
**TRANSNATIONAL CIVIL PROCEDURE -
FORMULATION OF REGIONAL RULES
ELI – UNIDROIT Rules of Transnational Civil
Procedure
Steering Committee and Working Groups
Joint Meeting
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WORKING GROUP ON ACCESS TO INFORMATION AND EVIDENCE

First Report November 2014

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ELI/UNIDROIT

UNIDROIT/ELI

WORKING GROUP

“ACCESS TO INFORMATION AND EVIDENCE”

WORKING GROUP REPORT: FIRST REPORT

Reporters: Neil Andrews and Fernando Gascón

Members: Frédérique Ferrand, Laura Ervo, Viktória Harsagi and Michael Stürner

I. SUMMARY

1. This project (which is a segment of the contemplated European Rules of Civil Procedure) concerns leading rules within the framework of the 2004 UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*.¹
2. This is an important and challenging project. We have begun the task of building a new set of transnational leading rules within the context of European practice of great importance.

¹ Also taking into account other sources, such as the 2010 IBA Rules on the Taking of Evidence in International Arbitration as well as the commentaries to those Rules accessible at:

http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

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3. On 14 July 2014 the members of the Working Group on “Access to Information and Evidence” met at Clare College (University of Cambridge) to discuss plans for this topic.

4. Our aim in this first Working Paper is to offer a tentative five pillar structure, building on UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*.

5. The five pillars are:
 - I. Scope of Dispute and Relevance
 - II. Claimant's and Defendant's Responsibilities Concerning Evidence and Information
 - III. Powers and Responsibilities of the Court for the Gathering and Assessment of Evidence
 - IV. Equal Access to Information and to Evidence
 - V. Types and Subject-matter of Evidence

6. The contemplated time-table for this project is tight. But it is believed that a Report, including Leading Rules and Commentary, can be achieved within that period.

II. BACKGROUND

7. The ‘Access to Information and Evidence’ Working Group proposes, in accordance with the sponsoring partners’ wishes, to proceed as follows:
 - (i) Leading rules should be drafted in two languages, English and French (according to the previous decision taken in the Steering Committee meeting in Rome).

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(ii) Leading rules should be accompanied by explanatory commentaries.

(iii) Leading rules should not be confined to transnational litigation. The idea is to draft a set of rules on evidence and access to information, which could be used by national courts in both domestic and cross-border cases.

(iv) Leading rules should address both business and consumer matters.

(v) Due to their great specificity, family and labour matters will not be addressed by the rules.

(vi) Special attention will be given to the relationship between evidence and new information technologies.

**III. UNIDROIT/ALI PRINCIPLES OF TRANSNATIONAL CIVIL
PROCEDURE**

8. The Working Group has identified the following as very helpful and informative within the UNIDROIT/ALI *Principles of Transnational Civil Procedure* so far as they relate to the topic of “access to information and evidence”. The following principles are relevant:

Principles: 3.1; 5.4, 5.5 and 5.6; 6.3; 7.2; 8; 9, 9.2, 9.3.4, 9.3.6 and 9.4; 11; 13; 14; 16; 17; 18; 19.2, 19.3 and 19.4; 20.1, 20.2 and 20.3; 21; 22; 23.2; 25.1; 27.3; 28; and 31.²

² Only the Principles are officially recognised. The Rules are instead illustrative. But the Rules provide helpful guidance, see, for example, UNIDROIT/American Law Institute’s *Principles of*

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IV. UNSUITABLE TOPICS

9. Although “*res judicata*” (principle 28) and “evidence in appellate proceedings” (principle 27.3)³ are linked to the topic, they will not be dealt with by the works. The Working Group considers it more appropriate that these issues should be addressed in a subsequent phase of development of the ELI/UNIDROIT general project.

Furthermore, “International Judicial Co-operation” (Principle 31)⁴ is sufficiently covered by EU Regulation on the Taking of Evidence (Regulation 1206/2001) and will not be addressed by the Working Group, at least at an initial phase.

V. THE FIVE PILLARS

10. The Working Group proposes these headings or ‘pillars’ for this project:

I. Scope of Dispute and Relevance

- A. The scope of the proceeding is determined by the claims and defenses of the parties in the pleadings, including amendments (Principle 10.3)
- B. The facts and legal claims and defenses in the pleadings determine relevance (Rule 25.2)

Transnational Civil Procedure: Rules: 6; 8.3; 12.1 and 12.4; 18.3.4, 18.3.5, 18.4 and 18.6; 20 to 30; 31.2; 32; 33.4; and 36.2.

³ UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*: Rule 33.4

⁴ UNIDROIT/American Law Institute’s *Principles of Transnational Civil Procedure*: Rule 36.2

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II. Claimant's and Defendant's Responsibilities Concerning Evidence and Information

- A. Burden of proof
- B. It is the parties' task and right to find and to present evidence to the court

The parties have the right to submit relevant contentions of fact and law and to offer supporting evidence (Principle 5.4)

- C. Contractual anticipation of evidential issues
- D. Costs

III. Powers and Responsibilities of the Court for the Gathering and Assessment of Evidence

- A. Each party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court (Principle 5.5.)
- B. Proportionality as an overarching requirement
- C. Role of the court in the management of evidence
 - a) Moment
 - b) Sanctions
- D. Criteria on the admissibility of evidence
- E. Standards of proof and assessment of proof

IV. Equal Access to Information and to Evidence

- A. Cooperation
- B. Non parties
- C. Protection of evidence

V. Types and Subject-matter of Evidence

- A. Documentary evidence

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- B. Testimony
- C. Expertise
- D. New technologies
- E. Privileges
- F. Forms of eliciting evidence

**VI. INTEGRATING THE FIVE PILLAR ANALYSIS AND
THE UNIDROIT/ALI PRINCIPLES**

The UNIDROIT/ALI *Principles of Transnational Civil Procedure* provide the foundation and can be adapted and incorporated as suggested in this section of this paper. This is a provisional set of drawings and they are put forward as merely a starting point for further analysis. (Note that quotations from UNIDROIT/ALI *Principles of Transnational Civil Procedure* are in **bold** and quotations from UNIDROIT/ALI *Rules of Transnational Civil Procedure* are in *italics*.)

I. SCOPE OF DISPUTE AND SCOPE OF EVIDENCE

The scope of the proceeding is determined by the claims and defenses of the parties in the pleadings, including amendments (Principle 10.3)

The facts and legal claims and defenses in the pleadings determine relevance (Rule 25.2)

**II. CLAIMANT'S AND DEFENDANT'S RESPONSIBILITY
CONCERNING EVIDENCE**

A. Burden of proof

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

A party has the burden to prove all the material facts that are the basis of that party's case. (Rule 28.1)

B. It is the parties' task and right to find and to present evidence to the court

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

The parties have the right to submit relevant contentions of fact and law and to offer supporting evidence (Principle 5.4)

In the final phase evidence not already received by the court according to Principle 9.3.6 ordinarily should be presented in a concentrated final hearing at which the parties should also make their concluding arguments. (Principle 9.4)

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

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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 (Rule 12.1)

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 (Rule 12.4)

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

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

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

C. Contractual anticipation of evidential issues

(.../...)

D. Costs

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

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

III. POWERS AND RESPONSIBILITIES OF THE COURT FOR THE GATHERING AND ASSESSMENT OF EVIDENCE

A. [Each] party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court. (Principle 5.5.)

B. Proportionality as an overarching requirement

(.../...)

C. Role of the court in the management of evidence

The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights. (Principle 3.1)

The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis

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for its decisions, including matters determined on the basis of foreign law. (Principle 22.1)

*The court, on its own motion or motion of a party, may:
Order reception of any relevant evidence (Rule 28.3.1)*

Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. (Principle 14.1)

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

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

In giving direction to the proceeding, the court, after discussion with the parties, may: Make decisions concerning admissibility and exclusion of evidence; the sequence, dates, and times of hearing evidence. (Rule 18.3.4)

a) Moment

In the interim phase the court should if necessary: address availability, admission, disclosure, and exchange of evidence. (Principle 9.3.4)

In the interim phase the court should if necessary: order the taking of evidence. (Principle 9.3.6)

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In the final phase evidence not already received by the court according to Principle 9.3.6 ordinarily should be presented in a concentrated final hearing at which the parties should also make their concluding arguments. (Principle 9.4)

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 to all other parties of the identity of the witness and the substance of the contemplated testimony. (Rule 29.3)

The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing. (Principle 22.3)

b) Sanctions

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

The court, on its own motion or motion of a party, may: 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. (Rule 28.3.3)

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

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

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

C. Criteria on the admissibility of evidence

In the interim phase the court should if necessary: Address availability, admission, disclosure, and exchange of evidence. (Principle 9.3.4)

In giving direction to the proceeding, the court, after discussion with the parties, may: Make decisions concerning admissibility and exclusion of evidence; the sequence, dates, and times of hearing evidence. (Rule 18.3.4)

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

The facts and legal claims and defenses in the pleadings determine relevance (Rule 25.2)

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*The court, on its own motion or motion of a party, may:
Exclude evidence that is irrelevant or redundant or that
involves unfair prejudice, cost, burden, confusion, or
delay. (Rule 28.3.2)*

The court may, while affording the parties opportunity to respond: Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly. (Principle 22.2.1)

The court may, while affording the parties opportunity to respond: Order the taking of evidence not previously suggested by a party. (Principle 22.2.2)

*The court, on its own motion or motion of a party, may:
Order reception of any relevant evidence (Rule 28.3.1)*

D. Standards of proof and assessment of proof

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

Facts are considered proven when the court is reasonably convinced of their truth. (Principle 21.2)

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

When it appears that a party has possession or control of relevant evidence that it declines without justification to produce, the court may draw adverse inferences with

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respect to the issue for which the evidence is probative.
(Principle 21.3)

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

The judgment must be rendered within [60 days] thereafter and be accompanied by a written reasoned explanation of its legal, evidentiary, and factual basis.
(Rule 31.2)

The court may, while affording the parties opportunity to respond: Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party. (Principle 22.2.3)

IV. EQUAL ACCESS TO INFORMATION AND TO EVIDENCE

The court should ensure equal treatment and reasonable opportunity for litigants to assert or defend their rights.
(Principle 3.1)

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

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

In giving direction to the proceeding, the court, after discussion with the parties, may: Order any person subject to the court's authority to produce documents or other evidence, or to submit to deposition. (Rule 18.3.5)

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:

1.1. Copies of documents or other records, such as contracts and correspondence; and

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

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

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 all other parties, together with a justification for the amendment.

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. (Rule 21)

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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:*

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

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

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

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. Such evidence must be produced within a reasonable time prior to the final hearing.*

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 review by the court.*

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 provide the evidence accordingly. If the party refuses in whole or in part, the requesting party, on notice of 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.*

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

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6. The fact that the requested information is adverse to the interest of the party to whom the demand is directed is not a valid objection to its production.

7. The court should recognize evidentiary privileges when exercising authority to compel disclosure of evidence or other information. 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 indirect sanctions. (Rule 22)

A. Co-operation

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

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

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

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

B. Non parties

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

In giving direction to the proceeding, the court, after discussion with the parties, may: Order any person subject to the court's authority to produce documents or other evidence, or to submit to deposition. (Rule 18.3.5)

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

1. The court may order persons who are not parties to the proceedings:

1.1. To give testimony; and

1.2. To produce information, documents, electronically stored information, or other things as evidence or for inspection by the court or a party.

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

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 that has such jurisdiction to enforce the order. (Rule 20)

C. Protection of evidence

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- 1. The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.**
- 2. A court may order provisional relief without notice only upon urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and legal issues of which the court properly should be aware. A person against whom ex parte relief is directed must have the opportunity at the earliest practicable time to respond concerning the appropriateness of the relief.**
- 3. An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation. (Principle 8)**

The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence. (Principle 11.2)

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

The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing. (Principle 22.3)

V. TYPES AND SUBJECT-MATTER OF EVIDENCE

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A. Documentary evidence

In giving direction to the proceeding, the court, after discussion with the parties, may: Order any person subject to the court's authority to produce documents or other evidence, or to submit to deposition. (Rule 18.3.5)

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. (Rule 25.5)

Documentary or other tangible evidence may be presented only if it has previously been disclosed to all other parties. (Rule 29.3)

The court and the parties may challenge a witness's credibility or the authenticity or accuracy of documentary evidence. (Rule 29.4).

Translation of lengthy or voluminous documents may be limited to portions, as agreed by the parties or ordered by the court. (Principle 6.3)

Translation must be provided when a document is not written, or a party or witness is not competent in a 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

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relevant portions, as agreed by the parties or ordered by the court. (Rule 8.3)

B. Testimony

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.*

2. *A 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 who requested the deposition, unless the court orders otherwise.*

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 and in accordance with forum-law procedure. All the parties have the right to attend and to submit supplemental questions to be answered by the deponent.*

4. *With permission of the court, a party may present a written statement of sworn testimony of any person, containing statements in their own words about relevant facts. The court, in its discretion, may consider such statements as if they were made by oral testimony before the court. Whenever appropriate, a party may move for an order of the court requiring the personal appearance or deposition of the author of such a statement. Examination of that witness may begin with supplemental questioning by the court or opposing party. (Rule 23)*

The parties should have the right to submit statements that are accorded evidentiary effect. (Principle 16.1)

A party, even if not allowed by forum law to give evidence, may nevertheless make statements that will be accorded

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probative weight. A party making such statement is subject to questioning by the court and other parties (Rule 25.3)

A party has a right to proof through testimony or evidentiary statement, not privileged under applicable law, of any person, including another party, whose evidence is available, relevant, and admissible. The court may call any witness meeting these qualifications. (Rule 25.4)

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

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

Testimonial evidence may be presented only if notice has been given to all other parties of the identity of the witness and the substance of the contemplated testimony. (Rule 29.3)

A person giving testimony may be questioned first by the court or the party seeking the testimony. All 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. (Rule 29.4).

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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. (Rule 29.5).

Translation should be provided when a party or witness is not competent in the language in which the proceeding is conducted. (Principle 6.3)

Translation must be provided when a document is not written, or a party or witness is not competent in a 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. (Rule 8.3)

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The parties must have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court. (Principle 13)

Any person or jural entity 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

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to the matters in the submission before it is considered by the court. (Rule 6)

C. Expertise

The court may appoint an expert to give evidence on any relevant issue for which expert testimony is appropriate, including foreign law. (Principle 22.4)

If the parties agree upon an expert the court ordinarily should appoint that expert. (Principle 22.4.1)

A party has a right to present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate. (Principle 22.4.2)

An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed. (Principle 22.4.3)

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.

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

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right to comment upon statements by an expert, whether appointed by the court or designated by a party.

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.

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. (Rule 26)

D. New technologies

The court may order persons who are not parties to the proceedings: To produce information, documents, electronically stored information, or other things as evidence or for inspection by the court or a party. (Rule 20.1.2)

E. Privileges

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

The court should consider whether these protections may justify a party's failure to disclose evidence or other information when deciding whether to draw adverse

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inferences or to impose other indirect sanctions. (Principle 18.2)

The court should recognize these protections when exercising authority to impose direct sanctions on a party or nonparty to compel disclosure of evidence or other information. (Principle 18.3)

1. Evidence may not be elicited in violation of:

1.1. The legal-profession privilege of confidentiality under forum law, including choice of law;

1.2. Confidentiality of communications in settlement negotiations;

1.3. [Other specified limitations].

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.

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. (Rule 27)

F. Forms of eliciting evidence

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

In the final phase evidence not already received by the court according to Principle 9.3.6 ordinarily should be

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presented in a concentrated final hearing at which the parties should also make their concluding arguments. (Principle 9.4)

The final hearing must be held before the judges who are to give judgment. (Principle 19.2)

The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing. (Principle 22.3)

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 (Rule 18.4)

The court should specify the procedure for presentation of testimony. Ordinarily, testimony of parties and witnesses should be received orally, and reports of experts in writing; but the court may, upon consultation with the parties, require that initial testimony of witnesses be in writing, which should be supplied to the parties in advance of the hearing. (Principle 19.3)

Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony or of an expert's report. (Principle 19.4)

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Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. Following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety, or privacy. (Principle 20.1)

Ordinarily, oral hearings, including hearings in which evidence is presented and in which judgment is pronounced, should be open to the public. Following consultation with the parties, the court may order that hearings or portions thereof be kept confidential in the interest of justice, public safety, or privacy. (Rule 24.1)

Court files and records should be public or otherwise accessible to persons with a legal interest or making a responsible inquiry, according to forum law. (Principle 20.2)

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

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

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. (Rule 30.2).

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In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private. (Principle 20.3)

In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private. (Rule 24.3)

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

In appropriate cases, the court may enter suitable protective orders to safeguard legitimate interests, such as trade or business or national-security secrets or information whose disclosure might cause undue injury or embarrassment. (Rule 24.6)

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

11. Further preliminary work. There are numerous matters which the Working Group must address or carry out soon. This further preliminary work includes these issues:

- (i) Is anything missing or defective within this structure?
- (ii) Gathering additional material:
 - (a) Relevant case law of the European Court of Justice on Evidence Regulation;

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- (b) Relevant domestic case law on The Hague Evidence Convention;
- (c) Relevant Strasbourg (European Court of Human Rights) case law on evidence;
- (d) and taking into account any other international documents, for example, the 2010 IBA Rules on the Taking of Evidence in International Arbitration ⁵

NHA FGI and colleagues within the working group

Nov 18, 2014

⁵ Accessible at:

http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

as well as the commentaries to those Rules.