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

Draft Rules of Transnational Civil Procedure with Comments,  
prepared by Professors G. C. Hazard, Jr., R. Stürner, M. Taruffo and A. Gidi

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

**A. Interpretation and Scope**

**1. Standards of Interpretation**

**1.1 These Rules must be interpreted in accordance with the Principles of Transnational Civil Procedure and applied with consideration of the transnational nature of the dispute.**

**1.2 The procedural law of the forum governs matters not addressed in these Rules.**

**Comment:**

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

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

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

**2.1 Subject to domestic constitutional provisions, and statutory provisions not superseded by these Rules, these Rules apply to disputes arising from transnational commercial transactions, if the dispute:**

**2.1.1 Is between parties from different states, determined by the habitual residence of an individual and by the principal place of business of an organization;**

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

**2.1.3 Is governed by an arbitration agreement providing that these Rules apply.**

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

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

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

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

**Comment:**

*R-2A* Rule 2.1 defines the matters governed by these Rules. The Rules apply to contract disputes and disputes arising from contractual relations; injuries to property, including immovable (real property), movable (personal property), and intangible property such as copyright, trademark, and patent rights; and injuries resulting from breach of obligations and commercial torts in business transactions. They do not apply to claims for personal injury or wrongful death. The term “transnational commercial transactions” includes a series of related events, such as repeated interference with property.

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

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

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

*R-2D* Under Rule 2.1.1, these Rules apply when a plaintiff and a defendant are from different states, determined by habitual residence or principal place of business. Thus, these Rules would apply in a dispute between a Japanese on one side and a Japanese and a Canadian on the other side. The habitual residence of an individual and the principal place of business of a jural entity are determined by general principles of private international law.

*R-2E* Rule 2.1.2 provides that these Rules apply in a dispute concerning property located in one state as to which a claim is made by a plaintiff or a defendant who is a habitual resident of another state. Whether a legal claim concerns property and whether it is a claim of ownership or of a security or other interest is determined by general principles of private international law.

*R-2F* Rule 2.1.3 provides that these Rules apply by contractual option, in case of arbitration. Some Rules are not applicable to arbitration disputes, such as Rules 3, 4, 5, 9, 10, and 17.

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

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

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

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

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

### **3. Forum and Territorial Competence**

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

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

**3.3 Whenever possible, territorial competence should be established, either originally or by transfer of the proceeding, at a place in the forum state that is reasonably convenient to a defendant.**

**Comment:**

*R-3A* Territorial competence is the equivalent of “venue” in some common-law systems.

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

**4. Jurisdiction Over Parties**

**4.1 Jurisdiction is established over a plaintiff by the plaintiff’s commencement of a proceeding or over a person who intervenes by the act of intervention.**

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

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

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

**4.2.3 Over a jural entity that has received its charter of organization from the forum state or maintains its principal place of business or administrative headquarters in the state; or**

**4.2.4 Over a person that has:**

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

**4.2.4.2 Committed tortious conduct in the forum state, or conduct having direct effect in the forum state, when the proceeding concerns such conduct.**

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

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

**4.4.1 Presence or nationality of the defendant in the forum state; or**

**4.4.2 Presence in the forum state of the defendant’s of property, whether or not the dispute relates to the property, but the court’s authority is limited to the property or its value .**

**4.5 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.**

**4.6.1 The forum should decline to exercise jurisdiction or suspend the proceeding, if:**

**4.6.1.1 Another forum was validly designated by the parties as exclusive;**

**4.6.1.2 The forum is manifestly inappropriate relative to another forum that could exercise jurisdiction; or**

**4.6.1.3 The dispute is previously pending in another court.**

**4.6.2 The forum may nevertheless exercise its jurisdiction or reinstate the proceeding when it appears that the dispute cannot otherwise be effectively and expeditiously resolved or there are other compelling reasons for doing so.**  
**Comment:**

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

*R-4B* The concept of “jural entity” includes a corporation, société anonyme, unincorporated association, partnership, or other organization recognized as a jural entity by forum law.

*R-4C* Rule 4.4.2 recognizes that a state may exercise jurisdiction by sequestration or attachment of locally situated property, even though the property is not the object or subject of the dispute. The procedure is called “quasi in rem jurisdiction” in some legal systems.

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

## **5. Multiple Claims and Parties; Intervention**

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

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

**5.3 A person having an interest substantially connected with the subject matter of the proceeding may apply to intervene. The court itself or on motion of a party may require notice to a party having such an interest, inviting intervention. If the intervention will not unduly delay, introduce confusion into the proceeding or otherwise unfairly prejudice a party, the court may permit the intervention.**

**5.4 A party added to the proceeding ordinarily has the same rights and obligations of participation and cooperation as the original parties. The extent of these rights and obligations should be adjusted according to the basis, timing, and circumstances of the joinder or intervention.**

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

**5.6 The court may order separation of claims, issues, or parties, or consolidation with other proceedings, for a fair or more efficient management and determination or in the interest of justice. That authority should extend to parties or claims that have been joined but are not within the scope of these Rules.**

### **Comment:**

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

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

## 6. Amicus Curiae Submission

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

### Comment:

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

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

## 7. Due Notice

**7.1 A party must initially be given formal notice of the proceeding commenced against that party, provided in accordance with forum law by means reasonably likely to be effective.**

**7.2 The notice must:**

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

**7.2.2 Advise that plaintiff invokes these Rules; and**

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

**7.3 The notice must be in a language of the forum and also in a language of the state of an individual’s habitual residence or an organization’s principal place of business, or the language of the principal documents in the transaction.**

**7.4 All parties must have prompt notice of claims, defenses, motions, and applications of other parties, and of determinations and suggestions by the court. Parties must have a fair opportunity and reasonably adequate time to respond.**

### Comment:

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

*R-7B* Concerning the language of the notice, the court ordinarily will assume that its own language is appropriate. The parties therefore may have responsibility to inform the court when that assumption is

inaccurate. The requirement that notice could be in a language of the state of the person to whom it is addressed establishes an objective standard for specification of language.

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

## **8. Languages**

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

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

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

### **Comment:**

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

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

*R-8C* A second possibility is examining the witness by way of deposition, as provided in Rule 23.1, under agreement of the parties or by order of the court. The deposition can then be translated and submitted at the hearing. The procedure and cost of the deposition are determined according to Rule 23.

## **C. Composition and Impartiality of the Court**

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

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

### **Comment:**

*R-9A* Rule 9 contemplates that the forum state, when implementing these Rules, may constitute a court of special jurisdiction to adjudicate disputes governed by these Rules.

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

*R-9C* Jury trial is a matter of constitutional right under various circumstances in some countries, notably the United States. Where jury trial is of right, the parties may waive the right or these Rules can apply with the use of a jury. See Rule 2.1 (subjecting these Rules to domestic constitutional provisions).

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

**10.1** A judge or other person having decisional authority must not participate if there are reasonable grounds to doubt such person's impartiality.

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

**10.3** A challenge of a judge must be heard and determined either by a judge other than the one so challenged or, if by the challenged judge, under procedure affording immediate appellate review or reconsideration by another judge.

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

### **Comment:**

*R-10A* All legal systems require judges to be impartial. In many systems, however, there is no recognized procedure by which a party to litigation can challenge a judge's impartiality. The absence of such a procedure means the problem itself is not sufficiently acknowledged. A procedure for challenge is essential to give reality to the concept.

*R-10B* Other persons having "decisional authority" include a lay member of the court, such as jurors, and an expert appointed by the court under Rule 26.

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

*R-10D* The prohibition on ex parte communications or proceedings (i.e., without notice to the person adversely interested) should extend not only to communications from the parties and the lawyers but also to communications from other government officials. There have been instances in which improper influence has been attempted by other judges in a court system.

## **D. Pleading Stage**

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

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

**11.2** The time of lodging of the complaint with the court determines compliance with statutes of limitations, lis pendens, and other requirements of timeliness, upon compliance with requirements of timely notice to the party affected thereby.

### **Comment:**

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

*R-11B* Rule 11 also provides for giving notice of the proceeding to the defendant, or "service of process" as it is called in common-law procedure. The Hague Service Convention specifies rules of notice that govern proceedings in countries signatory to that Convention. When judicial assistance from the courts of another country is required in order to effect notice, the procedure for obtaining such assistance should be followed. In



any event, the notice must include a copy of the statement of claim, a statement that the proceeding is conducted under these Rules, and a warning that default judgment may be taken against a defendant that does not respond. See Rule 7.2. Beyond these requirements, the rules of the forum govern the mechanisms and formalities for giving notice of the proceeding. In some states it is sufficient to mail the notice; some states require that notice, such as a summons, be delivered by an officer of the court.

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

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

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

**12.3 The statement of facts must, so far as reasonably practicable, set forth detail as to time, place, participants, and events. A party who is justifiably uncertain of a fact or legal grounds may make statements about them in the alternative. In connection with an objection that a pleading lacks sufficient detail, the court should give due regard to the possibility that necessary facts and evidence will develop in the course of the proceeding.**

**12.4 If plaintiff is required to have first resorted to arbitration or conciliation procedure, or to have made a demand concerning the claim or to have complied with other condition precedent, the complaint must allege compliance therewith.**

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

### **Comment:**

*R-12A* Rule 12.1 requires the plaintiff to state the facts upon which the claim is based. This Rule calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions. In contrast, some American systems, notably those employing “notice pleading” as under the Federal Rules of Civil Procedure, permit very general allegations. In these Rules, the facts pleaded in the statements of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings. See Rule 25.2.

*R-12B* Under Rules 12.1 and 12.2, the complaint must refer to the legal grounds on which the plaintiff relies to support the claim. Reference to such grounds is a common requirement in many legal systems and is especially appropriate when the transaction may involve the law of more than one legal system and present problems of choice of law. Rules of procedure in many national systems require a party’s pleading to set forth foreign law when the party intends to rely on that law. However, according to Principle 22.1, the court has responsibility for determining the correct legal basis for its decisions.

*R-12C* According to Rule 7.2.2, the notice must advise that plaintiff invokes these Rules. The court or a defendant or other party may challenge that application, or demand it if plaintiff has not done so.

*R-12D* Some systems require that a claim or demand be made against a prospective defendant before commencing litigation, for example claims against public agencies or insurance companies.

*R-12E* Rule 12.5 requires a statement of the amount of money demanded and, if injunctive or declaratory relief is sought, the nature and terms of the requested remedy. If the defendant defaults, the court may not award a judgment in an amount greater or in terms more severe than that demanded in the complaint, so that the defendant can calculate on an informed basis whether to dispute the claim. See Rule 15.4. It is a general principle that a default judgment may be entered only when the plaintiff has offered sufficient proof of the claims for which judgment is awarded. See Rule 15.3.2.

### 13. Statement of Defense and Counterclaims

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

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

**13.3** The defendant may state a counterclaim seeking relief from a plaintiff, or a claim against a co-defendant or a third person. Such a claim must be answered by the party to whom it is addressed as provided in this Rule.

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

**13.5** Objections referred to in Rule 19.1.1 may be presented in a motion before the answer but such a motion does not extend the time in which to answer unless the court so orders or the parties agree.

#### Comment:

*R-13A* Forum law should specify the time within which a defendant's response is required. The specification should take into account the transnational character of the dispute.

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

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

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

*R-13E* Rule 13.3 permits the defendant to assert a counterclaim, third-party claim, or cross-claim. Such a claim may be for indemnity or contribution. In most civil-law systems, a counterclaim is permitted only for a claim arising from the dispute addressed in the plaintiff's complaint. See Comment *R-2C* for reference to the civil-law concept of "dispute." In common-law systems a wider scope for counterclaims is generally permitted, including a "set off" based on a different transaction or occurrence. Compare United States Federal

Rules of Civil Procedure, Rule 13. These Rules, however, do not provide for compulsory counterclaims, so that omission to interpose a counterclaim does not result in preclusion. See Principles 10.3 and 28.3.

Rule 13.3 requires a plaintiff, third party, or co-defendant to submit an answer to a counterclaim, a third-party claim, or cross-claim. No such response is required to an affirmative defense or other allegations in the answer that are not counterclaims or other claims.

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

## 14. Amendments

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

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

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

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

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

### Comment:

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

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

*R-14C* In accordance with the right of contradiction stated in Principle 5, Rule 14.4 requires that if the complaint has been amended, default judgment may be obtained on the basis of an amended pleading only if the amended pleading has been served on the party against whom default judgment is to be entered. See Rules 14.3 and 15.4.

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

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

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

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

**15.3 In entering a default judgment for failure to appear or respond within the prescribed time, the court must:**

**15.3.1 Determine that there has been compliance with notice provisions and that the party has had sufficient time to respond;**

**15.3.2 Determine that the claim is reasonably supported by evidence and is legally sufficient, including the amount of 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 party who appears or responds after the time prescribed, but before judgment, may be permitted to enter a defense upon offering reasonable excuse, but the court may order compensation for costs resulting to the opposing party.**

**15.6 The court may enter default judgment as a sanction against a party who without justification fails to offer a substantial answer or otherwise fails to continue participation after responding.**

**15.6 Dismissal or default judgment is subject to appeal or request to set aside the judgment according to the law of the forum.**

### **Comment:**

*R-15A* Default judgment permits termination of a dispute. It is a mechanism for compelling a defendant to acknowledge the court's authority. If the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding and later dispute the validity of the judgment.

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

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

*R-15B* A plaintiff's abandonment of prosecution of the proceeding is usually referred to as "failure to prosecute" and results in "involuntary dismissal." It is the equivalent of a default.

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

*R-15D* A decision that the claim is reasonably supported by evidence and legally justified under Rule 15.3.2 does not require a full inquiry on the merits of the case. The judge need only determine whether the default judgment is consistent with the available evidence and is legally justified. For that decision, the judge

must analyze critically the evidence supporting the statement of claims. See Rule 21.1. The judge may request production of more evidence or schedule an evidentiary hearing.

*R-15E* Rule 15.4 limits a default judgment to the amount and kind demanded in the statement of claim. See Rule 12.5. This Rule is important in common-law systems in which judgment is normally not limited to the original claims made by the parties on the pleadings. In civil-law systems and some common-law systems, however, there is a traditional prohibition against a judgment that goes beyond the pleadings (ultra petita or extra petita prohibition) even if the claim is contested.

*R-15F* Rule 15.4 must be interpreted together with Rule 14.4, which requires an amendment to be served on the party before a default judgment may be rendered.

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

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

## **16. Settlement Offer**

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

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

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

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

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

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

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

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

**Comment:**

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

This Rule departs from traditions in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party. It allocates risk of unfavorable outcome and is not based on bad faith or misconduct. It protects a party from the expense of litigation in a dispute which the party has reasonably sought to settle. However, it imposes severe cost consequences on a party who fails to achieve a judgment more favorable than a formal offer that has been rejected. For this reason, the procedure may be regarded as impairing access to justice.

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

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

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

The offeree may deliver a counter-offer. According to the principle of equality of the parties, a counter-offer is regulated by the same rules as the offer. See Principle 3. For example, it can be withdrawn under the same conditions as an offer can be withdrawn. In addition, the counter-offer may lead to the same sanctions as an offer.

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

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

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

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

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

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

## **E. General Authority of the Court**

### **17. Provisional and Protective Measures**

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

**17.2 The injunction may be issued before the opposing party has an opportunity to respond only upon proof of urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and circumstances of which the court properly should be aware.**

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

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

**17.5 An applicant for an injunction is liable for compensation of a person against whom an injunction is issued if, upon subsequent reconsideration, the court determines that the relief should not have been granted.**

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

**17.6 The granting or denial of a provisional or conservatory measure is subject to immediate appellate review.**

#### **Comment:**

*R-17A* The term “injunction” refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Rule 17.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. The term is used here in a generic sense to include attachment, sequestration, and other directives. The concept of regulation of the status quo may include amelioration of the underlying dispute. A familiar example is supervision of management of a partnership during litigation among the partners. Availability of other provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law. A court may also grant provisional relief to facilitate arbitration or to enforce arbitration provisional measures.

*R-17B* If allowed by forum law, the court may, upon reasonable notice to the person to whom an order is directed, order persons who are not parties to the proceeding to comply with an injunction issued in accordance with Rule 17.1 or to retain a fund or other property the right to which is in dispute in the proceeding, and to deal with it only in accordance with an order of the court. See Comment *R-20A*.

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

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

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

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

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

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

*R-17G* Rule 17.6 provides for the review of an order granting or denying a provisional injunction, according to the procedure of the forum. 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. See Rule 33.2.

## **18. Case Management**

**18.1 In order to further the due administration of justice, the court should assume active management of the proceeding in all stages of the litigation. Consideration should be given to the transnational character of the dispute.**

**18.2 The court should order a planning conference early in the proceeding and may schedule other conferences thereafter. The lawyers for the parties must attend such conferences and other persons may be ordered to do so.**

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

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

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

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



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

**18.3.5 Order any person subject to the court's authority to produce documents or other evidence, or to submit to deposition as provided in Rule 23.**

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

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

**18.6 In conducting the proceeding the court may use any means of communication, including telecommunication devices such as video or audio transmission.**

**18.7 Time limits for complying with procedural obligations should begin to run from the date of notice to the party having the obligation.**

**Comment:**

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

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

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

*R-18D* In the conference, the court should discuss the issues of the case; which facts, claims, or defenses are not disputed; whether new disputed facts have emerged from disclosure or exchange of evidence; whether new claims or defenses have been presented; and what evidence will be admitted at the final hearing. The principal aim of the conference is to exclude issues that are no longer disputed and to identify precisely the facts, claims, defenses, and evidence concerning those issues that will be addressed at the final hearing. However, exceptionally, the court may decide that a conference is unnecessary, and that the final hearing may proceed simply on the basis of the parties' pleadings and stipulations if any.

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

Rule 18 authorizes various measures by the court to facilitate an efficient hearing. It is often useful to isolate one or more issues for hearing upon one occasion, with other issues reserved for consideration later if necessary. So also, it is often useful that a hearing be consolidated with another case when the same or

substantially similar issues are to be considered. As recognized in Rule 18.3.4, it is often convenient for the court to rule on admissibility of evidence before its presentation, especially evidence that is complicated, such as voluminous documents.

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

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

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

## **19. Early Court Determinations**

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

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

**19.1.2 Render a complete or partial judgment by deciding only questions of law;**

**19.1.3 Render a complete or partial judgment on the basis of evidence immediately available, in which case the court must have regard for the opportunity under these Rules for offering contradictory evidence or obtaining evidence before making such a determination.**

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

### **Comment:**

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

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

*R-19B* Rule 19.1.1 expresses a universal principle that the court's competence over the dispute and its jurisdiction over the parties may be questioned. A valid objection of this kind usually requires termination of the proceeding. A similar objection may be made that the dispute is not within the scope prescribed in Rule 2 and hence is not governed by these Rules. Among factors that may be considered under Rule 19.1.1 is dismissal for forum non conveniens. See Rule 4.6.2. Procedural law varies as to whether there are time

limitations or other restrictions on delay in making any of these objections, and whether participation in the proceeding without making such an objection results in its waiver or forfeiture.

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

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

In civil-law systems, the foregoing powers are exercised by the court as a matter of course. In common-law systems, the power to determine that a claim or defense is substantively insufficient derives from the old common-law demurrer and the modern motions for dismissal for failure to state a claim and for summary judgment and is usually exercised on the basis of a motion by a party. Examples of claims that typically may be so adjudicated are claims based on a written contract calling for payment of money, or to ownership of specific property, when no valid defense or denial is offered. Examples of defenses that typically may be so adjudicated are the defense of elapse of time (statute of limitations or prescription), release, and *res judicata*. In common-law systems, the power to determine prior to trial that a claim or defense cannot be supported through evidence is usually exercised on the basis of a motion for summary judgment.

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

### **20.1 The court may order persons who are not parties to the proceeding:**

#### **20.1.1 To give testimony as provided in Rules 23 and 29; and**

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

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

### **20.3 An order directed to a third person may be enforced by means authorized against such person by forum law, including imposition of cost sanctions, a monetary penalty, *astreintes*, contempt of court, or seizure of documents or other things. If the third party is not subject to the court's jurisdiction, any party may seek assistance of a court which has such jurisdiction to enforce the order.**

#### **Comment:**

*R-20A* In some common law countries, the court has broad authority to order nonparties to act or refrain from acting during pendency of the litigation, to preserve the status quo, and to prevent irreparable injury. In various situations a person may be involved in a suit without being a party, but should be subject to orders in the interest of justice in the proceeding. The right of contradiction stated in Principle 5 should be respected at all times. Therefore, interested persons should be notified and afforded a reasonable opportunity to respond. In civil law countries, such in personam authority is not recognized: a court's authority is generally limited to a relief in rem through attachment of property. The Anglo-American solution may be very effective, especially in international litigation, but also may be subject to abuse. See Comment *17B*.

*R-20B* When a nonparty's testimony is required, on a party's motion or on the court's own motion, the court may direct the witness to give testimony in the hearing or through deposition.

*R-20C* When a document or any other relevant thing is in possession of a nonparty, the court may order its production at the preliminary stage or at the final hearing.

*R-20D* An order directed to a third party is enforced by sanctions for noncompliance authorized by forum law. These sanctions include a monetary penalty or other legal compulsion, including contempt of court. When it is necessary to obtain evidentiary materials or other things, the court may order a direct seizure of such materials or things, and define the manner of doing it.

## **F. Evidence**

### **21. Disclosure**

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

**21.1.1 Copies of documents or other records, such as contracts and correspondence; and**

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

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

**21.2 A party must amend the specification required in Rule 21.1 to include documents or witnesses not known when the list was originally prepared. Any change in the list of documents or witnesses must be immediately communicated in writing to the court and to other parties, together with a justification for the amendment.**

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

#### **Comment:**

*R-21A* Rule 21.1 requires that a party disclose documents on which that party relies in support of the party's position. A party must also list the witnesses upon whom it intends to rely and include a summary of expected testimony. The summary of expected testimony should address all propositions to which the witness will give testimony and should be reasonably specific in detail. See Rule 23.4.

If a party later ascertains that there are additional documents or witnesses, it must submit an amended list, as provided in Rule 21.2. See also Rule 22.6. In accordance with Rules 12.1 and 13.4, the parties must state with reasonable detail the facts and the legal grounds supporting their position.

*R-21B* Under the concept of professional ethics in some civil-law systems, a lawyer should not discuss the matters in dispute with prospective witnesses (other than the lawyer's own client). That norm is designed to protect testimony from improper manipulation, but it also has the effect of limiting the effectiveness of a lawyer in investigating and organizing evidence for consideration by the court. In discussion with a prospective witness, the lawyer should not suggest what the testimony should be nor offer improper inducement. Although there is some risk of abuse in allowing lawyers to confer with prospective witnesses, that risk is less injurious to fair adjudication than is the risk that relevant and important evidence may remain undisclosed.

*R-21C* Rule 21.3 permits a voluntary ex parte interview by a lawyer with a witness. Such an interview is not a deposition, which is a formal interrogation, conducted before a court official. See Rule 23.

*R-21D* Rule 21.3 also provides the alternative that the lawyer initiating the interview may give notice to other parties, inviting them to attend voluntarily. This procedure can foreclose or ameliorate subsequent objection that the interview was improperly suggestive and therefore that the witness's testimony is suspect. In some circumstances a lawyer would prefer to risk such subsequent recrimination and therefore interview the witness in private.

## **22. Exchange of Evidence**

**22.1 A party who has complied with disclosure duties prescribed in Rule 21, on notice to the other parties, may request the court to order production by any person of any evidentiary matter, not protected by confidentiality or privilege, that is relevant to the case and that may be admissible, including:**

**22.1.1 Documents and other records of information that are specifically identified or identified within specifically defined categories;**

**22.1.2 Identifying information, such as name and address, about specified persons having knowledge of a matter in issue; and**

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

**22.2 The court must determine the request and order production accordingly. The court may order production of other evidence as necessary in the interest of justice.**

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

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

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

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

**22.7 The fact that the demanded information is adverse to the interest of the party to which the demand is directed is not a valid objection to its production.**

**22.8 The court should consider whether a privilege may justify a party's failure to disclose evidence or other information when deciding whether to draw adverse inferences or to impose other nondirect compulsory sanctions. The court should recognize evidentiary privileges when exercising authority under forum law to impose sanctions on a party or nonparty to compel disclosure of evidence or other information.**

### **Comment:**

*R-22A* These Rules adopt, as a model of litigation, a system consisting of preliminary hearings followed by a concentrated form of final hearing. The essential core of the first stage is preliminary disclosure and clarification of the evidence. The principal consideration in favor of a unitary final hearing is that of expeditious justice. To achieve this objective, a concentrated final hearing should be used, so that arguments and the taking of evidence are completed in a single hearing or in a few hearings on consecutive judicial days.

A concentrated final hearing requires a preliminary phase (called pretrial in common law systems) in which evidence is exchanged and the case is prepared for concentrated presentation.

*R-22B* Rules 21 and 22 define the roles and the rights of the parties, the duty of voluntary disclosure, the procedure for exchange of evidence, the role of the court, and the devices to ensure that the parties comply with demands for evidence. Proper compliance with these obligations is not only a matter of law for the parties, but also a matter of professional honor and obligation on the part of the lawyers involved in the litigation.

*R-22C* The philosophy expressed in Rules 21 and 22 is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited, as in Rules 21 and 22. However within those specifications disclosure is generally a matter of right.

*R-22D* Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that “appears reasonably calculated to lead to the discovery of admissible evidence.” This broad discovery is often criticized as responsible for the increasing costs of the administration of justice. However, reasonable disclosure and exchange of evidence facilitates discovery of truth.

*R-22E* Disclosure and exchange of evidence under the civil-law systems are generally more restricted, or nonexistent. In particular, a broader immunity is conferred against disclosure of trade and business secrets. This Rule should be interpreted as striking a balance between the restrictive civil-law systems and the broader systems in common-law jurisdictions.

*R-22F* Rule 22.1 requires the parties to make the disclosures required by Rule 21 prior to demanding production of evidence from an opposing party.

*R-22G* Rule 22.1 provides that every party is entitled to obtain from any person the disclosure of any unprivileged relevant evidence in possession of that person. Requests for evidence should usually be made to the court, and the court should direct the opposing party to comply with an order to produce evidence or information. This procedure can be unnecessarily burdensome on the parties and on the courts, especially in straightforward requests. Ideally, full disclosure of relevant evidence should result through dialogue among the parties, whereby the parties voluntarily satisfy each other’s demands without intervention of the court. A party therefore may present the request directly to the opposing party, which must comply with an adequate request within a reasonable time. If the opposing party refuses, the party may request the court to order the production of the evidence. The court will then hear both parties and decide the issue. See Rules 22.4 and 22.5.

*R-22H* According to Rule 22.1, compulsory exchange of evidence is limited to matters directly relevant to the issues in the case as they have been stated in the pleadings. See Rule 25.2. A party is not entitled to disclosure of information merely that “appears reasonably calculated to lead to the discovery of admissible evidence,” which is permitted under Rule 26 of the Federal Rules of Civil Procedure in the United States. “Relevant” evidence is that which supports or contravenes the allegations of one of the parties. This Rule is aimed at preventing overdiscovery or unjustified “fishing expeditions.” See Principle 11.3.

*R-22I* Exchange of evidence may concern documents and any other things (films, pictures, videotapes, recorded tapes, or objects of any kind), including any records of information, such as computerized information. The demanding party must show the relevance of the information, document, or thing to prove or disprove the facts supporting a claim or a defense, and identify the document or thing to be disclosed, specifically identified, or defined by specific categories. Thus, a document may be identified by date and title or by specific description such as “correspondence concerning the transaction between A and B in the period February 1 through March 31.” A party is not obliged to comply with a demand that does not fulfill these conditions. Disputes concerning whether the conditions of the demand have been satisfied, and whether the demand should be complied with, are resolved by the court on motion by any party. The court may declare the

demand invalid or order production of the document or thing, and if necessary specify the time and mode of production.

*R-22J* Exchange of evidence may concern the identity of a potential witness. As used in these Rules, the term “witness” includes a person who can give statements to the court even if the statements are not strictly speaking “evidence,” as is the rule in some civil-law systems concerning statements by parties. Under Rule 21.1.2 a summary of the expected testimony of a witness whom a party intends to call must be provided to other parties. A party is not allowed to examine a witness through deposition except when authorized by the court. See Rules 18.3.5, 21.3, and 23.

*R-22K* In general, parties bear the burden of obtaining evidence they need in preparation for final hearing. However, disclosure obtained by the parties on their own motion may be insufficient could surprise to the court or other parties. To deal with such inconvenience, the court may order additional disclosure on its own initiative or on motion of a party. For example, the court may order that a party or a prospective witness submit a written deposition concerning the facts of the case. The court may also subpoena a hostile witness to be orally deposed. See Rule 23.

*R-22L* In cases involving voluminous documents or remotely situated witnesses, or in similar circumstances of practical necessity, the court may appoint someone as a special officer to supervise exchange of evidence. A person so appointed should be impartial and independent, and have the same powers and duties as the judge, but decisions by such an officer are reviewable by the appointing court. See Rule 22.3.

*R-22M* If a party fails to comply with a demand for exchange of evidence, the court may impose sanctions to make disclosure effective. The determination of sanctions is within the discretion of the court, taking into account relevant features of the parties’ behavior in accordance with Principle 17.

The sanctions are:

- 1) Adverse inferences against the noncomplying party including conclusive determination of the facts.
- 2) A monetary penalty, fixed by the court in its discretion, or other means of legal compulsion permitted by forum law, including contempt of court. The court should graduate the penalty or contempt sanction according to the circumstances of the case.
- 3) Dismissal of claims, defenses, or allegations to which the evidence is relevant. This sanction is more severe than the drawing of an adverse inference. The adverse inference does not necessarily imply that the party loses the case on that basis, but dismissal of claims or defenses ordinarily has that result.
- 4) The most severe sanction against noncompliance with disclosure demands or orders is entry of adverse judgment with respect to one or more of the claims. The court may enter a judgment of dismissal with prejudice against the plaintiff or a judgment by default against the defendant.

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

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

**23.1 A deposition of a party or other person may be taken by order of the court. Unless the court orders otherwise, a deposition may be presented as evidence in the record.**

**23.2 Deposition must be taken upon oath or affirmation to tell the truth and transcribed verbatim or recorded by audio or video, as the parties may agree or as the court orders. The cost of transcription or recording must be paid by the party that requested the deposition, unless the court orders otherwise.**

**23.3 The deposition must be taken at a specified time and place upon notice to all parties, at least [30] days in advance. The examination must be conducted before a judge or other official authorized under**

forum law. All the parties have the right to attend and to submit supplemental questions to be answered by the deponent.

**23.4 With permission of the court, a party may present a 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 move for an order of the court requiring the personal appearance or deposition of the author or such an affidavit. Examination of that witness may begin with supplemental questioning by the court or opposing party.**

**Comment:**

*R-23A* A deposition is a form of taking testimony employed in common-law and in some civil-law systems. It consists of sworn testimony of a potential witness, including a party, taken outside of court prior to the final hearing. A deposition may be given orally in response to questions by lawyers for the parties or by questions from a judicial officer appointed by the court. A deposition may be conducted by electronic communication, for example by telephone conference. It may also be given through written responses to written questions. Ordinarily, a deposition is given after commencement of litigation but also, in accordance with the law of the forum, may be given *de bene esse*, i.e., prior to litigation to preserve testimony when the witness is expected to be unavailable after litigation has commenced. Questioning may seek to gather information and to test the witness's recollection and credibility. The testimony of a witness in a deposition may be presented as evidence, either in lieu of the witness or as direct testimony, but the court may require the presence of a witness who can attend in order to permit supplemental questioning. Under these Rules a deposition may be used in limited circumstances for exchange of evidence before trial.

*R-23B* A party is not allowed to examine a witness through deposition except when authorized by the court. See Rule 18.3.5. Rule 23.2 provides that deposition testimony be taken on oath or affirmation, as at a hearing before the court. It is to be transcribed verbatim or recorded on audio or video. The parties may agree about the form of transcription or recording, but the court may nevertheless determine what form is to be used. The party who requests the deposition must pay the cost of transcription or recording, unless the court orders otherwise.

*R-23C* Rule 23.3 specifies the procedure for a deposition. In general, the procedure should be similar to a presentation of the witness before the court. See Rule 22.3.

*R-23D* The deposition will follow, as far as possible, the procedure for taking testimony before a judge. Thus the party taking the deposition will examine the witness first, and the other parties will ask supplemental questions thereafter. As stated in Rule 23.3, before the deposition the court may specify questions that it requires to be asked of the witness. Time and place of the deposition may be prescribed by the court.

*R-23E* The general principle governing presentation of evidence is that evidence will be presented orally at the final hearing. See Principle 19 and Rule 29. However, oral examination of a witness at the final hearing may be impossible, burdensome, or impractical. Rule 23.1 permits the transcript of a deposition taken in accordance with this Rule to be presented to the court as a substitute for reception of testimony of a witness who cannot conveniently be present in court, for example by reason of illness or because the witness is in a remote location or cannot be compelled to attend to give testimony. A deposition may also be convenient for presenting testimony in a language other than that of the court. A deposition in any event may be used as a statement against interest.

*R-23F* Rule 23.4 permits the presentation of testimony by means of written affidavits containing statements about relevant facts of the case. Such a statement, although upon oath or affirmation, is *ex parte* in that neither the court nor opposing parties has been permitted to question the witness. According to Principle 19.3, "Ordinarily, testimony of parties and witnesses should be received orally." Therefore, a written statement may be regarded with corresponding skepticism by the court, especially if another party denies the



truth of the statements made by affidavit. However, facts not in serious dispute often may be conveniently proved by this procedure. See Rule 21.1.3. Testimony by affidavit may facilitate reception of evidence for early determination of the dispute. See Rule 19.1.3.

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

## **24. Public Proceedings**

**24.1 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 be kept confidential in the interest of justice, public safety, or privacy.**

**24.2 Court files and records should be public or accessible to persons with a legal interest or making a responsible inquiry, according to forum law.**

**24.3 In the interest of justice, public safety, or privacy, if the proceeding is public, the judge may order part of it to be conducted in private and if the proceeding is confidential, the judge may order part of it public.**

**24.4 Judgments and ordinarily other orders, are accessible to the public.**

**24.5 Information obtained under these Rules but not presented in an open hearing must be maintained in confidence in accordance with forum law.**

**24.6 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 injury or embarrassment.**

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

### **Comment:**

*R-24A* A hearing in camera is one closed to the public and, in various circumstances, closed to others. As the court may direct according to the circumstances, such a hearing may be confined to a lawyer without the parties or it may be ex parte, e.g., confined to a party and that party's lawyer, for example when trade secrets are involved.

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

**25.1 All relevant evidence generally is admissible. Forum law may determine that illegally obtained evidence is inadmissible and impose exclusions.**

**25.2 The facts and legal claims and defenses in the pleadings determine relevance.**

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

**25.4 A party has a right to proof through testimony, not privileged under applicable law, of any person whose testimony is available, relevant, and admissible. The court may call any witness meeting these qualifications.**

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

**Comment:**

*R-25A* This Rule states principles concerning evidence, defining generally the conditions and limits of what may be properly considered as proof. The basic principle is that any factual information that is rationally useful in reaching judgment on the relevant facts of the case should be admissible as evidence. The court may refuse to accept evidence that is redundant. Common-law concepts of hearsay and parol evidence as exclusionary rules are generally inappropriate in a nonjury case but they do affect the credibility and weight of evidence.

*R-25B* In applying the principle of relevance, the primary consideration is the usefulness of the evidence. In deciding upon admissibility of the evidence, the court makes a hypothetical evaluation connecting the proposed evidence with the issues in the case. If a probative inference may be drawn from the evidence to the facts, then the evidence is logically relevant. See Rule 12.1 and Comment *R-12A*.

*R-25C* In some legal systems there are rules limiting in various ways the use of circumstantial evidence. However, these rules seem unjustified and are very difficult to apply in practice. More generally, there is no valid reason to restrict the use of circumstantial evidence when it is useful to establish a fact in issue. Therefore, generally, the court may consider any circumstantial evidence provided it is relevant for the decision on the facts of the case.

*R-25D* Rule 25 defers to forum law the decision of who can properly give evidence or present statements. In some national systems the rules limit the extent to which parties or "interested" nonparties can be witnesses. However, even in such systems the modern trend favors admitting all testimony. A general rule of competency also avoids the complex distinctions that exclusionary rules require. The proper standard for the submission of evidence by a witness is the principle of relevancy. This does not mean, however, that subjective or objective connections of the witness with the case must be disregarded, but only that they are not a basis for excluding the testimony. These connections, for example kinship between the witness and a party, may be meaningful in evaluating credibility.

Any person having information about a relevant fact is competent to give evidence. This includes the parties and any other person having mental capacity. Witnesses are obligated to tell the truth, as required in every procedural system. In many systems such an obligation is reinforced by an oath taken by the witness. When a problem arises because of the religious character of the oath, the court has discretion to determine the terms of the oath or to permit the witness merely to affirm the obligation to tell the truth.

*R-25E* Rules 25.4 and 25.5 govern the parties' right to proof in the form of testimony, documentary evidence, and real or demonstrative evidence. A party may testify in person, whether called by the party, another party, or the court. That procedure is not always permitted in civil-law systems, where the party is regarded as too interested to be a regular witness on its own behalf.

*R-25F* The court may exercise an active role in the taking of testimony or documentary, real, or demonstrative evidence. For example, when the court knows that a relevant document is in possession of a party or of a nonparty, and it was not spontaneously produced, the court may on its own motion order the party or the nonparty to produce it. The procedural device is substantially an order of subpoena. The court in issuing the order may establish the sanctions to be applied in case of noncompliance.

## 26. Expert Evidence

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

**26.2** The court must specify the issues to be addressed by the expert and may give directions concerning tests, evaluations, or other procedures to be employed by the expert, and the form in which the report is to be rendered. The court may issue orders necessary to facilitate the inquiry and report by the expert. The parties have the right to comment upon statements by an expert, whether appointed by the court or by a party.

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

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

### Comment:

*R-26A* These Rules adopt the civil-law rule and provisions of the modern English procedure according to which the court appoints a neutral expert or panel of experts. The court decides on its own motion whether an expert is needed in order to evaluate or to establish facts that because of their scientific, legal, or technical nature, the court is unable to evaluate or establish by itself. The court appoints the expert or the experts (if possible using the special lists that exist in many countries) on the basis of the expert's competence in the relevant field. If the expert's neutrality is disputed, that issue is for the court to resolve. The court, informed by the parties' recommendations, should specify the technical or scientific issues on which the expert's advice is needed and formulate the questions the expert should answer. The court also should determine which techniques and procedures the expert will apply, regulate any other aspect of the tests, inquiries, and research the expert will make, and determine whether the expert will respond orally or by submitting a written report. The court should consult with the experts as well as the parties in determining the tests, evaluations, and other procedures to be used by the experts.

*R-26B* The court's expert is neutral and independent from the parties and from other influence. The court is expected to rely on the expert's advice when it appears sound and credible. If the advice does not appear reasonable, the court may appoint another expert. However, the court is not obliged to follow the expert's advice. In such a case, the court ordinarily should explain specifically the reasons why the expert's advice is rejected and the reasons supporting the court's different conclusion.

*R-26C* Rule 26 recognizes that the status of an expert is somewhat different from that of a percipient witness and that experts have somewhat different status in various legal systems.

*R-26D* In common-law systems an expert is presented by the parties on the same basis as other witnesses, recognizing that the role usually is one of interpretation rather than recounting first-hand observations. In civil-law systems the parties may present experts but ordinarily do so only to supplement or dispute testimony of a court-appointed expert.

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

*R-26E* Under Rule 26.2 the court may examine the expert orally in court or require a written report and afford oral examination of the expert after the report has been submitted. When the court receives oral testimony from the court's expert, the parties' experts should be similarly heard. When the court's expert submits a written report, the parties' experts should also be allowed to do so. The court may order all the experts to confer with each other in order to clarify the issues and to focus their opinions. The advice of the parties' experts may be taken into account by the court and the court may adopt a party's expert advice instead of that of the court's expert.

## **27. Evidentiary Privileges**

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

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

**27.1.2 Confidentiality of communications in settlement negotiations;**

**27.1.3 [Other specified limitations].**

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

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

### **Comment:**

*R-27A* Privileges exclude relevant evidence. They have evolved over time and reflect various social interests. Organized professions (e.g., doctors, psychiatrists, accountants, lawyers) are interested in protecting their clients and their members' professional activities by means of the privilege not to disclose information acquired during such an activity. Statutory law and case law have extended the list of professional privileges. However, the recognition of such privileges has significant cost in the quality of proof and discovery of truth.

*R-27B* Rule 27.1.1 gives effect to a "legal profession" privilege. The concept of this privilege is different in the common-law and civil-law systems but this Rule includes both concepts. The common law recognizes an "attorney-client privilege," which enables the client to object to inquiry into confidential communications between client and lawyer that were made in connection with the provision of legal advice or assistance. Under United States law and some other common-law systems a similar protection, called the "lawyer work product" immunity, additionally shields materials developed by a lawyer to assist a client in litigation. The civil law confers the same protections but under the concept of a professional right or privilege of the lawyer. See also Rule 22.8.

*R-27C* Rule 27.1.2 reflects the universal principle that confidentiality should be observed with regard to communications in the course of settlement negotiations in litigation. Some systems presume that only correspondence between lawyers is confidential, whereas many other systems extend this privilege to party communications concerning settlement. The precise scope of confidentiality of communications concerning settlement is determined by the law governing the communications, but the general principle stated above should be considered in determining the matter. See also Rule 24.

*R-27D* Rule 27.1.3 may be used to accord protection to other privileges under the law of the forum, such as those involving financial advisers or other professionals. In general, the civil-law systems accord privacy to the communications of many professionals. Many legal systems have additional privileges, usually in qualified form. Thus, the European Court of Human Rights has recognized various professional privileges under various circumstances, e.g., for bankers, accountants, and journalists, and many countries also have a privilege for communications between family members. Many state jurisdictions in the United States have an

accountant privilege and some have a “self-evaluation privilege” on the part of hospitals and some other organizations. However, in some civil-law systems the court may examine otherwise protected confidences if they appear highly relevant to the matter in dispute. Such an approach is known in the common law as a conditional privilege. However, if the court permits receipt of such evidence, it should protect the confidential information from exposure except as required for consideration in the dispute itself.

*R-27E* The court may make a determination whether to receive conditionally privileged information through an in camera hearing, in which the participants are limited to the court itself, the parties, and the parties’ lawyers. See Rule 24.7. The same device may be used concerning nonprivileged information when the court finds that publication could impair some important private or public interests, such as a trade secret. The taking of evidence in a closed hearing should be exceptional, having regard for the fundamental principle of the public nature of hearings.

*R-27F* A person who is entitled to a privilege may waive it, in which event evidence in the privileged communication is received without limitation. The privilege may be waived by means of an explicit statement or tacitly. An illustration of tacit waiver is when the protected party does not timely claim the privilege. However, in the interest of justice, the court may decline to enforce a waiver.

*R-27G* Rule 27.3 prescribes a procedure for claims of privilege with respect to documents. The claimant is required to identify the document in sufficient detail to permit an opposing party to make an intelligent disputation of the claim of privilege, for example that the document had been distributed to third persons.

*R-27H* Regarding the legal consequences of claiming privileges, see Principle 18.2 and 18.3 and Rule 22.3.

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

**28.1 A party has the burden to prove all the material facts that are the basis of that party’s case.**

**28.2 The court should make free evaluation of the evidence and attach no unjustified significance to evidence according to its type or source. Facts are considered proven when the court is reasonably convinced of their truth.**

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

**28.4.1 Order reception of any relevant evidence**

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

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

### **Comment:**

*R-28A* Rule 28 specifies various aspects of the authority of the court with reference to evidence. The court may exercise such powers on its own motion or on motion of a party.

Rule 28.4.1 gives the court the power to exclude evidence on various grounds. The first is irrelevancy of the evidence or its redundant or cumulative character. Redundant or cumulative evidence is theoretically relevant if considered by itself but not when considered in the context of the other evidence adduced. The court may in the course of a final hearing admit evidence that was preliminarily excluded because it had appeared irrelevant, redundant, or cumulative. The standard of exclusion by reason of “unfair prejudice, excessive cost, burden, confusion, or delay” should be applied very cautiously. The court should use this power primarily when a party adduces evidence with the apparent aim of delaying or confusing the proceedings.

*R-28B* Rule 28.4.2 provides for various sanctions, including *astreintes*. The court may draw an adverse inference from the behavior of a party such as failing to give testimony, present a witness, or produce a document or other item of evidence that the party could present. Drawing an adverse inference means that the court will interpret the party's conduct as circumstantial evidence contrary to the party.

Drawing adverse inference is a sanction appropriate only against a party. Sanctions applied to nonparties include contempt of court and imposing a fine, subject to the limitation in Rule 35.2.4. The conduct that may be sanctioned includes failing to attend as a witness or answer proper questions and failing without justification to produce documents or other items of evidence. See Principles 17, 18.2, and 18.3.

## **G. Final Hearing**

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

**29.1 So far as practicable, the final hearing should be concentrated.**

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

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

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

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

#### **Comment:**

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

*R-29B* In some civil-law systems, a party's statement is regarded as having lesser standing than testimony of a nonparty witness; and in some systems a party cannot call itself as a witness or can do so only under specified conditions. The common law treats parties as fully competent witnesses and permits parties to call themselves to the stand and obliges them to testify at the instance of an opposing party, subject to privileges such as that against self-incrimination. These Rules adopt the common-law approach, so that a party has both an obligation to testify if called by the opposing party and a right to testify on its own motion. See Rule 25.3. Failure without explanation or justification to testify may justify the court's drawing an adverse inference concerning the facts, or, in common-law countries, if a party disobeys an order to testify, holding the party in contempt. However, a party's failure to comply may have some reasonable explanation or justification. Sanctions may be gradually increased until the party decides to comply.

*R-29C* Rule 29.4 governs the examination of witnesses. The traditional distinction between common-law systems, which are based upon direct and cross-examination, and civil-law systems, which are based upon

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

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

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

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

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

However, the right to challenge the credibility of an adverse witness may be abused by harassment of the witness or distortion of the testimony. The court should prevent such conduct.

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

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

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

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

**Comment:**

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

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

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

**31. Final Discussion and Judgment**

**31.1** After the presentation of all evidence, each party is entitled to present a closing statement. The court may allow the parties' lawyers to engage with each other and with the court in an oral discussion concerning the main issues of the case.

**31.2** The judgment must be accompanied by a written reasoned explanation of its legal, evidentiary, and factual basis.

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

**Comment:**

*R-31A* The final hearing ends when all the evidence has been presented. The parties have a right to present oral or written closing statements, according to the direction of the court.

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

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

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

**32. Costs**

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

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



**32.3 The winning party ordinarily should be awarded all or a substantial portion of its reasonable costs.**

**32.4 The losing party must promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.**

**32.5 Exceptionally, the court may withhold or limit costs to the winning party when there is clear justification for doing so. The court may limit the award to a proportion that reflects expenditures for matters in genuine dispute and award costs against a winning party that has 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.**

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

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

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

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

**Comment:**

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

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

However, the rules concerning costs in common-law systems and some civil-law systems confer authority on the court to modify the normal allocation of costs to the losing party. Rule 32.5 adopts such a position.

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

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

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

## H. Appellate and Subsequent Proceedings

### 33. Appellate Review

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

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

**33.3** Orders of the court other than a final judgment and an order appealable under the previous subsection are subject to immediate review only upon permission of the appellate court. Such permission may be granted when an immediate review may resolve an issue of general legal importance or of special importance in the immediate proceeding.

**33.4** Appellate review is limited to claims (including counterclaims) and defenses addressed in the first-instance proceeding, but the appellate court may consider new facts and evidence in the interest of justice.

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

#### Comment:

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

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

*R-33C* The rule of finality is recognized in most legal systems. However, procedure in many systems permits formal correction of a judgment under specified conditions. All systems impose time limits on use of such procedures and generally require that they be invoked before the time to appeal has expired.

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

*R-33E* Rule 33.3 permits interlocutory appeal of orders other than the final judgment at the authorization of the appellate court. The judges of the appellate court must determine that the order is of the importance defined in Rule 33.3. Permission for the interlocutory appeal may be sought by motion addressed to the appellate court. The appellate court may take account of the first-instance judge’s views about the value of immediate appeal if such views are offered.

*R-33F* The restriction upon presenting additional facts and evidence to the second-instance court reflects the practice in common-law and in some civil-law systems. However, that practice is subject to the exception that an appellate court may consider additional evidence under extraordinary circumstances, such as the uncovering of determinative evidence after the appeal was taken and the record had been completed in the first-instance court.

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

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

#### **34. Rescission of Judgment**

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

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

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

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

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

**34.2 An application for rescission of judgment must be made within [90] days from the date of discovery of the circumstances justifying nullification.**

#### **Comment:**

*R-34A* As a general rule a final judgment should not be reexamined except in appellate review according to the provisions included in Rule 33. Only in exceptional circumstances may it be pursued through a new proceeding. A rescission proceeding ordinarily should be brought in the court in which the judgment was rendered. The relief may be cancellation of the original judgment or substitution of a different judgment.

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

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

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

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

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

**35.1 A final judgment, as well as a judgment for a provisional remedy, is immediately enforceable, unless it has been stayed as provided in Rule 35.3.**

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

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

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

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

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

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

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

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

#### **Comment:**

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

*R-35B* Rule 35.2 authorizes the court, upon request of the judgment holder, to impose monetary penalties upon the judgment obligor that take effect if the obligor does not pay the obligation within the time specified, or within 30 days after the judgment has become final if no time is specified. The monetary penalties are to be imposed according to the following standards:

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

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

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

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

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

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

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

**36.1 A final judgment or provisional remedy in a proceeding conducted in another forum in substantial compliance with these Rules must be recognized and enforced unless substantive public policy requires otherwise.**

**36.2 Courts of states that have adopted these Rules must provide reasonable judicial assistance in aid of proceedings conducted under these Rules in another state, including provisional remedies, assistance in the identification or production of evidence, and enforcement of a judgment.**

#### **Comment:**

*R-36A* It is a general principle of private international law that judgments of one state will be recognized and enforced in the courts of other states. The extent of such assistance and the procedures by which it may be provided are governed in many respects by the "Brussels I Regulation" and Brussels and Lugano Conventions.

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