

## ALI/UNIDROIT Principles of Transnational Civil Procedure \*

### Scope and Implementation

These Principles are standards for adjudication of transnational commercial disputes. These Principles may be equally appropriate for the resolution of most other kinds of civil disputes and may be the basis for future initiatives in reforming civil procedure.

#### Comment:

*P-A* A national system seeking to implement these Principles could do so by a suitable legal measure, such as a statute or set of rules, or an international treaty. Forum law may exclude categories of matters from application of these Principles and may extend their application to other civil matters. Courts may adapt their practice to these Principles, especially with the consent of the parties to litigation. These Principles also establish standards for determining whether recognition should be given to a foreign judgment. See Principle 30. The procedural law of the forum applies in matters not addressed in these Principles.

*P-B* The adoptive document may include a more specific definition of “commercial” and “transnational.” That task will necessarily involve careful reflection on local legal tradition and connotation of legal language. Transnational commercial transactions may include commercial contracts between nationals of different states and commercial transactions in a state by a national of another state. Commercial transactions may include sale, lease, loan, investment, acquisition, banking, security, property (including intellectual property), and other business or financial transactions, but do not necessarily include claims provided by typical consumer-protection statutes.

*P-C* Transnational disputes, in general, do not arise wholly within a state and involve disputing parties who are from the same state. For purposes of these Principles, an individual is considered a national both of a state of the person’s citizenship and the state of the person’s habitual residence. A jural entity (corporation, unincorporated association, partnership, or other organizational entity) is considered to be from both the state from which it has received its charter of organization and the state in which it has its principal place of business.

*P-D* In cases involving multiple parties or multiple claims, among which are ones not within the scope of these Principles, these Principles should apply when the court determines that the principal matters in controversy are within the scope of application of these Principles. However, these Principles are not applicable, without modification, to group litigation, such as class, representative, or collective actions.

\* The text of the *Principles* and the accompanying commentary were adopted by the American Law Institute (ALI) in May 2004 and by the International Institute for the Unification of Private Law (UNIDROIT) in April 2004.

*P-E* These Principles are equally applicable to international arbitration, except to the extent of being incompatible with arbitration proceedings, for example, the Principles related to jurisdiction, publicity of proceedings, and appeal.

**1. Independence, Impartiality, and Qualifications of the Court and Its Judges**

- 1.1 The court and the judges should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal and external influence.**
- 1.2 Judges should have reasonable tenure in office. Nonprofessional members of the court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution.**
- 1.3 The court should be impartial. A judge or other person having decisional authority must not participate if there is reasonable ground to doubt such person's impartiality. There should be a fair and effective procedure for addressing contentions of judicial bias.**
- 1.4 Neither the court nor the judge should accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration. When communication between the court and a party occurs in the absence of another party, that party should be promptly advised of the content of the communication.**
- 1.5 The court should have substantial legal knowledge and experience.**

**Comment:**

*P-1A* Independence can be considered a more objective characteristic and impartiality a more subjective one, but these attributes are closely connected.

*P-1B* External influences may emanate from members of the executive or legislative branch, prosecutors, or persons with economic interests, etc. Internal influence could emanate from other officials of the judicial system.

*P-1C* This Principle recognizes that typically judges serve for an extensive period of time, usually their entire careers. However, in some systems most judges assume the bench only after careers as lawyers and some judicial officials are designated for short periods. An objective of this Principle is to avoid the creation of ad hoc courts. The term "judge" includes any judicial or quasi-judicial official under the law of the forum.

*P-1D* A procedure for addressing questions of judicial bias is necessary only in unusual circumstances, but availability of the procedure is a reassurance to litigants, especially nationals of other countries. However, the procedure should not invite abuse through insubstantial claims of bias.

*P-1E* Proceedings without notice (ex parte proceedings) may be proper, for example in initially applying for a provisional remedy. See Principles 5.8 and 8. Proceedings after default are governed by Principle 15. Routine procedural administration includes, for example, specification of dates for submission of proposed evidence.

*P-1F* Principle 1.5 requires only that judges for transnational litigation be familiar with the law. It does not require the judge to have special knowledge of commercial or financial law, but familiarity with such matters would be desirable.

**2. Jurisdiction Over Parties**

**2.1 Jurisdiction over a party may be exercised:**

2.1.1 By consent of the parties to submit the dispute to the tribunal;

2.1.2 When there is a substantial connection between the forum state and the party or the transaction or occurrence in dispute. A substantial connection exists when a significant part of the transaction or occurrence occurred in the forum state, when an individual defendant is a habitual resident of the forum state or a jural entity has received its charter of organization or has its principal place of business therein, or when property to which the dispute relates is located in the forum state.

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

2.2.1 Presence or nationality of the defendant in the forum state; or

2.2.2 Presence in the forum state of the defendant's property, whether or not the dispute relates to the property, but the court's authority should be limited to the property or its value.

2.3 A court may grant provisional measures with respect to a person or to property in the territory of the forum state, even if the court does not have jurisdiction over the controversy.

2.4 Exercise of jurisdiction must ordinarily be declined when the parties have previously agreed that some other tribunal has exclusive jurisdiction.

2.5 Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.

2.6 The court should decline jurisdiction or suspend the proceeding, when the dispute is previously pending in another court competent to exercise jurisdiction, unless it appears that the dispute will not be fairly, effectively, and expeditiously resolved in that forum.

**Comment:**

*P-2A* Subject to restrictions on the court's jurisdiction under the law of the forum and subject to restrictions of international conventions, ordinarily a court may exercise jurisdiction upon the parties' consent. A court should not exercise jurisdiction on the basis of implied consent without giving the parties a fair opportunity to challenge jurisdiction. In the absence of the parties' consent, and subject to the parties' agreement that some other tribunal or forum has exclusive jurisdiction, ordinarily a court may exercise jurisdiction only if the dispute is connected to the forum, as provided in Principle 2.1.2.

*P-2B* The standard of "substantial connection" has been generally accepted for international legal disputes. Administration of this standard necessarily involves elements of practical judgment and self-restraint. That standard excludes mere physical presence, which within the United States is colloquially called "tag jurisdiction." Mere physical presence as a basis of jurisdiction within the American federation has historical justification that is inapposite in modern international disputes. The concept of "substantial connection" may be specified and

elaborated in international conventions and in national laws. The scope of this expression might not be the same in all systems. However, the concept does not support general jurisdiction on the basis of “doing business” not related to the transaction or occurrence in dispute.

*P-2C* Principle 2.2 covers the concept of “forum necessitatis” — the forum of necessity whereby a court may properly exercise jurisdiction when no other forum is reasonably available.

*P-2D* Principle 2.3 recognizes that a state may exercise jurisdiction by sequestration or attachment of locally situated property, for example to secure a potential judgment, even though the property is not the object or subject of the dispute. The procedure with respect to property locally situated is called “quasi in rem jurisdiction” in some legal systems. Principle 2.3 contemplates that, in such a case, the merits of the underlying dispute might be adjudicated in some other forum. The location of intangible property should be ascribed according to forum law.

*P-2E* Party agreement to exclusive jurisdiction, including an arbitration agreement, ordinarily should be honored.

*P-2F* The concept recognized in Principle 2.5 is comparable to the common-law rule of forum non conveniens. In some civil-law systems, the concept is that of preventing abuse of the forum. This principle can be given effect by suspending the forum proceeding in deference to another tribunal. The existence of a more convenient forum is necessary for application of this Principle. This Principle should be interpreted in connection with the Principle of Procedural Equality of the Parties, which prohibits any kind of discrimination on the basis of nationality or residence. See Principle 3.2.

*P-2G* For the timing and scope of devices to stay other proceedings, such as *lis pendens*, see Principles 10.2 and 28.1.

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

- 3.1 The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.**
- 3.2 The right to equal treatment includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence. The court should take into account difficulties that might be encountered by a foreign party in participating in litigation.**
- 3.3 A person should not be required to provide security for costs, or security for liability for pursuing provisional measures, solely because the person is not a national or resident of the forum state.**
- 3.4 Whenever possible, venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.**

#### **Comment:**

*P-3A* The term “reasonable” is used throughout the Principles and signifies “proportional,” “significant,” “not excessive,” or “fair,” according to the context. It can also mean the opposite of arbitrary. The concept of reasonableness also precludes hyper-technical legal argument and leaves a range of discretion to the court to avoid severe, excessive, or unreasonable application of procedural norms.

*P-3B* Illegitimate discrimination includes discrimination on the basis of nationality, residence, gender, race, language, religion, political or other opinion, national or social origin, birth or other status, sexual orientation, or association with a national minority. Any form of

illegitimate discrimination is prohibited, but discrimination on the basis of nationality or residence is a particularly sensitive issue in transnational commercial litigation.

*P-3C* Special protection for a litigant, through a conservatorship or other protective procedure such as a curator or guardian, should be afforded to safeguard the interests of persons who lack full legal capacity, such as minors. Such protective measures should not be abusively imposed on a foreign litigant.

*P-3D* Some jurisdictions require a person to provide security for costs, or for liability for provisional measures, in order to guarantee full compensation of possible future damages incurred by an opposing party. Other jurisdictions do not require such security, and some of them have constitutional provisions regarding access to justice or equality of the parties that prohibit such security. Principle 3.3 is a compromise between those two positions and does not modify forum law in that respect. However, the effective responsibility of a nonnational or nonresident for costs or liability for provisional measures should be evaluated under the same general standards.

*P-3E* Venue rules of a national system (territorial competence) generally reflect considerations of convenience for litigants within the country. They should be administered in light of the principle of convenience of the forum stated in Principle 3.4. A venue rule that would impose substantial inconvenience within the forum state should not be given effect when there is another more convenient venue and transfer of venue within the forum state should be afforded from an unreasonably inconvenient location.

#### **4. Right to Engage a Lawyer**

**4.1 A party has the right to engage a lawyer of the party's choice, including both representation by a lawyer admitted to practice in the forum and active assistance before the court of a lawyer admitted to practice elsewhere.**

**4.2 The lawyer's professional independence should be respected. A lawyer should be permitted to fulfill the duty of loyalty to a client and the responsibility to maintain client confidences.**

#### **Comment:**

*P-4A* A forum may appropriately require that a lawyer representing a party be admitted to practice in the forum unless the party is unable to retain such a lawyer. However, a party should also be permitted the assistance of other lawyers, particularly its regular lawyer, who should be permitted to attend and actively participate in all hearings in the dispute.

*P-4B* A lawyer admitted to practice in the party's home country is not entitled by this Principle to be the sole representative of a party in foreign courts. That matter should be governed by forum law except that a foreign lawyer should at least be permitted to attend the hearing and address the court informally.

*P-4C* The attorney-client relationship is ordinarily governed by rules of the forum, including the choice-of-law rules.

*P-4D* The principles of legal ethics vary somewhat among various countries. However, all countries should recognize that lawyers in independent practice are expected to advocate the interests of their clients and generally to maintain the secrecy of confidences obtained in the course of representation.

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

- 5.1** At the commencement of a proceeding, notice, provided by means that are reasonably likely to be effective, should be directed to parties other than the plaintiff. The notice should be accompanied by a copy of the complaint or otherwise include the allegations of the complaint and specification of the relief sought by plaintiff. A party against whom relief is sought should be informed of the procedure for response and the possibility of default judgment for failure to make timely response.
- 5.2** The documents referred to in Principle 5.1 must be in a language of the forum, and also a language of the state of an individual's habitual residence or a jural entity's principal place of business, or the language of the principal documents in the transaction. Defendant and other parties should give notice of their defenses and other contentions and requests for relief in a language of the proceeding, as provided in Principle 6.
- 5.3** After commencement of the proceeding, all parties should be provided prompt notice of motions and applications of other parties and determinations by the court.
- 5.4** The parties have the right to submit relevant contentions of fact and law and to offer supporting evidence.
- 5.5** A party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court.
- 5.6** The court should consider all contentions of the parties and address those concerning substantial issues.
- 5.7** The parties may, by agreement and with approval of the court, employ expedited means of communications, such as telecommunication.
- 5.8** An order affecting a party's interests may be made and enforced without giving previous notice to that party only upon proof of urgent necessity and preponderance of considerations of fairness. An *ex parte* order should be proportionate to the interests that the applicant seeks to protect. As soon as practicable, the affected party should be given notice of the order and of the matters relied upon to support it, and should have the right to apply for a prompt and full reconsideration by the court.

**Comment:**

*P-5A* The specific procedure for giving notice varies somewhat among legal systems. For example, in some systems the court is responsible for giving the parties notice, including copies of the pleadings, while in other systems that responsibility is imposed on the parties. The forum's technical requirements of notice should be administered in contemplation of the objective of affording actual notice.

*P-5B* The possibility of a default judgment is especially important in international litigation.

*P-5C* The right of a party to be informed of another party's contentions is consistent with the responsibility of the court stated in Principle 22.

*P-5D* According to Principle 5.5, the parties should make known to each other at an early stage the elements of fact upon which their claims or defenses are based and the rules of law that will be invoked, so that each party has timely opportunity to organize its case.

*P-5E* The standard stated in Principle 5.6 does not require the court to consider contentions determined at an earlier stage of the proceeding or that are unnecessary to the decision. See Principle 23, requiring that the written decision be accompanied by a reasoned explanation of its legal, evidentiary, and factual basis.

*P-5F* Forum law may provide for expedited means of communication without party approval or special court order.

*P-5G* Principle 5.8 recognizes the propriety of “ex parte” proceedings, such as a temporary injunction or an order for sequestration of property (provisional measures), particularly at the initial stage of litigation. Often such orders can be effective only if enforced without prior notice. An opposing party should be given prompt notice of such an order, opportunity to be heard immediately, and a right to full reconsideration of the factual and legal basis of such an order. An ex parte proceeding should be governed by Principle 8. See Principles 1.4 and 8.

## **6. Languages**

**6.1 The proceedings, including documents and oral communication, ordinarily should be conducted in a language of the court.**

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

**6.3 Translation should be provided when a party or witness is not competent in the language in which the proceeding is conducted. Translation of lengthy or voluminous documents may be limited to portions, as agreed by the parties or ordered by the court.**

### **Comment:**

*P-6A* The court should conduct the proceeding in a language in which it is fluent. Ordinarily this will be the language of the state in which the court is situated. However, if the court and the parties have competence in a foreign language, they may agree upon or the judge may order that language for all or part of the proceeding, for example the reception of a particular document or the testimony of a witness in the witness’s native language.

*P-6B* Frequently in transnational litigation witnesses and experts are not competent in the language in which the proceeding is conducted. In such a case, translation is required for the court and for other parties. The testimony must be taken with the aid of an interpreter, with the party presenting the evidence paying the cost of the translation unless the court orders otherwise. Alternatively, the witness may be examined through deposition, upon agreement of the parties or by order of the court. The deposition can then be translated and submitted at the hearing.

## **7. Prompt Rendition of Justice**

**7.1 The court should resolve the dispute within a reasonable time.**

**7.2 The parties have a duty to cooperate and a right of reasonable consultation concerning scheduling. Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason.**

**Comment:**

*P-7A* In all legal systems the court has a responsibility to move the adjudication forward. It is a universally recognized axiom that “justice delayed is justice denied.” Some systems have specific timetables according to which stages of a proceeding should be performed.

*P-7B* Prompt rendition of justice is a matter of access to justice and may also be considered an essential human right, but it should also be balanced against a party’s right of a reasonable opportunity to organize and present its case.

**8. Provisional and Protective Measures**

**8.1 The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.**

**8.2 A court may order provisional relief without notice only upon urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and legal issues of which the court properly should be aware. A person against whom ex parte relief is directed must have the opportunity at the earliest practicable time to respond concerning the appropriateness of the relief.**

**8.3 An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation.**

**Comment:**

*P-8A* “Provisional relief” embraces also the concept of “injunction,” which is an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Principle 8.1 authorizes the court to issue an order that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. The term is used here in a generic sense to include attachment, sequestration, and other directives. The concept of regulation includes measures to ameliorate the underlying controversy, for example supervision of management of a partnership during litigation among the partners. Availability of provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law. A court may also order disclosure of assets wherever located, or grant provisional relief to facilitate arbitration or enforce arbitration provisional measures.

*P-8B* Principle 5.8 and 8.2 authorize the court to issue an order without notice to the person against whom it is directed where doing so is justified by urgent necessity. “Urgent necessity,” required as a basis for an ex parte order, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of “balance of equities.” Considerations of fairness include the strength of the merits of the applicant’s claim, relevant public interest if any, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an ex parte order. See Principle 1.4.

*P-8C* The question for the court, in considering an application for an ex parte order, is whether the applicant has made a reasonable and specific demonstration that such an order is required to prevent an irreparable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until the opposing party has opportunity to be heard. The burden is on the party requesting an ex parte order to justify its issuance. However, as soon as practicable, the opposing party or person to whom the order is addressed should be given notice of the order and of the matters relied upon to support it and should have the right to apply for a prompt and full reconsideration by the court. The party or person must have the opportunity for a de novo reconsideration of the decision, including opportunity to present evidence. See Principle 8.2.

*P-8D* Rules of procedure generally require that a party requesting an ex parte order make full disclosure to the court of all issues of law and fact that the court should legitimately take into account in granting the request, including those against the petitioner's interests and favorable to the opposing party. Failure to make such disclosure is ground to vacate an order and may be a basis of liability for damages against the requesting party. In some legal systems, assessment of damages for an erroneously issued order does not necessarily reflect the proper resolution of the underlying merits.

*P-8E* After hearing those interested, the court may issue, dissolve, renew, or modify an order. If the court had declined to issue an order ex parte, it may nevertheless issue an order upon a hearing. If the court previously issued an order ex parte, it may dissolve, renew, or modify its order in light of the matters developed at the hearing. The burden is on the party seeking the order to show that it is justified.

*P-8F* Principle 8.3 authorizes the court to require a bond or other compensation, as protection against the disturbance and injury that may result from an order. The particulars of such compensation should be determined by the law of the forum. An obligation to compensate should be express, not merely by implication, and could be formalized through a bond underwritten by a third party.

*P-8G* An order under this Principle in many systems is ordinarily subject to immediate appellate review, according to the procedure of the forum. In some systems such an order is of very brief duration and subject to prompt reconsideration in the first-instance tribunal prior to the possibility of appellate review. The guarantee of a review is particularly necessary when the order has been issued ex parte. Review by a second-instance tribunal is regulated in different ways in various systems. However, it should also be recognized that such a review might entail a loss of time or procedural abuse.

## **9. Structure of the Proceedings**

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

**9.2 In the pleading phase the parties must present their claims, defenses, and other contentions in writing, and identify their principal evidence.**

**9.3 In the interim phase the court should if necessary:**

**9.3.1 Hold conferences to organize the proceeding;**

- 9.3.2 Establish the schedule outlining the progress of the proceeding;
  - 9.3.3 Address the matters appropriate for early attention, such as questions of jurisdiction, provisional measures, and statute of limitations (prescription);
  - 9.3.4 Address availability, admission, disclosure, and exchange of evidence;
  - 9.3.5 Identify potentially dispositive issues for early determination of all or part of the dispute; and
  - 9.3.6 Order the taking of evidence.
- 9.4 In the final phase evidence not already received by the court according to Principle 9.3.6 ordinarily should be presented in a concentrated final hearing at which the parties should also make their concluding arguments.

**Comment:**

*P-9A* The concept of “structure” of a proceeding should be applied flexibly, according to the nature of the particular case. For example, if convenient a judge would have discretion to hold a conference in the pleading phase and to hold multiple conferences as the case progresses.

*P-9B* An orderly schedule facilitates expeditious conduct of the litigation. Discussion between the court and lawyers for the parties facilitates practical scheduling and orderly hearings. See Principle 14.2 and Comment *P-14A*.

*P-9C* Traditionally, courts in civil-law systems functioned through a sequence of short hearings, while those in common-law systems organized a proceeding around a final “trial.” However, courts in modern practice in both systems provide for preliminary hearings and civil-law systems have increasingly come to employ a concentrated final hearing for most evidence concerning the merits.

*P-9D* In common-law systems, a procedure for considering potentially dispositive issues before final hearing is the motion for summary judgment, which can address legal issues, or the issue of whether there is genuine controversy about facts, or both such issues. Civil-law jurisdictions provide for similar procedures in the interim phase.

*P-9E* In most systems the objection of lack of jurisdiction over the person must be made by the party involved and at an early stage in the proceeding, under penalty of forfeiting the objection. In international litigation it is particularly important that questions of jurisdiction be addressed promptly.

**10. Party Initiative and Scope of the Proceeding**

- 10.1 The proceeding should be initiated through the claim or claims of the plaintiff, not by the court acting on its own motion.
- 10.2 The time of lodging the complaint with the court determines compliance with statutes of limitation, *lis pendens*, and other requirements of timeliness.
- 10.3 The scope of the proceeding is determined by the claims and defenses of the parties in the pleadings, including amendments.
- 10.4 A party, upon showing good cause, has a right to amend its claims or defenses upon notice to other parties, and when doing so does not unreasonably delay the proceeding or otherwise result in injustice.

**10.5 The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission, or settlement. A party should not be permitted unilaterally to terminate or modify the action when prejudice to another party would result.**

**Comment:**

*P-10A* All modern legal systems recognize the principle of party initiative concerning the scope and particulars of the dispute. It is within the framework of party initiative that the court carries out its responsibility for just adjudication. See Principles 10.3 and 28.2. These Principles require the parties to provide details of fact and law in their contentions. See Principle 11.3. This practice contrasts with the more loosely structured system of “notice pleading” in American procedure.

*P-10B* All legal systems impose time limits for commencement of litigation, called statutes of limitation in common-law systems and prescription in civil-law systems. Service of process must be completed or attempted within a specified time after commencement of the proceeding, according to forum law. Most systems allow for an objection that service of process was not completed or attempted within a specified time after commencement of the proceeding.

*P-10C* The right to amend a pleading is very restricted in some legal systems. However, particularly in transnational disputes, the parties should be accorded some flexibility, particularly when new or unexpected evidence is confronted. Adverse effect on other parties from exercise of the right of amendment may be avoided or moderated by an adjournment or continuance, or adequately compensated by an award of costs.

*P-10D* The forum law may permit a claimant to introduce a new claim by amendment even though it is time-barred (statute of limitations or prescription), provided it arises from substantially the same facts as those that underlie the initial claim.

*P-10E* Most jurisdictions do not permit a plaintiff to discontinue an action after an initial phase of the proceeding over the objection of the defendant.

**11. Obligations of the Parties and Lawyers**

**11.1 The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.**

**11.2 The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence.**

**11.3 In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.**

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

**11.5 Lawyers for parties have a professional obligation to assist the parties in observing their procedural obligations.**

**Comment:**

*P-11A* A party should not make a claim, defense, motion, or other initiative or response that is not reasonably arguable in law and fact. In appropriate circumstances, failure to conform to this requirement may be declared an abuse of the court's process and subject the party responsible to cost sanctions and fines. The obligation of good faith, however, does not preclude a party from making a reasonable effort to extend an existing concept based on difference of circumstances. In appropriate circumstances, frivolous or vexatious claims or defenses may be considered an imposition on the court and may be subjected to default or dismissal of the case, as well as cost sanctions and fines.

*P-11B* Principle 11.3 requires the parties to make detailed statements of facts in their pleadings, in contrast with "notice pleading" permitted under the Federal Rules of Civil Procedure in the United States. The requirement of "sufficient specification" ordinarily would be met by identification of principal documents constituting the basis of a claim or defense and by concisely summarizing expected relevant testimony of identified witnesses. See Principle 16.

*P-11C* Failure to dispute a substantial contention by an opposing party ordinarily may be treated as an admission. See also Principle 21.3.

*P-11D* It is a universal rule that the lawyer has professional and ethical responsibilities for fair dealing with all parties, their lawyers, witnesses, and the court.

**12. Multiple Claims and Parties; Intervention**

**12.1 A party may assert any claim substantially connected to the subject matter of the proceeding against another party or against a third person subject to the jurisdiction of the court.**

**12.2 A person having an interest substantially connected with the subject matter of the proceeding may apply to intervene. The court itself, or on motion of a party, may require notice to a person having such an interest, inviting intervention. Intervention may be permitted unless it would result in unreasonable delay or confusion of the proceeding or otherwise unfairly prejudice a party. Forum law may permit intervention in second-instance proceedings.**

**12.3 When appropriate, the court should grant permission for a person to be substituted for, or to be admitted in succession to, a party.**

**12.4 The rights and obligations of participation and cooperation of a party added to the proceeding are ordinarily the same as those of the original parties. The extent of these rights and obligations may depend upon the basis, timing, and circumstances of the joinder or intervention.**

**12.5 The court may order separation of claims, issues, or parties, or consolidation with other proceedings, for fair or more efficient management and determination or in the interest of justice. The authority should extend to parties or claims that are not within the scope of these Principles.**

**Comment:**

*P-12A* Principle 12.1 recognizes the right to assert claims available against another party related to the same transaction or occurrence.

*P-12B* There are differences in the rules of various countries governing jurisdiction over third parties. In some civil-law systems, a valid third-party claim is itself a basis of jurisdiction whereas in some common-law systems the third party must be independently subject to jurisdiction. Principle 12.1 requires an independent basis of jurisdiction.

*P-12C* Joinder of interpleading parties claiming the same property is permitted by this Principle, but the Principle does not authorize or prohibit class actions.

*P-12D* An invitation to intervene is an opportunity for the third person to do so. The effect of failure to intervene is governed by various rules of forum law. Before inviting a person to intervene, the court must consult with the parties.

*P-12E* Forum law provides for replacement or addition of parties, as a matter of substantive or procedural law, in various circumstances, such as death, assignment, merger of a corporation, bankruptcy, subrogation, and other eventualities. It may also permit participation on a limited basis, for example with authority to submit evidence without becoming a full party.

*P-12F* In any event, the court has authority to sever claims and issues, and to consolidate them, according to their subject matter and the affected parties.

**13. Amicus Curiae Submission**

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

**Comment:**

*P-13A* The “amicus curiae brief” is a useful means by which a nonparty may supply the court with information and legal analysis that may be helpful to achieve a just and informed disposition of the case. Such a brief might be from a disinterested source or a partisan one. Any person may be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention. Written submission may be supported by oral presentation at the discretion of the court.

*P-13B* It is in the court’s discretion whether such a brief may be taken into account. The court may require a statement of the interest of the proposed amicus. A court has authority to refuse an amicus curiae brief when such a brief would not be of material assistance in determining the dispute. Caution should be exercised that the mechanism of the amicus curiae submission not interfere with the court’s independence. See Principle 1.1. The court may invite a third party to present such a submission. An amicus curiae does not become a party to the case but is merely an active commentator. Factual assertions in an amicus brief are not evidence in the case.

*P-13C* In civil-law countries there is no well-established practice of allowing third parties without a legal interest in the merits of the dispute to participate in a proceeding, although

some civil-law countries like France have developed similar institutions in their case law. Consequently, most civil-law countries do not have a practice of allowing the submission of amicus curiae briefs. Nevertheless, the amicus curiae brief is a useful device, particularly in cases of public importance.

*P-13D* Principle 13 does not authorize third persons to present written submissions concerning the facts in dispute. It permits only presentation of data, background information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case. For example, a trade organization might give notice of special trade customs to the court.

*P-13E* The parties must have opportunity to submit written comment addressed to the matters in the submission before it is considered by the court.

#### **14. Court Responsibility for Direction of the Proceeding**

**14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.**

**14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.**

**14.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise such directions.**

#### **Comment:**

*P-14A* Many court systems have standing orders governing case management. See Principle 7.2. The court's management of the proceeding will be fairer and more efficient when conducted in consultation with the parties. See also Comment *P-9A*.

*P-14B* Principle 14.3 is particularly important in complex cases. As a practical matter, timetables and the like are less necessary in simple cases, but the court should always address details of scheduling.

#### **15. Dismissal and Default Judgment**

**15.1 Dismissal of the proceeding ordinarily must be entered against a plaintiff who, without justification, fails to prosecute the proceeding. Before entering such a dismissal, the court must give plaintiff a reasonable warning thereof.**

**15.2 Default judgment ordinarily must be entered against a defendant or other party who, without justification, fails to appear or respond within the prescribed time.**

**15.3 The court in entering a default judgment must determine that:**

**15.3.1 There is jurisdiction over the party against whom judgment is to be entered;**

**15.3.2 There has been compliance with notice provisions and that the party has had sufficient time to respond; and**

**15.3.3 The claim is reasonably supported by available facts and evidence and is legally sufficient, including the claim for damages and any claim for costs.**

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

**15.5 A dismissal or a default judgment is subject to appeal or rescission.**

**15.6 A party who otherwise fails to comply with obligations to participate in the proceeding is subject to sanctions in accordance with Principle 17.**

**Comment:**

*P-15A* Default judgment permits termination of a dispute if there is no contest. It is a mechanism for compelling a party to acknowledge the court's authority. For example, if the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding and later disputing the validity of the judgment. A plaintiff's abandonment of prosecution of the proceeding is, in common-law terminology, usually referred to as "failure to prosecute" and results in "involuntary dismissal." It is the equivalent of a default. See Principles 11.4 and 17.3.

*P-15B* A party who appears after the time prescribed, but before judgment, may be permitted to enter a defense upon offering reasonable excuse, but the court may order compensation for costs resulting to the opposing party. In making its determination, the court should consider the reason why the party did not answer or did not proceed after having answered. For example, a party may have failed to answer because that party did not receive actual notice, or because the party was obliged by his or her national law not to appear by reason of hostility between the countries.

*P-15C* Reasonable care should be exercised before entering a default judgment because notice may not have been given to a defendant, or the defendant may have been confused about the need to respond. Forum procedure in many systems requires that, after a defendant has failed to respond, an additional notice be given to the defendant of the court's intention to enter default judgment.

*P-15D* The decision about whether the claim is reasonably supported by evidence and legally justified under Principle 15.3.3 does not require a full inquiry on the merits of the case. The judge must only determine whether the default judgment is consistent with the available facts or evidence and is legally warranted. For that decision, the judge must analyze critically the evidence supporting the statement of claims. The judge may request production of more evidence or schedule an evidentiary hearing.

*P-15E* Principle 15.4 limits a default judgment to the amount and kind demanded in the statement of claim. In civil-law systems, a restriction in a default judgment to the amount claimed in a complaint merely repeats a general restriction applicable even in contested cases (*ultra petita* or *extra petita* prohibition). In common-law systems, no such restriction applies in contested cases, but the restriction on default judgments is a generally recognized rule. The restriction permits a defendant to avoid the cost of defense without the risk of greater liability than demanded in the complaint.

*P-15F* Notice of a default judgment or a dismissal must be promptly given to the parties, according to Principle 5.3. If the requirements for a default judgment are not complied with, an

aggrieved party may appeal or seek to set aside the judgment, according to the law of the forum. Every system has a procedure for invalidating a default judgment obtained without compliance with the rules governing default. In some systems, including most common-law systems, the procedure is initially pursued in the first-instance court, and in other systems, including some civil-law systems, it is through an appeal. This Principle defers to forum law.

P-15G The party who has defaulted should be permitted, within the limit of a reasonable time, to present evidence that the notice was materially deficient or other proper excuse.

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

**16.1 Generally, the court and each party should have access to relevant and nonprivileged evidence, including testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person. The parties should have the right to submit statements that are accorded evidentiary effect.**

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

**16.3 To facilitate access to information, a lawyer for a party may conduct a voluntary interview with a potential nonparty witness.**

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

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

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

### **Comment:**

*P-16A* "Relevant" evidence is probative material that supports, contradicts, or weakens a contention of fact at issue in the proceeding. A party should not be permitted to conduct a so-called "fishing expedition" to develop a case for which it has no support, but an opposing party may properly be compelled to produce evidence that is under its control. These Principles thereby permit a measure of limited "discovery" under the supervision of the court. Nonparties are in principle also obliged to cooperate.

*P-16B* In some legal systems the statements of a party are not admissible as evidence or are accorded diminished probative weight. Principle 16.1 accords a party's testimony potentially the same weight as that of any other witness, but the court in evaluating such evidence may take into account the party's interest in the dispute.

*P-16C* Under Principle 16.2, the requesting party may be required to compensate a nonparty's costs of producing evidence.

*P-16D* In some systems, it is generally a violation of ethical or procedural rules for a lawyer to communicate with a potential witness. Violation of this rule is regarded as "tainting" the witness. However, this approach may impede access to evidence that is permitted in other systems and impair a good preparation of the presentation of evidence.

*P-16E* The physical or mental examination of a person may be appropriate when necessary and reliable and its probative value exceeds the prejudicial effect of its admission.

*P-16F* According to Principle 16.4, eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum, either with the parties conducting the primary examination or with the judge doing so. In any event, a party should have the right to conduct supplemental questioning by directly addressing another party or witness. The right of a party to put questions directly to an adverse party or nonparty witness is of first importance and is now recognized in most legal systems. Similarly, a party should be permitted to address supplemental questions to a witness, including a party, who has initially been questioned by the court.

*P-16G* Principle 16.6 signifies that no special legal value, positive or negative, should be attributed to any kind of relevant evidence, for example, testimony of an interested witness. However, this Principle does not interfere with national laws that require a specified formality in a transaction, such as written documentation of a contract involving real property.

*P-16H* Sanctions may be imposed against the failure to produce evidence that reasonably appears to be within that party's control or access, or for a party's failure to cooperate in production of evidence as required by the rules of procedure. See Principles 17 and 21.3.

*P-16I* There are special problems in administering evidence in jury trials, not covered by these Principles.

## **17. Sanctions**

**17.1 The court may impose sanctions on parties, lawyers, and third persons for failure or refusal to comply with obligations concerning the proceeding.**

**17.2 Sanctions should be reasonable and proportionate to the seriousness of the matter involved and the harm caused, and reflect the extent of participation and the degree to which the conduct was deliberate.**

**17.3 Among the sanctions that may be appropriate against parties are: drawing adverse inferences; dismissing claims, defenses, or allegations in whole or in part; rendering default judgment; staying the proceeding; and awarding costs in addition to those permitted under ordinary cost rules. Sanctions that may be appropriate against parties and nonparties include pecuniary sanctions, such as fines and *astreintes*. Among sanctions that may be appropriate against lawyers is an award of costs.**

**17.4 The law of the forum may also provide further sanctions including criminal liability for severe or aggravated misconduct by parties and nonparties, such as submitting perjured evidence or violent or threatening behavior.**

**Comment:**

*P-17A* The sanctions a court is authorized to impose under forum law vary from system to system. These Principles do not confer authority for sanctions not permitted under forum law.

*P-17B* In all systems the court may draw adverse inferences from a party's failure to advance the proceeding or to respond as required. See Principle 21.3. As a further sanction, the court may dismiss or enter a default judgment. See Principles 5.1 and 15. In common-law systems the court has authority under various circumstances to hold a party or lawyer in contempt of court. All systems authorize direct compulsory measures against third parties.

**18. Evidentiary Privileges and Immunities**

**18.1 Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information.**

**18.2 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.**

**18.3 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.**

**Comment:**

*P-18A* All legal systems recognize various privileges and immunities against being compelled to give evidence, such as protection from self-incrimination, confidentiality of professional communication, rights of privacy, and privileges of a spouse or family member. Privileges protect important interests, but they can impair establishment of the facts. The conceptual and technical bases of these protections differ from one system to another, as do the legal consequences of giving them recognition. In applying such rules choice-of-law problems may be presented.

*P-18B* The weight accorded to various privileges differs from one legal system to another and the significance of the claim of privilege may vary according to the context in specific litigation. These factors are relevant when the court considers drawing adverse inferences from the party's failure to produce evidence.

*P-18C* Principles 18.2 and 18.3 reflect a distinction between direct and indirect sanctions. Direct sanctions include fines, *astreintes*, contempt of court, or imprisonment. Indirect sanctions include drawing adverse inferences, judgment by default, and dismissal of claims or defenses. A court has discretionary authority to impose indirect sanctions on a party claiming a privilege, but a court ordinarily should not impose direct sanctions on a party or nonparty who refuses to disclose information protected by a privilege. A similar balancing approach may apply when blocking statutes hinder full cooperation by a party or nonparty.

*P-18D* In some systems, the court cannot recognize a privilege sua sponte, but may only respond to the initiative of the party benefited by the privilege. The court should give effect to any procedural requirement of the forum that an evidentiary privilege or immunity be

expressly claimed. According to such requirements, a privilege or immunity not properly claimed in a timely manner may be considered waived.

## 19. Oral and Written Presentations

- 19.1 Pleadings, formal requests (motions), and legal argument ordinarily should be presented initially in writing, but the parties should have the right to present oral argument on important substantive and procedural issues.
- 19.2 The final hearing must be held before the judges who are to give judgment.
- 19.3 The court should specify the procedure for presentation of testimony. Ordinarily, testimony of parties and witnesses should be received orally, and reports of experts in writing; but the court may, 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.
- 19.4 Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony or of an expert's report.

### Comment:

*P-19A* Traditionally, all legal systems received witness testimony in oral form. However, in modern practice, the tendency is to replace the main testimony of a witness by a written statement. Principle 19 allows flexibility in this regard. It contemplates that testimony can be presented initially in writing, with orality commencing upon supplemental questioning by the court and opposing parties. Concerning the various procedures for interrogation of witnesses, see Principle 16.4 and Comment *P-16E*.

*P-19B* Forum procedure may permit or require electronic communication of written or oral presentations. See Principle 5.7.

*P-19C* In many civil-law systems, the primary interrogation is conducted by the court with limited intervention by the parties, whereas in most common-law systems, the roles of judge and lawyers are the reverse. In any event, the parties should be afforded opportunity to address questions directly to a witness. See Principle 16.4.

## 20. Public Proceedings

- 20.1 Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. Following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety, or privacy.
- 20.2 Court files and records should be public or otherwise accessible to persons with a legal interest or making a responsible inquiry, according to forum law.
- 20.3 In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private.
- 20.4 Judgments, including supporting reasons, and ordinarily other orders, should be accessible to the public.

**Comment:**

*P-20A* There are conflicting approaches concerning publicity of various components of proceedings. In some civil-law countries, the court files and records are generally kept in confidence although they are open to disclosure for justifiable cause, whereas in the common-law tradition they are generally public. One approach emphasizes the public aspect of judicial proceedings and the need for transparency, while the other emphasizes respect for the parties' privacy. These Principles express a preference for public proceedings, with limited exceptions. In general, court files and records should be public and accessible to the public and news media. Countries that have a tradition of keeping court files confidential should at least make them accessible to persons with a legal interest or making a responsible inquiry.

*P-20B* In some systems the court upon request of a party may grant privacy of all proceedings except the final judgment. Some systems have a constitutional guaranty of publicity in judicial proceedings, but have special exceptions for such matters as trade secrets, matters of national security, etc. Arbitration proceedings are generally conducted in privacy.

**21. Burden and Standard of Proof**

**21.1 Ordinarily, each party has the burden to prove all the material facts that are the basis of that party's case.**

**21.2 Facts are considered proven when the court is reasonably convinced of their truth.**

**21.3 When it appears that a party has possession or control of relevant evidence that it declines without justification to produce, the court may draw adverse inferences with respect to the issue for which the evidence is probative.**

**Comment:**

*P-21A* The requirement stated in Principle 21.1 is often expressed in terms of the formula "the burden of proof goes with the burden of pleading." The allocation of the burden of pleading is specified by law, ultimately reflecting a sense of fairness. The determination of this allocation is often a matter of substantive law.

*P-21B* The standard of "reasonably convinced" is in substance that applied in most legal systems. The standard in the United States and some other countries is "preponderance of the evidence" but functionally that is essentially the same.

*P-21C* Principle 21.3 is based on the principle that both parties have the duty to contribute in good faith to the discharge of the opposing party's burden of proof. See Principle 11. The possibility of drawing adverse inferences ordinarily does not preclude the recalcitrant party from introducing other evidence relevant to the issue in question. Drawing such inferences can be considered a sanction, see Principle 17.3, or a shifting of the burden of proof, see Principle 21.1.

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

**22.1 The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.**

- 22.2 The court may, while affording the parties opportunity to respond:
- 22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly;
  - 22.2.2 Order the taking of evidence not previously suggested by a party; or
  - 22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.
- 22.3 The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing.
- 22.4 The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law.
- 22.4.1 If the parties agree upon an expert the court ordinarily should appoint that expert.
  - 22.4.2 A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.
  - 22.4.3 An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.

**Comment:**

*P-22A* It is universally recognized that the court has responsibility for determination of issues of law and of fact necessary for the judgment, and that all parties have a right to be heard concerning applicable law and relevant evidence. See Principle 5.

*P-22B* Foreign law is a particularly important subject in transnational litigation. The judge may not be knowledgeable about foreign law and may need to appoint an expert or request submissions from the parties on issues of foreign law. See Principle 22.4.

*P-22C* The scope of the proceeding, and the issues properly to be considered, are determined by the claims and defenses of the parties in the pleadings. The judge is generally bound by the scope of the proceeding stated by the parties. However, the court in the interest of justice may order or permit amendment by a party, giving other parties a right to respond accordingly. See Principle 10.3.

*P-22D* Use of experts is common in complex litigation. Court appointment of a neutral expert is the practice in most civil-law systems and in some common-law systems. However, party-appointed experts can provide valuable assistance in the analysis of difficult factual issues. Fear that party appointment of experts will devolve into a “battle of experts” and thereby obscure the issues is generally misplaced. In any event, this risk is offset by the value of such evidence. Expert testimony may be received on issues of foreign law.

**23. Decision and Reasoned Explanation**

- 23.1 Upon completion of the parties’ presentations, the court should promptly give judgment set forth or recorded in writing. The judgment should specify the remedy awarded and, in a monetary award, its amount.

**23.2 The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision.**

**Comment:**

*P-23A* A written decision not only informs the parties of the disposition, but also provides a record of the judgment, which may be useful in subsequent recognition proceedings. In several systems a reasoned opinion is required by constitutional provisions or is considered as a fundamental guarantee in the administration of justice. The reasoned explanation may be given by reference to other documents such as pleadings in case of a default judgment or the transcript of the instructions to the jury in case of a jury verdict. Forum law may specify a time limit within which the court must give judgment.

*P-23B* When a judgment determines less than all the claims and defenses at issue, it should specify the matters that remain open for further proceedings. For example, in a case involving multiple claims, the court may decide one of the claims (damages, for example) and keep the proceedings open for the decision of the other (injunction, for example).

*P-23C* In some systems, a judgment may be pronounced subject to subsequent specification of the monetary award or other terms of a remedy, for example an accounting to determine damages or a specification of the terms of an injunction.

*P-23D* See Principle 5.6, requiring that the court consider each significant contention of fact, evidence, and law.

**24. Settlement**

**24.1 The court, while respecting the parties' opportunity to pursue litigation, should encourage settlement between the parties when reasonably possible.**

**24.2 The court should facilitate parties' participation in alternative-dispute-resolution processes at any stage of the proceeding.**

**24.3 The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors. The court may adjust its award of costs to reflect unreasonable failure to cooperate or bad-faith participation in settlement endeavors.**

**Comment:**

*P-24A* The proviso "while respecting the parties' opportunity to pursue litigation" signifies that the court should not compel or coerce settlement among the parties. However, the court may conduct informal discussions of settlement with the parties at any appropriate times. A judge participating in settlement discussions should avoid bias. However, active participation, including a suggestion for settlement, does not impair a judge's impartiality or create an appearance of partiality.

*P-24B* Principle 24.3 departs from tradition in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party. Forum law may appropriately provide settlement-offer procedure enforced by special cost sanctions for refusal to accept an opposing party's offer. Prominent

examples of such procedures are the Ontario (Canada) civil-procedure rule and Part 36 of the new English procedural rules. Those are formal procedures whereby a party may make a definite offer of settlement and thereby oblige the opposing party to accept or refuse it on penalty of additional costs if that party does not eventually obtain a result more advantageous than the proposed settlement offer. See also Principle 25.2.

## 25. Costs

**25.1 The winning party ordinarily should be awarded all or a substantial portion of its reasonable costs. "Costs" include court filing fees, fees paid to officials such as court stenographers, expenses such as expert-witness fees, and lawyers' fees.**

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

### Comment:

*P-25A* Award of attorneys' fees is the rule prevailing in most legal systems, although, for example, not in China, Japan, and the United States. In some systems, the amount of costs awarded to the prevailing party is determined by an experienced officer and often is less than the winning party is obligated to pay that party's lawyer. In some systems, the amount awarded to the prevailing party is governed by fee regulation. A fee-shifting rule is controversial in certain types of litigation but is generally considered appropriate in commercial litigation and is typically stipulated in commercial contracts.

*P-25B* According to Principle 25.2, exceptionally the court may decline to award any costs to a winning party, or award only part of the costs, or may calculate costs more generously or more severely than it otherwise would. The exceptional character of Principle 25.2 requires the judge to give reasons for the decision. See also Principle 24.3.

## 26. Immediate Enforceability of Judgments

**26.1 The final judgment of the first-instance court ordinarily should be immediately enforceable.**

**26.2 The first-instance court or the appellate court, on its own motion or motion of a party, may in the interest of justice stay enforcement of the judgment pending appeal.**

**26.3 Security may be required from the appellant as a condition of granting a stay or from the respondent as a condition of denying a stay.**

### Comment:

*P-26A* The principle of finality is essential to effective adjudication. In some jurisdictions, immediate enforcement is available only for judgments of second-instance courts. However, the

tendency is toward the practice of common-law and some civil-law countries that judgments of first-instance courts are accorded that effect by law or court order.

*P-26B* The fact that a judgment should be immediately enforceable upon becoming final does not prohibit a court from giving the losing party a period of time for compliance with the award. The judgment should be enforced in accordance with its own terms.

*P-26C* Under forum law, a partial judgment (dealing only with part of the controversy) may also be final and, therefore, immediately enforceable.

## 27. Appeal

**27.1 Appellate review should be available on substantially the same terms as other judgments under the law of the forum. Appellate review should be concluded expeditiously.**

**27.2 The scope of appellate review should ordinarily be limited to claims and defenses addressed in the first-instance proceeding.**

**27.3 The appellate court may in the interest of justice consider new facts and evidence.**

### Comment:

*P-27A* Appellate procedure varies substantially among legal systems. The procedure of the forum therefore should be employed.

*P-27B* Historically, in common-law systems appellate review has been based on the principle of a "closed record," that is, that all claims, defenses, evidence, and legal contentions must have been presented in the first-instance court. In most modern common-law systems, however, the appellate court has a measure of discretion to consider new legal arguments and, under compelling circumstances, new evidence. Historically, in civil-law systems the second-instance court was authorized fully to reconsider the merits of the dispute, but there is variation from this approach in many modern systems. In a diminishing number of civil-law systems a proceeding in the court of second instance can be essentially a new trial and is routinely pursued. In many systems the decision of the court of first instance can be reversed or amended only for substantial miscarriage of justice. This Principle rejects both of these extremes. However, reception of new evidence at the appellate level should be permitted only when required by the interest of justice. If a party is permitted such an opportunity, other parties should have a correlative right to respond. See Principle 22.2.

*P-27C* In some systems, the parties must preserve their objections in the first-instance tribunal and cannot raise them for the first time on appeal.

## 28. Lis Pendens and Res Judicata

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

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

**28.3 The concept of issue preclusion, as to an issue of fact or application of law to facts, should be applied only to prevent substantial injustice.**

**Comment:**

*P-28A* This Principle is designed to avoid repetitive litigation, whether concurrent (*lis pendens*) or successive (*res judicata*).

*P-28B* Some systems have strict rules of *lis pendens* whereas others apply them more flexibly, particularly having regard to the quality of the proceeding of both forums. The Principle of *lis pendens* corresponds to Principle 10.3, concerning the scope of the proceeding and Principle 2.6, concerning parallel proceedings.

*P-28C* Some legal systems, particularly those of common law, employ the concept of issue preclusion, sometimes referred to as collateral estoppel or issue estoppel. The concept is that a determination of an issue as a necessary element of a judgment generally should not be reexamined in a subsequent dispute in which the same issue is also presented. Under Principle 28.3, issue preclusion might be applied when, for example, a party has justifiably relied in its conduct on a determination of an issue of law or fact in a previous proceeding. A broader scope of issue preclusion is recognized in many common-law systems, but the more limited concept in Principle 28.3 is derived from the principle of good faith, as it is referred to in civil-law systems, or estoppel in pais, as the principle is referred to in common-law systems.

**29. Effective Enforcement**

**Procedures should be available for speedy and effective enforcement of judgments, including money awards, costs, injunctions, and provisional measures.**

**Comment:**

*P-29A* Many legal systems have archaic and inefficient procedures for enforcement of judgments. From the viewpoint of litigants, particularly the winning party, effective enforcement is an essential element of justice. However, the topic of enforcement procedures is beyond the scope of these Principles.

**30. Recognition**

**A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms.**

**Comment:**

*P-30A* Recognition of judgments of another forum, including judgments for provisional remedies, is especially important in transnational litigation. Every legal system has firm rules of recognition for judgments rendered within its own system. International conventions prescribe other conditions concerning recognition of foreign judgments. Many jurisdictions limit the effect of most kinds of provisional measures to the territory of the

issuing state and cooperate by issuing parallel injunctions. However, the technique of parallel provisional measures is less acceptable than direct recognition and enforcement. See also Principle 31.

*P-30B* According to Principle 30, a judgment given in a proceeding substantially compatible with these Principles ordinarily should have the same effect as judgments rendered after a proceeding under the laws of the recognizing state. Principle 30 is therefore a principle of equal treatment. The Principles establish international standards of international jurisdiction, sufficient notice to the judgment debtor, procedural fairness, and the effects of *res judicata*. Consequently most traditional grounds for nonrecognition, such as lack of jurisdiction, insufficient notice, fraud, unfair foreign proceedings, or conflict with another final judgment or decision, do not arise if the foreign proceeding meets the requirements of these Principles. Reciprocity is no longer a prerequisite of recognition in many countries, but it will be also fulfilled if the law of the forum accepts these Principles and especially Principle 30. Only the limited exception for nonrecognition based on substantive public policy is allowed when the foreign proceedings were conducted in substantial accordance with these Principles.

### **31. International Judicial Cooperation**

**The courts of a state that has adopted these Principles should provide assistance to the courts of any other state that is conducting a proceeding consistent with these Principles, including the grant of protective or provisional relief and assistance in the identification, preservation, and production of evidence.**

#### **Comment:**

*P-31A* International judicial cooperation and assistance supplement international recognition and, in modern context, are equally important.

*P-31B* Consistent with rules concerning communication outside the presence of parties or their representatives (*ex parte* communications), judges should, when necessary, establish communication with judges in other jurisdictions. See Principle 1.4.

*P-31C* For the significance of the term "evidence," see Principle 16.