5 of the present Rule provides that the interim payment order will ordinarily be made subject to giving security. The security backs up the risk of repayment should the defendant not succeed in the main proceedings. However, in case the defendant has admitted liability such security may not be appropriate. This rule is in line with the Van Uden v. Deco-Line ruling (Case C-391/95) where the CJEU required in the context of international jurisdiction in favour of a court not having jurisdiction on the substance that 'repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim'.*

## PART III – CROSS BORDER ISSUES

### Rule 19. International jurisdiction

(1) Within the scope of the EU Regulations or international conventions, the international jurisdiction of the court in relation to provisional and protective measures, is governed by those Regulations or conventions.

(2) In any event, the court having jurisdiction on the substance will have jurisdiction to grant provisional and protective measures.

(3) Without prejudice to the applicable EU rules and international conventions, another court may grant such provisional and protective measures necessary to protect interests located within or the subject-matter of which have a real connecting link with the territory of the court, or that are necessary to support main proceedings brought in another country.

### Sources

ALI/UNIDROIT Principle 2.3; Article 35 Brussels Ibis Regulation (No. 1215/2012); Article 6 EAPO Regulation; ILA Principles on Provisional and Protective Measures in International Litigation, Principles 16-17

### Comments

*This Rule primarily refers to the existing applicable rules to determine international jurisdiction (para 1). Within the EU, many cases will be within the scope of the Brussels Ibis Regulation, no. 1215/2012 (see Articles 1, 4 and 6 Brussels Ibis). In line with Article 35 of this Regulation and the interpretation by the CJEU, in particular in the Van Uden v. Deco-Line ruling (Case C-391/95), the court having jurisdiction on the substance can grant provisional and protective measures. Where it does not have jurisdiction on the substance of the case, there should be a real connecting link between the subject-matter of the measure and the territory of that court. In relation to interim payments, the CJEU required that, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made. While the first part can be considered primarily as part of the qualification as a provisional measure – and is in line with Rule 18(4) – the second part can be considered a jurisdiction rule. The general requirement of the 'real connecting link' should be understood as the place where assets of the respondent are located or will be located (e.g. debts of third parties to the respondent that will fall due). Other EU rules on jurisdiction and provisional measures include Article 6 EAPO Regulation and Article 20 Brussels Ibis Regulation (No 2201/2003).*

*International conventions on international jurisdiction are scarce so far, but incidental special or bilateral conventions may include relevant rules in this regard. According to Article 8 of the Hague Choice of Court Convention this convention does not govern interim measures of protection.*

*Paragraph 2 states the rule common to international jurisdiction regimes, including the EU rules, that the court having jurisdiction on the substance can also grant provisional and protective measures. It is not required that main proceedings have already been brought, as also follows from Rule 5 of the present rules. The court having jurisdiction on the substance is the 'natural' forum for granting provisional and protective measures. This rule is also (implicitly) included in ALI/UNIDROIT Principle 2.3 and in Principle 16 of the ILA Principles on Provisional and Protective Measures in International Litigation.*

*In accordance with the international jurisdiction regimes, including the EU rules, a court may have jurisdiction to grant a provisional and protective measure where it does not have jurisdiction on the merits. This rule is explicated in Article 35 Brussels Ibis Regulation among others. It is also included in ALI/UNIDROIT Principle 2.3 and in Principle 17 of the ILA Principles on Provisional and Protective Measures in International Litigation. However, it will only have jurisdiction to do so where local interests need protection (e.g. evidence, assets, or perishable goods located in that jurisdiction), where there is an otherwise close connection between the measures sought and that jurisdiction (e.g. a restraining order relating to acts taking place in that jurisdiction), or where these are necessary to support main proceedings brought in another country. It is for the applicant to show that one of these situations exist.*

### Rule 20. Recognition and enforcement

(1) Within the scope of the EU Regulations or international conventions the recognition and enforcement of provisional and protective measures in other Member States is regulated by those Regulations or conventions.

(2) Where no EU Regulation or international convention applies, provisional and protective measures will be recognized and enforced in accordance with domestic law.

(3) In any case courts should, at the request of the parties, take into account provisional and protective measures granted in another country and, where appropriate and within the limits of their competence, cooperate in securing the effectiveness of provisional and protective measures ordered in other countries in line with the present Rules.

### **Sources**

ALI/UNIDROIT Principles 30 and 31; ILA Principles on Provisional and Protective Measures in International Litigation, Principles 18-20

### **Comments**

*In line with Rule 19(1) the present Rule refers to the existing systems of recognition and enforcement of judgments, including provisional and protective measures. Particular reference can be made to Article 2 sub (a) of the Brussels Ibis Regulation. According to that rule, provisional and protective measures ordered by a court having jurisdiction to the substance and where the defendant was heard or served prior to enforcement, are recognized and enforced in accordance with the rules of that Regulation.*

*Outside the scope of EU Regulations and international conventions domestic rules will apply (para 1). Domestic rules may also be relevant where an international convention applies in dual systems, such as in Scandinavian countries, or to implement specific rules of the convention that are left to national law. National law diverges on the recognition and enforcement of foreign judgments in general. As regards the enforcement of provisional measures the 'finality' requirement may limit or prevent enforcement, as is for instance the case in England and Italy.*

*In addition, the general exceptions included in international and domestic recognition and enforcement regimes apply, notably the public policy exception and the notion of fair trial. The procedural requirements included in the present Rules are guiding in this regard.*

*Both under the situation of paragraph 1 and 2, the present Rule require a court to at least take into account provisional and protective measures granted in another country. This may imply recognition of such measures (para 2). Where appropriate courts should also cooperate in securing the effectiveness of provisional and protective measures ordered in other countries. The latter rule is in line with ALI/UNIDROIT Principles 30 and 31 and Principles 18-20 of the ILA Principles on Provisional and Protective Measures in International Litigation.*

## ACCESS TO INFORMATION AND EVIDENCE

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## **PREAMBLE**

Evidence is a crucial matter lying at the core of civil procedure. Access to information and evidence are basic tools to ensure real access to justice, enshrined in Art. 6.1 ECHR, in Art. 47 CFREU and in many national Constitutions.

The approach to evidence and, very specially, to access to information varies within the European countries. It is not just a matter of the civil law/common law divide; legal history and procedural culture, namely the distribution of roles among parties and judges are also of paramount importance at this point.

Comparative research shows strong divergence concerning many of the crucial points of the evidence law: more or less formalism in the taking of evidence; more or less attachment to the principle of immediacy; and more or less proactive rules concerning access to information and/or evidence in the possession of the opponent or of third-parties are good examples of diversity. There are also different levels of efficiency and satisfaction with the evidence rules: e.g., more or less value to testimony depends on how testimony was taken, and this, in turn, has influence on the access to justice of claims that could only be proved by means of witnesses (e.g. in many tort cases); more or less access to information and to evidence has also an influence in the sort of claims that will eventually come into court.

Divergences may be the source of trouble and shortcomings also in cross-border litigation. The European Evidence Regulation and the Hague Convention on the Taking of Evidence are not aimed at harmonizing the rules on evidence at an international level and, therefore, they cannot avoid that diverging approaches to relevant issues (namely, access to information and production of evidence held by opponents and third parties) hamper cooperation.

Identifying the common core of the law of evidence and the best – or more convenient – rules, including those related to the management of evidence, should be regarded as the best attempt to improve the situation, not only at a cross-border level, but mainly within the European jurisdictions. This set of rules has also taken due account of the ALI/UNIDROIT Principles of Transnational Civil Procedure, of the 2010 IBA Rules on the Taking of Evidence in International Arbitration and of recent legal instruments addressing the issue of evidence and access to information within the European Union (Directives on IP right, competition damages claims and trade secrets, Regulation on the European Small Claims Procedure and rules on evidence of the Unified Patent Court).

These rules apply to evidence and to access to information in civil and commercial matters. No specific rules have been established for family cases nor for consumer protection, although most of the proposed solutions might be suitable also for those proceedings.

## **PART I – GENERAL PART**

### **SECTION 1. General provisions on evidence**

#### **[Rule 1. Scope of the Dispute]**

The scope of the dispute is determined by the claims and defences of the parties in the pleadings, including amendments.

#### **Source**

ALI/UNIDROIT Principle 10.3.

#### **Comments**

*Defining the scope of dispute is necessary in order to develop a criterion of "relevance" within the particular claim or dispute, which is essential for the purposes of evidence.*

*The notion of "scope" is necessary not just within the law of evidence but to other facets of procedure, such as the principles of res judicata.*

As for the term "pleadings", in most legal systems this refers to the parties' formulation of their respective cases, that is, the substance of both the claim and any defences raised (encompassing the facts on which claim and defences are founded, as well as the legal perspective under which those facts should be considered).

The term "pleadings", therefore, should be understood in the most possible neutral way and does not intend to define how the formulation of the parties' case should be done in each legal system. It is common to all of them that initial statements always include the factual framework and the remedy the party is seeking. How succinct or detailed the first pleadings are may vary in each legal system and, also, for different procedural tracks: sometimes in writing, sometimes orally; sometimes through a single document, sometimes after exchange of contentions among the parties. This rule takes for granted that in each procedural system, at the initial phase, the contentions and statements of the parties will define the scope of the proceedings.

### **[Rule 2. Burden of Proof]**

(1) Each party has the burden to prove all the material facts which form the basis of that party's case.

(2) Substantive law determines the burden of proof.

#### **Source**

ALI/UNIDROIT Principle 21.1; ALI Rule 28.1.

#### **Comments**

As to (1): *The burden of proof concerns not only the claimant, but also the defendant (regarding his defences). This distribution of the burden of proof among claimant and defendant is common to all legal systems and needs no further comment (see, for instance, Article 1353 of the French Civil Code, Article 2697 of the Italian Civil Code, Article 217 of the Spanish Code of Civil Procedure, or Article 414 of the Portuguese Code of Civil Procedure)*

As to (2): *Substantive law determines the facts underpinning the respective rights and, thus, it is substantive law to determine the criteria distributing the burden of proof. Relevant private international provisions govern the way to determine the applicable law [see, for instance, Article 18 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Article 22 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)]. The situations in which reversal of the burden of proof is possible are primarily matters of substantive law. In some legal systems judges are entitled to apply the rules on burden of proof taking into account the exceptional circumstances of the case and what should reasonably be expected from the parties (e.g., the lack of cooperation of one of the litigants in providing documents required by the opponent) [see, for instance, Articles 116 and 118 of the Italian Code of Civil Procedure, or Article 217 of the Spanish Code of Civil Procedure]. It is arguable if those situations involve real reversals of the burden of proof or, rather, the application of rules on admission of facts or on drawing adverse inferences. Nothing in these Rules impedes the judges to apply these criteria, when appropriate (on the contrary, see below rules 4 and 20).*

*In many jurisdictions, practice shows an increasing presence of agreements by the parties concerning the allocation of the burden of proof (or the admission or exclusion of means of evidence). An example can be found in Article 2698 of the Italian Civil Code or in the new Article 1356 of the French Civil Code. It is again a matter of substantive law to determine the validity of such agreements and the limits to them. In civil law and in civil proceedings the parties' autonomy remains a basic principle. However, such agreements should not be binding where this will lead to manifest injustice, taking into account, in particular, any significant imbalance of economic power and/or experience between the parties. In this vein, pursuant to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, among the terms which may be considered unfair, the Annex includes those which have the object or effect of imposing on the consumer a burden of proof which, according to the applicable law, should lie with another party to the contract (Annex 1 (q)).*

### **Rule 3. Standard of Proof**

A contested issue of fact is proven when the court is reasonably convinced of its truth.

#### **Source**

ALI/UNIDROIT Principle 21.2; ALI Rule 28.2.

#### **Comments**

*Setting the standard of proof in civil proceedings is of paramount importance and influences heavily not only the court's fact finding, but also the parties' strategy. In legal theory it is common to make reference to different possible standards of proof, requiring different levels of conviction from the judge, the minimum acceptable of which would be the balance of probabilities (the judge considering more probable the existence of a fact than the non-existence thereof). This rule is aimed at setting a qualified high standard of proof in civil proceedings. Requiring any court in any case to show "full" conviction, nevertheless, would be as demanding as difficult to imagine in practice. Therefore, the term "reasonably" used in the wording of the rule should be understood as meaning "as closely to the full conviction as possible", assuming that full conviction is only an ideal, probably not always to be reached.*

*The term "truth" in this context must be read free from any philosophical connotation. It is merely intended to describe the level or degree of confidence sufficient for the court to pronounce a decision on the facts.*

*The term "convinced" must also be taken with caution and should be understood to be a synonym for "satisfied". It is, therefore, necessary to assume that, within the aim of establishing a high standard, there is certain flexibility and a need to adapt to the circumstances in order to decide when a court is "reasonably convinced".*

*It goes without saying that the court may only consider itself convinced or satisfied of the truth taking account of all relevant evidence or other valid methods, such as those described in rule 4; private knowledge of the court shall never be the basis for a decision on issues of fact.*

### **Rule 4. Matters Not Requiring Positive Evidence**

(1) The following do not require positive evidence:

- (a) admitted facts;
- (b) uncontested facts; or
- (c) facts which are notorious to the court.

(2) The existence of facts can be presumed on the basis of other proven facts.

(3) When a party has possession or control of evidence concerning a relevant fact and that party, without justification, fails to produce that evidence, the court may consider that relevant fact to be proven.

#### **Source**

ALI/UNIDROIT Principle 21.3.

#### **Comments**

*As for (1): The rule is based on what is already commonly accepted by most jurisdictions.*

*Admitted facts shall be understood in the sense of "actively" or "expressly" admitted.*

*Regarding "uncontested facts", it has to be related to the principle of party autonomy. In some legal systems, uncontested facts are binding to the court, whereas in other jurisdictions the courts are simply allowed to consider uncontested facts as proven (or true).*

*Regarding "notorious", it is important to note that the facts have to be notorious to the court. Therefore, it should also be possible for the court to inform the parties that he/she considers a fact to be notorious and release the respective party from the burden of proving it. Examples are: the*

*public underground system in the capital city is crowded during rush-hours; tigers are not an indigenous species of Western European States.*

*The court, nevertheless, can only consider as "notorious" a fact that is also widely known in the community and context where the court is located. On the contrary, judges are not entitled to make use of their private knowledge of the relevant facts of a case, i.e., knowledge gathered through means different from those established in these rules.*

*As for (2): Presumptions are a system to determine the truth of facts known to all legal systems. Under the notion of "proven facts" also "admitted", "uncontested" and "notorious" facts are to be included. Unless otherwise established by the law, presumptions are always rebuttable.*

*As for (3): This rule shares with the preceding ones the idea that it is a special form to reach the truth of a contested fact. If a party fails to present evidence that it clearly could present, the court may infer that the evidence would be harmful to the party's case. This rule is also related to the provision of rule 20 on sanctions (for the cases where the court orders a party to produce evidence and it disobeys the order). The notion of "relevant fact" has to be interpreted in connection to rules 1 and 5.*

### **[Rule 5. Relevance]**

(1) Any relevant evidence is admissible. The court, whether of its own motion or on application by a party, shall exclude evidence which is irrelevant.

(2) Matters alleged in the parties' pleadings determine relevance.

#### **Source**

ALI Rules 25.1, 28.3.2, and 25.2.

#### **Comments**

*This rule has to be interpreted in connection to rule 1.*

*As for (1): The second sentence might look redundant, but helps to put in clear terms the duties and the powers of the court concerning the consequences of lack of relevance of evidence. It is the court's ultimate responsibility to tell relevant from non-relevant evidence.*

*In cases of spontaneous disclosure or implementation of an order for access to evidence, the courts shall also be entitled to exclude evidence which is redundant or involves unfair prejudice, cost, burden or delay. These are issues that must be assessed by the court when managing the taking of the evidence; but they must not be misunderstood as features of lack of relevance.*

*As for (2): When analysing relevance of evidence, the court shall address the scope of the evidence proposed and its connection to the controversial facts and issues of the case; it shall also address, as a question of relevance, if the contemplated evidence appears to be useful, i.e., possibly contributing to conviction in the terms of rule 3.*

### **Rule 6. Illegally Obtained Evidence**

Illegally obtained evidence should be excluded from the proceedings.

However, in exceptional cases, the court may admit such evidence if it is the only way to establish the facts, taking into account the behaviour of the other party or of non-parties and the degree of the infringement.

#### **Source**

ALI Rule 25.1.

## Comments

*Exclusion, in the sense of this rule, should be understood in the sense that the evidence shall not be the basis of any decision, neither principal, nor ancillary.*

*The issue of illegally obtained evidence does not receive a similar treatment in all jurisdictions. The first sentence is favoured by some jurisdictions. The second sentence reflects the view taken in some occasions by the European Court of Human Rights, which seems to have established an exception, arising from the "right to evidence": If the illegally obtained evidence is the only way to establish the facts and to win the trial, it should be admissible (see ECtHR 10 October 2006 L.L. v. France, appl. no 7508/02, concerning; 13 May 2008, N.N. and T.A. v. Belgium, appl. no 65097/01. Practice in England under the so-called "Hildebrand rule" shows also a flexible approach (at least in family law cases).*

*In L.L. v. France the decision concerned a case of infringement of the specific rule of Article 259-1 of the French Civil Code in divorce proceedings, according to which "A spouse may not produce in the proceedings any evidence that he or she may have obtained by duress or fraud". The Court considered that infringement of such provision in the case (the spouse had produced medical documents that showed alcoholism of her husband) had entailed an infringement of Article 8 of the ECHR, since it was not the only available way to prove that fact in the proceeding.*

*N.N. and T.A. v. Belgium was also a divorce proceeding, where the spouse introducing the claim had produced private letters of her husband to prove the existence of a durable relationship thereof with another person: once again respect to Article 8 ECHR was at stake, and the ECtHR considered that no infringement had taken place because that fact had never been denied by the defendant during the proceeding.*

*However, the general rule should still be the exclusion, especially when illegality arises from the infringement of fundamental rights of parties or non-parties. Therefore, a careful balance between the right to evidence and to a fair trial, on the one hand, and the fundamental right infringed to obtain the evidence (frequently, a privacy right), on the other, shall be performed in order to take a proper decision in critical cases.*

*The standards to define illegality can vary from one jurisdiction to another and so could also be the examples of "critical cases" of "clearly" illegally obtained evidence: document produced after opening a letter addressed to somebody without his/her consent; recording a conversation without knowledge of the speakers; an employer accessing personal files of an employee's computer; utilization of images recorded by a so-called "dash cam" located in the front of a car. Evidence obtained by torture shall always be excluded.*

*Exceptions to this rule should be scarce and only after a thoughtful balancing of all involved interests, including access to evidence, other fundamental rights' protection –especially, those connected to privacy-, good faith and fair play. It could be controversial, for instance, if a party is entitled to claim the exclusion of a document that is produced after having been –presumably- obtained through illegal methods, if that party did not disclose the document upon timely request by its opponent. On the other hand, it seems important to stress that the admission of exceptions should not be understood as fostering the illegal gathering of evidence as a sort of "precautionary" strategy; on the contrary, the general rule is aimed to deter such and similar practices. This set of rules provides the parties to litigation in its Part II with fair and reasonable tools to access information and evidence, which should be the tool to reach information in difficult situations.*

## [Rule 7. Equality and Proportionality]

The court must ensure that:

- (a) the parties, and prospective parties, enjoy equal treatment and reasonable opportunity to gain access to, and to present, evidence;
- (b) these rules operate in a manner which is proportionate to the importance and complexity of the issues.

**Source**

ALI/UNIDROIT Principle 3.1

**Comments**

*These standards are intended to regulate all applications and interpretation of these rules. They do not entitle the court with additional general powers allowing it to proceed differently as established, but they might be of help as underlying principles that can be used to justify judicial decisions in controversial situations and/or to grant the parties' motions.*

**Rule 8. Privileges**

(1) Effect should be given to privileges, immunities, and similar protections of all persons who are heard in order to get information in a case or concerning production of evidence or other information.

(2) In particular, evidence may not be elicited in violation of:

(a) The right of a spouse, partner equal to a spouse or close relative of a party to refuse testimony, also with regard to situations where testifying would entail the risk of that party being prosecuted.

(b) The right of a person not to incriminate him/herself.

(c) The legal-professional privilege and other professional privileges or of confidence, trade secrets and other similar interests in the terms provided by the applicable law.

(d) Confidentiality of communications in settlement negotiations unless the negotiations have occurred in a public hearing or overriding public interests so require.

(e) National security interests, secrets of State or other equivalent public interest issues.

(3) The court should consider whether these protections may justify a party's failure to disclose evidence or other information when deciding whether to draw adverse inferences or to impose other indirect sanctions.

(4) The court should recognize these protections when exercising authority to impose direct sanctions on a party or nonparty to compel disclosure of evidence or other information.

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

**Sources**

ALI/UNIDROIT Principles 18.1, 18.2 and 18.3; Preliminary set of provisions for the Rules of Procedure of the Unified Patent Court, Rule 179.3; Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Article 9); Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Article 7); Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (Article 14.1).

**Comments**

*The reason behind the privileges is the need to protect some interests despite of the truth-finding and the aim to the best evidence. For instance, family relations, confidentiality in professional*

*relations and "nemo tenetur se ipsum accusare" (privilege against self-incrimination) are such protected interests. Therefore, nobody shall be obliged to sign a written witness statement or to give evidence at an oral hearing if he/she is a spouse, partner equal to a spouse under applicable national law, descendant, sibling or parent of a party. A witness may also refuse to answer questions if answering them would violate a professional privilege or other duty of confidentiality imposed by the national law applicable to the witness or expose him or his spouse, partner equal to a spouse under applicable national law, descendant, sibling or parent to criminal prosecution under applicable national law.*

*It is a duty of the court to protect privileges ex officio. However, the court has not always information on current privileges and therefore the rule is based on co-operation. Absolute privileges have to be protected in all cases. Privileges can also be relative: in such cases the consent of the protected person (for instance patient's in the case of health professionals) will forfeit the privilege. The same happens if the truth finding is very intense in a case due to specific interests. Some privileges are based on the right to keep silent (close relatives have this right) whereas professional privileges are not up to the will of the person concerned. In other cases relevant public interests are at stake and only the State could waive the privilege. Whenever it is a right of a person to give evidence or keep silent, he or she cannot change his/her mind later once again but the decision to give evidence is binding. The case may also arise of inadvertent disclosure of privileged documents; the court should rule taking into account the principle underlying the privilege.*

*These general provisions on privileges have to be read together with the provisions of Part II of these Rules on Access to Evidence Orders, which are indeed restricted to the gathering of "(...) non-privileged evidence" [Rule 21(i)]*

*As for (1). In personam, privileges cover all persons –despite of their procedural status- who are heard in order to get information in the case. Temporally, the protection covers the whole proceedings, including hearings and gathering of information at a pre-trial stage.*

*As for (2). Under (a), the rule deals with the protection of family relationships by granting the spouse, partner equal to a spouse and other close relatives the privilege not to give testimony. The definition of the circle of persons covered by the privilege is strictly linked to family law and should therefore be done by national provisions.*

*Under (b), the rule implements in the context of civil proceedings the privilege against self-incrimination.*

*Under (c), the rule covers all situations where the privileges are based on some protected interest (more important than the best evidence and the truth-finding) according to the national law. Typically those interests are based on professional confidentiality (lawyers, clergymen, health professionals, journalists) but there are other situations as well, like the right not to incriminate her-himself and trade secrets. Concerning trade secrets, special attention must be drawn to the Directive on the protection of trade secrets, especially to its Article 9.*

*Under (d), the settlement efforts should be protected as well according to the EU Mediation Directive. According to the Directive, mediators or those involved in the mediation process are not obliged to give evidence in judicial proceedings regarding information obtained during that process, except if: a) necessary for overriding considerations of public policy, particularly to protect the physical integrity of a person; b) disclosure of the content of the agreement is necessary to implement or enforce that agreement. The latter can be seen as a matter of fact.*

*Under e), overriding concerns of public interest give rise to a privilege as they are accepted in most legal orders.*

*The rule must not be read as an exhaustive list of all possible heads of privilege, immunity or similar protection that could be successfully claimed. Some margin of appreciation is left to national legislation in matters as state security or family relationships (e.g., the degree of personal connection).*

*In the specific field of cross-border litigation, consideration is due to Article 14.1 of the Evidence Regulation, pursuant to which a request for the hearing of a person shall not be executed when the person concerned claims the right to refuse to give evidence or to be prohibited from giving evidence, (a) under the law of the Member State of the requested court; or (b) under the law of the Member State of the requesting court, and such right has been specified in the request, or, if need be, at the instance of the requested court, has been confirmed by the requesting court. Such issues have turned to be controversial in practice, e.g. with the so-called "French blocking statute".*

*As for (3): The protection of the privileges requires that the court may not draw adverse inferences whenever a person has used her/his right to the privilege. Therefore the court's consideration is limited to analyze if there has been a valid reason to the failure or not.*

*As for (4): As a matter of fact, the protection of privileges requires that sanctions are not used in the privileged situations. Courts and other public authorities shall guarantee the observance of privileges.*

*As for (5): Privileges may not be used to hide information and pieces of evidence. Therefore the rule is needed. However, the court has to interpret the rule cautiously to avoid the opposite party to use the rule for fishing protected information.*

## **SECTION 2. PRESENTATION OF EVIDENCE**

### **Rule 9. Presentation of Evidence and Contradiction**

(1) Each party has the right to offer relevant evidence supporting their contentions of fact and law.

[(2) Each party should have a fair opportunity and adequate time to respond to contentions of fact and law and to evidence presented by another party.]

#### **Source**

ALI/UNIDROIT Principles 5.4 and 5.5.

#### **Comments**

*As for (1): In some jurisdictions there is a fundamental right to evidence enshrined in national constitutions. ECtHR case law has also considered it to be a part of the rights encompassed in Article 6 (1) ECHR. This rule serves as reminder of the paramount relevance of the right to evidence within the general framework of the right of access to justice.*

*[As for (2): This paragraph is associated with the rule of fairness of proceedings and the right to defence.]*

### **Rule 10. Admission by Failure to Challenge**

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

#### **Source**

ALI/UNIDROIT Principle 11.4.

## Comments

*This provision is related to rule 4(1)(b), regarding "uncontested facts". The rule is related to the principle of party autonomy and does not establish any mandatory binding effect to the court. Additionally, the rule establishes a specific requirement: the court's informing of the fact that the party has failed to respond. Such an information should be given in the most appropriate context in order to give the apparently failing party the opportunity to amend his/her involuntary lack of reaction (e.g., during the hearing where the contention was made, or at a preliminary hearing where the court and the parties are establishing the facts that are to be considered admitted). The "timely response" may consist of a mere denial of the fact alleged by the opponent, but also, if permitted in that stage of the proceedings, of the contention of different facts.*

## Rule 11. Early Party Identification of Evidence

During the pleading phase, the parties must identify the evidence which they propose to produce to support their respective factual allegations.

## Source

ALI/UNIDROIT Principles 9.2 and 11.3; ALI Rule 12.1.

## Comments

*In accordance to the principles of loyalty –to the court and to the due administration of justice-, co-operation and good faith parties have the duty to make an early identification of their evidence. "Identification" in this context may entail different degrees of deepness (maybe not just naming and listing the pieces of evidence: e.g., witnesses: naming or listing who they are, enough to address main whereabouts and information he/she possesses; on the contrary, documents: a copy might be produced together with the initial pleading).*

*This rule –indeed, this whole set of rules- assumes a structure of civil proceedings divided in three main phases, as suggested by ALI/UNIDROIT Principle 9: an initial pleading phase, where the parties present their contentions (usually in writing) and identify their (principal) evidence; an interim phase, where the court (with the parties) should, if necessary, organize the proceeding, decide preliminary matters (like questions of jurisdiction), address availability, admission, disclosure, and exchange of evidence, and/or identify issues for early determination of all or part of the dispute; and a final phase, where evidence should be presented at a main hearing, in which the parties should also make their concluding arguments.*

## Rule 12. Notification of Evidence

- (1) Documentary or tangible evidence must be made available to the other party.
- (2) Witness evidence may be proposed to the court only if notice is given to all other parties of the relevant witness' identity and the subject-matter of the proposed evidence.
- (3) The court may direct that the opponent must keep confidentiality with respect to the evidence which has been notified to him.

## Source

ALI Rule 29.3.

## Comments

*This duty of notification is necessary in order to render proceedings fair, since it enables the other party to challenge that evidence in due course. Therefore, the lack of the due previous notification should entail preclusive effects and the affected evidence should not be admissible.*

*In some jurisdictions, the evidence must have been made available to the other party before being presented in court. In other legal systems evidence may or must be made available both to the other party and to the court at the same moment (i.e., when it is presented using electronic communication procedures). In some jurisdictions, the court itself will ensure that evidence already produced to it is duly notified to all parties.*

*In any case, this requirement of notification has become a central issue in the preparation of evidence and has become the core, in practice, of evidence, since it prevents the parties from abusive presentation of evidence and bad faith practices. Therefore, notification of evidence must be done in such a manner and within a time framework that enables the opposing party to duly analyse it and, as the case may be, challenge its admissibility.*

*As for (1): Tangible evidence concerns any non-documentary evidence which can be presented physically to the court.*

*Documentary evidence covers any sort of information which can be recorded or stored, also electronically (this rule must be read in connection to Part III of these Rules and, namely, to rule 33).*

*[As for (2): The notion of "witness" evidence also covers matters of expertise and expert witnesses. In that sense, witness evidence may relate to facts, but also to other non-factual issues, such as foreign law or empirical or scientific rules.]*

*Exceptions to this rule should only be considered in cases where there is a clear need to protect the witness' identity (i.e., whistle-blowers in competition damages claims).*

*The notion of "subject-matter of the proposed evidence" is directly linked with the notion of relevance addressed by rule 5 and should be understood as entailing different possible degrees of deepness, depending on the situation (main facts on which a witness should be examined, specific questions on which the witness might have made previous statements in other proceedings or before public authorities). In some legal systems it has been understood as requiring verbatim advanced evidence. And producing such documents in due course becomes the evidence supplied by the party to the court and will be subject to further examination.*

*As for (3): The issue of confidentiality of evidence must be applied and interpreted taking into account the provisions of rules 25 and 26.*

## Rule 13. Additional Evidence after Amendment of the Contentions

The court may, while affording the parties opportunity to respond, permit or invite a party to clarify or amend his contentions of fact and to offer additional evidence accordingly.

## Source

ALI/UNIDROIT Principle 22.2.1.

## Comments

*This is also related to case management (especially, to the provisions set for in rule 15), but it is important to make clear that this rule is also necessary in the field of evidence. "Clarifying" and "amending" should be interpreted in a reasonably restrictive way, in order to safeguard good faith and to avoid disregard of the rules on preclusion and timely identification of facts and evidence (see, for instance, rules 11, 13 and 14).*

**Rule 14. Late Presentation of Evidence**

Once a party has presented evidence during the relevant phase of the proceedings, further evidence will not be admissible unless that party shows good reason for not having produced it during that earlier phase.

**Comments**

*The same consequence applies where a party presents evidence belatedly in the first place. This rule promotes the orderly production of evidence (by developing the notion of preclusion associated with the previous rules) and the fairness of the proceedings. The relevant standard imposes a requirement for each party to be reasonably diligent in identifying and producing evidence. Late presentation of evidence, therefore, must be regarded as an exception that must be grounded on justified reasons.*

**SECTION 3. MANAGEMENT AND EVALUATION OF EVIDENCE****[Rule 15. Concentrated Final Hearing]**

(1) During the final phase of the proceedings evidence not already received by the court should be presented in a concentrated final hearing at which the parties should also make their concluding arguments.

(2) The final hearing must be held before the judge or judges who are to give judgment.

**Source**

ALI/UNIDROIT Principle 9.4.

**Comments**

*[See comment to rule 11 on the structure of proceedings and on the notion of "final phase" and "concentrated final hearing"]*

*As for (1), the main aim is to organize the concentrated main hearing where the evidence is taken and discussed together with the parties. To make the procedure more effective, there are many exceptions to this rule. Still, the fair trial is based on the communicative proceedings where all evidence is presented in open court, in an oral and immediate way in the presence of both parties.*

*Some exceptions could be permitted, where the court could extend the final hearing when there is good reason to do so: for instance, depending on the matter, deciding first on liability and then on the quantum and/or other additional matters.*

*As for (2), it is aimed at stressing the relevance of the immediacy principle, which is the main principle for the best evaluation of evidence.*

**[Rule 16. The Court's Management of Evidence]**

(1) During the early stages of the procedure the court, after giving the parties opportunity to respond, should address the admissibility, production and exchange of evidence. When necessary, the court will order the taking of evidence.

(2) The parties have the right to challenge the court decision.

(3) The court, after giving the parties opportunity to respond, may make decisions concerning the sequence and timing of producing evidence, as well as, where appropriate, the form in which evidence will be produced.

### Source

ALI/UNIDROIT Principles 9.3.4, 9.3.6, 14.1, 14.2 and 14.3; ALI Rule 18.3.4

### Comments

*This rule reflects the modern emphasis upon case management.*

*Discussion with the parties follows from the parties' right to be heard, but it is important to stress its application in this specific context. It can be helpful to introduce a more efficient case management system.*

*The issue of the "quantity" of evidence should be decided on the basis of proportionality (rule 7).*

*As for (1). The second sentence is not intended to grant the court a general power to decide on the taking of evidence: the ex officio powers of the court are addressed in rule 17. On the contrary, the words "when necessary" have the aim to clarify that the court will have to make the necessary provisions to ensure that admitted evidence is eventually taken, in case this is necessary (e.g., hearing witnesses).*

*As for (2). These are the most important decisions of the court regarding evidence. There might be good reasons, therefore, for challenging them. A challenge is envisageable in two possible ways: the party whose evidence was refused may try to have it admitted; the party may also challenge the admission of evidence requested by its opponent, if it deems it to be inadmissible. The rule does not define any specific means to challenge the court's decision. An interlocutory appeal or a more simple motion for reconsideration could be suitable; in most jurisdictions a later appeal against final judgment grounded on the court's refusal to admit relevant evidence depends on the party having previously (unsuccessfully) challenged that decision in the first instance. It is up to national legislation a more precise definition of such interlocutory challenges.*

*The rule is not intended, either, to convey the message that the decisions included in it are the sole ones that might be challenged. General forum rules on motions for reconsideration, interlocutory, and final appeals shall apply as usual.*

*As for (3). The reference to the "form in which evidence will be produced" includes, when appropriate, the so-called "new technologies", including the available technologies for communication [see also rules 18 (6), 33, 34 (2), 37 (2), and 46 (2)].*

### Rule 17. Powers of the Court with Respect to Further Evidence

(1) The court may, while affording the parties opportunity to respond, suggest what evidence not previously proposed by a party it sees to be relevant and useful. If a party accepts that suggestion the court will order the taking of that evidence.

(2) Exceptionally, the court may, while affording the parties opportunity to respond, order the taking of evidence not previously proposed by a party.

### Source

ALI/UNIDROIT Principle 22.2.2; ALI Rule 28.3.1.

### Comments

*These rules deal with a very controversial issue, which does not receive a uniform answer in national procedural legislations, and they try to set a compromise. Both have a common starting*

*point: the court has made a first assessment of the case and of the evidence proposed by the parties and considers that additional evidence would be useful or necessary in order to assess the truth of relevant facts as asserted by the parties. Two possible answers are foreseen by the rules in order to overcome this situation.*

*As for (1). The first possibility, existing in some jurisdictions, grants the court the (limited) power to suggest what other evidence could be proposed by a party in order to cover the detected evidentiary need. However, under a very restrictive view of the principles of disposition and of impartiality, the court is not entitled to order ex officio the taking of that evidence.*

*As for (2). The second possibility (which in fact includes also the first) grants the court the (also limited) power to order sua sponte the taking of evidence. In jurisdictions where the court can order on its own motion the taking of any measure aimed at establishing legally admissible evidence (for example, appointing an expert witness, ordering the performance of a genetic test or directly interrogating any of the parties), it is still in practice an exception, not main practice. In general the court shall rely –and relies– on the parties to identify and present evidence: in civil proceedings the general approach is to rely on the parties to elicit and present evidence to support the claim and defence. Therefore, an exceptional power to require further evidence might be exercised by the court under this rule where, for example, the court apprehends that the transaction or dealings between the parties are illegal, or that a contract term is null and void (as follows from recurring ECJ case law). It might also be necessary for the court to take an active role under this rule if one, or even both, parties are not legally represented. Additionally, these powers are considered as more acceptable in litigation areas where the principle of party autonomy does not apply in full (family law, consumer protection law, for instance). But in general caution is required. Before doing so, the court should consider the cost of the measure and choose the less or least expensive one if the results to be expected are otherwise equally satisfactory (rule 7). If the court orders the taking of evidence on the basis of this rule, the parties will also be granted opportunity to propose the taking of relevant evidence, as a reaction to the court’s initiative.*

*In both cases it must be emphasised that the court may not introduce new facts (see rule 1). In other terms, this rule does not derogate from rule 1 and from the principle of parties’ disposition.*

### **Rule 18. Conduct of Hearings**

- (1) The court will hear and receive all evidence directly in the courtroom unless, exceptionally, the court has authorized evidence to be taken by a delegate judge or at another location.
- (2) Oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. However, following consultation with the parties, the court may order that hearings or parts thereof be kept confidential or be conducted in private in the interest of justice, public safety, or privacy.
- (3) Any hearing where evidence is taken shall be video recorded, provided that the necessary technical equipment is available. The video recording must be kept under the court’s direction.
- (4) Court files and records should be public or otherwise accessible to persons with a legal interest or making a responsible inquiry.
- (5) Information obtained under these Rules but not presented in an open hearing must be maintained in confidence. In appropriate cases, the court may enter suitable protective orders to safeguard legitimate interests, such as trade or business or national-security secrets or information whose disclosure might cause undue injury or embarrassment. Where appropriate, the court may examine evidence in camera.
- (6) The taking of evidence, in hearings or in camera, can involve, where appropriate, the use of technology, such as videoconferencing or similar distance communication technologies.

## Source

ALI/UNIDROIT Principles 20.1, 20.3 and 22.3; ALI Rules 24.1, 24.2, 24.3., 24.5, 24.6, 24.7, and 30.2; EU Evidence Regulation 1206/2001; EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) (Article 9); EU Regulation No 861/2007 on European Small Claims Procedure (Article 8); International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) [Article 8 (1)].

## Comments

*As for (1): The presence of the whole court when receiving evidence is a basic procedural safeguard (immediacy principle), which is also stressed by rule 15 (2).*

*In some jurisdictions the practice might be that, for reasons of efficiency and convenience, not all members of a multi-judge panel will gather certain types of evidence (e.g. the French juge/conseiller de la mise en état). Recourse may be made to a delegate judge, who will be a member of the panel (principle of immediacy) or, in any case, a member of the judiciary.*

*In some jurisdictions a related example of judicial flexibility is the possibility that a judge in another district within that jurisdiction might be used to receive the evidence and then transmit it to the court (domestic judicial cooperation). The same situation can also take place in cross-border cases, in accordance to EU Evidence Regulation 1206/2001. This should happen only in exceptional circumstances where the court cannot assess the evidence directly, due to the importance of immediacy (e.g. because the witness is in a remote country and cannot be summoned). Therefore, to circumvent those obstacles new technologies should preferably be envisaged.*

*In some jurisdictions children, at least in certain sort of cases, are not heard directly by the court, but rather by an official appointed by the court. This rule should not be an obstacle to such practice, as long as the prevailing interest of the children so require.*

*The main purpose of the rule is fostering the direct questioning in person at the immediate proceedings. If this is not possible or reasonable but the value of the evidence can still be assessed in a trustworthy way, the "modern techniques" like phone or videoconferences may be used (in the terms established in these Rules). In cross-border situations, the State sovereignty may cause problems because the domestic court cannot hear persons abroad. Therefore, in cases of legal assistance and judicial cooperation, the court may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing. In these situations, where the evidence is not taken in the immediate and concentrated main hearing in the presence of all parties, the supplementary questioning by the parties and their possibility to challenge the pieces of evidence has, however, to be respected in the name of fair proceedings.*

*This rule also addresses the issue of the location: in exceptional circumstances, the evidential hearing may take place at a place different from the courtroom (e.g., at a private domicile, at a hospital, in prison); the use of distance communication technologies should be also an alternative in such situations.*

*As for (2): The public proceedings is the main principle and it is important to fulfill the requirements of fairness. Sometimes the interests of privacy and other privileges like the State safety can collide with the publicity. In those situations, the publicity may be optimized to the other interests to find a fair balance. Especially, in the business litigation the trade secrets should be protected quite widely to make the court proceedings a competitive instrument for business litigation. Otherwise, arbitration is another tool solving business disputes in secrecy. The party publicity has to be guaranteed in all circumstances. The possibility stressed here, therefore, must be read in connection with rule 8 on privileges: privileged information and evidence will not be produced or taken; but when a privilege does not apply, alternative protective measures should be granted, such as the exclusion of publicity from the hearings and access to sensitive parts of the judicial files (see 5).*

*As for (3): National practice will vary, but the main requirement is that the hearing shall be recorded and verified afterwards, provided that the necessary technical equipment is available.*

*States should make the effort to provide their courts with such equipments. A summary record of the hearings must be kept under the court's direction. If the party wants to get a copy of the record, it is up to the national legislator if he/she will be required to pay for the extra costs or not (e.g., in jurisdictions where court fees are applied).*

*As for (4): The publicity should not be limited more than necessary. In many cases, the protection of competing interests requires proceedings in camera only partly. If there are some milder tools for protecting the competing interests, they may be used instead of limitations in publicity.*

*As for (5): This rule is aimed at ensuring the protection of confidentiality and at avoiding misuse of the procedural principle of public proceedings. The provisions of Article 9 of the Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) are to be taken into account when putting in practice this rule.*

*As for (6): The use of technology in civil proceedings is no longer a "new" issue, but rather a common situation. The rule is intended to be technologically neutral, so any possible technological system, currently existent or to be created in the future, may fall within its scope. The use of technology for evidentiary purposes may consist, for instance, in displaying electronic programs in front of the court (in order to permit the court to know the contents of non-documentary electronically stored information), or activating audio or video software, and of course, to use electronic devices and systems (such as videoconference) to get direct communication with a person (witness, expert) located at a different place. Many jurisdictions admit this last possibility (see CPR 32.3 or § 128a German ZPO, for instance). This Rule is based on the assumption that oral evidence is more credible if the witness or expert is physically present in the courtroom. The EU Small Claims Procedure Regulation (Regulation No 861/2007) is more open to new technologies, especially after the amendments introduced in its Article 8 by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015. A general preference of distance communication technologies in this field of small claims is coherent with the proportionality principle. However, as travel costs will mostly be higher than the costs for a videoconference, a generalization of such a practice for all claims might be expected, which may lead to the result that there would be probably no more direct oral hearings in court. This result would, in turn, be also disproportionate and not suitable.*

*Recourse to the use of communications technology at the performance of the taking of evidence in cross-border cases is also foreseen by Article 10(4) of the 1206/2001 Regulation on the Taking of Evidence (unless this is incompatible with the law of the Member State of the requested court or by reason of major practical difficulties such as the lack of access to the technical means).*

### **Rule 19. Evaluation of Evidence and Judgment**

- (1) The court shall take into account all relevant evidence when making its final decision.
- (2) The court will freely evaluate the evidence.
- (3) Final judgment should be accompanied, whether immediately or within a reasonable time, by a reasoned explanation of the essential evidential, factual, and legal basis of the decision.

### **Source**

ALI/UNIDROIT Principles 16.6, 22.1 and 23.2; ALI Rules 28.2 and 31.2.

### **Comments**

*This rule addresses how the judge has to deal with evidence when taking his final decision on the merits, but it also concerns issues other than the resolution of the substance, such as costs and leave to appeal, when appropriate.*

*As for (1). Judicial decisions shall be consistent with parties' allegations and they shall also be exhaustive, in the sense that the parties know that none of their factual allegations and evidences has been overlooked by the court. This relates to the parties' right to a fair trial.*

*As for (2). The general rule is the free evaluation of the evidence. However, in some jurisdictions the law attributes binding or enhanced value to certain types of evidence (e.g. public or authentic documents); these rules should be considered admissible, when they have a sufficient underpinning. Additionally, in some jurisdictions certain facts or claims may only be proven through certain specific means of evidence [this is the case for France in civil (but not in commercial) matters, where claims over 1 500 € may only be established by a written document, except in exceptional circumstances]. In England, from a different point of view, disputes concerning the interpretation issues of written contracts are classified as matters of law rather than fact. The result is that permission to appeal such decisions is more readily granted, especially if the relevant contract is of widespread legal interest and importance. By contrast, ascertaining the contents of unwritten or partly written contracts and giving effect to such terms is a matter of fact.*

*In any case, free evaluation of evidence means that the court has the power to interpret the evidence in a manner different from that proposed by the parties.*

*As for (3). Free evaluation of evidence does not relieve the court from its fundamental duty to give reasons for its final decision. The "giving of reasons" or "motivation" should encompass all relevant controversial issues, which can be evidential, factual and/or legal (although legal issues are not directly the scope of these Rules). The European Court of Justice has stressed the relevance of "motivation" of decisions as being a part of the fundamental right enshrined in Article 47 of the Charter of Fundamental Rights of European Union (Case C-619/10, Trade Agency, Judgment of 6 September 2012, paragraph 53) and in Article 6.1 of the European Convention on Human Rights (Case C-283/05, ASML, Judgment of 14 December 2006, paragraph 28).*

*The practice in many jurisdictions is that important interim decisions (e.g., the grant of an important interim injunction concerning the substance of the case) would also involve evidential and legal reasoning.*

*The rule gives room to different domestic practices concerning "motivation". In some jurisdictions the decision is first announced (frequently orally), followed later by its foundations and motivations (in writing); while in most jurisdictions decision and explanation appear together. From a different point of view, some jurisdictions do not require certain specific judgments to be "motivated": this may be the case with default judgments, where, nevertheless, the European Court of Justice (in the above mentioned Trade Agency case) considered that "(...) the courts of the Member State in which enforcement is sought may refuse to enforce a judgment given in default of appearance which disposes of the substance of the dispute but which does not contain an assessment of the subject-matter or the basis of the action and which lacks any argument of its merits, only if it appears to the court, after an overall assessment of the proceedings and in the light of all the relevant circumstances, that that judgment is a manifest and disproportionate breach of the defendant's right to a fair trial referred to in the second paragraph of Article 47 of the Charter, on account of the impossibility of bringing an appropriate and effective appeal against it."*

*Ordinarily motivation should be given in written form, in order to put the aggrieved party in a position to lodge an appeal against the decision.*

*Lex fori may provide that the parties can waive the right to "motivation", either explicitly or by other means (e.g., when the final decision is publicly announced at a hearing and all the parties declare that they will not appeal it).*

*The requirement contained in this rule should apply equally to situations where the decision of final issues may be split (liability, quantum).*

#### **[Rule 20. Sanctions Concerning Evidence]**

(1) The court, whether on its own motion or on application by a party, may impose sanctions in these circumstances:

- (a) a person has unjustifiably failed to attend to give evidence or to answer proper questions, or to produce a document or other item of evidence;
- (b) a person has otherwise obstructed the fair application of the rules concerning evidence.
- (2) Appropriate sanctions against parties include: drawing adverse inferences; staying the proceeding; and awarding costs in addition to those permitted under ordinary costs rules.
- (3) Appropriate sanctions against parties and non-parties include pecuniary sanctions, such as fines and *astreintes*.
- (4) Appropriate sanctions against lawyers include an award of costs.
- (5) In any particular case, the court should ensure that sanctions are reasonable and proportionate to the seriousness of the default or non-compliance, the harm caused, the extent of participation and the degree to which the conduct was deliberate.

### Source

ALI/UNIDROIT Principles 17.1, 17.2, 17.3, and 17.4; ALI Rule 28.3.3.

### Comments

*As for (1). Under (a) the rule describes certain types of misconduct which are typically against the parties and non-parties' duties and responsibilities in the field of evidence. Under (b) the rule allocates room for additional improper conduct concerning evidence: for example, threatening witnesses, destroying evidence, burying the opponent under an avalanche of documents.*

*The cases mentioned under (a) represent the most obvious ways in which parties or persons might fail to comply with the demands of the rules on evidence. But it must be acknowledged that in some legal systems sanctions are applied in a demanding fashion as a part of the system of case management.*

*As for (2), (3) and (4). These provisions prescribe various possible sanctions against parties, non-parties (including witnesses and experts, for instance) and lawyers. The list is neither exhaustive nor mandatory. Forum law must play a significant role, since sanctions are linked to the very core of sovereignty. The possibility of drawing adverse inferences is also addressed in rule 4(3). The possibility of imposing pecuniary sanctions, as well as the option between fines and *astreintes*, should depend on the law of the forum provisions (having in mind that fines will be payed to the State, whereas *astreintes* will have to be paid to the opponent). Drawing adverse inferences may also imply taking facts as established and this, in turn, could lead to dismissing claims, defences, or allegations in whole or in part. It is worth recalling that in *Marco Gambazzi (C-394/07, 2 April 2009)* the ECJ, in a case involving the public policy clause as ground to refuse recognition and enforcement, had to deal with a sanction imposed by an English court, consisting in exclusion of the defendant from the proceedings due to lack of compliance with an evidentiary obligation imposed by a court order. The ECJ did not determine, but left to the requested State judicial authority (Italian courts) to determine if, "following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard." Subsequent to this guidance, the Italian courts held that in fact the relevant sanctions deployed by the English courts had not operated in a disproportionate manner.*

*As for (5). This is linked to the general rule on proportionality (rule 7). Among other, the seriousness of the matter and the harm caused, the extent of participation in the breach and the degree to which the conduct was deliberate, can be relevant balancing elements. Consistent with this, severe or aggravated misconduct by parties and non-parties, such as submitting perjured evidence or violent or threatening behaviour, may lead to more serious sanctions and criminal liability.*

## **PART II – ACCESS TO EVIDENCE ORDERS**

### **Rule 21. General Framework**

When making orders under the rules in this Part the court will give effect to the following principles:

(a) As a general rule, each party should have access to all forms of relevant and non-privileged evidence;

(b) in response to a party's application, the court will direct production of relevant, non-privileged, and sufficiently identified evidence held or controlled by another party or, if necessary, by a non-party, even if such production might be adverse to that person.

### **Source**

ALI/UNIDROIT Principles 16.1 and 16.2; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Articles 6 to 8); Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Articles 5 to 8).

### **Comments**

*This rule is intended to provide a general framework within which access to evidence orders considered or made under this Part should be approached. In general terms, the provisions set in this Part find their grounds on already existing EU rules (namely the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights and the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union), where relevant standards have already been established. Underlying EU principles and policies should be taken into account when interpreting these rules. It is important to note that the rules in this Part intend to represent the European best practice to ensure access to evidence in a manner very different from US-style discovery.*

*As for (a). Evidence includes all forms of evidence as listed in Part III of these Rules and includes, therefore, testimony, parties' statements, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person.*

*As for (b). The terms "if necessary" are related to the notion of subsidiarity: non-parties should only be annoyed when there are no other available means to access the evidence. "Person" is meant to cover parties and non-parties. The requirement of a "reasonable" identification of evidence has to be interpreted as a balance between a too restrictive and a too broad approach, which is further developed by rule 24 (1).*

*The term "evidence" in (b) has to be understood in a very broad sense, encompassing information and data that can later be transformed into proper evidence. In that sense, the scope of access could be more properly described as "sources of evidence", i.e., documents (in a wide sense), objects and information which the requesting party could later formally adduce as evidence.*

*Evidence is also considered to be "held" or "controlled" by another person when it is electronically stored information or where the information remains in the mind of a person (and, then, the only possible measure to access evidence would be an interrogatory or a statement).*

**[Rule 22. Orders for Access to Evidence]**

(1) Subject to the considerations and procedure contained in these rules, any claimant or defendant, or any prospective claimant who intends to sue, can request the court to make an order for access to relevant and non-privileged evidence held or controlled by the other party or by non-parties.

(2) An order under (1) shall not be granted ex officio by the court, without prejudice to the provisions laid down in special rules.

(3) Material or information supplied under this rule only becomes evidence when it is formally introduced as such into the proceedings.

**Comments**

*This rule provides the core of the system for making orders under this Part. This rule has to be read in the light of the following ones, where strict requirements are established in order to prevent an interpretation that could lead to a sort of transplant of US-style discovery.*

*Orders can be sought by parties or prospective claimants; they may be used, therefore, to prepare a claim (or, prior to this, to decide if filing or not a claim, and/or against whom).*

*As for (1). The order must be capable of covering not just traditional documents but all other forms of relevant information: electronic documents and all other means of storing or accessing information or data, including sound and images. The court may also make orders, upon request, concerning expert reports, witnesses, objects or places to be inspected by the court.*

*As for (2). It is the court's task to respond to a request and not to act of its own motion. Therefore, the court cannot make an order which is more burdensome than that requested. The following Rules amplify the factors relevant to such an application.*

*As for (3). It is for the concerned party to propose timely the relevant evidence based on the obtained information, documents or sources of evidence. The court cannot on its own motion grant evidential value to the information gathered through one of these orders. On the contrary, it is a burden lying on the parties. An applicant who receives a set of documents might decide that only one or part of them is to be relied upon; in that case, according to the relevant rules, he/she will be constrained to introduce that document as evidence in the case. In a similar basis, it is for the applicant to decide, after hearing the declaration of a potential witness, if it is of interest to propose that that person be examined in the presence of the court during trial.*

**[Rule 23. Relevant Factors]**

(1) The party or prospective party seeking an order for access to evidence must satisfy the court:

(a) that the requested evidence is necessary for the proof or proposed proof of issues in dispute in pending proceedings or in proceedings which are contemplated; and

(b) that the applicant cannot otherwise gain access to this evidence without the court's assistance.

(2) Furthermore, the party or prospective party making a request under Rule 21 must submit with its request prima facie evidence of the merits of its claim or defence. If the order is requested prior to the initiation of proceedings, the applicant must indicate with sufficient precision all elements which are necessary to allow the court to identify the claim which the applicant intends to make.

**Source**

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Articles 6 and 8); Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Articles 5 and 6.10).

### **Comments**

*The requirements set out in this rule are important to ensure that the court only makes an order which is both necessary and adequately supported. The stated requirements, together with those foreseen in rule 24, are intended to prevent potential applicants to use this mechanism as a tool for fishing expeditions (when applications are too premature) and to ensure that the system, as a whole, is fair and just. If an applicant requires more information than is really necessary, the danger is that implementing the order turns to be too burdensome for the opponent. To enable the court assessing whether the application is premature or unnecessarily broad, in cases where the main proceedings have not been yet initiated, the rule makes clear that the applicant should provide adequate details of the intended main claim. Sometimes, indeed, the order should be necessary to define who will be the defendant and what sort of relief ought to be sought from the court. This would be the case, for instance, where an insurance company refuses responsibility alleging that the insurance policy does not bind it because the person acting on its behalf when subscribing it was at that moment no longer its employee (but refuses to show proof of it): depending on the content of the information gathered two different claims might be envisaged (a contract claim against the insurance company or a tort claim against the person who unduly acted as its representative).*

### **Rule 24. Specificity and Proportionality**

(1) The applicant shall identify, as accurately as possible in the light of the circumstances of the case, the specific sources of evidence to which access is sought or, alternatively, closely defined categories of evidence by reference to its nature, content, or date. The court shall refuse in any case to make an order in respect of a request which involves a vague, speculative, or unjustifiably wide-ranging search for information.

(2) The applicant must justify that the requested measures are proportionate and reasonable. For this purpose the court will take into account the legitimate interests of all parties and all interested non-parties.

### **Source**

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Articles 6 and 8); Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Articles 5 and 6.4)

### **Comments**

*The constraining factors mentioned in this rule, connected with those in rule 23, are intended to prevent a culture of fishing expeditions from developing. Courts may make orders under these Rules only where the request is shown to be sufficiently specific, proportionate, and reasonable.*

### **[Rule 25. Confidential Information]**

(1) The court shall consider whether the proposed request concerns or includes confidential information, especially in relation to non-parties. For this purpose, the court shall have regard to all relevant rules for the protection of confidential information.

(2) Where necessary, in the light of the circumstances of the case, the court may, inter alia, make an order for access to evidence containing confidential information adjusted in one or more of the following ways in order to protect the relevant interest in maintaining confidentiality:

- (a) redacting sensitive passages in documents;
- (b) conducting hearings in camera;
- (c) restricting the persons allowed to gain access to or inspect the proposed evidence;
- (d) instructing experts to produce a summary of the information in an aggregated or otherwise non-confidential form;
- (e) writing a non-confidential version of a judicial decision in which passages containing confidential data are deleted;
- (f) limiting access to certain sources of evidence to the representatives and lawyers of the parties and to experts who are subject to a duty of confidentiality.

#### Source

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Article 6); Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Article 5.4 and Recital 18); Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Article 9).

#### Comments

*This rule strikes a balance between the need to grant orders even where the material is commercially sensitive or otherwise confidential and the information-holder's interest (including legal obligation) to maintain confidentiality. At paragraph (2) the court is given a flexible portfolio of measures to ensure that these competing interests can be practically and effectively balanced.*

*The list, however, is not exhaustive. In exceptional occasions, for instance, it might be admitted that confidential information (e.g., concerning paramount trade secrets) is only shown to the court, but not to the opponent, at least in order to decide if the information is to be made available to the applicant [for the UK, see *Wallace Smith Trust v. Deloitte Haskins & Sells* [1997] 1 WLR 257 (CA)].*

#### [Rule 26. Breach of Confidentiality]

(1) If a person breaches any duty of confidentiality the aggrieved party may apply to the court for the imposition on the defaulting party of one or more of the following consequences:

- (a) wholly or partially dismissing the claim of the party in breach, where the main proceedings are still pending;
- (b) declaring the party in breach liable for damages and ordering payment of such compensation;
- (c) ordering the party in breach to pay the costs of the proceedings conducted under these rules, whatever the outcome of it might be;

(d) imposing on the party in breach (and/or on his representatives) a fine (or fines) ranging from XXX to YYY euros.

(2) When deciding on the consequences, the court shall ensure that it is proportionate to the relevance of the breach, considering especially if it occurred before proceedings on the merits were commenced.

### **Comments**

*This rule makes clear that there are serious practical consequences if the applicant fails to respect that party's two-fold duties to respect confidentiality and not to misuse information procured following the making of an order under these rules, without prejudice to any possible criminal liability.*

*The consequences stipulated in (1)(a) shall be administered by the court very carefully, and should only apply to very serious breaches. However, it is a necessary tool in situations where monetary sanctions would not have a sufficiently deterrent power.*

### **Rule 27. Access to Evidence Held by Public Authorities**

Government and other public agencies shall comply with an order made under these rules, except in the case of information protected on grounds of public interest. In support of such a refusal, a reasoned explanation of the basis for claiming such special protection will have to be made available to the court.

### **Source**

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Article 6).

### **Comments**

*Important information may be held by public authorities. It is not acceptable for such bodies simply to deny access when an order is contemplated or made under this set of rules. The public respondent's assertion that the information must not be divulged must be carefully evaluated by the court, having regard to national and other applicable law, and taking also into account the provision set in rule 8(2)(e).*

### **Rule 28. Time of Applications**

(1) Requests for access to evidence may be made (a) prior to the initiation of the proceedings, or (b) in the document instituting the proceedings, or (c) pending proceedings.

(2) If an order has been made at stage (1)(a) above, where appropriate, the successful applicant might also be required to initiate proceedings within a specified reasonable period of time. If the applicant fails to comply with this requirement it is within the discretion of the court to adopt appropriate measures.

### **Comments**

*An order might be sought in anticipation of the commencement of the main proceedings. This is a common situation in some jurisdictions. For these cases rule 23 (2) makes clear that the applicant*

*should provide adequate details of the intended main claim. Furthermore, in such a case it might be appropriate to require that the applicant should gain an order on condition that the main proceedings will be swiftly commenced. If there is a failure to comply with that requirement, the court, where appropriate, may provide as needed to reverse the effects of having implemented the order. A flexible and proportionate approach is necessary at this point, depending on the intensity of the non-compliance.*

*For instance, the court, at the request of an aggrieved person, may require return of all documents, records, and objects; it may also ensure that the data and information collected by or made available to the applicant cannot be used in any other process by that person or any other person to whom the information has been disclosed.*

*The court may also cancel the order, if it has not yet been implemented (although this situation might be considered rare).*

*In serious cases, the court might even, ex officio, issue an order for costs and declare that the applicant is responsible for the damage caused to those persons who have been subject to the order.*

*It is possible that the information gathered (or not gathered) by means of the order leads the applicant to abandon his/her intention to commence proceedings; no sanction should seem necessary, but return of documents, records, and objects should still be appropriate.*

*Applications made ante litem raise another difficulty, linked with the issue of lis pendens. In general terms, such a request shall not lead to the beginning of pendency, even if it is clearly established what the scope of the proceedings will be (see the Opinion of Advocate General Saugmandsgaard Øe, delivered on 26 January 2017, in the case C-29/16, Hanse Yachts AG). However, there is the risk that in such a case the opponent initiates a so-called "torpedo claim" in another jurisdiction. Under such a circumstance the court seized on the merits should take this situation into account when deciding on its own jurisdiction.*

## **Rule 29. The Process for Granting Access Orders**

(1) The court shall determine an application for an order for access to evidence only after having given all parties and those to be subject to the proposed order the opportunity to oppose the proposed order and to make representations concerning its scope and proposed implementation. When necessary, the court may order the taking of an adversarial hearing.

(2) The person from whom a measure of access to evidence is requested may apply to the court for the making of a different but no less effective form or method of gaining access to evidence on the basis that this alternative will be less burdensome.

[(3) Ex parte applications may be accepted by the court in case of urgent necessity. If the application is granted the party and non-party affected by the order can ask the court to reconsider it. If appropriate, a hearing will be held in the terms provided for in (1).]

(4) The application may also include a request for measures to protect or preserve evidence.

## **Comments**

*As a rule both parties shall have the opportunity to participate in the judicial decision whether to grant an order and, if so, on what terms. Non-parties subject to the order should also have the right to be heard. An oral hearing should be advisable, but not mandatory, especially when it can be a source of delay.*

*The provision in (2) has to be put in connection with rule 24(2) on proportionality.*

*Exceptionally, ex parte orders are admissible in case of urgent necessity, i.e., where there is a risk that the order will not be successfully implemented due to the delay needed to hold the hear the*

*other party and potential non-parties to be affected by the order or otherwise (there is the risk that the opponent hides or destroys documents or files or other "sources" of information). When an order has been granted ex parte, the other party and non-parties affected by it shall have the right to ask the court for reconsideration (i.e. making the same representations they could have made if they had been heard prior to the issuance of the order).*

*[The Evidence project does not propose to make detailed rules (beyond the acknowledgement in sub-rule (3) of the text above) concerning ex parte or without notice evidence preservation orders. That topic is covered by the project concerning Protective Measures]*

### **[Rule 30. Costs and Security]**

(1) The applicant shall bear the cost of any expense incurred in the implementation of an order for access to evidence. Where appropriate the court may require that the applicant make immediate payment in respect of said costs and expenses.

(2) On request of the opponent the court can order the applicant to provide security for any predictable expense to be incurred in the implementation of an order for access to evidence. If security is required by the court, it will be necessary for the applicant to provide such security before seeking to implement the order.

(3) At the end of the main proceedings the court may decide on the costs differently from the general rule.

### **Comments**

*The applicant must bear the financial burden of the implementation of an order for access to evidence, unless differently decided by the court in the decision on costs at the end of proceedings. Any required upfront payment shall be borne by the applicant.*

*Security to meet those costs may also be sometimes required by the persons from whom the measure is required. The court will decide on the request and, where appropriate, determine the amount of the security. The requirement to provide security before implementing the order is necessary to ensure that the provision of security is taken seriously and not overlooked by the applicant.*

*Implementation of orders for access to evidence may cause losses to the person subject to them, apart from costs and expenses. In principle the applicant should be considered liable for the damages that may arise as a result of an improper use thereof.*

### **Rule 31. Implementation**

The court is responsible for prescribing all necessary and practical steps to ensure that its order under these Rules is effectively and fairly implemented, including issuing directions concerning the appropriate place and manner in which the order is carried out. In particular, the court can direct that the applicant may be assisted by an expert.

### **Comments**

*The court's task in administering these rules will sometimes require detailed supervision. If necessary, an order made under these rules can include the requirement that a specific enforcement agent or bailiff, on behalf of the applicant, be permitted to enter premises, domestic or otherwise, including specified vehicles, and the physical securing of documents or data and tangible items of property. The question of invasive access to premises, which is going to be*

*sought and granted on an ex parte basis, should also (and mainly) be governed by the rules on protective relief.*

*In many cases the participation of an expert may be needed for a successful implementation of the order: this is clear where the agreed measure consists of inspecting documents or other data; but it can also be the case when it is necessary to inspect other objects and places (e.g., machinery in case of alleged infringement of intellectual property rights). The expert this rule refers to is not the "independent expert" required in some legal systems in order to legitimate the access to premises, especially in the context of the granting of interim relief. This expert is appointed by the applicant to support him when giving an order practical effect and will be paid by him/her.*

### **[Rule 32. Non-compliance with Access Orders]**

(1) If a person who is subject to, and aware of, an order made under these rules, destroys or conceals the relevant evidence, or otherwise renders it impossible to carry out the order successfully, the applicant may request the court to impose, consistent with a requirement of proportionality, any or more of the following consequences:

(a) declaring as admitted the facts which form the subject-matter of the relevant order for access to sources of evidence;

(b) treating the defendant or prospective defendant as having impliedly conceded the basis or any relevant part of the claim which has been made or which was proposed by the applicant;

(c) imposing on the relevant respondent to the order (and in accordance with the relevant court's established disciplinary powers) a penalty of between XXX and YYY Euros (or their national equivalent sums) per day of delay in implementing the order.

(2) This rule will operate without prejudice to any other sanctions or disciplinary procedural measures available to the court, including measures according to rule 20.

### **Comments**

*The party who is subject to an order and aware of its effect cannot be permitted to frustrate its successful implementation. This rule prescribes a measured set of responses to such misconduct, without prejudice to any criminal liability which such conduct might involve. Sanctions foreseen in (a) and (b) may lead to dismissing or declaring invalid, wholly or partially, defences or counterclaims made by the relevant respondent to the order.*

*This rule only applies if an order for access to evidence has already been issued, even if no protection or preservation of evidence was asked –nor granted– under rule 29.2. If the evidence is destroyed or concealed, or otherwise the implementation of a potential order is rendered impossible before the order is issued –namely, if the party acting in bad faith suspects the imminent filing of an application for an order to access–, then the general provision of rule 20 will be applicable, leading to equivalent results.*

## **PART III – TYPES OF EVIDENCE**

### **SECTION 1. DOCUMENTS**

#### **Rule 33. Documentary and Electronic Evidence**

- (1) The parties may offer in evidence any relevant document.
- (2) Document means a writing, picture, drawing, programme or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.
- (3) Documents that a party maintains in electronic form shall ordinarily be submitted or produced in electronic form, unless the court decides otherwise.
- (4) The parties may challenge the authenticity of any document produced by the opponent. In such case, the court shall order the adequate measures to establish the documents' authenticity.

### Source

ALI Rule 29.4; IBA Rules on the Taking of Evidence in International Arbitration (2010) [Definitions and Article 3 (12)]; Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

### Comments

*As for (1) and (2): The particular importance of documentary evidence flows –among others– from the fact that in many specific situations this form of evidence is in practice indispensable. Certain types of documents –namely in some civil law jurisdictions– are typically attributed predefined probative force. Indeed, one of the most ancient restrictions relating to admissible means of evidence which exists in a reduced form even today is the rule that some legal transactions may only be concluded in writing and, additionally, such transactions are non-provable without a document [as happens in France in civil (but not in commercial) matters, where claims over 1 500 € may only be established by a written document, except in exceptional circumstances].*

*The definition of document offered in this rule intends to encompass those elements common to all legal systems. A document may typically be distinguished from objects of inspection by the fact that it contains the embodiment of thought content (information), which "has a life" independently of its supporting element (the "material" that carries the information). In other words, the means to record or store the information itself has no importance, as long as it is suitable for recording thought permanently. The rule, therefore, is open to the reality of electronic documents; although they may lack of a "tangible" physical form of existence, they serve the same function by storing information permanently and displaying it authentically.*

*A relevant distinction, however, must be drawn between electronic document and electronic signature. Electronic documents may exist, which have not been electronically signed, and they may have probative value, according to their contents and to the circumstances of the case. In the case of contractual or similar documents, where signatures are relevant, electronic signature in the electronic document will be relevant. The implementation of Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures and, later, of Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, has led to harmonisation of national legislation on e-signatures, including an equalization of respective probative value.*

*As for (3): Evidence which exists in electronic form should ordinarily be presented electronically. This rule will have a special significance in procedural systems where "paperless" proceedings have been already put in place and where, in general terms, documents (also procedural ones, as claims) may or must be submitted electronically. Exceptions to this rule might be acceptable due to technical shortcomings, for instance.*

*As for (4). The parties may challenge the authenticity, accuracy or completeness of documentary evidence. In some cases, it will just be a matter of (free) evaluation of evidence; however, if the*

*authorship of the document is at stake, more serious steps could be taken within the procedure or affecting its development; proceedings to do so, and consequences thereof, may vary from one jurisdiction to another (see, for instance the French inscription de faux or the Italian querela di falso) and are not addressed in these rules.*

### **Rule 34. Authentic Instruments**

(1) An authentic instrument is a document, which has been formally drawn up or the authenticity of which has been certified by a public authority.

(2) Electronically recorded authentic instruments shall have the same probative force as those recorded in paper.

#### **Source**

European Enforcement Order Regulation (Regulation 805/2004) (Article 4.3); Brussels I bis Regulation (Regulation 1215/2012) [Article 2 (c)]

#### **Comment**

*A public document is a document issued in an appropriate form by a competent authority or person acting within the scope of their authority. Public documents are typically attributed the presumption of authenticity and full probative force. In the common law system it is usually possible to speak of a public document if the document has been issued by a public officer in the line of his official duty. The institution of the "notary" as the person assigned the task of laying down legal transactions in documents exists in all continental European states.*

*Although the probative force of the public document is partly founded on the authority of the person issuing it, another important ground for it is the procedure preceding the issue of the document and relating to it. Thus, apart from the person issuing the document, it is also of crucial importance – when establishing whether a document may be evaluated as a public document – whether the person or authority entitled to issue the public document has issued the document concerning a matter falling within his/her scope of authority or competence. Formal requirements relating to public documents may vary from one jurisdiction to another, also depending on the type of document.*

*The European legislator has made the effort to provide an autonomous notion of public document or authentic instrument in Article 4.3 of the European Enforcement Order Regulation (Regulation 805/2004) and in Article 2 (c) of the Brussels I bis Regulation (Regulation 1215/2012), taking into account the previous decision of the European Court of Justice in the Unibank case (C-260/97, Judgment of 17 June 1999): "a document which has been formally drawn up or registered as an authentic instrument (...) and the authenticity of which: (i) relates to the signature and the content of the instrument; and (ii) has been established by a public authority or other authority empowered for that purpose".*

### **Rule 35. Documents: Language and Translation**

(1) At the request of a party or the court, any document shall be produced or translated into a language of the court.

(2) Translation of lengthy or voluminous documents may be limited to relevant portions, as agreed by the parties or ordered by the court.

#### **Source**

ALI/UNIDROIT Principles 6.1 and 6.3; ALI Rule 8; ESCP Regulation, Article 6.

### Comments

*Translation should be provided when a document is not written in a language in which the proceeding is conducted, but only at the request of a party or of the court. Therefore, if the court and the parties have competence in a foreign language, they may agree that documents are produced in that foreign language (especially in cross-border litigation). The European Court of Justice has addressed the issue of the language of documents when dealing with service of proceedings on defendants domiciled in a different Member State and has clearly linked it to the right of defence and to a fair trial [see cases C-443/03 (Leffler), C-14/07 (Weiss und Partner), C-325/11 (Alder) and C-384/14 (Alta Realitat)].*

*Translation must be made by a neutral translator selected by the parties or appointed by the court. The cost must be advanced by the party presenting the document unless the court orders otherwise.*

## SECTION 2. TESTIMONY

### Rule 36. Witnesses of Fact

- (1) Subject to considerations of relevance, admissibility, case management and privileges, a party has the right to present the testimony of any witness of fact.
- (2) If a witness of fact whose testimony satisfies the requirements of rule 36(1) refuses to give evidence, in whole or in part, he can be ordered to do so by the court.
- (3) A witness is under an obligation to tell the truth while being interrogated. The court shall instruct the witness accordingly prior to the examination.

### Source

ALI Rule 25.4; Preliminary set of provisions for the Rules of Procedure (“Rules”) of the Unified Patent Court (rules 177 and 179).

### Comment

*As for (1). The notion of witness is common to all legal systems: any person having information about a relevant fact, provided he/she has the capacity to convey that information adequately. The rule does not address specific requirements in order to be qualified as a witness, such as minimum age or capacity (a certain degree of flexibility, indeed, is recognised in many national legislations, for instance in family law matters).*

*Witnesses must be identified, so far as practicable, by name, address, e-mail and telephone number. The above mentioned data should be handled confidentially if the circumstances of the case justify the protection of the witness.*

*The presentation of witnesses may be limited by grounds of relevance and admissibility, like all evidence in general. Case management considerations may also be taken into account by the court (e.g., the court may decide that it will hear not more than three or four witnesses on the same relevant factual issue). As far as privileges are concerned, waiver thereof may be decided by the witness him/herself or by the subject in whose interest the privilege was granted, depending on the circumstances of the case.*

*As for (2). When the court has admitted testimony, the witness has the duty to appear and give evidence. The court's reaction in case of refusal may depend on the context. Unjustified refusal to appear before the court may lead to renewal of the order or, when appropriate, to more severe consequences (including sanctions and/or penalties). Unjustified refusal to give evidence before the court, or to answer a relevant question, may also lead to sanctions and penalties. When summoning a witness, the court shall inform him/her of his rights and duties.*

*Witnesses who may not be able to appear before the court because of their old age, disease, physical disability or for some other justified reason may be heard in their place of residence or by means of communications technology.*

*The witness has the right to compensation for the expenses and losses that arise directly from its participation to the procedure. This compensation will be in principle considered within the costs of the procedure.*

*As for (3). Witnesses' statements should be the account of the witnesses' own recollection. Witnesses have the duty to tell the truth; this obligation is usually strengthened by means of an oath or by explicitly reminding the witness of that obligation and informing him/her of the sanctions and penalties established in case of perjury. The nature and degree of those sanctions and penalties vary from one jurisdiction to another and are not addressed by these rules. However, their prominent relevance shall not be overlooked to avoid that testimony is considered a second-class evidence.*

### **Rule 37. Testimony**

(1) Ordinarily, testimony of witnesses should be received orally. However, the court may, upon consultation with the parties, require that initial testimony of witnesses be in writing, which should be supplied to the parties in advance of the hearing. Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony.

(2) Each witness shall appear in person unless the court allows the use of videoconference or similar technology with respect to a particular witness.

(3) A person giving testimony may be questioned first by the court or the party seeking the testimony. Where the witness has first been questioned by the court or by another party, a party should have the right to conduct supplemental questioning directly to that witness.

(4) Parties may challenge the testimony's reliability.

### **Source**

ALI/UNIDROIT Principles 16.4, 19.3, 19.4; ALI Rule 29.4; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 8, ESCP Regulation, Articles 8 and 9.

### **Comments**

*As for (1). Orality should be the rule in the practice of testimony, as a means to ensure the best evaluation of the evidence. The possibility established to require an initial testimony in writing has to be treated with great caution and exceptionality (see also rule 39). It might prove useful in complex litigation and, especially, for a better case management; but the parties' consent is always necessary.*

*As for (2). It is also related to rule 36 (2). The use of videoconferencing or similar devices may be very useful to reduce costs and to spare time; nevertheless, it is important to stress that the principle of immediacy is not fully satisfied when the witness has not appeared in person before the*

court. Therefore, personal appearance and videoconference are not equivalent; the latter is subsidiary to the prior.

As for (3). The rule gives room to different traditions regarding the way to examine a witness, either with the parties conducting the primary examination or with the judge doing so. Direct and cross-examination is a first option, with a judge that may afterwards ask for further clarification. First examination by the judge is equally compatible with the spirit of the rules, provided that the parties are granted the possibility to conduct a supplemental questioning.

The right of a party to ask questions directly to a witness is of paramount importance and is now recognized in most legal systems. According to the European Court of Human Rights [*C.G. v. United Kingdom*, Application no. 43373/98 (19.12.2001)], the right to supplemental questioning belongs to the parties and therefore the use of this right may not be interrupted by unnecessary case management. This has to be stressed in situations where the questioning is carried through via an intermediary –for instance, when protecting children.

In some jurisdictions duly summoned witnesses may be required to produce documents in their possession pertaining to the lawsuit at the time of their examination (see, for instance, § 296 of the new Hungarian Code of Civil Procedure). Such provisions are not in principle incompatible with this rule; orders for access to evidence under Part II of these rules may also serve to this purpose.

As for (4). The connections of a witness to a party or to the litigation should not impede testimony, although the parties will have the possibility to challenge his/her credibility. The rule does not address specifically the possible ways to challenge the credibility of a witness (for instance, showing prior inconsistent statements, interest or bias, personal connections, employment relationships, incapacity to perceive and recollect facts prior convictions for perjury). A balance between the right to challenge the credibility and abuse by witness harassment or distortion of the testimony needs to be struck by the court.

### **Rule 38. Witnesses: Language and Translation**

(1) Translation should be provided when a witness is not competent in the official language(s) in which the proceeding is being, or may be, conducted.

(2) Where appropriate, with the consent of the court and the parties a witness may testify in a language other than the official language of proceedings.

### **Source**

ALI/UNIDROIT Principle 6.3; Preliminary set of provisions for the Rules of Procedure of the Unified Patent Court (Rule 178.7).

### **Comments**

The rule in most jurisdictions is that the court should conduct the proceeding in the official language of the State or region where it is located (or in one of the official languages thereof). The general rule, when a witness is not competent in the court's official language, is to provide an interpreter. However, if the court and the parties have competence in the witness's foreign language, or in a language common to all of them, the reception of the testimony in that language could be in some cases considered as a good practice, which could be of interest, namely in cross-border cases. It is important to stress, nevertheless, that the language of the proceedings is strictly connected to the constitutional principle of public proceedings; the rule, therefore, should not authorize a deviation from this basis unless sufficiently founded.

*Translation must be made by a neutral translator selected by the parties or appointed by the court. The cost must be advanced by the party presenting the pertinent witness unless the court orders otherwise; see also the comment to rule 35.*

### **Rule 39. Witness Statements**

With permission of the court, a party may present a written statement of sworn testimony of any person, containing statements in their own words about relevant facts. The court, in its discretion, may consider such statements as if they were made by oral testimony before the court. Whenever appropriate, a party may apply for an order of the court requiring the personal appearance of the author of such a statement. Examination of that witness may begin with supplemental questioning by the court or opposing party.

#### **Source**

ALI Rule 23.4; ESCP Regulation, Article 9.1.

#### **Comments**

*In many jurisdictions witnesses are allowed to present written statements about relevant facts (affidavits, in the common law legal culture). Although the main rule should remain orality [rule 37 (1)], this feature offers some flexibility, especially in complex cases, in cross-border cases or where the information to be provided is neutral and its accuracy may not depend from the credibility of the person submitting it (e.g., the written report of a public officer concerning information appearing in their files). Presenting written statements may prove also helpful to show the potential strength of a case and to foster settlement. Recourse to written testimony should not be exclusively based on grounds of convenience. Distance communication technologies (when necessary, enhanced through 1206/2001 Regulation or other international conventions on the taking of evidence abroad) allow overcoming many of the hurdles that could justify recourse to written statements (see rules 50 and 51).*

*The presentation of a written statement does not preclude any party to apply for an order to require the oral examination of the witness; in such case, the provisions of rules 36.2 and 37 would apply. The possibility to challenge the witness' credibility shall always remain open, if necessary by ordering the witness to appear before the court for direct questioning.*

## **SECTION 3. EXAMINATION OF PARTIES**

### **Rule 40. Examination of Parties and Consequences of Refusal to Respond**

(1) The court may accord evidentiary effect to any statement made by a party that has been questioned before the court.

(2) Each party shall have the opportunity to question his/her opponent in front of the court on relevant issues of fact.

(3) The court may draw relevant inferences if a party unjustifiedly refuses to appear in the hearing or to answer any relevant question formulated by the opponent or by the court.

(4) If the party to be questioned is a legal person, it shall provide the identity of the natural person or persons that participated directly in the relevant cause of events on behalf of the legal person, in order for them to be questioned, provided they may still be considered as representatives of the legal person. The court may draw relevant inferences if the legal person unjustifiedly fails to provide this information.

**Source**

ALI/UNIDROIT Principles 16.1 and 16.4; ALI Rule 25.3

**Comment**

*The "nemo testis in causa sua" principle applies –if it does– in very different ways, depending on the jurisdiction. The common law tradition is more open to the possibility of a party giving evidence in support of its contentions, while the traditional approach in continental systems is different: a party may be questioned by the court or by the opponent, the latter aiming usually to lead that party to admitting facts or inferences, which could be harmful to his/her position. The rule offers a compromise between both approaches, requiring the party having been questioned before the court, in order to grant evidentiary value to his/her statements, on the one hand, and also granting each party the right to question its opponent, on the other. Regarding the way to proceed to the examination of the party, rule 37 (3) on examination of witnesses should apply accordingly.*

*As for (3), it has to be related with other similar provisions, such as those established in rules 4(1), 10, 20(1)(a) or 20 (2).*

*As for (4), the rule aims at preventing legal entities from avoiding compliance with the previous rules. Any legal entity shall be expected to be able to identify the natural person or persons that participated directly in the cause of events on its behalf. If these persons, for the purposes of giving evidence, may be considered as representatives of the legal persons (and this, in turn, will be the rule if they participated in the relevant facts on behalf of the legal person), then the provisions in para. (3) shall also apply. Otherwise, these natural persons will be directly considered as witnesses of fact.*

**SECTION 4. EXPERT EVIDENCE****Rule 41. Party-appointed Experts**

A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert evidence is appropriate.

**Source**

ALI/UNIDROIT Principle 22.4.2; ALI Rule 26.3; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 5; European Guide for Legal Expertise, 1.3, 1.4 and 1.5.

**Comment**

*Most jurisdictions identify two possible approaches to expert evidence. On the one hand, experts can be appointed by the court, ex officio and/or upon request of one or both parties. On the other hand, parties are frequently permitted to present expert testimony furnished by an expert selected by them. The second possibility, addressed by this rule, follows from the right to be heard and is accepted in (most, if not all) procedural orders. Such party expert evidence may entail the risk of the court regarding it with a certain fear of bias; it is therefore in the party's interest to present party experts with proper qualification and skills. General standards of objectivity and neutrality should govern the activities of party-appointed experts.*

*This rule must be applied taking into account the general provisions on proportionality; it shall not be understood as granting the right to adduce an unlimited number of experts or expert reports.*

*In cases where one party or both have submitted experts' statements but which do not clarify the issue at stake to the court's persuasion, it may lie, in accordance to rule 17, within the court's discretion to appoint an expert; the court, nevertheless, may also apply the general provisions on burden of proof.*

*The costs for a party's expert are initially born by that party. As a general rule, reimbursement will only be possible even in case that party wins the case where the expert was necessary.*

#### **Rule 42. Court-appointed Experts**

- (1) The court may appoint one or several experts to give evidence on any relevant issue for which expert evidence is appropriate, including foreign law.
- (2) Experts can be individuals or legal entities. In the case of legal entities at least one individual must assume responsibility for the report.
- (3) If the parties agree upon an expert, the court ordinarily should appoint that expert.
- (4) The parties have the right to reject an expert appointed by the court for the same reasons that entitles them to reject a judge.

#### **Source**

ALI/UNIDROIT Principle 22.4; ALI Rules 26.1 and 26.2; ESCP Regulation, Recital 20 and Article 9; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 6 (1); European Guide for Legal Expertise, Ch. 1.6, 2.1, 2.4, 2.5, 3.20, 3.25 and 7.15.

#### **Comment**

*In many jurisdictions the general rule is still that experts are appointed by the court and, in many occasions, recourse to court-appointed experts seems proportionate and convenient. This rule shall not be read as an alternative to the prior one on party appointed experts; the principle of party autonomy should also govern this matter and, therefore, an option should be open for each party to choose between both possibilities.*

*As for (1), it clarifies that the court may appoint several experts if necessary. However, there should normally be only one expert for any relevant issue. The general provision on proportionality should apply when deciding the number of experts to be appointed, having in mind the increase of costs. The value of the litigation matter in hand should be a relevant criterion, although it should not be the only one: the overarching aim should always remain getting a correct decision.*

*Selection and choice of court-appointed experts may be performed in different ways, depending on the issue for which expert evidence is required: in many jurisdictions there are lists of potential experts at the court's disposal, namely for matters where expert evidence is frequently required. The rule does not address this issue directly, but the court should have the power, especially in complex matters, to appoint any expert that appears suitable.*

*Issues for which expert evidence is appropriate are those where scientific or technical knowledge is required. Foreign law is seen to be a matter of law, not of fact. However, as the court may lack knowledge about the relevant rules of foreign law an expert may be appointed at the court's discretion, namely if the interested party has not submitted a report or otherwise clarified the pertinent questions of foreign law.*

*As for (2), it recognizes the practice of entrusting expert reports to legal entities (such as universities, public or private laboratories, scientific societies, etc.). For the purposes of ensuring seriousness, and also for a better management of the taking of the evidence, at least one private*

*individual within the legal entity will take on the responsibility for the report. The organisation of the legal entity shall guarantee the independence of the individual taking on this responsibility, and also of any other individual taking part in its drafting.*

*As for (3), it reflects the principle of party autonomy. The court should not lightly interfere with the parties' consent as to the suitability of an expert. However, the court must ensure the neutrality and the competence of the proposed expert for the envisaged issue.*

*As for (4). This Rule makes reference to the duty of neutrality of the expert. If a party has doubts he/she may take reference to the procedure available against a judge and recuse the expert for fear of bias if sound reasons justify a lack of confidence in his impartiality. The rule, of course, makes only sense with regard to a court expert.*

### **Rule 43. Duties of Experts**

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

(2) An expert appointed by the court may only refuse to give expertise if the subject-matter lies outside the competence of the expert. The expert may also refuse to give expertise for the same reasons a witness may refuse to give testimony.

(3) The expert may not delegate the task to third parties unless authorized to do so by the court.

(4) In case the expert fails to render the expertise within the time limits set by the court without reasonable explanation the court may impose appropriate sanctions.

### **Source**

ALI/UNIDROIT Principle 22.4.3; ALI Rule 26.3; European Guide for Legal Expertise, 7.1 and 7.7.

### **Comment**

*As for (1): All experts owe the same duty to the court and are subject to the same consequences. General provisions on sanctions of rule 20 should apply accordingly; criminal sanctions, such as prosecution for perjury if the expert gives false evidence, will certainly be also foreseen by national legislation.*

*As for (2): This reflects the public dimension of the expertise. Just like a witness, an expert has a general duty to help the court in ascertaining the truth. Consequently, an expert may only refuse to render the expertise if it lies outside his or her competence, or if there are other compelling reasons such as a family relationship to one of the parties, a duty of confidentiality or a different privilege.*

*As for (3): The appointment by the court is primarily linked to the professional competence of the expert. Therefore, a delegation to a sub-contractor is not possible. However, preparatory work may be done by third persons provided the court agrees. Minor tasks can always be left with third parties if the expert cannot reasonably be expected to perform such work in person (this applies more clearly when the expert is a legal entity).*

*As for (4): As the expert is under a duty to assist the court a failure to render the report or to appear in court may entail sanctions. Such sanctions should be proportionate and could consist in imposing costs or even a fine. It may be useful to distinguish between court appointed experts and party experts when it comes to sanctions. While the former are assisting the court and therefore perform a public duty, the latter act primarily as on a private law basis. A failure to render expertise may therefore entail procedural consequences, as the party may not be able to discharge the burden of proof. A possible sanction for false expertise should therefore be directed towards*

*the party who has engaged the expert (but, obviously, it would only apply to party appointed experts).*

#### **Rule 44. Instructions by the Court**

The court shall instruct the expert and set a reasonable time limit for the submission of the written report. In appropriate cases the court may extend or limit the scope of the instructions or extend time limits. The parties shall duly be informed of such procedural measures.

#### **Source**

IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 6 (1); European Guide for Legal Expertise, 4-5 to 4-9.

#### **Comment**

*This rule clarifies that it is the court's responsibility to delimit the task of the court-appointed expert and set time limits. The parties' right to be heard requires that the court informs them about every step taken. As a general rule the parties may apply to the court to include or exclude certain issues from the scope of the expert report. However, it remains the responsibility of the court to supervise the expert appointed by it.*

#### **Rule 45. Expert Access to Information**

(1) A court-appointed expert should have access to all relevant and non-privileged information necessary for the preparation of the report.

(2) In particular, the expert may request a party to provide any information or to provide access to any documents, permit inspection of things or entry upon land for inspection, to the extent relevant to the case and material to its outcome.

(3) Under appropriate circumstances, the expert may examine a person or have access to information derived from physical or mental examination of a person.

#### **Source**

ALI/UNIDROIT Principle 16; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 6 (3).

#### **Comment**

*As for (1): This rule acknowledges that the expert may need access to information in order to render the expertise in an accurate manner. Provisions in Part II might be used when party appointed experts need such access to information. Court-appointed experts could apply directly to the court and ask it to give the necessary orders.*

*As for (2): If the requested party refuses to comply with the request, the court will decide the most appropriate consequence, according to the circumstances of the case, within the framework of the general provisions on sanctions (rule 20).*

*As for (3): This provision should apply, for instance, in cases where personal injuries have to be determined, or where the mental capacity of a party is challenged.*

**Rule 46. Expert Reports and Oral Evidence**

- (1) Expert evidence should ordinarily be rendered in written form. However, in simple cases the court may order that the expert evidence be given orally.
- (2) At the request of the court or of either party the expert shall explain the written report in the oral hearing which may be held in a videoconference in accordance with applicable legal provisions. Each party may only ask relevant questions.
- (3) The court may require the expert to give evidence on oath when rendering the written report or when giving oral testimony.
- (4) If a party-appointed expert duly summoned fails to appear to the oral hearing without a valid reason the court may disregard this expert's written report.

**Source**

ALI Rule 26.4; IBA Rules on the Taking of Evidence in International Arbitration (2010), Articles 5(5), 6 (4) and 6(6); European Guidelines for Legal Expertise, 4.24, 4.3, 7.8.

**Comment**

*Normally an expert will produce a written report. Contradiction shall be respected, when appropriate while preparing the report and, in any case, once the report has been presented. Therefore, at the request of either party the court will summon the expert to the oral hearing to explain the written report; the court can also order appearance of the witness of its own motion, but the parties shall in any case be informed and will be entitled to participate. Questioning the expert by the court and by the opponent will be permitted. Just like a witness the expert may be placed under oath when giving evidence before the court, according to the general provisions. However, as criminal sanctions apply to perjury, the court may exercise discretion if the expert is sworn in or not.*

**[Rule 47. Costs]**

- (1) The fees and expenses of a court-appointed expert shall form part of the costs of the proceedings. The court may order that the party requesting the expertise pay an advance.
- (2) The fees and expenses of a party-appointed expert shall only be recoverable from the other party if the court orders so.

**Source**

ALI/UNIDROIT Principle 25.1; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 6(8); European Guidelines for Legal Expertise, 6.1.

**Comment**

*As for (1): Experts are entitled to a fair remuneration. Court-appointed experts should be paid by the party who applied for their appointment, but its fees shall have the consideration of costs. Therefore, the loser pays principle also comprises expert fees. The amount of the fees is subject to domestic legislation and will not be covered by these rules. The court may order an advance payment from the party requesting the appointment of the expert, otherwise from the party on whom the burden lies for the particular issue at stake.*

*As for (2): The fees and expenses of party-appointed experts may be subject to specific considerations; when deciding if they will be recoverable under the loser pays principle, the court*

*should take into account the necessity and relevance thereof. It may be expected that, in jurisdictions where party-appointed expert evidence prevails, the practice will be to consider costs thereof as recoverable, at least to a certain amount.*

## **SECTION 5. JUDICIAL INSPECTION**

### **Rule 48. Judicial Inspection in General**

- (1) On application by a party, the court may order the inspection of things, or, under appropriate circumstances, the physical or mental examination of a person.
- (2) When necessary for the inspection, the court may order entry upon land or into private premises.
- (3) The court may inspect or require the inspection by court-appointed expert or a party-appointed expert, as it deems appropriate.
- (4) The parties and their representatives shall have the right to attend any inspection, unless the courts provides otherwise. The court shall, in consultation with the parties, determine the timing and arrangement for the inspection.

#### **Source**

ALI/UNIDROIT Principle 16.1; IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 7.

#### **Comment**

*As for (1). All legal systems admit taking evidence consisting in direct inspection by the court of things or persons. It is frequently understood as a subsidiary means of evidence, when direct inspection cannot be substituted by other means (such as documents, photographs, video recordings, etc.). Under the term "things", the rule encompasses any physical or electronic item, movable or immovable elements (e.g., the current situation of a building), different from documents, and places. The physical or mental examination of a person may be necessary in some family law cases; decision to undertake it should undergo a careful assessment of its proportionality.*

*As for (2). The rule empowers a civil court to order entrance in private premises, when necessary and proportionate to carry out the inspection. The order might be addressed to any party or non-party*

*As for (3). In many situations, the court will need assistance of an expert in order to better interpret or understand what it is examining. Whenever appropriate, examination of witnesses might be done at the same time of the inspection.*

*As for (4). The rule has to be interpreted taking into account the rules on confidentiality. Examination of persons is the clearest example of a situation in which generally the court may exclude the presence of parties and representatives thereof.*

### **Rule 49. Non-Parties and Judicial Inspection**

According to the provisions set in Part II of these Rules, the court may order persons who are not parties to the proceeding to produce things for inspection by the court or a party.

#### **Source**

ALI Rule 20.1.

**Comment**

*The rule is a specification of the general provisions on access to evidence set in Part II (including the right of the non-party to submit contentions to refuse compliance with the order). When necessary, the court may order a direct seizure of such materials or things. As a result of the order, a party may apply for provisional measures in order to preserve evidence.*

**PART IV – CROSS-BORDER ISSUES****SECTION 1. IN THE EUROPEAN UNION****Rule 50. Cross-border Taking of Evidence within the European Union**

(1) When evidence has to be taken in another Member State of the European Union and when access is needed to evidence located in another Member State, the court and the parties may rely on the provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

(2) Without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters,

(a) the court may summon directly a witness residing in another Member State;

(b) the court may appoint an expert to submit a report, whose preparation requires the undertaking of activities (inspection of persons or premises located) in another Member State;

(c) a party or non-party, to whom an order for access to evidence is addressed, and who is residing or domiciled in the Member State of the court, has the duty to produce the required documents and evidence, even if they are located in a Member State different to the one of the court issuing the order;

(d) a court may address an order for access to evidence to prospective parties and to non-parties domiciled in another Member State.

**Comment**

*The rule addresses the duality of systems in order to take evidence abroad within the European Union, which has been recognized by the European Court of Justice, both for taking evidence in a different MS or for asking a foreign court to order production of evidence.*

*As for (1). The court and the parties may always have recourse to the EU Evidence Regulation. Nevertheless, its use is not compulsory (except, possibly, for inspections that have to be performed at a different Member State); this gives room to the powers established in sub-rule (2).*

*As for (2) (a), the ECJ has recognized that national courts may summon directly witnesses residing in other Member States (C-170/11, Lippens, 6 September 2012). The use of videoconferencing, already addressed in these rules, may be of help in such cases.*

*As for (2) (b), the ECJ has also ruled that "the court of one Member State, which wishes the task of taking of evidence entrusted to an expert to be carried out in another Member State, is not necessarily required to use the method of taking evidence laid down by those provisions to be able to order the taking of that evidence" (C-332/11, ProRail, 21 February 2013). This possibility, however, does not allow the expert to affect the powers of the Member State in which his/her*

*activities take place (e.g., where it is an investigation carried out in places connected to the exercise of such powers or in places to which access or other action is prohibited or restricted to certain persons. In such cases, in the absence of an agreement or arrangement between Member States, recourse to the Evidence Regulation is the only means to carry out an expert investigation directly in another Member State.*

*As for (2)(c), the person to whom an order for access to evidence is addressed may not refuse compliance on the ground that the evidence to be produced is in another Member State, provided that the addressee of the order is residing or domiciled in the Member State of the court.*

*As for (2)(d): When the order concerns prospective defendants, the rule is a logical consequence of the general rules set in Part II: orders for access to evidence under Part II are permitted ante litem; the requested court shall analyze its jurisdiction before issuing the order; and it is possible that the court finds itself competent, even if the prospective defendant is not domiciled in its territory. As far as non-parties are concerned, the rule is based on the principles of mutual trust and mutual recognition, and places non-parties under the same duty to comply with orders addressed to them by the courts of other Member States, in the same manner as they are expected to comply with those issued by the courts of the Member State of their domicile.*

## **SECTION 2. OUTSIDE THE EUROPEAN UNION**

### **Rule 51. Cross-border Taking of Evidence outside the European Union**

When evidence needs to be taken outside the EU or when the addressee of an order for access to evidence has no domicile or habitual residence within the European Union, the court and the parties may rely on the provisions of the Convention on the taking of evidence abroad in civil or commercial matters (Hague Evidence Convention, concluded 18 March 1970) or of other relevant international conventions.

#### **Comment**

*A national or European rule cannot address the duties of courts or parties domiciled outside the European Union. It cannot either regulate the terms in which applications issued by courts outside the European Union should be implemented in the European Union. Recourse, therefore, will have to be made to the 1970 Hague Evidence Convention or, where applicable, to other relevant international conventions.*

**ANNEXE III**

**ELI-UNIDROIT European Rules of Civil Procedure**  
**[GROUPE DE TRAVAIL sur la notification des actes de procédure]**  
**Version Française**

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**Préambule.****PARTIE I – PARTIE GENERALE [NOTIFICATION ET CONTRADICTOIRE]**

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## **PARTIE III – NOTIFICATIONS TRANSFRONTIERES**

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## **PARTIE I – PARTIE GENERALE [NOTIFICATION ET CONTRADICTOIRE]**

### **Règle 1. Nécessité d'une notification et contenu minimal.**

L'acte introductif d'instance ou tout autre acte de procédure modifiant la demande ou soumettant une nouvelle demande est notifié aux parties autres que le demandeur en application des Règles 7-11 et 13-14. Ces actes de procédure doivent comprendre au minimum l'identité des parties, les faits, les moyens et la prétention.

### **Règle 2. Information du destinataire sur les formalités procédurales à accomplir pour contester la demande.**

Les éléments suivants doivent ressortir clairement de l'acte introductif d'instance, de l'acte équivalent ou de toute citation à comparaître les accompagnant :

- (a) les exigences de procédure à respecter pour contester la demande, y compris les délais prévus pour la contester par écrit ou, le cas échéant, la date de l'audience, le nom et l'adresse du tribunal ou d'une autre institution à laquelle il convient d'adresser la réponse ou, le cas échéant, devant laquelle comparaître, ainsi que la nécessité d'être représenté par un avocat lorsque cela est obligatoire;
- (b) les conséquences de l'absence de contestation ou de la non comparution, notamment, le cas échéant, la possibilité d'une décision contre le défendeur et la charge des frais de justice.

### **Règle 3. Défaut de comparution du défendeur.**

Lorsque le défendeur ne répond pas par écrit ou ne comparaît pas, le jugement ne sera pas rendu aussi longtemps qu'il n'est pas établi :

(a) l'acte introductif d'instance ou un acte équivalent a été notifié en personne au défendeur ou notifié par un autre mode prévu par ces règles, et

(b) la notification n'est pas intervenue en temps utile pour lui permettre de préparer sa défense.

## **PARTIE II – CHARGE ET MODES DE NOTIFICATION.**

### **SECTION 1.- Dispositions générales.**

#### **Règle 4. Personnes en charge de la notification.**

La charge de servir les documents repose sur le tribunal/ sur les parties (effacer la mention inutile). [Si la charge de servir les actes de procédure repose sur le tribunal celui-ci peut néanmoins inviter les parties à les notifier par un moyen approprié.] [Si la charge de notifier repose sur les parties, le tribunal contrôle les opérations et peut, au besoin, annuler la notification.]

#### **Règle 5. Champ d'application.**

Les règles suivantes relatives aux méthodes de notification s'appliquent aux actes mentionnés à la Règle 1 ou à tout autre acte devant être notifié y compris les décisions judiciaires.

#### **Règle 6. Le principe de la notification assortie de la preuve de la réception.**

Les actes de procédures doivent être notifiés selon une méthode garantissant la bonne réception (Règles 7-9). Si une telle notification n'est pas possible, une méthode alternative peut être employée selon les termes de la Règle 11. En cas d'adresse inconnue ou d'échec des autres méthodes, il peut être procédé en dernier recours selon les dispositions de la Règle 13.

### **SECTION 2. [Méthodes de notification]**

#### **Règle 7. Notification assortie de la preuve de la réception.**

(1) La notification assortie de la preuve de sa réception par le destinataire inclut :

(a) la notification à personne, le destinataire ayant signé un accusé de réception portant la date de réception et/ou un huissier, un postier, un greffier ou une autre personne habilitée ayant signé le document indiquant que le destinataire a accepté de recevoir le document ainsi que la date de la remise ;

(b) la notification par des moyens électroniques utilisant des standards techniques de haut niveau attestée par un accusé de réception généré automatiquement quand le destinataire a une obligation légale de s'enregistrer dans le réseau de communication électronique. Une telle obligation est imposée aux personnes morales et aux personnes physiques ayant une

activité professionnelle pour les litiges nés dans le cadre de leur activité commerciale ou professionnelle.

(c) la notification par d'autres moyens électroniques si le destinataire a expressément et préalablement donné son accord à l'utilisation de ces moyens ou a l'obligation légale de fournir son courriel dans la perspective d'une notification, le destinataire ayant signé et renvoyé un accusé de réception portant la date de réception.

(d) la notification par voie postale, le destinataire ayant signé et renvoyé un accusé de réception portant la date de réception;

(2) Si dans les cas (1) (c) ou (d) aucun accusé de réception n'est envoyé dans un délai fixé par la loi ou le juge, la notification selon le cas (1) (a) ou (b) doit être tentée, si elle est possible, avant de recourir aux méthodes alternatives.

#### **Règle 8. Notification dans les locaux professionnels d'une personne morale.**

Si la Règle 7 (1) (a) ou (d) est appliquée, la notification à une personne morale faite à un représentant légal est effectuée dans ses locaux professionnels. Les locaux professionnels s'entendent du centre principal de ses activités, du lieu du siège statutaire, du centre administratif ou d'un établissement si le litige s'est élevé à l'occasion des activités de cet établissement.

#### **Règle 9. Notification aux représentants.**

(1) La notification faite au représentant légal d'un mineur ou d'un majeur incapable (tuteur, curateur) est équivalente à la notification faite à la personne du destinataire.

(2) La notification faite à un représentant détenant un pouvoir signé par le destinataire est équivalente à la notification faite à la personne du destinataire.

#### **Règle 10. Refus d'acceptation.**

La notification faite en application de la Règle 7 (1) (a) peut être réalisée au moyen d'un document signé par la personne compétente qui a procédé à la notification, spécifiant que le destinataire a reçu l'acte ou qu'il a refusé de le recevoir ainsi que la date à laquelle l'acte a été signifié ou notifié. Ce document est déposé dans un lieu spécifié pendant un certain délai afin d'être retiré par le destinataire qui est informé du lieu et du moment auxquels il peut récupérer ce document.

#### **Règle 11. Méthodes alternatives de notification.**

(1) S'il n'est pas possible de notifier l'acte juridique au destinataire selon une méthode prévue à l'article 7, l'un des modes suivants peut être effectué par un huissier, un postier, un greffier ou une autre personne habilitée :

(a) notification à l'adresse personnelle du destinataire, à des personnes vivant à la même adresse que celui-ci ou employées à cette adresse acceptant de recevoir l'acte et ayant un discernement suffisant ;

(b) si le destinataire est un agent indépendant ou une personne morale, la notification dans les locaux professionnels du destinataire à des personnes employées habilitées par le destinataire et acceptant de recevoir l'acte ;

(c) Le dépôt de l'acte dans un bureau de poste ou auprès d'une autorité publique compétente et communication écrite de ce dépôt dans la boîte aux lettres du destinataire. Dans un tel cas, la communication écrite mentionne clairement la nature judiciaire de l'acte, le lieu et le moment auxquels il peut être retiré ainsi que les coordonnées de la personne compétente ayant procédé à la notification. La notification est considérée comme effectuée dès que lors que le destinataire a retiré l'acte de procédure.

(2) La notification d'un acte en application du paragraphe 1 (a)-(b), est attestée par:

(a) un acte signé par la personne compétente ayant procédé à la notification mentionnant les éléments suivants:

(i) le mode de notification utilisé;

(ii) la date de notification, et

(iii) Le nom de la personne qui a reçu la notification et son lien avec le destinataire, ou

(b) un accusé de réception émanant de la personne qui a reçu la notification.

(3) Les méthodes de notification prévues au paragraphe 1, (a) et (b) ne sont pas autorisées si la personne qui reçoit l'acte est l'adversaire du destinataire dans la procédure.

(4) La notification d'un acte en application du paragraphe 1 c) est attestée par :

(a) un procès-verbal signé par la personne compétente qui a procédé à la notification indiquant :

(i) le mode de notification employé ; et

(ii) la date du retrait, ou

(b) un accuse de réception par la personne qui a reçu la notification.

## **Règle 12. Notification en cours d'instance.**

(1) En cours d'instance, si une partie est représentée par un avocat ou un autre représentant ad litem, la notification peut être en principe effectuée auprès du représentant ou même d'avocat à avocat sans l'intervention du tribunal. Les

avocats ou les autres représentants ad litem ont l'obligation légale de fournir une adresse électronique à laquelle peuvent être envoyés les actes de procédure.

- (2) Au cours de l'instance, si une partie est représentée par un avocat ou un autre représentant ad litem, l'avocat ou un autre représentant ad litem a l'obligation de notifier au tribunal et à l'avocat ou un autre représentant ad litem de la ou les parties adverses tout changement d'adresse postale ou électronique.
- (3) Au cours de l'instance les parties ont l'obligation de notifier au tribunal tout changement de résidence, de centre d'activité ou d'adresse, postale ou électronique.

### **Règle 13. Mode résiduel de notification.**

(1) Si la notification assortie de la preuve de sa réception par le destinataire (Règles 7-10) ou une méthode alternative (Règle 11) n'est pas possible car l'adresse du destinataire est inconnue ou parce qu'une tentative de notification a échoué, la notification peut être effectuée de la manière suivante :

- (a) par l'affichage d'un avis au destinataire selon une forme prévue par la loi de l'Etat requis, y compris l'affichage sur un registre électronique accessible au public, et
- (b) En envoyant un avis de passage à la dernière adresse connue du destinataire et, si possible, sur son courriel.

En application des sous-paragraphes (a) et (b) le mot „avis“ signifie une information qui indique clairement la nature judiciaire de l'acte qui doit être notifié, les effets juridiques de la notification (comme notification effectuée), le lieu et le moment auxquels le destinataire peut venir retirer les actes de procédure ou leur copie ainsi que la date limite du retrait.

- (2) L'adresse est considérée comme inconnue si la personne responsable de la notification a accompli toutes les diligences pour rechercher l'adresse actuelle du destinataire de l'acte. Les diligences accomplies doivent donner lieu à une mention au dossier de l'affaire.
- (3) La notification est considérée comme effectuée dans le délai de deux semaines après l'affichage de l'avis et après l'envoi d'un avis de passage à la dernière adresse connue. S'il n'existe aucune dernière adresse connue ou de courriel, la notification est considérée comme effectuée dans le délai de deux semaines après l'affichage de l'avis.

### **Règle 14. Moyens de remédier au non-respect des règles de notification.**

Si la notification n'a pas satisfait aux exigences énoncées aux Règles 7-13, il est remédié au non-respect de ces exigences s'il est prouvé par le comportement du débiteur au cours de la procédure judiciaire qu'il a reçu personnellement l'acte devant être notifié, en temps utile pour pouvoir préparer sa défense ou réagir de toute autre manière appelée par la nature de l'acte en question.

### **PARTIE III – NOTIFICATIONS TRANSFRONTIERES**

#### **SECTION 1. Au sein de l'Union européenne.**

Règle 15. Conditions concernant la langue.

- (1) Si le destinataire est une personne physique qui n'est pas engagée dans une activité professionnelle indépendante, les actes de procédures prévus à la Règle 1 et les informations prévues à la Règle 2 doivent être rédigés dans le langage du tribunal saisi et à moins que le destinataire ne comprenne manifestement le langage du tribunal, aussi dans la langue de l'Etat membre où l'individu a sa résidence habituelle.
- (2) Si le destinataire est une personne morale, les actes de procédures prévus à la Règle 1 et l'information prévue à la Règle 2 doivent être rédigés dans le langage du tribunal saisi et aussi dans la langue de l'Etat membre où la personne morale a le centre principal d'activité ou son siège social ou dans le langage des principaux documents de l'opération litigieuse.

#### **Règles 16. Non application de la Règle 14.**

Si la notification des actes de procédures n'est pas conforme aux conditions concernant la langue prévues par la Règle 15, la Règle 14 ne s'applique pas.

#### **SECTION 2. En dehors de l'Union Européenne.**

##### **Règle 17. Prorogation de délai.**

Si le destinataire est domicilié dans un autre Etat Membre que celui du juge saisi, le délai prévu à la Règle 13 (3) est de 4 semaines au lieu de deux.

##### **Règle 18. Règle générale.**

Les règles précédentes s'appliquent aussi quand le destinataire n'a ni domicile ni résidence habituelle au sein de l'Union européenne, sous réserve de l'article 19.

##### **Règle 19. Relation avec la Convention de la Haye sur la notification.**

Quand un acte judiciaire ou extrajudiciaire est notifié en dehors de l'Union Européenne, les règles précédentes s'appliquent sans préjudice de l'application de la CONVENTION DE LA HAYE SUR LA NOTIFICATION ET LA SIGNIFICATION DES ACTES JUDICIAIRES ET EXTRAJUDICIAIRES EN MATIERE CIVILE OU COMMERCIALE CONCLUE LE 15 NOVEMBRE 1965 (Convention de la Haye sur la notification).

**ANNEXE IV****RÈGLES EUROPÉENNES DE PROCÉDURE CIVILE ELI/UNIDROIT  
ACCÈS AUX INFORMATIONS ET PREUVES****CONTENU****prÉambUle****PARTIE i****PARTIE GÉNÉrALE****Section 1: Dispositions générales sur la preuve**

Règle 1: Objet du litige

Règle 2: Charge de la preuve

Règle 3: Standard probatoire

Règle 4: Dispense de preuve

Règle 5: Pertinence

Règle 6: Preuves illégalement obtenues

Règle 7: Égalité et proportionnalité

Règle 8: Droit au secret

**Section 2: Présentation des preuves**

Règle 9: Présentation des preuves et principe contradictoire

Règle 10: Admission par défaut de contestation

Règle 11: Identification préliminaire des preuves par les parties

Règle 12: Communication des preuves

Règle 13: Preuve additionnelle suite à la modification des prétentions

Règle 14: Présentation tardive de preuves

**Section 3: Administration et évaluation des preuves**

Règle 15: Audience finale concentrée

Règle 16: Pouvoirs de direction du juge en matière probatoire

Règle 17: Pouvoirs du juge en matière de preuves additionnelles

Règle 18: Conduite des auditions

Règle 19: Évaluation des preuves et jugement

Règle 20: Sanctions en matière probatoire

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Règle 30: Frais et garanties

Règle 31: Mise en œuvre

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**Section 4: L'expertise**

Règle 41: Experts désignés par les parties

Règle 42: Experts désignés par le juge

Règle 43: Obligations des experts

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Règle 45: Accès de l'expert aux informations

Règle 46: Rapport d'expertise et audition de l'expert

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**Section 5: Vérifications judiciaires**

Règle 48: Règles générales matière de vérifications judiciaires

Règle 49: Tiers et vérifications judiciaires

## **PARTIE IV**

### **Situations trans-frontières**

#### **Section 1. Dans l'Union européenne**

Règle 50. Obtention transfrontière des preuves au sein de l'Union européenne

#### **Section 2. En dehors de l'Union européenne**

Règle 51. Obtention transfrontière des preuves en dehors de l'Union européenne

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## **PARTIE I**

### **PARTIE GENERALE**

#### **Section 1: DISPOSITIONS GÉNÉRALES SUR LA PREUVE**

##### **Règle 1. Objet du litige**

L'objet du litige est déterminé par les demandes et défenses des parties, telles que présentées dans l'acte introductif d'instance et les conclusions en défense, y compris dans les modifications qui leur sont apportées.

##### **Règle 2 – Charge de la preuve**

Chaque partie supporte la charge de prouver tous les faits matériels qui fondent ses prétentions.

La loi de fond détermine le fardeau de la preuve.

##### **Règle 3. Standard probatoire**

Un fait contesté est prouvé si le juge est raisonnablement convaincu de sa véracité.

##### **Règle 4. Dispense de preuve**

(1) N'ont pas à être prouvés :

- (a) Les faits reconnus ;
- (b) Les faits non contestés ;
- (c) Les faits notoires pour le juge.

(2) Des faits peuvent être présumés sur le fondement d'autres faits établis.

(3) Si une partie ayant en sa possession ou sous son contrôle des éléments probatoires relatifs à un fait pertinent s'abstient de produire cette preuve sans motif légitime, le juge peut considérer le fait pertinent comme établi.

##### **Règle 5 – Pertinence**

- (1) Toute preuve pertinente est recevable. Le juge, d'office ou sur requête d'une partie, écarte les preuves non pertinentes.
- (2) La pertinence est déterminée par le contenu des conclusions des parties.

### **Règle 6. Preuves illégalement obtenues**

Les preuves illégalement obtenues sont écartées de la procédure.

Toutefois, dans des cas exceptionnels, le juge, en tenant compte du comportement de l'autre partie ou de tiers ainsi que de l'intensité de la violation, peut déclarer recevable une telle preuve si elle constitue le seul moyen d'établir les faits.

### **Règle 7. Égalité et proportionnalité**

Le juge veille à ce que

- (a) les parties et parties éventuelles bénéficient d'une égalité de traitement et d'une possibilité raisonnable d'avoir accès aux preuves et de les présenter ;
- (b) les présentes règles fonctionnent de manière proportionnée à l'importance et la complexité des questions en jeu.

### **Règle 8 – Droit au secret**

- (1) Toutes personnes entendues aux fins d'information dans une affaire, de production de preuves ou d'autres informations peuvent, le cas échéant, se prévaloir du droit au secret, d'immunités ou de protections similaires.
- (2) Une preuve ne peut être obtenue en violation notamment :
  - (a) Du droit d'un époux, d'un partenaire assimilé à un époux ou d'un parent proche d'une partie de refuser de témoigner, également dans les cas où le témoignage comporterait le risque de poursuites pénales de ladite partie ;
  - (b) Du droit d'une personne de ne pas s'auto-incriminer ;
  - (c) De l'obligation de confidentialité de l'avocat ou d'autres droits ou obligations professionnels au secret, de secrets des affaires ou autres intérêts similaires dans les conditions prévues par la loi applicable ;
  - (d) De la confidentialité des échanges dans le cadre de négociations amiables, à moins que les négociations n'aient eu lieu au cours d'une audience publique ou que des intérêts publics primordiaux ne l'exigent ;
  - (e) Des intérêts de la sécurité nationale, du secret d'État ou d'autres questions similaires d'intérêt public.
- (3) Lorsqu'il décide s'il y a lieu de tirer des conséquences défavorables à une partie ou de prononcer d'autres sanctions indirectes, le juge apprécie si ces protections sont de nature à justifier la non divulgation par cette partie de preuves ou autres informations.
- (4) Le juge tient compte de ces protections lorsqu'il exerce son pouvoir de prononcer des sanctions directes à l'encontre d'une partie ou d'un tiers afin de les contraindre à divulguer certaines preuves ou autres informations.
- (5) Celui qui invoque un droit ou une obligation au secret concernant un document doit décrire le document de façon suffisamment détaillée afin de permettre à une autre partie de contester le droit au secret.

## **SECTION 2. PRÉSENTATION DES PREUVES**

### **Règle 9. Présentation des preuves et principe contradictoire**

- (1) Chaque partie peut proposer des preuves pertinentes au soutien de ses allégations en fait et en droit.

- (2) Chaque partie dispose d'une possibilité équitable et d'un temps raisonnablement suffisant pour répondre aux allégations de fait et de droit ainsi qu'aux preuves présentées par une autre partie.

#### **Règle 10. Admission par défaut de contestation**

Le juge peut décider, après en avoir informé la partie, que l'absence injustifiée de réponse en temps utile de celle-ci à une allégation de la partie adverse constitue une base suffisante pour considérer cette allégation comme admise ou acceptée.

#### **Rule 11. Identification préliminaire des preuves par les parties**

Au cours de la phase introductive de la procédure, les parties identifient les preuves qu'elles proposent de produire au soutien de leurs allégations de fait respectives.

#### **Règle 12. Communication des preuves**

- (1) Les preuves documentaires et matérielles sont mises à la disposition de la partie adverse.
- (2) Des preuves par témoignage ne peuvent être proposées au juge que si toutes les autres parties ont été informées de l'identité du témoin et de l'objet de la preuve proposée.
- (3) Toutefois, le juge peut imposer à l'adversaire la confidentialité de la preuve qui lui a été communiquée.

#### **Règle 13. Preuve additionnelle suite à la modification des allégations**

Le juge peut, tout en mettant les parties en mesure de répondre, autoriser ou inviter une partie à clarifier ou modifier ses allégations de fait et à proposer des preuves additionnelles en conséquence.

#### **Règle 14. Présentation tardive de preuves**

Une fois qu'une partie a produit des preuves au cours de la phase procédurale pertinente, de nouvelles preuves seront irrecevables ultérieurement sauf à cette partie à démontrer que l'absence de production pendant la phase procédurale antérieure est justifiée par un motif sérieux.

### **SECTION 3. Administration et Évaluation des preuves**

#### **Règle 15. Audience finale concentrée**

- (1) Au cours de la phase procédurale finale, les preuves non encore reçues par le juge sont administrées au cours d'une audience finale concentrée au cours de laquelle les parties présentent leurs moyens conclusifs.
- (2) L'audience finale se déroule devant le ou les juges appelés à statuer.

#### **Règle 16. Pouvoirs de direction du juge en matière probatoire**

- (1) Au début de la procédure, et tout en mettant les parties en mesure de présenter leurs observations, le juge aborde la recevabilité, la production et l'échange des preuves. En cas de nécessité, il ordonne l'administration de la preuve.
- (2) Les parties peuvent contester la décision du juge.
- (3) Après avoir mis les parties en mesure de présenter leurs observations, le juge peut arrêter l'ordre et le moment de la production des preuves ainsi que, si cela est opportun, la forme selon laquelle la preuve sera produite.

#### **Règle 17. Pouvoirs du juge en matière de preuves additionnelles**

- (1) Tout en mettant les parties en mesure de présenter leurs observations, le juge peut suggérer la pertinence et l'utilité de preuves non encore proposées par une partie. Si une partie accepte la suggestion, le juge ordonne l'administration de cette preuve.

- (2) A titre exceptionnel, le juge peut, tout en mettant les parties en mesure de présenter leurs observations, ordonner l'administration d'une preuve non préalablement proposée par une partie.

### **Règle 18. Conduite des auditions**

- (1) Le juge entend et reçoit toutes les preuves directement dans la salle d'audience à moins que, à titre exceptionnel, il n'ait autorisé que la preuve soit reçue par un juge délégué ou en un autre lieu.
- (2) Les audiences, y compris celles au cours desquelles des preuves sont présentées et le jugement prononcé, sont ouvertes au public. Toutefois, après consultation des parties, le juge peut ordonner que les audiences demeureront en tout ou partie confidentielles ou se dérouleront à huis clos dans l'intérêt de la justice, de la sécurité publique ou du respect de la vie privée.
- (3) Toute audience au cours de laquelle des preuves sont administrées fait l'objet d'un enregistrement vidéo si l'équipement technique est disponible. L'enregistrement vidéo est conservé sous le contrôle du tribunal.
- (4) Les dossiers et enregistrements du tribunal sont publics ou accessibles de toute autre manière aux personnes justifiant d'un intérêt juridique ou formulant une requête légitime.
- (5) Les informations obtenues dans le cadre des présentes règles mais qui n'ont pas été présentées en audience publique sont gardées confidentielles. Le cas échéant, le juge peut prendre toute ordonnance protectrice de nature à sauvegarder des intérêts légitimes tels que des secrets commerciaux, d'affaires ou de sécurité nationale ou des informations dont la divulgation pourrait causer un préjudice ou un trouble excessif. Le juge peut, le cas échéant, procéder à l'examen des preuves à huis clos.
- (6) L'administration des preuves en audience publique ou à huis clos peut, le cas échéant, impliquer l'utilisation de techniques telles que la vidéoconférence ou autres technologies similaires de communication à distance.

### **Règle 19. Appréciation des preuves et jugement**

- (1) Le juge prend en compte toutes les preuves lorsqu'il statue au fond.
- (2) Le juge apprécie librement les preuves.
- (3) Le jugement au fond est accompagné, immédiatement ou dans un délai raisonnable, de motifs énonçant les fondements factuels, probatoires et légaux essentiels de la décision.

### **Règle 20. Sanctions en matière probatoire**

- (1) D'office ou à la demande d'une partie, le juge peut prononcer des sanctions lorsque
  - (a) Une personne s'est abstenue sans motif légitime de se présenter afin d'apporter une preuve, de répondre à des questions pertinentes, de produire un document ou tout autre élément probatoire ;
  - (b) Une personne a, de quelque autre manière, fait obstacle à l'application équitable des règles relatives à la preuve.
- (2) Constituent notamment des sanctions appropriées à l'encontre des parties : le fait de tirer des conséquences défavorables, la suspension de la procédure et la condamnation aux frais au-delà de ce qui est permis par les règles générales en matière de frais.
- (3) Constituent notamment des sanctions appropriées à l'encontre des parties et des tiers des sanctions financières telles qu'amendes et astreintes.
- (4) Constitue notamment une sanction appropriée à l'encontre des avocats leur condamnation aux frais de la procédure.

- (5) En toutes circonstances, le juge veille à ce que les sanctions soient raisonnables et proportionnées à la gravité de l'abstention ou du refus d'exécution, au préjudice causé, à l'importance de la participation et à la nature intentionnelle ou non du comportement.

## **PARTIE ii**

### **ORDONNANCES D'ACCÈS AUX PREUVES**

#### **Règle 21. Cadre général**

Lorsqu'il rend une ordonnance en application de cette Partie, le juge applique les principes suivants :

- (a) En règle générale, chaque partie a accès à toutes formes de preuves pertinentes et non couvertes par un droit au secret ;
- (b) Sur requête d'une partie, le juge ordonne la production de preuves pertinentes, non couvertes par un droit au secret et suffisamment identifiées qui sont en possession ou sous le contrôle d'une autre partie ou, si nécessaire, d'un tiers, même si cette production peut être défavorable à cette personne.

#### **Règle 22. Ordonnances d'accès aux preuves**

- (1) Dans le respect des critères et de la procédure prévus dans les Règles, tout demandeur ou défendeur ainsi que tout demandeur potentiel envisageant d'engager une action en justice, peut solliciter du juge une décision ordonnant l'accès à des preuves pertinentes et non couvertes par un droit au secret qui sont détenues par une autre partie ou par un tiers ou bien sous son contrôle.
- (2) Le juge ne peut d'office rendre une telle ordonnance, sauf dispositions contraires énoncées dans des lois spéciales.
- (3) Les éléments matériels ou les informations obtenus en application de cette règle n'acquièrent la qualité de preuves que s'ils sont produits en tant que telles au cours de la procédure.

#### **Règle 23. Critères pertinents**

- (1) La partie ou la partie potentielle qui sollicite une ordonnance d'accès à des preuves doit convaincre le juge
- (a) que la preuve sollicitée est nécessaire en vue d'établir des faits contestés dans une procédure pendante ou dans une procédure envisagée, et
- (b) que le demandeur ne peut obtenir l'accès à cette preuve sans l'aide du tribunal.
- (2) En outre, la partie ou la partie potentielle qui forme une requête au sens de la Règle 21 présente au soutien de sa requête la preuve *prima facie* du bien-fondé de sa demande ou de sa défense. Si aucune action en justice n'a encore été intentée, le demandeur indique avec suffisamment de précision tous les éléments nécessaires pour permettre au juge d'identifier l'action que le demandeur envisage d'introduire.

#### **Règle 24. Spécification et proportionnalité**

- (1) Le requérant identifie aussi précisément que possible au regard des circonstances de l'affaire, les sources spécifiques de preuve auxquelles il demande à avoir accès ou bien les catégories précisément définies de preuve en mentionnant leur nature, leur teneur ou leur date. Le juge rejette toute requête portant sur une recherche d'information vague, spéculative ou dont la vaste étendue n'est pas justifiée.
- (2) Le requérant démontre que les mesures sollicitées sont proportionnées et raisonnables. A cette fin, le juge met en balance les intérêts légitimes de toutes les parties et des tiers concernés.

**Règle 25. Informations confidentielles**

- (1) Le juge apprécie si la requête a pour objet ou inclut des informations confidentielles, notamment au regard de tiers. A cette fin, il tient compte de toutes les règles pertinentes relatives à la protection d'informations confidentielles.
- (2) En cas de nécessité et au regard des circonstances de l'espèce, le juge peut notamment rendre une ordonnance d'accès à des preuves contenant des informations confidentielles mais en l'adaptant de l'une ou de plusieurs des façons suivantes, afin de protéger l'intérêt pertinent à la confidentialité :
  - (a) en apportant des modifications aux passages sensibles dans les documents ;
  - (b) en conduisant des audiences à huis clos ;
  - (c) en limitant le nombre de personnes autorisées à prendre connaissance des preuves ;
  - (d) en faisant injonction à des experts de produire des résumés des informations sous une forme globale ou sous une autre forme non confidentielle ;
  - (e) en rédigeant une version non confidentielle d'une décision judiciaire dans laquelle les passages contenant des données confidentielles sont supprimés ;
  - (f) en limitant l'accès à certaines sources probatoires aux représentants et avocats des parties ainsi qu'aux experts qui sont tenues d'une obligation de confidentialité.

**Règle 26. Violation de la confidentialité**

- (1) En cas de violation par une personne de son obligation de confidentialité, la partie ayant subi un préjudice de ce fait peut demander au juge de prononcer à l'encontre de la partie responsable une des sanctions suivantes :
  - (a) Rejet total ou partiel de la demande de la partie fautive, à condition que la procédure principale soit encore pendante ;
  - (b) Constat de responsabilité de la partie coupable de la violation et condamnation de celle-ci à réparation ;
  - (c) Condamnation de la partie coupable de la violation à payer les frais de la procédure conduite en application des Règles, quel que soit le résultat final de l'instance ;
  - (d) Condamnation de la partie coupable de la violation (et/ou de son ou ses représentants) à une ou des peines d'amende de XXX à YYY euros.
- (2) Lorsqu'il se prononce sur les sanctions, le juge veille à ce qu'elles soient proportionnées à la gravité de la violation et prend notamment en compte le fait que cette dernière soit intervenue avant l'introduction de la procédure au fond.

**Règle 27. Accès à des preuves détenues par des autorités publiques**

Le gouvernement et les autres organismes publics se conforment à une ordonnance rendue en application des Règles, sauf si les informations sont protégées en raison d'un intérêt public. Le refus adressé au juge doit être accompagné de motifs justifiant le fondement de la protection spéciale invoquée.

**Règle 28. Moment de la requête**

- (1) Les requêtes sollicitant l'accès à des preuves peuvent être présentées (a) avant le commencement de la procédure au fond ; (b) dans le document engageant cette procédure, ou (c) au cours d'une procédure pendante.
- (2) Si une ordonnance d'accès aux preuves a été rendue avant qu'une procédure au fond ait été engagée, il peut être exigé du demandeur bénéficiaire de cette ordonnance qu'il intente une procédure au fond dans un délai raisonnable déterminé. Si le demandeur ne se

conforme pas à cette obligation, le juge a tout pouvoir pour prendre les mesures adéquates.

### **Règle 29. Procédure de délivrance d'une ordonnance d'accès à des preuves**

- (1) Avant de statuer sur la requête d'ordonnance d'accès aux preuves, le juge met les parties et ceux qui font l'objet de la requête en mesure de s'opposer à la mesure sollicitée ainsi que de présenter leurs observations sur l'étendue et la mise en œuvre de celle-ci. En cas de nécessité, le juge peut ordonner la tenue d'une audience contradictoire.
- (2) La personne visée par la mesure d'accès aux preuves sollicitée peut demander au juge d'ordonner une forme ou méthode différente mais tout aussi effective d'accès aux preuves qui serait moins contraignante.
- (3) Les requêtes non contradictoires peuvent être acceptées par le juge en cas de nécessité urgente. S'il est fait droit à la requête, la partie et le tiers subissant l'ordonnance peuvent demander au juge de la rétracter. Le cas échéant, une audience peut se tenir selon les modalités prévues au (1).
- (4) La requête peut également solliciter des mesures en vue de protéger ou de préserver des preuves.

### **Règle 30. Frais et garantie**

- (1) Le requérant supporte tous les frais et dépenses liés à la mise en œuvre de l'ordonnance d'accès aux preuves. Le cas échéant, le juge peut lui imposer de payer immédiatement lesdits frais et dépenses.
- (2) Sur requête de l'adversaire, le juge peut ordonner que le requérant devra constituer une garantie couvrant les dépenses prévisibles en vue de la mise en œuvre de l'ordonnance d'accès aux preuves. Si le juge impose une garantie, le demandeur doit la fournir avant de pouvoir mettre en œuvre l'ordonnance.
- (3) A l'issue de la procédure principale, le juge peut, dans sa décision sur les frais, déroger à la règle générale en la matière.

### **Règle 31. Mise en œuvre**

Il incombe au juge d'ordonner toutes les mesures pratiques nécessaires afin de garantir que l'ordonnance rendue en application des Règles soit mise en œuvre de façon effective et équitable. Il peut notamment émettre des instructions quant au lieu et à la manière adéquats d'exécuter l'ordonnance. Le juge peut notamment décider que le demandeur pourra bénéficier de l'assistance d'un expert.

### **Règle 32. Non-respect de l'ordonnance d'accès à des preuves**

- (1) Si une personne faisant l'objet d'une ordonnance rendue en application des Règles et, en ayant connaissance, détruit, dissimule les preuves pertinentes ou, de quelque autre manière, rend impossible, la mise en œuvre de l'ordonnance, le requérant peut solliciter du juge qu'il prononce, dans le respect de l'exigence de proportionnalité, une ou plusieurs des conséquences suivantes :
  - (a) Considérer comme reconnus les faits faisant l'objet de l'ordonnance d'accès aux preuves ;
  - (b) Considérer que le défendeur ou le défendeur potentiel a implicitement reconnu le fondement en tout ou partie de la demande faite ou proposée par le demandeur ;
  - (c) Conformément aux pouvoirs disciplinaires reconnus au juge, imposer au destinataire tenu de se conformer à l'ordonnance une astreinte de XXX à YYY euros (ou un montant équivalent dans la monnaie nationale) par jour de retard dans la mise en œuvre de ladite ordonnance.

- (2) Cette règle s'applique sans préjudice de toutes autres sanctions ou mesures procédurales disciplinaires à la disposition du juge, y compris les mesures prévues dans la Règle 20.

### **PART III – TYPES DE PREUVE**

#### **SECTION 1. DOCUMENTS**

##### **Règle 33. Preuve documentaire et électronique**

- (1) Les parties peuvent présenter comme preuves tout document pertinent.
- (2) Un document peut être un écrit, une image, un dessin, un programme ou une donnée de toute nature, enregistrés ou conservés sur papier ou sur un support électronique, audio, visuel ou autre.
- (3) Les documents qu'une partie conserve sous forme électronique sont en principe soumis ou produits en la forme électronique, sauf décision contraire du juge.
- (4) Les parties peuvent contester être l'auteur de tout document produit par l'adversaire. Dans un tel cas, le juge ordonne toute mesure de nature à établir l'authenticité des documents.

##### **Règle 34. Actes authentiques**

- (1) Constitue un acte authentique tout instrument établi formellement par une autorité publique ou bien dont l'authenticité a été certifiée par elle.
- (2) Les actes authentiques enregistrés sous forme électronique ont la même force probatoire que ceux sous forme papier.

##### **Règle 35. Documents: langue et traduction**

- (1) Sur demande d'une partie ou du juge, tout document est produit ou traduit dans la langue du tribunal.
- (2) Sur accord entre les parties ou décision du juge, la traduction de documents longs ou volumineux peut être limitée aux parties pertinentes.

#### **SECTION 2. TÉMOIGNAGES**

##### **Règle 36. Témoins**

- (1) Sous réserve de leur pertinence et admissibilité, ainsi que du pouvoir de direction de l'instance par le juge et des droits au secret, une partie a le droit de présenter la déposition de tout témoin.
- (2) Si un témoin factuel dont le témoignage remplit les conditions formulées à l'alinéa 1er de cette Règle, refuse en tout ou partie de témoigner, le juge peut lui en intimer l'ordre.
- (3) Le témoin est tenu de dire la vérité lors de sa déposition. Le juge l'en informe préalablement à son audition.

##### **Règle 37. Témoignages**

- (1) En principe, les témoignages sont reçus oralement. Toutefois, le juge peut, après consultation des parties, exiger que le témoignage initial soit présenté sous forme écrite et transmis aux parties préalablement à l'audience. Le témoignage oral peut être limité à des questions additionnelles à la suite de la présentation du témoignage écrit.
- (2) Tout témoin se présente en personne ; le juge peut toutefois autoriser l'usage de la vidéoconférence ou de toute technologie similaire pour l'audition d'un témoin.

(3) La personne qui témoigne peut être interrogée d'abord par le juge ou par la partie se ayant proposé le témoignage. Si le témoin a tout d'abord été interrogé par le juge ou la partie adverse, la partie a le droit de poser directement au témoin des questions additionnelles.

(4) Les parties peuvent contester la fiabilité d'un témoignage.

### **Règle 38. Témoins: langue et traduction**

(1) Lorsqu'un témoin ne maîtrise pas la langue officielle (ou les langues officielles) dans laquelle la procédure est conduite ou peut être conduite, un service d'interprétariat est fourni.

(2) Le cas échéant, avec l'accord tant du juge que des parties, un témoin peut s'exprimer dans une langue autre que la langue officielle de la procédure.

### **Règle 39. Attestations de témoins**

Sur autorisation du juge, une partie peut présenter une attestation comportant le témoignage sous serment de toute personne sous forme de déclaration rédigée avec les propres mots du témoin sur des faits pertinents. Le juge peut souverainement décider d'assimiler ces déclarations à un témoignage oral devant le tribunal. Les cas échéant, une partie peut solliciter du juge qu'il ordonne la comparution personnelle de l'auteur de la déclaration. L'interrogation du témoin peut alors débiter par des questions additionnelles du juge ou de la partie adverse.

## **SECTION 3. COMPARUTION PERSONNELLE DES PARTIES**

### **Règle 40. Comparution personnelle des parties et conséquences d'un refus de répondre**

(1) Le juge peut retenir comme preuve toute déclaration faite par une partie qui a comparu personnellement devant le tribunal.

(2) Devant le tribunal, toute partie est mise en mesure de poser à son adversaire des questions portant sur des points de fait pertinents.

(3) Le juge peut tirer toutes conséquences pertinentes de refus d'une partie de comparaître personnellement ou de répondre aux questions pertinentes émanant de l'adversaire ou du juge.

(4) Si la partie qui doit comparaître personnellement est une personne morale, elle indique l'identité de la ou des personnes physiques qui ont directement participé, au nom de la personne morale, aux événements pertinents, afin qu'elles soient entendues, sous condition toutefois qu'elles puissent encore être considérées comme des représentants légaux de la personne morale. Le juge peut tirer toutes conséquences de l'abstention non justifiée de la personne morale à fournir cette information.

## **SECTION 4. PREUVE PAR EXPERTISE**

### **Règle 41. Experts désignés par les parties**

Toute partie a le droit de présenter le rapport d'un expert qu'elle a elle-même désigné sur tout point pertinent pour lequel une expertise est adéquate.

### **Règle 42. Experts désignés par le juge**

(1) Le juge peut désigner un ou plusieurs experts afin qu'ils fournissent des preuves sur tout point pertinent pour lequel une expertise est adéquate, y compris le droit étranger.

(2) Les experts peuvent être des personnes physiques ou morales. Si ce sont des personnes morales, une personne physique au moins doit assumer la responsabilité du rapport.

(3) Si les parties s'entendent sur le nom d'un expert, le juge désigne en principe cet expert.

(4) Les parties peuvent récuser un expert désigné par le juge pour des motifs identiques à ceux permettant la récusation d'un magistrat.

### **Règle 43. Obligations des experts**

(1) L'expert, qu'il soit désigné par le juge ou par une partie, est tenu envers le tribunal de présenter une évaluation complète et objective de la question faisant l'objet de l'expertise.

(2) L'expert désigné par le juge ne peut refuser la mission d'expertise que si le domaine de cette dernière est en dehors de ses compétences. L'expert peut également refuser la mission pour des motifs identiques à ceux permettant à une personne de refuser de témoigner.

(3) Sauf autorisation du juge, l'expert ne peut déléguer sa mission à des tiers.

(4) Si l'expert, sans motif légitime, ne rend pas son rapport dans le délai fixé par le juge, ce dernier peut prononcer les sanctions adéquates.

#### **Règle 44. Instructions du juge**

Le juge donne à l'expert les instructions nécessaires et fixe un délai pour la remise du rapport écrit. Le cas échéant, le juge peut étendre ou limiter le champ des instructions ou le délai imparti. Les parties sont dûment informées de ces mesures.

#### **Règle 45. Accès de l'expert aux informations**

(1) L'expert nommé par le juge a accès à toutes les informations pertinentes et non couvertes par le secret, qui sont nécessaires à la préparation de son rapport.

(2) L'expert peut notamment demander à une partie de lui fournir toute information ou de lui donner accès à tout document, et de permettre la vérification de biens ou l'entrée dans un lieu pour vérification, dans la mesure pertinente à l'affaire et adéquate au regard du résultat.

(3) L'expert peut examiner une personne ou avoir accès à des informations découlant de l'examen physique ou mental d'une personne.

#### **Règle 46. Rapport d'expertise et audition de l'expert**

(1) Le rapport d'expertise est en principe rendu sous forme écrite. Toutefois, dans les affaires simples, le juge peut ordonner que l'expert présentera son rapport oralement.

(2) A la demande du juge ou d'une des parties, l'expert explique son rapport écrit lors d'une audition orale qui peut avoir lieu par vidéoconférence conformément aux dispositions nationales applicables. Chaque partie ne peut formuler que des questions pertinentes.

(3) Le juge peut exiger de l'expert qu'il prête serment lors du dépôt de son rapport écrit ou lors de son audition.

(4) Si, sans motif légitime, l'expert désigné par une partie, qui a été dûment cité à comparaître ne se présente pas à l'audience, le juge peut écarter le rapport écrit rédigé par cet expert.

#### **Règle 47. Frais**

(1) Les honoraires et frais de l'expert désigné par le juge font partie des frais du procès. Le juge peut ordonner à la partie qui a sollicité l'expertise d'avancer ces frais.

(2) Les honoraires et frais de l'expert désigné par une partie ne peuvent être mis à la charge de la partie adverse que si le juge l'ordonne.

### **SECTION 5. VÉRIFICATIONS JUDICIAIRES**

#### **Règle 48. Règles générales en matière de vérifications judiciaires**

(1) Sur requête d'une partie, le juge peut ordonner la vérification de biens ou, le cas échéant, l'examen physique ou mental d'une personne.

(2) Si cela est nécessaire pour les vérifications, le juge peut ordonner l'entrée dans des lieux ou dans des locaux privés.

(3) Le cas échéant, le juge peut procéder à des vérifications personnelles ou ordonner des vérifications par un expert désigné judiciairement ou nommé par une partie.

(4) Sauf décision contraire du juge, les parties et leurs représentants ont le droit d'assister à toutes vérifications. Le juge, après consultation des parties, fixe le moment et les modalités des vérifications.

#### **Règle 49. Tiers et vérifications judiciaires**

Conformément aux dispositions de la Partie II des présentes Règles, le juge peut ordonner à des tiers à la procédure de produire des objets aux fins de vérifications par le juge ou par une partie.

### **PART IV – SITUATIONS TRANSFRONTIÈRES**

#### **SECTION 1. DANS L'UNION EUROPÉENNE**

##### **Règle 50. Obtention transfrontière des preuves au sein de l'Union Européenne**

**(1)** Si des preuves doivent être obtenues dans un autre État membre de l'Union Européenne et si un accès est nécessaire à des preuves situées dans un autre État membre, le juge et les parties peuvent se fonder sur les dispositions du règlement (CE) 1206/2001 **du Conseil du 28 mai 2001 relatif à la coopération entre les juridictions des États membres dans le domaine de l'obtention des preuves en matière civile ou commerciale.**

**(2)** Sans préjudice de l'application du règlement (CE) 1206/2001 **du Conseil du 28 mai 2001 relatif à la coopération entre les juridictions des États membres dans le domaine de l'obtention des preuves en matière civile ou commerciale,**

- a) le juge peut citer directement à comparaître un témoin résidant dans un autre État membre ;
- b) le juge peut désigner un expert afin que celui-ci présente un rapport dont la préparation requiert que des actes soient réalisés dans un autre État membre (examen de personnes ou de lieux) ;
- c) toute partie ou tout tiers à l'encontre de qui est rendue une ordonnance d'accès à des preuves et qui n'a ni domicile, ni résidence dans l'État membre du tribunal, est tenu de produire les documents et éléments probatoires requis, même s'ils sont situés dans un État membre différent de celui du tribunal qui a rendu l'ordonnance ;
- d) le juge peut rendre une ordonnance d'accès à des preuves à l'encontre de parties potentielles ou de tiers domiciliés dans un autre État membre.

#### **SECTION 2. EN DEHORS DE L'UNION EUROPÉENNE**

##### **Règle 51. Obtention transfrontière des preuves en dehors de l'Union Européenne**

Si des preuves doivent être obtenues en dehors de l'Union Européenne ou si le destinataire d'une ordonnance d'accès à des preuves n'a ni domicile, ni résidence habituelle dans l'Union européenne, le juge et les parties peuvent se fonder sur la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile et commerciale ou sur toutes autres conventions pertinentes.