



FR

CONSEIL DE DIRECTION
98^{ème} session
Rome, 8-10 mai 2019

UNIDROIT 2019
C.D. (98) 6 (a)
Original: anglais
mars 2019

**Point n°6 de l'ordre du jour: Procédure civile transnationale –
formulation de règles régionales**

(préparé par le Secrétariat)

<i>Sommaire</i>	<i>Mise à jour sur les développements relatifs au projet conjoint ELI/UNIDROIT pour l'élaboration de règles régionales basées sur l'adaptation des Principes ALI/UNIDROIT</i>
<i>Action demandée</i>	<i>Le Conseil de Direction est invité à prendre note de l'avancement des travaux depuis sa dernière session</i>
<i>Mandat</i>	<i>Programme de travail 2014-2016 reconduit par le Programme de travail 2017-2019</i>
<i>Degré de priorité</i>	<i>Elevé</i>
<i>Documents connexes</i>	<i>UNIDROIT 2017 – C.D. (96) 7; UNIDROIT 2018 – C.D. (97) 2</i>

I. HISTORIQUE DU PROJET

1. Les Principes ALI/UNIDROIT de procédure civile transnationale ont été préparés par un Groupe de travail conjoint *American Law Institute (ALI)/UNIDROIT* et adoptés par le Conseil de Direction d'UNIDROIT lors de sa 83^{ème} session (Rome, 19-21 avril 2004 – le texte est disponible sur le site: <https://unidroit.org/french/principles/civilprocedure/ali-unidroitprinciples-f.pdf>). Ils visent à réduire les effets des divergences entre les systèmes juridiques pour ce qui concerne les litiges portant sur des opérations commerciales transnationales. Leur but consiste à proposer un modèle universel de procédure qui respecte les éléments essentiels d'une procédure équitable. Ils étaient accompagnés d'un ensemble de "Règles de procédure civile transnationale", qui n'étaient pas formellement adoptées par UNIDROIT ou ALI, mais constituaient "un modèle rédigé par les Rapporteurs de mise en œuvre des Principes, fournissant plus de détails et illustrant concrètement l'application des Principes". Les Règles pourraient être considérées pour adoption ou "pour une adaptation selon les différents systèmes juridiques", et avec les Principes peuvent être prises en considération comme un "modèle pour la réforme des législations internes".¹

¹ Etude des Rapporteurs, *Rules on Transnational Civil Procedure, Introductory Note*, dans ALI/UNIDROIT Principles of Transnational Civil Procedure, Cambridge University Press, 2006, p. 99.

2. Envisageant de reprendre des travaux dans ce domaine, UNIDROIT a concentré ses efforts sur la promotion et la mise en œuvre des Principes ALI/UNIDROIT à travers l'élaboration de règles régionales basées sur l'adaptation des Principes. Dans ce contexte, la possibilité d'un projet conjoint d'élaboration de règles européennes de procédure civile a été discutée dans le cadre d'une coopération institutionnelle avec l'Institut de droit européen (*European Law Institute* – ELI). Le projet conjoint ELI/UNIDROIT a été considéré comme le moyen de fournir un outil utile pour éviter une évolution fragmentaire et désordonnée du droit procédural civil européen. En même temps, du point de vue d'UNIDROIT, il a été considéré comme une promotion des Principes ALI/UNIDROIT et comme une première tentative de développement d'autres projets régionaux adaptant les Principes ALI/UNIDROIT aux spécificités des cultures juridiques régionales, ouvrant la voie à la rédaction d'autres règles régionales. En 2014, UNIDROIT et l'ELI ont conclu un Protocole d'accord portant spécifiquement sur le projet sur la procédure civile, qui identifiait clairement les rôles et responsabilités de chaque partie. Un Comité pilote a été constitué, co-présidé par la Présidente de l'ELI et le Secrétaire Général d'UNIDROIT, et composé de représentants des deux organisations.²

3. Le projet a été autorisé par l'Assemblée Générale d'UNIDROIT à sa 72^{ème} session (Rome, 5 décembre 2013) et inclus dans le Programme de travail de l'Institut pour la période triennale 2014-2016 (voir UNIDROIT 2013 - AG (72) 9, 8, Paragraphes 26 à 28). A sa 73^{ème} session (Rome, 11 décembre 2014), l'Assemblée Générale d'UNIDROIT, sur proposition du Conseil de Direction, à sa 93^{ème} session (Rome, 7-10 mai 2014), a décidé d'augmenter le degré de priorité de faible à moyen (UNIDROIT 2014 - AG (73) 9, paragraphe 30). L'Assemblée Générale d'UNIDROIT à sa 74^{ème} session (Rome, 1^{er} décembre 2016), sur proposition du Conseil de Direction à sa 95^{ème} session (Rome, 18-20 mai 2016), a approuvé la poursuite du projet dans le cadre du Programme de travail de l'Institut 2017-2019.

II. STRUCTURE ET DEVELOPPEMENT DU PROJET

4. La rédaction des Règles et Commentaires a été confiée à des Groupes de travail (GTs) chargés d'élaborer des règles régionales sur chacun des principaux sujets couverts par les Principes ALI/UNIDROIT (en y ajoutant une partie sur les Procédures d'appel). Un total de huit Groupes de travail a été créé ("Accès à l'information et preuve"³; "Mesures provisoires et conservatoires"⁴; "Signification et notification des documents"⁵; "*Lis pendens et res judicata*"⁶; "Obligations des parties

² Outre les Co-présidents Diana Wallis, alors Présidente de l'ELI et José Angelo Estrella Faria, alors Secrétaire Général d'UNIDROIT: John Sorabji (Conseiller juridique principal auprès du Lord Chief Justice and Master of the Rolls) et Remo Caponi (Université de Florence) pour l'ELI; Anna Veneziano (Secrétaire Générale adjointe d'UNIDROIT) et Rolf Stürner (Université de Freiburg et ancien Co-rapporteur pour les Principes ALI/UNIDROIT) pour UNIDROIT.

³ Neil Andrews (Clare College, Université de Cambridge) (Co-rapporteur); Fernando Gascón Inchausti (Université Complutense de Madrid) (Co-rapporteur); Laura Ervo (Université d'Örebro); Frédérique Ferrand (Université Jean Moulin Lyon 3); Victória Harsági (Université catholique Pázmány Péter, Budapest); Michael Stürner (Université de Constance).

⁴ Xandra Kramer (Université Erasmus, Rotterdam, Co-rapporteur depuis août 2016); Remo Caponi et John Sorabji (membres de soutien depuis septembre 2016); Torbjörn Andersson (Université d'Uppsala); Fernando de la Mata (Ecole de droit ESADE Barcelone, Baker & McKenzie); Alan Uzelac (Université de Zagreb). Anciens Co-rapporteurs Neil Andrews et Gilles Cuniberti (Université de Luxembourg).

⁵ Astrid Stadler (Université de Constance) (Co-rapporteur); Eva Storskrubb (Université d'Uppsala) (Co-rapporteur); Marco De Cristofaro (Université de Padoue); Emmanuel Jeuland (Université Paris 1 Panthéon-Sorbonne); Wendy Kennett (Université de Cardiff); Dimitrios Tsikrikas (Université d'Athènes).

⁶ Frédérique Ferrand (Université Jean Moulin Lyon 3, Co-rapporteur); Burkhard Hess (Professeur, Directeur, Institut Max Planck de droit procédural et règlementaire international et européen, Luxembourg, Co-rapporteur); Neil Andrews (Clare College, Université de Cambridge); Alexander Arabadjiev (Juge, Cour européenne de justice); Marco De Cristofaro (Université de Padoue); Tania Domej (Université de Zürich); Fernando Gascón Inchausti (Universidad Complutense, Madrid); Kalliopi Makridou (Université Aristote, Thessalonique); Jarkko Männistö (Juriste, Finlande); Karol Weitz (Université de Varsovie).

et des avocats”⁷; “Parties et actions collectives”⁸; “Jugements”⁹; “Frais de procédure”¹⁰; et “Procédures d’appel”¹¹). Les Groupes de travail ont commencé à fonctionner de façon successive, de 2014 à 2018, pour une bonne gestion du projet et afin de permettre à des membres des premiers Groupes de participer aux autres Groupes, permettant ainsi de tirer parti au mieux de leur expérience. Une ample représentation de différents systèmes juridiques européens au sein des GTs ainsi que la participation d’intervenants de langue anglaise et de langue française dans chaque Groupe était recommandée. Les Groupes de travail ont été chargés de la préparation de Règles et de Commentaires qui étaient ensuite discutés durant les réunions plénières biennuelles du Comité pilote et par les Rapporteurs (et membres) des GTs accueillis par les deux organisations. Enfin, un “Groupe sur la Structure”¹² transversal avec la participation des membres du Comité pilote a été constitué en vue de pourvoir à la consolidation des textes et à la coordination substantielle et linguistique des Dispositions et des Commentaires. Dès le début, les Réunions Plénières Annuelles du projet ont bénéficié de la participation d’un certain nombre d’observateurs institutionnels, en particulier la Conférence de La Haye de droit international privé (HCCH), d’institutions européennes (la Commission européenne, le Parlement européen et la Cour de justice de l’Union européenne), d’associations professionnelles et d’instituts de recherche ainsi que l’American Law Institute (ALI). Enfin, il a été décidé de créer une liste de conseillers issus du milieu universitaire et de la pratique juridique, au nombre desquels des membres du Conseil de Direction d’UNIDROIT.

III. ACTIVITES DU PROJET EN 2018 ET 2019

5. Au cours de l’année 2018, les Co-rapporteurs de tous les Groupes de travail et les membres des Groupes de travail actifs se sont réunis avec le Comité pilote et le Groupe sur la Structure à Rome les 9-10 avril 2018. La réunion a abordé les textes à un stade de rédaction avancé sur les “Jugements”, les “Parties et les “Actions collectives” et les “*Lis Pendens et Res Judicata*”, ainsi que les premiers projets des Groupes de travail récemment créés sur les “Frais de procédure” et les “Procédures d’appels”. Une partie des travaux en cours a été présentée au Conseil de Direction d’UNIDROIT lors de sa 97^{ème} session du 2 au 4 mai 2018 (voir C.D. (97) 8 a). Le 6 septembre 2018, le projet ELI/UNIDROIT a été discuté lors de la Conférence annuelle de l’ELI 2018 à Riga, lors d’une session co-présidée par Diana Wallis et Anna Veneziano, avec la participation de Xandra Kramer, John Sorabji et Emmanuel Jeuland. Enfin, une conférence sur le projet s’est tenue les 26 et 27 novembre 2018 à Trèves, avec la participation de nombreux membres du projet et de commentateurs externes. La conférence, accueillie par l’Académie de droit européen (ERA), était articulée autour de trois thèmes de discussion sur des points centraux du projet, à savoir “Les parties, les actions collectives et le financement”, “La procédure civile, les défis posés par les technologies modernes et l’intelligence artificielle” et “Structure des procédures civiles - vers une loi type cohérente”, avec une session introductive qui a offert un aperçu de divers aspects du projet présenté par les Groupes de

⁷ C.H.(Renzo) van Rhee (Université de Maastricht, Co-Rapporteur); Alan Uzelac (Université de Zagreb, Co-Rapporteur); Emmanuel Jeuland (Université Paris 1 Panthéon-Sorbonne); Bartosz Karolczyk (DZP, Varsovie); Walter Rechberger (Université de Vienne); Elisabetta Silvestri (Université de Pavie); John Sorabji (Conseiller juridique principal auprès du Lord Chief Justice and Master of the Rolls); Magne Strandberg (Université de Bergen).

⁸ Emmanuel Jeuland (Université Paris I Panthéon Sorbonne; Co-rapporteur); Astrid Stadler (Université de Constance, Co-rapporteur); Vincent Smith (British Institute for International and Comparative Law (BIICL)); Ianika Tzankova (Université de Tillburg); Istvan Varga (Faculté de droit ELTE), Stefaan Voet (Centre de droit public, Louvain).

⁹ Chiara Besso (Juge, Cour de cassation, Italie, Co-rapporteur), Christoph Kern (Université de Heidelberg, Co-rapporteur), Thomas Sutter-Somm (Université de Bâle), Laura Ervo, Natalie Fricero (Université de Nice), Andrew Higgins (Université d’Oxford).

¹⁰ Paul Oberhammer (Université de Vienne, Co-rapporteur), Eva Storskrubb et Wendy Kenneth.

¹¹ Frédérique Ferrand, Christoph Kern (Co-Reporters); Fernando Gascón Inchausti, Magne Strandberg.

¹² Loïc Cadiet (Université Paris 1; Président, Association internationale de droit processuel (IAPL), Co-rapporteur); Xandra Kramer (Co-rapporteur) et John Sorabji et Rolf Stürner, membres du Comité pilote. Le Comité pilote a invité Frédérique Ferrand et Emmanuel Jeuland à se joindre aux travaux du Groupe sur la Structure pour la version française de l’instrument.

travail. Pour plus d'informations sur ces événements et sur les conférenciers et les participants, voir le Rapport annuel (C.D. (98) 2).

6. La réunion annuelle finale du Comité pilote avec les Co-rapporteurs de tous les Groupes de travail s'est tenue à Rome les 25 et 26 février 2019. La réunion a commencé par examiner l'état actuel du projet consolidé sur la base du texte fourni par le Groupe de travail sur la "Structure", et a ensuite abordé les principales questions qui étaient encore à l'étude. La discussion a porté sur les documents révisés de cinq Groupes de travail, sur la structure mise à jour des Règles, sur une partie introductive contenant les règles générales et un ensemble supplémentaire de règles sur les pièces de procédure élaboré par le Groupe sur la Structure. La réunion plénière a ensuite examiné l'état d'avancement des projets sur les "Frais de procédure", les "Jugements" et les "Procédures d'appels", avec des présentations et des discussions fructueuses pour faciliter leur mise au point. Lors de la réunion précédant la Conférence, le Comité pilote et le Groupe sur la Structure ont discuté des actions à prendre et du calendrier pour l'adoption des textes définitifs en anglais et en français, pour l'approbation par les deux organisations promotrices et pour leur publication (pour le calendrier, voir ci-dessous, paragraphe VI). Il a également été convenu d'inviter les Professeurs Frédérique Ferrand et Emmanuel Jeuland à faire partie du Groupe sur la Structure, pour coordonner et préparer la version consolidée des Règles en français, en coopération avec le Professeur Loïc Cadiet. Il a en outre été convenu que le Groupe sur la Structure serait soutenu dans la préparation de la version française des Règles et des Commentaires par le Secrétariat d'UNIDROIT.

7. Le projet ELI/UNIDROIT a également été discuté lors d'une conférence organisée par la *Wissenschaftliche Vereinigung für Internationales Verfahrensrecht*, qui s'est tenue à Hambourg à la Faculté de droit Bucerius du 13 au 16 mars 2019, ouverte par les Professeurs Burkhard Hess, Katharina Boele-Woelki et Karsten Thorn. Lors de ce séminaire spécial, des présentations ont été faites par les Professeurs Rolf Stürner et Xandra Kramer, suivies d'une table ronde présidée par le Professeur Paul Oberhammer avec la participation des Professeurs Beate Czerwenka, Gottfried Hammer et Roman Poseck.

IV. LA STRUCTURE DES REGLES ET LE PROJET DE TEXTE CONSOLIDE (MARS 2019)

8. Comme indiqué ci-dessus, un Groupe de travail transversal chargé de la Structure du projet a été mis en place avec pour mandat de "coordonner les projets de nouvelles règles dans un ensemble fonctionnel" et de "veiller aux questions linguistiques". Chapeautant les huit Groupes de travail, le Groupe sur la Structure a pour tâche d'assurer la cohérence de la portée et du contenu ainsi que de la terminologie et du style rédactionnel, et de maintenir un niveau de détail comparable pour l'ensemble des Règles en tenant compte de la différence des sujets traités. Le Groupe sur la Structure est en outre chargé d'assurer la cohérence de la version française des Règles et Commentaires. Enfin, il a également la responsabilité d'adapter les projets de règles existants lorsque les questions sont communes à plus d'un Groupe de travail, d'élaborer les règles manquantes sur la direction de l'instance et la structure des procédures et d'examiner l'opportunité de proposer des règles alternatives dans les cas où les systèmes présentent une divergence marquée ou afin de tenir compte de différents objectifs de politique intérieure.

9. Le Groupe sur la Structure a élaboré une version consolidée regroupant les contributions des trois premiers Groupes de travail (Signification et notification des documents, Information et preuve et Mesures provisoires) qui a été présentée au Conseil de Direction pour commentaires à sa 97^{ème} session en 2017 (C.D. (97) 8 a)). Pour la présente session du Conseil de Direction, le Groupe sur la Structure a élaboré un projet consolidé pratiquement final de toutes les dispositions en anglais, qui a été discuté lors de la dernière Session Plénière du projet en février 2019 et affiné sur la base de cette discussion. Ce document se trouve en ANNEXE.

10. Le document contient:

1) Le Projet consolidé du Groupe de travail sur la "Structure" du 31 mars 2019, présentant dans les grandes lignes la structure de l'instrument et les Règles jusqu'aux Parties I à V (Dispositions générales; Parties; Direction de l'instance; Introduction de l'instance; Préparation de l'audience finale) ainsi que les Parties VI (Signification et notification des documents de l'instance), VII (Accès à l'information et la preuve) et X (Mesures provisoires et conservatoires). Ces Règles sont le résultat des projets révisés fournis par les Groupes de travail et par le Groupe sur la Structure, en coopération avec les Co-rapporteurs, mais elles contiennent également des dispositions relatives à l'introduction des demandes et à la préparation de l'audience finale qui ont été élaborées par le Groupe sur la Structure. Bien que finalisées, les Règles peuvent encore faire l'objet de révisions et d'ajustements mineurs en vue d'assurer leur cohérence avec les parties non consolidées (par exemple, avec les règles relatives aux Frais de procédure) et, dans une certaine mesure, avec la Partie générale.

2) Les contributions finalisées des Groupes de travail qui n'ont pas encore été consolidées, à savoir la Partie VIII Section 1 (Jugements) et Section 2 (Effets des jugements – *lis pendens* et *res judicata*) ainsi que la Partie XI (Actions collectives). Ces Règles ont été finalisées par les Groupes de travail respectifs et ont fait l'objet de discussions approfondies au cours des réunions sur le Projet, mais elle doivent encore être révisées afin d'en assurer la coordination complète avec l'ensemble.

3) Les Règles rédigées par le Groupe de travail sur les Procédures d'appel figurant dans la Partie IX et discutées lors de la dernière Session Plénière en février 2019. Ces Règles, bien qu'elles soient presque finalisées, nécessitent des contributions supplémentaires de la part du Groupe de travail avant d'être revues par le Groupe sur la Structure.

11. Il convient de noter qu'une partie sur les Frais de procédure (Partie XII) sera ajoutée. Le Groupe de travail sur les Frais de procédure a élaboré un projet avancé de Règles et de Commentaires, déjà examiné lors de la dernière Réunion Plénière du projet à Rome, qui est toutefois encore sujet à modifications et n'a pas été inséré dans le présent document.

12. Suivant le modèle des Principes ALI/UNIDROIT, les Règles sont accompagnées de Commentaires qui sont déjà disponibles pour toutes les parties du projet consolidé. Des travaux supplémentaires sont toutefois nécessaires pour assurer un produit coordonné et cohérent, en harmonie avec les modifications de la structure et du contenu des Dispositions. C'est la raison pour laquelle le projet consolidé figurant en annexe ne contient que les Dispositions.

13. Enfin, dès le début, la plupart des Groupes de travail ont rédigé leur Règles non seulement en anglais, mais aussi dans plusieurs langues dont le français. Cela a été fait expressément pour bénéficier d'une discussion multilingue, ce qui était important pour une expression linguistique et un contenu cohérents, notamment par rapport au texte anglais. L'instrument final sera rédigé en anglais et en français. Afin d'assurer la coordination des deux versions linguistiques des Règles et la traduction de tous les Commentaires en français, le Comité pilote a invité Frédérique Ferrand et Emmanuel Jeuland à se joindre aux travaux du Groupe sur la Structure pour la préparation de la version française, comme indiqué précédemment. Le Secrétariat d'UNIDROIT coopérera avec eux, notamment pour la traduction des Commentaires.

V. ACTIVITES PREVUES ET ACHEVEMENT DU PROJET

14. Compte tenu des travaux qui restent à accomplir, c'est-à-dire élaborer un texte coordonné des Dispositions et des Commentaires en anglais et en français, tant du point de vue substantiel que

linguistique, et de la nécessité de combler les lacunes restantes, un délai prompt et raisonnable a été convenu avec les Rapporteurs du projet et avec l'ELI pour l'achèvement de cet instrument. Le texte final doit être approuvé par les organes compétents des deux organisations en 2020.

15. Lors de la prochaine Conférence de l'Assemblée générale de l'ELI, qui se tiendra à Vienne du 4 au 6 septembre 2019, le projet de texte finalisé des Règles en anglais sera présenté pour commentaires aux membres de l'ELI et en particulier aux membres du Comité consultatif du projet.

16. Un ensemble consolidé finalisé du projet de Règles et de Commentaires en anglais devrait être soumis début 2020 au Conseil de l'ELI, et simultanément aux membres du Conseil de Direction d'UNIDROIT en format électronique. L'instrument finalisé, en anglais et en français, sera soumis au Conseil de Direction d'UNIDROIT en mai 2020 pour approbation.

17. A cette fin, le Secrétariat continuera à coopérer avec l'ELI et à soutenir les travaux du Comité pilote et du Groupe sur la Structure en vue de la finalisation de l'instrument jusqu'à son approbation et sa publication (la publication fera l'objet d'un accord de libre accès financé par une subvention obtenue par l'ELI). Cette activité de soutien comprendra des tâches supplémentaires, comme la gestion de l'exemplaire original du projet consolidé et la coopération à la traduction des Commentaires en français. Le Secrétariat participera également à des événements de promotion qui seront pour la plupart financés par la subvention obtenue par l'ELI.

VI. ACTION DEMANDEE

18. *Le Conseil de Direction est invité à prendre note de l'avancement des travaux accomplis pour la réalisation du projet sur la procédure civile transnationale – formulation de règles régionales.*

TRANSNATIONAL CIVIL PROCEDURE - FORMULATION OF REGIONAL RULES

DRAFT ELI – UNIDROIT Rules of Civil Procedure

This document includes:

**Consolidated Draft of the Working Group on “Structure” 31 March 2019
(with general outline of instrument - fully consolidated up to parts I to V
and parts VI, VII and X)¹**

**Finalised drafts of Working Groups not yet consolidated
(part VIII, Sections 1 and 2; part XI)²**

**Draft by the Working Group on “Appeals”
(part IX)³**

¹ These rules will be subject to minor revisions and adjustments due to the need to coordinate with rules in the non-consolidated part, e.g. Costs).

² These rules were finalized by the respective Working Groups, but still need to be revised by the Structure Group for the purpose of coordination.

³ These rules were discussed at the latest Plenary Session and revised by the Working Group, but need further input by the Working Group.

ELI-UNIDROIT EUROPEAN RULES OF CIVIL PROCEDURE

Draft Outline

PREAMBLE

PART I – GENERAL PROVISIONS SECTION

SECTION 1 – Scope

SECTION 2 – Principles

- A. Cooperation**
- B. Proportionality**
- C. Settlement**
- D. Right to be heard**
- E. Defence**
- F. Oral, written and public proceedings**
- G. Languages, interpretation and translation**

SECTION 3 – Proceedings

- A. Commencement, termination and scope**
- B. Facts, evidence and applicable law**

PART II - PARTIES

SECTION 1 – General Part

SECTION 2 – Special Part

- A. Multiple Parties**
 - 1. Joinder of parties**
 - 2. Intervention and Third Parties**
- B. Substitution and Succession of Parties**

SECTION 3 – Cross Border Issues

PART III – CASE MANAGEMENT

PART IV – COMMENCEMENT OF THE PROCEEDINGS

SECTION 1 – Pre-commencement procedural duties

SECTION 2 – Commencement and pleadings

- A. Statement of claim**
- B. Joint application**

PART V – PROCEEDINGS UNTIL THE FINAL DECISIONS

PART VI – SERVICE AND DUE NOTICE OF PROCEEDINGS

SECTION 1 – General part

SECTION 2 – Responsibility for and methods of service

- A. General Provisions
- B. Methods of Service

SECTION 3 – Cross border issues

- A. In the European Union
- B. Outside the European Union

PART VII – ACCESS TO INFORMATION AND EVIDENCE

SECTION I – General part

- A. General Provisions on Evidence
- B. Presentation of Evidence
- C. Management and Evaluation of Evidence

SECTION II – Access to evidence orders

SECTION III – Types of evidence

- A. Documents
- B. Testimony
- C. Examination of Parties
- D. Expert Evidence
- E. Judicial Inspection

SECTION IV – Cross-border issues

- A. In the European Union
- B. Outside the European Union

PART VIII - JUDGMENTS/*RES JUDICATA* AND *LIS PENDENS*

SECTION 1 – Types of Judgment

- A. General part
- B. Default judgments and judicial settlements

SECTION 2 – Effects of Judgment

- A. General part
- B. *Lis pendens* and related actions
- C. *Res judicata*

PART IX – MEANS OF REVIEW

SECTION 1 – Appeal

SECTION 2 – Motion for revision

PART X – PROVISIONAL AND PROTECTIVE MEASURES

SECTION 1 – General part

SECTION 2 – Special part

- A. Protective and Regulatory Measures
 - 1. Asset Preservation
 - 2. Regulatory Measures
- B. Evidence Preservation

C. Interim Payment

SECTION 3 – Cross border issues

PART XI – COLLECTIVE REDRESS

A. General part

B. Admissibility of Collective Redress

C. Case Management of Collective Redress Actions

D. Settlements in Collective Redress Actions Already Commenced

E. Collective Redress Judgments

F. Collective Settlements outside Collective Actions

G. Cross border issues

1. Within the European Union

2. Outside the European Union

H. Costs, Expenses and Funding

PART XII – COSTS (To be added)

DRAFT

PART I – GENERAL PROVISIONS

SECTION 1 – Scope

Rule 1. Scope

- (1) These Rules apply to the resolution of domestic and cross-border disputes in civil and commercial matters whatever the nature of the court.
- (2) These Rules do not apply to:
 - (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
 - (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
 - (c) social security;
 - (d) arbitration;
 - (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
 - (f) wills and succession, including maintenance obligations arising by reason of death.
- (3) These Rules apply to all claims irrespective of the number of parties or causes of action. They may also be applied where there are multiple causes of action, including those which fall within rule 1(2), where the principal matters in dispute are within the scope of rule 1(1).

SECTION 2 – Principles

A. Co-operation

Rule 2[3]. General

Parties, their lawyers and the Court must cooperate to promote the fair, efficient and speedy resolution of the dispute.

Rule 3[4]. Role of the parties and their lawyers

Parties and their lawyers must:

- (a) take reasonable and appropriate steps to settle disputes amicably;
- (b) contribute to the proper management of the proceedings;
- (c) present facts and evidence and assist in the proper determination of the facts;
- (d) assist the Court in the determination of the applicable law;
- (e) act in good faith and avoid procedural abuse when dealing with the Court and other parties.

Rule 4[5]. Role of the Court

The Court is responsible for active and effective case management. Throughout proceedings it shall monitor whether parties and their lawyers comply with their responsibilities under these Rules.

B. Proportionality

Rule 5[6]. Role of the Court

- (1) The Court must ensure that the dispute resolution process is proportionate.
- (2) In determining whether a process is proportionate the Court must take account of the nature, importance and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice.

Rule 6[7]. Role of the parties and their lawyers

Parties and their lawyers must co-operate with the Court to promote a proportionate process of dispute resolution.

Rule 7[8]. Proportionality of sanctions

Sanctions for breach of any of the rules must be 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.

[Rule 8[9]. Proportionality of costs]

C. Settlement

Rule 9[10]. Role of the parties and their lawyers

- (1) Parties must co-operate in seeking to resolve their dispute consensually, both before and after proceedings begin.
- (2) Lawyers must inform the parties about the availability of consensual dispute resolution methods, assist them in selecting the most suitable method, and, where appropriate, encourage its use. They must ensure that they use any mandatory method.
- (3) Parties may ask the Court to render a settlement agreement enforceable.
- (4) When a consensual settlement as a whole cannot be reached, parties must take all reasonable opportunities to reduce the number of contested issues prior to adjudication.

Rule 10[11]. Role of the Court

- (1) The Court must facilitate settlement at any stage of the proceedings. If necessary for furthering the settlement process, it may order the parties to appear in person.
- (2) Settlement must be specifically considered in the preparatory stage of proceedings and at case management conferences.
- (3) The Court must inform the parties about the availability of different types of settlement methods. It may suggest or recommend the use of specific ADR methods.
- (4) The Court may participate in settlement attempts and assist the parties in reaching a consensual solution. It may also assist with the drafting of settlement agreements.

(5) Where a judge mediates during a settlement process and receives information in the absence of one of the parties, that judge must not decide the case.

D. Right to be heard

Rule 11[12]. Fair opportunity to present claim and defence

The Court must manage proceedings to ensure that parties have a fair opportunity to present their case, to respond to their respective claims and defences, and to any Court orders or matters raised by the Court.

Rule 12[13]. Basis of Court Decisions

(1) In reaching any decision in proceedings the Court must consider all factual and legal issues advanced by the parties. The Court's decisions must specifically set out the reasoning concerning substantial issues.

(2) The Court must not base its decisions on issues that parties have not had an opportunity to address.

Rule 13[14]. Communications with the Court

(1) The Court must not communicate with a party in the absence of the other parties. This prohibition does not apply to without-notice proceedings or to routine procedural administration.

(2) All communications by parties with the Court must be provided to all other parties at the time when they are made to the Court.

(3) When the Court becomes aware of a failure to comply with this requirement, it requires the parties to be provided promptly with the content of the communication.

E. Defence

Rule 14[15]. Self-representation and mandatory representation

Except when legal representation is required by law, parties have a right to represent themselves in proceedings.

Rule 15[16]. Representation and assistance in Court

(1) Parties may engage a lawyer of their own choice. They may do so if they choose to be represented by a lawyer and when they are required by law to be represented by a lawyer. This right includes the right to representation by a lawyer admitted to practice in the forum and active assistance before the Court of a lawyer admitted to practice elsewhere.

(2) Parties may, where the law permits it, be represented or assisted in Court by any other individual or organisation than a lawyer.

(3) When representing or assisting a party a lawyer's professional independence must be respected by the Court. This includes ensuring that lawyers are able to fulfil their duty of loyalty to their client and maintain client confidentiality.

Rule 16[17]. Hearing Parties

- (1) Parties have the right to be heard in person by the Court.
- (2) The Court may always hear parties in person.

F. Oral, written and public Proceedings

Rule 17[18]. Public proceedings

- (1) Hearings and court decisions, including their reasoning, must, as a general rule, be public.
- (2) The Court may order the proceedings, or parts thereof, especially oral hearings, to be in private for reasons of public policy, including national security, privacy, or professional secrets, including business confidentiality, or in the interests of the administration of justice.
- (3) Judgments and their reasoning are accessible to the public to the extent that the proceedings are publicly open. When hearings have been in private, publicity of the judgment may be limited to its operative part.
- (4) Court files and records shall be publicly accessible at least to persons with a legal interest in them and to those making a legitimate inquiry.
- (5) The identity of parties, witnesses and other natural persons mentioned in the judgment may be private where strictly necessary.

Rule 18[19]. Oral and Written Proceedings

- (1) Pleadings and applications must initially be presented in writing.
- (2) The Court may order parties to present oral argument and carry out the oral examination of witnesses or experts. Where a party requests it, the Court must permit oral argument, and may permit oral examination.
- (3) The Court may order witnesses and experts to submit written statements.
- (4) In so far as appropriate, proceedings may be conducted using any available means of information and communication technology.

G. Languages, interpretation and translation

Rule 19[20]. Language of the Court

Proceedings, including documents and oral communications, must as a general rule be in a language of the Court. The Court may permit all or part of the proceedings to be conducted in other languages where doing that would not prejudice the parties or the right to a public hearing.

Rule 20[21]. Interpretation and translation

- (1) Interpretation or translation must be provided by the Court to parties who are not sufficiently competent in the language used in the proceedings. The right to interpretation includes the right of parties with hearing or speech impediments to receive appropriate assistance. Such interpretation and translation shall ensure the proceedings are fair by enabling the parties to participate in them effectively.

ELI – UNIDROIT Rules of Civil Procedure

(2) Where documents are translated, the parties may agree, or the court may order, that such translation be limited to such parts of the documents as necessary to ensure the proceedings are fair and that the parties are able to participate effectively in them.

SECTION 3 – Proceedings

A. Commencement, termination and scope

Rule 21[22]. Commencement and termination

(1) Proceedings may only be instituted by a party. The Court cannot institute proceedings on its own motion.

(2) A party may terminate proceedings in whole or in part by withdrawal, admission of the claim or settlement.

Rule 22[23]. Scope

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

(2) The Court must decide on and only on the relief claimed

B. Facts, evidence and applicable law

Rule 23[24]. Facts

(1) The parties must put forward such facts as support their claim or defence. The Court may invite the parties to clarify or supplement these facts.

(2) The Court must not consider facts not introduced by the parties.

(3) The Court may consider such facts not specifically addressed by a party but that are necessarily implied by matters of fact put forward by the parties or which are contained within the case file. It may only do so if they are relevant to a party's claim or defence and the parties have been given a reasonable opportunity to respond.

Rule 24[25]. Evidence

(1) Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions. Substantive law determines the burden of proof.

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

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

(4) Each party has, in principle, a right to access all forms of relevant, non-privileged and reasonably identified evidence. In so far as appropriate, parties and third persons must contribute to disclosure and production of evidence. It is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties.

Rule 25[26]. Applicable law

- (1) The parties may present legal arguments supporting their claim or defence.
- (2) The Court must determine the correct legal basis for its decision. This includes matters determined on the basis of foreign law. It may only do so having provided the parties a reasonable opportunity to present their arguments on the applicable law.
- (3) Where parties are free to dispose of their rights, they may agree on the legal basis of the claim or on specific issues in the claim. Such an agreement must be explicit and must be set out in the pleadings. The agreement binds the Court.

PART II – PARTIES

SECTION 1 – General Part

Rule 26[1.] The Parties to the Action

- (1) Parties to a civil action are all the persons by and against whom the action is being brought.
- (2) Anybody who has the capacity to possess a right under substantive law may be a party in civil proceedings.

Rule 27[2]. Litigation Capacity of Natural Persons

- (1) Litigation capacity is the capacity to exercise rights in civil actions.
- (2) Anybody who has full capacity to exercise rights or obligations in their own name under substantive law shall be recognized as having litigation capacity.
- (3) Anybody not within the scope of paragraph (2) must be represented in proceedings by a representative according to the rules of the applicable law.

Rule 28[3]. Representation of Legal Persons

Legal persons and other entities which are parties must exercise their rights through the natural persons entitled to represent them according to the rules of substantive law.

Rule 29[4]. Proof of Representation

The court may at any time in the proceedings order the representative to prove the existence or scope of his or her power to act.

Rule 30[5]. Review ex officio

The court shall at all times in the proceedings ensure compliance with Rules 1 to 3 and make any appropriate order.

Rule 31[6]. Persons Entitled to Bring Actions

Persons having litigation capacity must bring actions in their own name and on the basis of their own substantive rights unless either the rules in Chapter X and Y or a rule of substantive law permits otherwise.

Rule 32[7]. Public Interest

Where permitted by law, an authorized person may, in the public interest, act as a main party or intervene in an action.

SECTION 2 – Special Part

A. Multiple Parties

1. Joinder of parties

Rule 33[8]. Voluntary Joinder of Parties

(1) An action may be brought by several claimants or against several defendants as joined parties if

- (a) their claims are closely connected, and
- (b) the court has jurisdiction with respect to all parties.

(2) The court may order separation of proceedings for the purpose of properly managing the action.

(3) Each of the joined parties acts on its own account. His or her acts or omissions in the proceedings shall not prejudice the other joined parties.

Rule 34[9]. Consolidation of Separate Actions

The court may order consolidation of separate actions pending before it for the purpose of properly managing the actions.

Rule 35[10]. Necessary Joinder of Parties

(1) An action must be brought by or against parties jointly where either the joint nature of the legal right or a rule of substantive law will require the judgment of the court to bind all of the joined parties in the same terms.

(2) A procedural act by one or more of the parties joined under this Rule shall affect the position of the other parties.

(3) In case of settlement, waiver of claim, or an admission, the consent of all of the joint parties is required.

2. Intervention and Third Parties

Rule 36[11]. Principal Intervention

Anyone not a party to the action who claims a right in the subject matter of that action, may bring a claim directly against one or more of the parties in the court in which the dispute is pending at first instance or, if the court so permits, on appeal.

Rule 37[12]. Voluntary Intervention in Support

(1) Anyone who has a legitimate interest in one party succeeding in an action between other parties may intervene in support of that party at any time before the end of the trial.

(2) The intervenor in support of a party shall not object to any procedural step already taken in the action. The intervenor may take all procedural steps in the proceedings which the supported party is allowed to take provided that they do not conflict with the procedural acts of the supported party.

Rule 38[13]. Notice by Voluntary Intervenors

(1) Anyone seeking to participate in an action as an intervenor must make an application to the court. Notice of the application shall be given to the parties. The notice shall state the basis of the application. The parties shall be heard concerning the intervention. The court may order the applicant and the parties to attend an oral hearing.

(2) An intervention does not suspend the proceedings unless the court otherwise orders.

Rule 39[14]. Third Party Notice

(1) A party may notify a person of the dispute if, in the event of that party being unsuccessful in the action, the party might have a claim against or be subject to a claim by that person.

(2) A notified third party shall become a party to the action unless the court, upon application orders otherwise.

(3) The third party notice must state the matter at issue and the reason for the measure being taken.

Rule 40[15]. Amicus Curiae

Submissions concerning important issues in the action may be received from individuals or entities with the consent of the court. The court may invite such a submission. The court shall consult the parties before giving consent or making an invitation.

B. Substitution and Succession of Parties

Rule 41[16]. Substitution and Succession

(1) At any time after commencement of the action the court must permit the substitution or the succession of one party by another person where the law requires.

(2) At any time after the commencement of the action the court may permit a substitution or the succession of one party by another person if appropriate and in the interest of the good administration of justice.

(3) The party substituting or succeeding to the claim shall take over the action as it stands unless the court otherwise orders.

SECTION 3 – Cross border issues

Rule 42[17]. Capacity of foreigners to be a party to the action

The capacity of foreign nationals or legal persons incorporated outside the forum state shall be assessed according to the law of the country of their nationality or the place where the legal person is incorporated.

Rule 43[18]. Litigation capacity

- (1) The litigation capacity of a foreign national shall be assessed according to the law of the country of his or her nationality.
- (2) A foreign citizen who lacks litigation capacity under the law of the country of his or her nationality, but has litigation capacity under the law of the forum state may undertake procedural steps on their own behalf.
- (3) The litigation capacity of a legal person incorporated outside the forum state shall be assessed according to the law of the place of incorporation.

PART III – CASE MANAGEMENT

Rule 44[1]. Careful Conduct of litigation by the Parties

The parties must present their claims, defences, factual allegations and offers of evidence as early and completely as possible and appropriate to careful conduct of litigation with a view to expedition of the proceeding.

Rule 45[2]. Control by the Court

At any stage of the proceeding the Court must monitor whether the parties and their lawyers comply with the requirements of careful conduct of litigation.

Rule 46[3]. Means of Case management

Where necessary for proper management of the case, the Court shall, in particular:

- (1) encourage the parties to take active steps to settle their dispute or parts of their dispute and, where appropriate, to use alternative dispute resolution methods;
- (2) schedule case management conferences;
- (3) determine the type and the form of the procedure;
- (4) set a timetable or procedural calendar with deadlines for the parties' procedural steps;
- (5) limit the number and length of future submissions;
- (6) determine the order in which issues should be tried and whether proceedings should be consolidated or split;
- (7) determine the separation of questions of jurisdiction, provisional measures and statutes of limitation for early decision upon special hearings;
- (8) address necessary amendments regarding the parties' proper representation, the consequences of changes related to the parties to litigation and the participation of third parties or other persons;
- (9) address amendments of the pleadings or offers of evidence in the light of the parties' contentions;
- (10) require a party's appearance in person or require a party's representative, who should be fully-informed of all matters relevant to the proceedings, to be present at a court hearing;
- (11) address the availability, admissibility, form, disclosure and exchange of evidence and, if adequate to the state of proceedings,
 - (a) determine the admissibility of evidence;
 - (b) order the taking of evidence.

Rule 47[4]. Case Management Orders

- (1) The Court may make any case management order on its own or a party's motion. When orders or decisions are made without prior consultation of the parties or on an *ex parte* basis, parties not previously heard may apply for reconsideration in a hearing or in written form.
- (2) If the parties agree on a management measure the Court shall not determine differently without good reason.
- (3) The Court may vary or repeal any case management order and shall monitor whether the parties comply with court orders.

Rule 48[5]. Sanctions of Non-Compliance with Rules or Management Orders

- (1) The court shall disregard allegation of facts, modifications of claims and defences, and offers of evidence that are introduced later than permitted by these rules including rules on amendment. Preclusion does not apply if the court could have taken notice of the party's failure or mistake and failed to ask in time for amendment.
- (2) As a rule, the Court may continue the proceedings and decide on the merits based on available facts and evidence.
- (3) The court may draw negative inferences as to facts, order that a party or its lawyer has to bear the costs of non-compliance, or in appropriate cases render an order for payment of a fine.

PART IV – COMMENCEMENT OF THE PROCEEDINGS

SECTION 1 – Pre-commencement procedural duties

Rule 49[1]. Duty to promote consensual resolution and effective management

- (1) Before the claim is issued, parties shall co-operate with each other in order to avoid unnecessary disputes and costs, and to facilitate the early consensual resolution of disputes and, where such a resolution is not possible, the management of later proceedings according to Rules 44-48.
- (2) In order to further the general duty set out in paragraph (1), parties may:
 - (a) provide each other with concise details of their potential claims or defences;
 - (b) clarify and, wherever possible, narrow the legal and factual issues in dispute; and
 - (c) identify relevant evidence so as to facilitate effective and early assessment of the merits of the parties' positions.
- (3) Parties may also:
 - (a) consider a possible timetable of the proceedings;
 - (b) estimate the potential cost of the proceedings;
 - (c) consider issues on statute of limitations, jurisdiction, provisional measures, and on any other procedural matter.

SECTION 2 – Commencement and pleadings

A. Statement of claim

Rule 50[1]. Submission of the Statement of Claim

The claimant must submit a statement of claim to the Court, as provided in Rule 51[2]. Notice shall be given as provided in Part VI.

Rule 51[2]. Contents of the Statement of Claim

- (1) The statement of claim must state, as a minimum, the designation of the specific court and of the parties, the relief sought and the grounds therefore.
- (2) The statement of claim shall:
 - (a) state the relevant facts, on which the claim is based, in reasonable detail as to time, place, participants and events
 - (b) describe with sufficient specification the available means of evidence to be offered in support of factual allegations;
 - (c) refer to the legal grounds that support the claim, including foreign law, in a way sufficient to permit the court to determine the legal validity of the claim;
 - (d) state the detailed remedy requested, including the monetary amount or the specified terms of any other remedy sought;
- (3) allege compliance with applicable conditions precedent to bringing a claim according to applicable national law, such as first resort to conciliation or mediation or to a formal demand concerning the claim.
- (4) If the claimant does not fully comply with the requirements of Rule 2(2), the court must invite the claimant to amend the statement. When the claimant shows good cause why it is not possible to provide details of relevant facts or specify the means of evidence but the statement of claim demonstrates that there is plausible dispute on the merits, the court should give due regard to the possibility that relevant detailed facts will develop later in the course of the taking of evidence.
- (5) Whenever possible, means of evidence on which the claimant relies, must be attached to the statement of claim, if feasible with a copy for the defendant and other parties.
- (6) In the statement of claim the claimant may apply for access to means of evidence under the custody or control of the defendant or third parties which are to be offered in support of the claimant's allegations.
- (7) The claimant may respond in the statement of claim to the defendant's defence as known from any exchange of arguments before commencement of proceedings. In this case Rule 3 applies to this part of the statement of claim.

Rule 52[3]. Statement of Defence and Counterclaims

- (1) The defendant must, within 30 consecutive days from the date of service of notice, answer the complaint. In appropriate cases, the court may properly extend the time for answer by court order.
- (2) The requirements of rule 51[2] concerning the details of statements of claims apply to the answer.
- (3) Failure explicitly or tacitly to deny an allegation may be considered an admission for the purpose of the proceeding and obviates proof thereof.

(4) In the answer the defendant must state which allegations are admitted or contested. A contested allegation is one that is either denied, neither admitted nor denied, or for which an alternative statement of facts is alleged. Where the defendant can neither admit nor deny reasons must be given in the defence why that is the case.

(5) If the defendant relies on an affirmative defence, the defendant must allege all facts sufficient to permit the court to determine the legal validity of the defence, and offer means of evidence in support of the factual allegations. Rule 51(2) (a)-(c) (3) and (4) applies. The claimant may answer affirmative defences.

(6) The defendant may state a counterclaim seeking relief from a claimant. The defendant may also state a claim against a co-defendant or a third person. Rule 51[2] applies. The parties addressed must answer these claims as provided in the previous provisions.

Rule 53[4]. Amendments

(1) A party, upon showing good cause to the court and notice to other parties, has a right to amend its claims or defences when the amendment does not unreasonably delay 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 new evidence obtained through exchange.

(2) Permission 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.

(3) The amendment must be served on the opposing party who has 30 consecutive days in which to respond, or such time as the court may order.

(4) 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.

Rule 54[5]. Withdrawal and admission of the claim

(1) With the consent of the defendant, the plaintiff may terminate the proceedings or any part of it by complete or partial withdrawal of the claim without prejudice. Unilateral withdrawal without prejudice is permitted only before the first hearing of the court. In any case the plaintiff has to bear the reasonable and adequate costs of the other party.

(2) The defendant may terminate the proceedings or any part of it by admission of the whole claim or a part of the claim. The claimant may file a request to obtain judgment.

B. Joint application [for party agreed proceedings]

Rule 55[1]. Contents of the joint application

(1) A joint application is a common document by which the parties submit to the Court their agreement according to Rule 25, and their respective claims and defences, the issues on which they disagree to be determined by the court and their respective arguments. It amounts to pleadings.

ELI – UNIDROIT Rules of Civil Procedure

- (2) In order to be admissible, the joint application must contain:
 - 1° the designation of the parties,
 - 2° the designation of the Court before which the action is brought;
 - 3° the relief sought, including the monetary amount or the specified terms of any other remedy sought;
 - 4° the relevant facts and the legal grounds, on which the action is based.
- (3) The joint application must describe the available means of evidence to be offered in support of factual allegations. Whenever possible, such evidence must be attached to the application.
- (4) It must be dated and signed by the parties.

Rule 56[2]. Related agreements

- (1) According to Article 25 (3), the parties may, if they have not done so before the commencement of the proceedings, bind the Court by determining the legal basis of their dispute or the specific issues in the dispute to which they intend to limit the proceedings.
- (2) In so far as procedural rules are subject to party disposition, parties may agree on any procedural matter, such as the jurisdiction of the court, provisional measures, and publicity of hearings.

Rule 57[3]. Amendments

- (1) Parties have a right to amend their joint application when the amendment does not unreasonably delay the proceedings. In particular, amendments may be justified to take account of events occurring after those alleged in earlier pleadings, or newly discovered facts or evidence that could not previously have been obtained through reasonable diligence.
- (2) Amendments are only admissible upon agreement of both parties.

Rule 58[4]. Termination of the proceedings

Before the proceedings are decided by the Court, parties may terminate them or any part of them by complete or partial joint withdrawal of the claim.

PART V – PROCEEDINGS UNTIL FINAL DECISIONS

Rule 59[5]. Case management hearings for preparation of a final hearing and determination

- (1) To prepare for a concentrated final hearing, the Court may hold an early case management hearing and if necessary further ones as the case progresses.
- (2) Case management hearings may be held in person. If appropriate the court may proceed in written form or use electronic means of communication.
- (3) In or immediately after the case management hearings, the Court should, upon consultation with the parties, set a timetable or procedural calendar with deadlines for the completion of the parties' procedural obligations and the possible date by which judgment will be given.

(4) Whenever appropriate, the Court may provide the parties with advice relevant to their preparation for the final hearing and decision. Such advice should be given in the early case management hearing. Orders for managing the case should be made in or immediately after the early case management hearing.

Rule 60[6]. Means of Case Management

(1) The Court may use all the means of case management as provided in Part III, Rule 3 (a), (c) – (f).

(2) Appropriate measures of disclosure of evidence and the taking of evidence before a final hearing are, particularly,

- (a) the production and mutual exchange of documents;
- (b) requests for written witness statements and their exchange;
- (c) the appointment of a court expert and expert conferences between a court-appointed expert and experts appointed by the parties, or between court-appointed experts;
- (d) requests for information from third parties, including public authorities;
- (e) personal inspection of evidence by the Court.

Rule 61[7]. Closing of Proceedings

(1) As soon as the Court is satisfied that both parties have had a reasonable opportunity to present their case, it will close the proceedings and refer the case to the final hearing. Once proceedings are closed, no further submissions, arguments or evidence are allowed.

(2) Only under very exceptional circumstances the Court, on its own motion or upon a party's well-founded request, may permit further statements and submissions.

Rule 62[9]. The Final Hearing

(1) So far as practicable, the final hearing should be concentrated. The concentrated final hearing may be adapted to the use of electronic communication techniques.

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

(3) Evidence not already received by the court in the stage between pleadings and final hearing may be presented in the final hearing. Ordinarily, at the final hearing, the Court should take oral evidence and evidence on those issues that are matters of serious dispute between the parties.

(4) The Court must properly manage the final hearing according to Part III, Rules 2 and 3. In particular, it must

- (a) determine the order in which issues shall be tried;
- (b) require a party's appearance in person or require a party's representative, who should be fully-informed of all matters relevant to the proceedings, to be present at the hearing;
- (c) order the taking of evidence.

(5) Documentary or other tangible evidence must have been disclosed to all other parties prior to the final hearing. Oral evidence may be taken only if notice has been given to all parties of the identity of the person to be examined and the substance of their intended evidence.

ELI – UNIDROIT Rules of Civil Procedure

(6) Parties must have the opportunity to make their final conclusions including statements on the results of the taking of evidence.

Rule 63[10]. Early Final Judgments

(1) The Court, on its own motion or on the application of a party, may give an early final judgment and:

- (a) determine whether the court lacks jurisdiction or competence to adjudicate the dispute or whether the claim is inadmissible due to a failure to comply with other procedural requirements; or
- (b) give a final judgment or a judgment on part of the claim for relief by only deciding questions of law based on non-contested facts, or on the basis that there has been a failure by the parties to assert necessary and relevant facts timeously, or there has been a failure to proffer means of evidence timeously; or
- (c) give a judgment upon not permitted or consented withdrawal of the claim or upon admission by the defendant.

(2) Where appropriate, Rules 5–7 apply.

Rule 64[11]. Judgments on Preliminary Procedural Issues or on Legal Issues on the Merits

In appropriate cases, the Court on its own motion or on the motion of a party may give a judgment determining preliminary procedural issues or a specific legal issue on the merits. Rules 5–7 apply as appropriate to the issue to be determined.

Rule 65[12]. Provisional Measures and Interim Payment Orders

The Court may order provisional measures or an interim payment orders as provided by Part X.

PART VI – SERVICE AND DUE NOTICE OF PROCEEDINGS

SECTION 1 – General part [due service and right to be heard]

Rule 66 [Rule 1]. Requirement of service and minimum content

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

Rule 67 [Rule 2]. Due information about the procedural steps necessary to contest the claim

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

- (a) the procedural requirements for contesting the claim, including the time limit for contesting the claim in writing and/or the time for the court hearing, where applicable, the name and address of the court or other institution to which to respond or before which to appear, as applicable, and whether it is mandatory to be represented by a lawyer;

(b) the consequences of a failure to respond or to appear in court, in particular, where applicable, the possibility that a judgment may be entered against the defendant and the liability for costs related to the court proceedings.

Rule 68 [Rule 3. Defendant not entering an appearance]

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

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

SECTION 2 – Responsibility for and methods of service

A. General Provisions

Rule 69 [Rule 4]. Responsibility

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

Rule 70 [Rule 5]. Applicability of rules

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

Rule 71 [Rule 6]. Priority of methods guaranteeing receipt

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

B. Methods of Service

Rule 72 [Rule 7]. Service guaranteeing receipt

- (1) Service guaranteeing receipt includes
 - (a) service by physical delivery attested by an acknowledgement of receipt signed by the addressee and/or by a document signed by a court officer, bailiff, post officer or other competent person who effected the service stating that the addressee has accepted the document, and the date of the service;

ELI – UNIDROIT Rules of Civil Procedure

- (b) service via a designated electronic information system using appropriately high technical standards attested by an acknowledgement of receipt automatically generated by the system where the addressee has a legal obligation to register for the system. Such an obligation shall be imposed on legal persons and on natural persons engaging in independent professional activities for disputes relating to their trade or profession;
 - (c) service by other electronic means if the addressee has previously explicitly agreed to this type of service or is under a legal obligation to register an e-mail address for the purpose of service and service is attested by the addressee's acknowledgement of receipt including the date of receipt, which is returned by the addressee;
 - (d) postal service attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the addressee.
- (2) Where in the case of (1) (c) or (d) no acknowledgement of receipt is received within a designated time, service according to (1) (a) or (b) if available should be attempted before alternative methods of service can be used.

Rule 73 [Rule 8]. Service on legal persons by physical delivery

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

Rule 74 [Rule 9]. Service on representatives

- (1) If a minor or a party who lacks legal capacity has a legal custodian or guardian, service on him or her is equivalent to service on the addressee.
- (2) Service on a person nominated to receive service by the addressee is equivalent to service on the addressee.

Rule 75 [Rule 10]. Refusal of acceptance

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

Rule 76 [Rule 11]. Alternative methods of service

- (1) If the addressee is not available for service according to Rule 7, the following alternative methods of service effected by a court officer, bailiff, postal officer or other competent person are available
 - (a) service at the addressee's home address on persons who are living in the same household as the addressee or are employed by the addressee, and who have the ability and are willing to accept the document;

- (b) in case of a self-employed addressee or a legal person, service at the addressee's business premises on persons who are employed by the addressee, and who have the ability and are willing to accept the document;
 - (c) deposit of the document at a post office or with competent public authorities and the placing in the addressee's mailbox of a written notification of that deposit. In such case the notification must clearly state the character of the document as a court document, the date by which the document must be collected, the place where the document can be collected and the contact details of the relevant person effecting service. Service is only effected when the document is collected.
- (2) Service pursuant to paragraph 1 (a)-(b) shall be attested by:
- (a) a document signed by the competent person who effected service, indicating:
 - (i) the method of service used; and
 - (ii) the date of service; and
 - (iii) the name that person and his/her relation to the addressee, or
 - (b) an acknowledgement of receipt by the person served.
- (3) Service according to paragraph 1 (a) and (b) is not allowed if the recipient is the party opposing the addressee in the proceedings.
- (4) Service pursuant to paragraph 1 (c) shall be attested by:
- (a) a document signed by the competent person who effected service, indicating:
 - (i) the method of service used; and
 - (ii) the date of collection, or
 - (b) an acknowledgement of receipt by the person served.

Rule 77 [Rule 12]. Service of documents during proceedings

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

Rule 78 [Rule 13]. Service methods of last resort

- (1) If service by methods that guarantee receipt (Rules 7-10) or alternative service (Rule 11) is not possible because the addressee's address is unknown or service has otherwise failed, service of documents may be effected as follows:
- (a) by publication of a notice to the addressee in a form provided for by the law of the forum state, including publication in electronic registers accessible to the public, and
 - (b) by sending a notice to the addressee's last known address or e-mail address, if applicable.

ELI – UNIDROIT Rules of Civil Procedure

- (c) For the purpose of subparagraph (a) and (b) “notice” means information which clearly states the character of the document to be served as a court document, the legal effect of the notification as effecting service, information as to where the addressee can collect the documents or copies thereof, and the date by which they have to be collected.
- (2) The address is unknown if the court or the party responsible for service has made every reasonable effort to discover the present address of the addressee. Efforts to find the present address must be documented in the court files.
- (3) Service shall be deemed to be effected within two weeks after publication of the notice and after having sent the notice to the last known address or e-mail address. If there is no last known address or e-mail address service shall be deemed to be effected within two weeks after publication of the notice.

Rule 79 [Rule 14]. Cure of defects in service

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

SECTION 3 – Cross border issues

A. In the European Union

Rule 80 [Rule 15]. Language requirements

(1) In the case of natural persons not engaging in independent professional activities the documents referred to in Rule 1 and the information referred to in Rule 2 must be in a language of the proceedings and, unless it is evident that the addressee understands the language of the forum, also in a language of the Member State of the individual’s habitual residence.

(2) In the case of legal persons the documents referred to in Rule 1 and the information referred to in Rule 2 must be in a language of the proceedings, and also the language of the legal person’s principal place of business, its statutory seat or of the principal documents in the transaction.

Rule 81 [Rule 16]. Non-application of Rule 14

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

Rule 82 [Rule 17]. Modification of time periods

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

B. Outside the European Union

Rule 83 [Rule 18]. General Rule

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

Rule 84 [Rule 19]. Relationship to the Hague Service Convention

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

PART VII – ACCESS TO INFORMATION AND EVIDENCE

SECTION I – General part

A. General Provisions on Evidence

Rule 85 [Rule 1. Scope of the Dispute]

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

Rule 86 [Rule 2. Burden of Proof]

- (1) Each party has the burden to prove all the material facts which form the basis of that party's case.
- (2) Substantive law determines the burden of proof.

Rule 87 [Rule 3]. Standard of Proof

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

Rule 88 [Rule 4]. Matters Not Requiring Positive Evidence

- (1) The following do not require positive evidence:
 - (a) admitted facts;
 - (b) uncontested facts; or
 - (c) facts which are notorious to the court.
- (2) The existence of facts can be presumed on the basis of other proven facts.
- (3) When a party has possession or control of evidence concerning a relevant fact and that party, without justification, fails to produce that evidence, the court may consider that relevant fact to be proven.

Rule 89 [Rule 5. Relevance]

- (1) Any relevant evidence is admissible. The court, whether of its own motion or on application by a party, shall exclude evidence which is irrelevant.
- (2) Matters alleged in the parties' pleadings determine relevance.

Rule 90 [Rule 6]. Illegally Obtained Evidence

Illegally obtained evidence should be excluded from the proceedings.

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

Rule 91 [Rule 7. Equality and Proportionality]

The court must ensure that:

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

Rule 92 [Rule 8]. Privileges

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

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

- (a) The right of a spouse, partner equal to a spouse or close relative of a party to refuse testimony, also with regard to situations where testifying would entail the risk of that party being prosecuted.
- (b) The right of a person not to incriminate him/herself.
- (c) The legal-professional privilege and other professional privileges or of confidence, trade secrets and other similar interests in the terms provided by the applicable law.
- (d) Confidentiality of communications in settlement negotiations unless the negotiations have occurred in a public hearing or overriding public interests so require.
- (e) National security interests, secrets of State or other equivalent public interest issues.

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

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

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

B. Presentation of Evidence

Rule 93 [Rule 9]. Presentation of Evidence and Contradiction

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

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

Rule 94 [Rule 10]. Admission by Failure to Challenge

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

Rule 95 [Rule 11]. Early Party Identification of Evidence

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

Rule 96 [Rule 12]. Notification of Evidence

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

Rule 97 [Rule 13]. Additional Evidence after Amendment of the Contentions

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

Rule 98 [Rule 14]. Late Presentation of Evidence

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

C. Management and Evaluation of Evidence

Rule 99 [Rule 15. Concentrated Final Hearing]

- (1) During the final phase of the proceedings evidence not already received by the court should be presented in a concentrated final hearing at which the parties should also make their concluding arguments.
- (2) The final hearing must be held before the judge or judges who are to give judgment.

Rule 100 [Rule 16. The Court's Management of Evidence]

- (1) During the early stages of the procedure the court, after giving the parties opportunity to respond, should address the admissibility, production and exchange of evidence. When necessary, the court will order the taking of evidence.
- (2) The parties have the right to challenge the court decision.
- (3) The court, after giving the parties opportunity to respond, may make decisions concerning the sequence and timing of producing evidence, as well as, where appropriate, the form in which evidence will be produced.

Rule 101 [Rule 17]. Powers of the Court with Respect to Further Evidence

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

Rule 102 [Rule 18]. Conduct of Hearings

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

Rule 103 [Rule 19]. Evaluation of Evidence and Judgment

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

Rule 104 [Rule 20. Sanctions Concerning Evidence]

- (1) The court, whether on its own motion or on application by a party, may impose sanctions in these circumstances:
 - (a) a person has unjustifiably failed to attend to give evidence or to answer proper questions, or to produce a document or other item of evidence;
 - (b) a person has otherwise obstructed the fair application of the rules concerning evidence.

- (2) Appropriate sanctions against parties include: drawing adverse inferences; staying the proceeding; and awarding costs in addition to those permitted under ordinary costs rules.
- (3) Appropriate sanctions against parties and non-parties include pecuniary sanctions, such as fines and *astreintes*.
- (4) Appropriate sanctions against lawyers include an award of costs.
- (5) In any particular case, the court should ensure that sanctions are reasonable and proportionate to the seriousness of the default or non-compliance, the harm caused, the extent of participation and the degree to which the conduct was deliberate.

SECTION II – Access to evidence orders

Rule 105 [Rule 21]. General Framework

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

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

Rule 106 [Rule 22. Orders for Access to Evidence]

- (1) Subject to the considerations and procedure contained in these rules, any claimant or defendant, or any prospective claimant who intends to sue, can request the court to make an order for access to relevant and non-privileged evidence held or controlled by the other party or by non-parties.
- (2) An order under (1) shall not be granted *ex officio* by the court, without prejudice to the provisions laid down in special rules.
- (3) Material or information supplied under this rule only becomes evidence when it is formally introduced as such into the proceedings.

Rule 107 [Rule 23. Relevant Factors]

- (1) The party or prospective party seeking an order for access to evidence must satisfy the court:
 - (a) that the requested evidence is necessary for the proof or proposed proof of issues in dispute in pending proceedings or in proceedings which are contemplated; and
 - (b) that the applicant cannot otherwise gain access to this evidence without the court's assistance.
- (2) Furthermore, the party or prospective party making a request under Rule 21 must submit with its request *prima facie* evidence of the merits of its claim or defence. If the order is requested prior to the initiation of proceedings, the applicant must indicate with sufficient precision all elements which are necessary to allow the court to identify the claim which the applicant intends to make.

Rule 108 [Rule 24]. Specificity and Proportionality

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

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

Rule 109 [Rule 25. Confidential Information]

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

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

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

Rule 110 [Rule 26. Breach of Confidentiality]

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

- (a) wholly or partially dismissing the claim of the party in breach, where the main proceedings are still pending;
- (b) declaring the party in breach liable for damages and ordering payment of such compensation;
- (c) ordering the party in breach to pay the costs of the proceedings conducted under these rules, whatever the outcome of it might be;
- (d) imposing on the party in breach (and/or on his representatives) a fine (or fines) ranging from XXX to YYY euros.

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

Rule 111 [Rule 27]. Access to Evidence Held by Public Authorities

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

Rule 112 [Rule 28]. Time of Applications

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

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

Rule 113 [Rule 29]. The Process for Granting Access Orders

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

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

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

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

Rule 114 [Rule 30. Costs and Security]

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

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

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

Rule 115 [Rule 31]. Implementation

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

Rule 116 [Rule 32. Non-compliance with Access Orders]

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

- (a) declaring as admitted the facts which form the subject-matter of the relevant order for access to sources of evidence;
- (b) treating the defendant or prospective defendant as having impliedly conceded the basis or any relevant part of the claim which has been made or which was proposed by the applicant;
- (c) imposing on the relevant respondent to the order (and in accordance with the relevant court's established disciplinary powers) a penalty of between XXX and YYY Euros (or their national equivalent sums) per day of delay in implementing the order.

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

SECTION III – Types of evidence

A. Documents

Rule 117 [Rule 33]. Documentary and Electronic Evidence

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

Rule 118 [Rule 34]. Authentic Instruments

- (1) An authentic instrument is a document, which has been formally drawn up or the authenticity of which has been certified by a public authority.
- (2) Electronically recorded authentic instruments shall have the same probative force as those recorded in paper.

Rule 119 [Rule 35]. Documents: Language and Translation

- (1) At the request of a party or the court, any document shall be produced or translated into a language of the court.
- (2) Translation of lengthy or voluminous documents may be limited to relevant portions, as agreed by the parties or ordered by the court.

B. Testimony

Rule 120 [Rule 36]. Witnesses of Fact

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

Rule 121 [Rule 37]. Testimony

- (1) Ordinarily, testimony of witnesses should be received orally. However, the court may, upon consultation with the parties, require that initial testimony of witnesses be in writing, which should be supplied to the parties in advance of the hearing. Oral testimony may be limited to supplemental questioning following written presentation of a witness's principal testimony.
- (2) Each witness shall appear in person unless the court allows the use of videoconference or similar technology with respect to a particular witness.
- (3) A person giving testimony may be questioned first by the court or the party seeking the testimony. Where the witness has first been questioned by the court or by another party, a party should have the right to conduct supplemental questioning directly to that witness.
- (4) Parties may challenge the testimony's reliability.

Rule 122 [Rule 38]. Witnesses: Language and Translation

- (1) Translation should be provided when a witness is not competent in the official language(s) in which the proceeding is being, or may be, conducted.
- (2) Where appropriate, with the consent of the court and the parties a witness may testify in a language other than the official language of proceedings.

Rule 123 [Rule 39]. Witness Statements

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

C. Examination of Parties

Rule 124 [Rule 40]. Examination of Parties and Consequences of Refusal to Respond

- (1) The court may accord evidentiary effect to any statement made by a party that has been questioned before the court.
- (2) Each party shall have the opportunity to question his/her opponent in front of the court on relevant issues of fact.
- (3) The court may draw relevant inferences if a party unjustifiedly refuses to appear in the hearing or to answer any relevant question formulated by the opponent or by the court.
- (4) If the party to be questioned is a legal person, it shall provide the identity of the natural person or persons that participated directly in the relevant cause of events on behalf of the legal person, in order for them to be questioned, provided they may still be considered as representatives of the legal person. The court may draw relevant inferences if the legal person unjustifiedly fails to provide this information.

D. Expert Evidence

Rule 125 [Rule 41]. Party-appointed Experts

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

Rule 126 [Rule 42]. Court-appointed Experts

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

Rule 127 [Rule 43]. Duties of Experts

- (1) An expert, whether appointed by the court or by a party, owes a duty to the court to present a full and objective assessment of the issue addressed.
- (2) An expert appointed by the court may only refuse to give expertise if the subject-matter lies outside the competence of the expert. The expert may also refuse to give expertise for the same reasons a witness may refuse to give testimony.
- (3) The expert may not delegate the task to third parties unless authorized to do so by the court.
- (4) In case the expert fails to render the expertise within the time limits set by the court without reasonable explanation the court may impose appropriate sanctions.

Rule 128 [Rule 44]. Instructions by the Court

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

Rule 129 [Rule 45]. Expert Access to Information

- (1) A court-appointed expert should have access to all relevant and non-privileged information necessary for the preparation of the report.
- (2) In particular, the expert may request a party to provide any information or to provide access to any documents, permit inspection of things or entry upon land for inspection, to the extent relevant to the case and material to its outcome.
- (3) Under appropriate circumstances, the expert may examine a person or have access to information derived from physical or mental examination of a person.

Rule 130 [Rule 46]. Expert Reports and Oral Evidence

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

Rule 131 [Rule 47. Costs]

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

E. Judicial Inspection

Rule 132 [Rule 48]. Judicial Inspection in General

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

Rule 133 [Rule 49]. Non-Parties and Judicial Inspection

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

SECTION IV – Cross-border issues

A. In the European Union

Rule 134 [Rule 50]. Cross-border Taking of Evidence within the European Union

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

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

- (a) the court may summon directly a witness residing in another Member State;
- (b) the court may appoint an expert to submit a report, whose preparation requires the undertaking of activities (inspection of persons or premises located) in another Member State;
- (c) a party or non-party, to whom an order for access to evidence is addressed, and who is residing or domiciled in the Member State of the court, has the duty to produce the required documents and evidence, even if they are located in a Member State different to the one of the court issuing the order;
- (d) a court may address an order for access to evidence to prospective parties and to non-parties domiciled in another Member State.

B. Outside the European Union

Rule 135 [Rule 51]. Cross-border Taking of Evidence outside the European Union

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

PART VIII – JUDGMENTS, *RES JUDICATA* AND *LIS PENDENS*

SECTION 1 – Types of Judgment

A. General Part

Rule 136 [Rule 1]. Structure of a judgment

The judgment must contain

- (a) the designation and the composition of the court;
- (b) the place and date of the judgment;
- (c) the names of the parties and, if applicable, of their lawyers;
- (d) the relief claimed;
- (e) the order of the court;
- (f) the legal and factual grounds for the judgment;
- (g) the signature of the judge/s if necessary;
- (h) the signature of the court clerk if necessary;
- (i) information on the availability, deadlines and formal requirements of any means to challenge the decision.

Rule 137 [Rule 2]. Contents of judgments

- (1) Depending on the claimant's demand, the court either orders the defendant to do or not to do something, creates, alters or terminates a legal relationship or makes a declaration of rights.
- (2) The court may grant a declaratory judgment, including a negative declaratory judgment, if the claimant can show that he or she has a legitimate interest in obtaining the declaration sought.
- (3) The court dismisses a claim for relief insofar as the procedural requirements for the action or claim are not met or the claim for relief is without merit.

Rule 138 [Rule 3]. Procedural requirements

- (1) The court gives a judgment on the merits only if the procedural requirements are met.
- (2) Procedural requirements include the following:
 - (a) the requirements set out in the Rules 27-29 and 43-44;
 - (b) subject matter and territorial jurisdiction;
 - (c) no pending proceedings involving the same parties and the same cause of action in another court unless an exception provided for in the Rules on *lis pendens* applies;
 - (d) no *res judicata* of the cause of action as between the parties;
 - (e) a legitimate interest of the claimant.

Rule 139 [Rule 4]. Service of judgment

The judgment must be served on all parties by a method provided for in the Rules on service.

Rule 140 [Rule 5]. Judgments on a part of a claim or on one of several claims for relief

- (1) The court may give
 - (a) a judgment deciding part of a claim for relief;
 - (b) where more than one claim for relief is made, a judgment deciding one or more, but not all, of the claims.
- (2) Where more than one claim for relief is made, a judgment deciding part of a claim may be a judgment deciding one or more, but not all, of the claims.
- (3) The proceedings continue with respect to the part of a claim or the claims on which the court has not given a judgment.

Rule 141 [Rule 6]. Judgments on preliminary procedural issues

- (1) The court may give a judgment deciding a preliminary procedural issue.
- (2) A judgment deciding a preliminary procedural issue is subject to an independent appeal only if it concerns a procedural requirement or if it is addressed at a non-party.

Rule 142 [Rule 7]. Judgments on legal issues on the merits

The court may give a judgment deciding a specific legal issue on the merits.

B. Default judgments and judicial settlements

Rule 143 [Rule 8]. Default judgment against claimant

If the claimant does not appear in a hearing, the court must, on application of the defendant, give a default judgment against the claimant dismissing the action.

Rule 144 [Rule 9]. Default judgment against defendant

- (1) If the defendant fails to reply to the complaint within the time limit for filing a defence or does not appear in a hearing, the court must, on application of the claimant, give a default judgment against the defendant.
- (2) Insofar as the facts put forward by the claimant justify the relief sought, the court decides according to the claim; insofar as this is not the case, the claim is dismissed on the merits.

Rule 145 [Rule 10]. Default judgments on a part of a claim or on one of several claims for relief

- (1) If a party does not appear in a hearing dedicated exclusively to a part of a claim or one of several claims, or if the defendant fails to reply to the complaint only with respect to a part of a claim or one of several claims, the default judgment is limited to the part of the claim or to the claim with respect to which the party was in default.
- (2) If the case was ready to be decided with respect to a part of a claim or one of several claims and the party is in default, the court must enter a regular judgment on the part of the claim or the one of several claims with respect to which the case was ready to be decided and enter a default judgment with respect to the other part of the claim or the other claims.

Rule 146 [Rule 11]. Conditions precedent

- (1) The court enters a default judgment for non-appearance of a party in a hearing only if
 - (a) the document setting the date and time of the hearing was served on this party by a method provided for by these Rules and
 - (b) the time period between service and the hearing was, from the court's point of view, adequate in the particular case.
- (2) The court enters a default judgment against the defendant for lack of defence only if
 - (a) the documents instituting the proceedings were served on the defendant by a method provided for by these Rules and
 - (b) the time limit for filing a defence has expired and where no time limit was prescribed by the rules, service was effected in sufficient time to enable the defendant to arrange for his defence.
- (3) The court may enter a default judgment even if no receipt of service has been submitted to the court if all the following conditions are fulfilled:
 - (a) The documents were served by a method provided for in these Rules;
 - (b) a period of time of not less than three months, considered adequate by the court in the particular case, has elapsed since the date of service;
 - (c) reasonable efforts have been made to obtain evidence that the defendant actually received the documents instituting the proceeding.
- (4) The court enters a default judgment only if the matter is amenable to settlement.

Rule 147 [Rule 12]. Recourse by setting aside

The party against which default judgment has been entered may have the default judgment set aside if

- (a) any of the conditions precedent of a default judgment were not met, or
- (b) the party was not responsible for the default or the default was excusable.

Rule 148 [Rule 13]. Deadline for setting aside

- (1) The application to set aside shall be made within 30 days after the service of the default judgment. In cross-border cases, the application to set aside shall be made within 60 days after the service of the default judgment.
- (2) This deadline may be extended by the court where the defendant can show good reason for failing to comply, but in any case, the application to set aside cannot be brought more than one year and, in cross-border cases, two years after the default judgment was pronounced.

Rule 149 [Rule 14]. Judicial settlements

- (1) When, during court proceedings or before proceedings have been commenced, the parties reach an agreement settling a dispute, they may ask the court to enter a decision giving effect to the agreement.
- (2) A decision giving effect to the agreement shall not be entered if the agreement is contrary to law or the court would not have the power to enter a judgment in accordance with the parties' agreement.

ELI – UNIDROIT Rules of Civil Procedure

(3) If the court refuses to give effect to the agreement, any party can appeal this decision within the deadlines set for appeals, but without any further limitations concerning the right to appeal.

SECTION 2 – Effects of Judgment

A. General Part

Rule 150 [Rule 1] – Scope of the Proceeding

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

Rule 151 [Rule 2] – Principle of Concentration of Legal and Factual Issues – Inadmissibility

- (1) The claimant and the defendant must bring all their legal and factual elements of dispute arising out of the same claim in one single proceeding.
- (2) The infringement of para. 1 leads to the inadmissibility of the new claim.

Rule 152 [Rule 3] – Admissibility of New Claims in Subsequent Proceedings

However, a new claim can be brought:

- (a) Where subsequent to the earlier proceeding, there has been a change of the relevant facts on which the earlier court decision was based.
- (b) Where the litigant has obtained or acquired a new right since the judgment in the earlier proceeding.

B. *Lis pendens* and related actions

Rule 153 [Rule 4] – Pendency

- (1) Where proceedings involving the same cause of action and between the same parties are brought in different courts, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
- (2) In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court about the proceedings pending before it and indicate the date when it was seised in accordance with Rule 7.
- (3) Where the jurisdiction of the court first seised is established, the consolidation of the parallel actions shall be ordered by that court according to Rule 8. Where the actions have been consolidated, any court other than the court first seised shall decline its jurisdiction in favour of that court. When the requirements of consolidation are not met any court other than the court first seised shall dismiss or stay the action as appropriate.

Rule 154 [Rule 5] – Exceptions from the Priority Principle

- (1) When the court second seised has exclusive jurisdiction, the court first seised shall decline jurisdiction in favour of that court. In this case the court having exclusive jurisdiction must not stay its proceedings.

- (2) Paragraph 1 does not apply when both courts have exclusive jurisdiction.
- (3) Without prejudice to the rules protecting weaker parties and without prejudice to jurisdiction by appearance, where a court on which an agreement confers exclusive jurisdiction is seised, any other court shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
- (4) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any other court shall decline jurisdiction in favour of that court.

Rule 155 [Rule 6] – Related Actions

- (1) Where related actions are pending in different courts, any court other than the court first seised may stay its proceedings.
- (2) Where the action in the court first seised is pending at first instance, any other court must also decline jurisdiction if the court first seised has consolidated the actions according to Rule 8.
- (3) For the purposes of this Rule, actions are deemed to be related where there is a relationship between the causes of actions such that it would be in the interests of justice to determine them together.

Rule 156 [Rule 7] – Moment of Seizure for the Purposes of Pendency and Relatedness

- (1) A court shall be deemed to be seised:
 - (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or
 - (b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

- (2) Where a claim is filed during the proceedings that claim becomes pending at the time when it is invoked in the hearing or when a written pleading has been lodged with the court or served on the other party.
- (3) The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

Rule 157 [Rule 8] – Consolidation of Actions

- (1) Where the jurisdiction of the court first seised is established, this court may, upon application of one of the parties, order the consolidation of several sets of proceedings in the cases of Rules 4 and 6.
- (2) The court first seised may only order a consolidation when it has jurisdiction to hear the actions and when the parallel actions are pending in the first instance.
- (3) Before ordering the consolidation the court shall hear the parties and communicate with the other court(s) seised.

ELI – UNIDROIT Rules of Civil Procedure

(4) When the court first seised has assumed jurisdiction over the actions in question and has consolidated the actions, any other court must also decline jurisdiction.

(5) The consolidation does not prejudice any procedural or substantive consequences of the filing/pendency of the parallel action.

(6) In case consolidation is not possible at the court seised first, the court seised second may, on application of each party, consolidate the proceedings, as appropriate, according to paras 1-5.

C. Res judicata

Rule 158 [Rule 9] – Judgments becoming *res judicata*

A judgment becomes *res judicata* when ordinary means of recourse are not or no longer available.

Rule 159 [Rule 10] - Kinds of Judgments Becoming *Res Judicata*

(1) Judgments on the merits, including partial judgments and default judgments, as well as judgments dismissing the claim on procedural issues become *res judicata*.

(2) A provisional measure does not have *res judicata* effects on the merits of the main dispute. The competent court may modify it at any time in case of a change of circumstances.

Rule 160 [Rule 11] – Material Scope of *Res judicata*

(1) The material scope of *res judicata* is determined by reference to the claims in the parties' pleadings, including amendments as decided by the court judgment.

(2) *Res judicata* shall also cover incidental and necessary legal issues explicitly decided in the judgment, if the parties to the subsequent lawsuit are the same and if the court had jurisdiction to decide the incidental and necessary legal issues.

(3) Where a defence based on set off is brought by the defendant and the claim as well as the defence are sustained by the court, *res judicata* extends to both. The same applies where the claim is admitted and the set off defence is rejected. If the claim is rejected on grounds different than set off, the court shall not decide on the set off defence so that only the judgement on the claim becomes *res judicata*.

Rule 161 [Rule 12] – Modification of Judgment Ordering Periodical Performances

Upon request by a party, the court may modify for the future a previous judgment, which has become *res judicata*, in cases of periodical performances, if there is a substantial change of circumstances.

Rule 162 [Rule 13] – Persons Bound by *Res Judicata*

The assessment contained in the judgment, which has become *res judicata*, is binding upon the parties to the proceedings, their heirs and successors.

Rule 163 [Rule 14] – Ex officio assessment of res judicata

The court shall take *res judicata* into account *ex officio*.

Rule 164 [Rule 15] – Extraordinary Motion for Review

(1) The extraordinary motion for review aims at rescinding a judgment that has become *res judicata* so that a new ruling may be given on factual and legal grounds.

(2) An extraordinary motion for review may be brought against a judgment only on the following grounds:

- (a) The court was wrongly constituted;
- (b) The right to be heard of a party has been severely violated;
- (c) The decision has been obtained by fraud or violence;
- (d) After the judgment is issued, decisive documents are recovered or obtained, and they were not available due to force majeure or due to the party the judgment has favoured; or
- (e) The European Court of Human Rights has ruled that the judgment given in a national proceeding had been rendered in infringement of any of the rights established in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the infringement, due to its nature and seriousness, entails persistent effects, which can only be ceased by means of this review; however, in no case may the review affect the rights acquired in good faith by third parties.

(3) In the case of para. 2, a), b) and c), the motion shall be admissible only if the applicant has not been able, without any fault on his behalf, to raise the ground on which he relies before the judgment has become *res judicata*.

(4) The time-limit for an extraordinary motion for review is three months. It shall run from the date on which the party has become aware of the grounds for the review. In no case may the review be sought after ten years have elapsed from the time the judgment intended to be challenged has become *res judicata*.

PART IX – MEANS OF REVIEW

SECTION 1 – Appeal

Rule 165 [Rule 1]. Legal interest

A party may appeal, or use other types of recourse, against a judgment if the party has a legal interest in doing so.

Rule 166 [Rule 2]. Waiver of appeal or recourse

(1) The right of appeal or other recourse may be waived expressly in writing or orally in a court hearing if recorded in the judgment or the hearing's minutes, if any.

(2) The right of appeal or other recourse may be waived before the ruling is pronounced only if the waiver is mutual. A consumer cannot waive his right to appeal before the ruling is pronounced.

Rule 167 [Rule 3]. Withdrawal

An appeal or other recourse can be withdrawn at any time except as provided for in these Rules.

Rule 168 [Rule 4]. Extension of deadlines

If a party is not domiciled in the state whose court is seized, any deadline contained in this part is extended by [one month] unless the court provides otherwise.

Rule 169 [Rule 5]. Representation by a lawyer

- (1) Representation by a lawyer is mandatory before the second appeal court.
- (2) The first appeal court may require a party to be represented by a lawyer if the party is not capable of presenting his or her case in an understandable manner or if necessary for the proper administration of justice.

Rule 170 [Rule 6]. Right to appeal

- (1) A party has a right to appeal against a first instance judgment if
 - (a) the value of the appealed claim exceeds [twice the average monthly wage in the forum state], or
 - (b) the first appeal court grants leave to appeal on a motivated application of the appellant.
- (1a) In deciding whether to grant leave to appeal, the first appeal court shall take into account if
 - (a) legal matter is of fundamental significance, or
 - (b) the further development of the law or the interests in ensuring uniform adjudication require a decision of the appellate court, or
 - (c) fundamental procedural requirements have been violated.
- (2) The appellate court shall, on its own motion, assess whether the appeal is in compliance with paragraph 1.

Rule 171 [Rule 7]. Scope of appeal

- (1) The appeal can be brought against the whole first instance judgment or only against a part of that judgment.
- (2) In general, the relief sought is limited by what was claimed or defended in the first instance.
- (3) However, the relief sought may be broadened or amended if
 - (a) the opponent consents or
 - (b) the court considers it appropriate for the sound administration of justice.

Rule 172 [Rule 8]. Notice/Statement of appeal

- (1) The appeal is lodged by way of submitting a notice/statement of appeal with the court of appeal.
- (2) The notice/statement of appeal must identify the judgment and declare that an appeal is being lodged against it.
- (3) The deadline for filing the notice/statement of appeal is [one month] upon service of the judgment.

Rule 173 [Rule 9]. Reasons for the appeal

- (1) The appellant must provide the reasons for the appeal.
- (2) The reasons for the appeal must contain:
 - (a) the relief sought;
 - (b) the legal arguments, substantive and procedural, on which the appeal is based with respect to admissibility and substance;
 - (c) if applicable, the grounds for which the evaluation of the evidence was seriously wrong;
 - (d) if applicable, new facts that will be alleged and new means of evidence that will be introduced, and the reasons for which these new facts and new means of evidence are admissible.
- (3) The deadline for providing the reasons for the appeal is [two months] upon service of the judgment. The court may set another deadline.

Rule 174 [Rule 10]. Response of the respondent

- (1) The notice of appeal and the reasons of the appeal shall be served on the respondent.
- (2) Upon service of the reasons of the appeal, the respondent has two months to reply. The court may set another deadline.
- (3) The response of the respondent shall be served on the appellant.
- (4) Upon service of the reply of the respondent, the appellant has a deadline of [one week] to respond. The court may set another deadline.

Rule 175 [Rule 11]. Derivative appeal

- (1) A party who lacks a right of appeal because the time limit for appeal has expired, still has a right to appeal if the opposite party appeals the judgment.
- (2) A derivative appeal shall contain the reasons listed in Rule 9 paragraph 2.
- (3) A derivative appeal shall lapse if the appeal by the opposite party is not heard on its merits.
- (4) Upon service of the derivative appeal, the appellant has a deadline of [two months] to respond. The court may set another deadline.

Rule 176 [Rule 12]. Scope of appellate review

- (1) Within the relief sought, the review of the appellate court encompasses:
 - (a) the application of the law in the judgment;
 - (b) the legality of the proceedings in the first instance court, provided that the appellant challenged the error complained about immediately before the court of first instance if such challenge was possible;
 - (c) the evaluation of the evidence if, in the full discretion of the appellate court, this is warranted in order to prevent serious injustice.
- (2) The appellate court will reverse the first instance judgment for a procedural error only if the procedural error has potentially influenced the judgment or if it was so grave that such influence need not be proven.

Rule 177 [Rule 13]. New facts and taking of evidence

- (1) Within the relief sought, the appellate court shall consider new facts alleged by the parties
 - (a) insofar as they could not have been introduced before the first instance court;
 - (b) insofar as the first instance court failed to provide a hint to the parties that there is no sufficient factual basis for a claim.
- (2) Within the relief sought, the appellate court shall take evidence offered by the parties only if
 - (a) the evidence could not have been offered to the first instance court;
 - (b) the evidence was offered to the first instance court and was erroneously rejected or could not be taken for reasons outside the party's control;
 - (c) the evidence concerns new facts admissible according to paragraph 1.

Rule 178 [Rule 14]. Provisional enforcement

- (1) A final judgment is immediately enforceable regardless of whether an appeal has been lodged.
- (2) Enforcement may be stayed on application of the judgment debtor to the appellate court if he has lodged an appeal and enforcement is manifestly excessive.
- (3) Security may be required from the judgment debtor as a condition of granting a stay or from the judgment creditor as a condition of denying a stay.

Rule 179 [Rule 15]. Decisions of the appellate court

- (1) In general, the appellate court shall decide the matter by itself.
- (2) The appellate court may refer the matter back to the first instance court if necessary for the proper decision of the matter.
- (3) On agreement of the parties, the appellate court must decide the matter by itself.

Rule 180 [Rule 16]. Contents of the appellate court's judgment

Insofar as it agrees with the first instance court, the appellate court can refer to the legal and factual grounds of the first instance court or write down its own reasons. In the latter case, it is deemed to have adopted the legal and factual grounds of the first instance judgment which are not contrary to its own reasoning.

Rule 181 [Rule 17]. Access to second appeal

- (1) An appeal against a second instance judgment is possible only if such an appeal is necessary to correct a violation of a fundamental right, to secure the uniformity of the law, to decide a fundamental question which is not limited to the case at issue or to develop the law.
- (2) The second appeal court shall, on its own motion, assess whether the appeal is in compliance with paragraph 1.

Rule 182 [Rule 18]. Scope of second appeal

- (1) The second appeal can be brought against the whole second instance judgment or only against a part of the appellate court judgment.
- (2) The relief sought is limited by what was claimed or defended in the second instance.

Rule 183 [Rule 19]. Notice/Statement of and reasons for the appeal

- (1) The second appeal is lodged by way of submitting a notice/statement of second appeal including the reasons on admissibility and substance.
- (2) The reasons for the second appeal must contain:
 - (a) the relief sought;
 - (b) the legal arguments, substantive and procedural, on which the second appeal is based with respect to admissibility and substance.
- (3) The deadline for filing the notice/statement of second appeal and the reasons is [two months] upon service of the appellate court's judgment.

Rule 184 [Rule 20]. Response of the respondent

- (1) The notice of second appeal and the reasons of the second appeal shall be served on the respondent.
- (2) Upon service, the respondent has two months to reply.
- (3) The reaction of the respondent shall be served on the appellant.

Rule 185 [Rule 21]. Derivative second appeal

- (1) A party who lacks a right of appeal because the time limit for appeal has expired, still has a right to appeal if the opposite party appeals the judgment.
- (2) A derivative second appeal shall contain the reasons listed in Rule 19 paragraph 2.
- (3) A derivative second appeal shall lapse if the second appeal by the opposite party is not heard on its merits.
- (4) Upon service of the derivative second appeal, the appellant has a deadline of [two weeks] to respond. The court may set another deadline.

SECTION 2 – Motion for revision

Rule 186 [Rule 22]. Scope of review

- (1) Within the relief sought, as far as admissible, the review of the second appeal court encompasses:
 - (a) the interpretation and application of the law in the appellate judgment;
 - (b) the legality of the proceedings in the second instance court, provided that the appellant challenged the error complained about immediately before the court of second instance.
- (2) The second appeal court will reverse the appellate judgment for a procedural error only if the procedural error has potentially influenced the judgment or if it was so grave that such influence need not be proven.

Rule 187 [Rule 23]. Provisional enforcement

- (1) A judgment of the appellate court is immediately enforceable regardless of whether a second appeal has been lodged.
- (2) Enforcement may be stayed on application of the judgment debtor to the second appeal court if he or she has lodged a second appeal and enforcement is manifestly excessive.
- (3) Security may be required from the judgment debtor as a condition of granting a stay or from the judgment creditor as a condition of denying a stay.

Rule 188 [Rule 24]. Decisions of the second appeal court

- (1) The second appeal court shall decide on the matter as such if the appellate judgment is reversed only due to a violation of the law and, based on the legal assessment of the second appeal court, the matter is ready for a final decision.
- (2) Otherwise, the second appeal court refers the matter back to the second instance court. The appellate court is bound by the legal assessment of the second appeal court.

Rule 189 [Rule 25]. Contents of the second appeal court's judgment

The second appeal court provides its own reasons. If adequate, it may refer to the appellate court or the first instance court judgement.

Rule 190 [Rule 24a]. Restriction of withdrawal

At the second appeals level, withdrawal is only possible with the consent of the other party and the court.

Rule 191 [Rule 24b]. Leapfrog appeal

- (1) Instead of a regular appeal to the first appeal court, an appeal may be brought directly to the second appeal court if
 - (a) the requirements of Art. 17 paragraph 1 are met and
 - (b) the second appeal court grants a leave to such an appeal on a motivated application of the appellant within the deadlines for a regular appeal.
- (2) Rules 20-25 apply

Rule 192 [Rule 26]. Scope of the extraordinary motion for review

The extraordinary motion for review aims at rescinding a judgment that has become res judicata so that a new ruling may be given on factual and legal grounds.

Rule 193 [Rule 27]. Grounds for an extraordinary motion for review

(1) An extraordinary motion for review may be brought against a judgment only on the following grounds:

- (a) The court was wrongly constituted;
- (b) The right to be heard of a party has been severely violated
- (c) The decision has been obtained by fraud or violence;
- (d) After the judgment is issued, decisive documents are recovered or obtained, and they were not available due to force majeure or due to the party the judgment has favoured; or
- (e) The European Court of Human Rights has ruled that the judgment given in a national proceeding had been rendered in infringement of any of the rights established in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the infringement, due to its nature and seriousness, entails persistent effects, which can only be ceased by means of this review; however, in no case may the review affect the rights acquired in good faith by third parties.

(2) In the case of para. 2, a), b) and c), the motion shall be admissible only if the applicant has not been able, without any fault on his behalf, to raise the ground on which he relies before the judgment has become res judicata.

Rule 194 [Rule 28]. Deadlines

(1) The deadline for an extraordinary motion for review is three months. It shall run from the date on which the party has become aware of the grounds for the review.

(2) In no case may the review be sought after ten years have elapsed from the time the judgment intended to be challenged has become res judicata.

Rule 195 [Rule 29]. Immediate challenge of procedural decisions

(1) Procedural decisions may be challenged only on the earliest possible occasion (immediately) in the court where the case is pending.

(2) In an oral hearing, the decision may be challenged orally. Outside an oral hearing, the decision must be challenged in writing.

(3) The court shall rule on the challenge immediately unless the complexity or the importance of the issue require otherwise. The ruling shall be accompanied by brief reasons which, in an oral hearing, may be provided orally.

Rule 196 [Rule 30]. Further challenge

(1) Unless otherwise provided, the ruling on the challenge of a procedural decision is not subject to a separate appeal or other form of recourse.

(2) A separate appeal or other form or recourse is available against decisions on the following matters:

- (a) decisions ordering the stay of the proceedings;
- (b) decisions ordering the transfer of the proceedings to another court;
- (c) decisions on the security for costs;
- (d) decisions ordering the exclusion of a party from a hearing or fining a party;
- (e) decisions denying the recusation of a judge or court-appointed expert;
- (f) if applicable, decisions assigning a case to a specific track.

Rule 197 [Rule 31]. Procedural decisions addressed at non-parties

A person who is not a party to the litigation, but directly addressed by a procedural decision can further challenge this decision.

PART X – PROVISIONAL AND PROTECTIVE MEASURES

SECTION 1 – General part

Rule 198 [Rule 1]. Provisional and Protective Measures

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

- (a) to ensure or promote effective enforcement of final decisions concerning the substance of the case, whether or not the underlying claim is pecuniary, including securing assets and obtaining or preserving information concerning a debtor and his assets; or
- (b) to preserve the opportunity for a complete and satisfactory determination of the claim, including securing evidence relevant to the merits or preventing its destruction or concealment; or
- (c) to preserve the existence and value of goods or other assets which form or will form the subject-matter of civil proceedings (pending or otherwise) on the merits
- (d) to prevent harm from being suffered, to prevent further harm, or to regulate the disputed matters, pending final determination of the issues.

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

Rule 199 [Rule 2. Principle of proportionality]

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

Rule 200 [Rule 3]. Ex parte procedure

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

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

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

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

Rule 201 [Rule 4]. Security

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

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

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

Rule 202 [Rule 5]. Initiation of Proceedings on the Substance of the Matter

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

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

Rule 203 [Rule 6]. Review

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

Rule 204 [Rule 7]. Liability of the Applicant

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

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

Rule 205 [Rule 8]. Sanctions

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

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

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

SECTION 2 – Special part

A. Protective and Regulatory Measures

1 Asset Preservation

Rule 206 [Rule 9]. Types of Asset Preservation Measures

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

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

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

Rule 207 [Rule 10]. Criteria for Awarding Asset Preservation Orders

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

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

Rule 208 [Rule 11]. Limitations on the Asset Preservation Orders

Asset Preservation Orders must ensure that the respondent is not deprived from receiving these allowances, provided the amounts are reasonable: (a) its ordinary living and/or (b) its legitimate business expenses, or (c) from funding legal advice and representation necessary to enable him to respond to the order, including seeking its variation or discharge under Rules 3(4) or 6.

Rule 209 [Rule 12]. Notification of Asset Preservation Orders to Respondent and Effects

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

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

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

2. Regulatory Measures

Rule 210 [Rule 13]. Measures to Perform or Abstain

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

Rule 211 [Rule 14]. Criteria for awarding a Regulatory Measure

A party seeking an order under Rule 13 must show:

- (a) it has a good chance of succeeding in the main proceedings; or
 - (b) where there is a significant risk that damages to the respondent will not be capable of providing adequate compensation for any interference with their rights if the main proceedings are dismissed, there is a very strong possibility that the applicant will succeed in the main proceedings;
- and
- (c) the order is necessary to regulate the substantive matter in dispute pending final determination of the main proceedings.

B. Evidence Preservation

Rule 212 [Rule 15]. Evidence Preservation Orders

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

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

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

Rule 213 [Rule 16] Criteria for awarding an Evidence Preservation Measure

A party seeking an evidence preservation order must show that:

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

C. Interim Payment

Rule 214 [Rule 17]. Interim Payment Measures

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

Rule 215 [Rule 18]. Criteria for awarding an Interim Payment

- (1) A party seeking an order under Rule 17 must show that:
 - (a) the defendant has admitted liability in the main proceedings to pay a monetary sum to the applicant or a judgment on liability has been obtained by the applicant, or it is highly likely that the applicant will succeed to obtain at least the amount sought on the merits; and
 - (b) payment is needed urgently from the defendant.
- (2) In assessing whether to make an interim payment order the court should consider all the circumstances, including any potential or actual hardship to the applicant or the respondent as a result of refusing or granting the order.
- (3) An interim payment order can only be made after hearing the respondent.
- (4) Where judgment in the main proceedings is for a lesser amount than that paid, any over-payment must be repaid.
- (5) An interim payment order will ordinarily be made subject to giving security.

SECTION 3 – Cross border issues

Rule 216 [Rule 19]. International jurisdiction

- (1) Within the scope of the EU Regulations or international conventions, the international jurisdiction of the court in relation to provisional and protective measures, is governed by those Regulations or conventions.
- (2) In any event, the court having jurisdiction on the substance will have jurisdiction to grant provisional and protective measures.
- (3) Without prejudice to the applicable EU rules and international conventions, another court may grant such provisional and protective measures necessary to protect interests located within or the subject-matter of which have a real connecting link with the territory of the court, or that are necessary to support main proceedings brought in another country.

Rule 217 [Rule 20]. Recognition and enforcement

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

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

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

PART XI – COLLECTIVE REDRESS

A. General Part

Rule 218 [X1]⁴ Collective Redress Action

A collective redress action is an action which is brought by a qualified claimant on behalf of a group of persons who he claims are affected by an event giving rise to mass harm, but where those persons are not parties to the action ("group members").

Rule 219 [X2] Claimants Qualified to Bring a Collective Redress Action

A "qualified claimant" to bring a collective redress action is:

- (a) an organisation authorized in accordance with national law and whose purpose has a direct relationship with the event giving rise to the mass harm;
- (b) an entity which is solely established for the purpose of obtaining redress for group members and which meets the requirements of Rule [X3]; or
- (c) a person who is a group member and who meets the requirements of Rule [X3] a to c.

Rule 220 [X3] Requirements for qualified claimants

A person or entity shall not be a qualified claimant unless:

- (a) he shows that he has no conflict of interest with any group member;
- (b) he has sufficient capability to conduct the collective redress action. The court shall take account of the financial, human and other resources available to him. If appropriate, the court may require a security for costs;
- (c) he is legally represented; and
- (d) he is not a lawyer or exercising any legal profession.

⁴ Rules will be re-numbered in a final version. In some respects the draft also still requires harmonization with the drafts of other Working Groups (e.g. cost, lis pendens...).

Rule 221 [X4] Requirements for Collective Redress Claim

- (1) The qualified claimant must include in his claim all relevant information available concerning
- (a) the event of mass harm;
 - (b) the group;
 - (c) the causal connection between the event of mass harm and the loss suffered by the group members;
 - (d) the similarity of the claims of the group members in law and fact;
 - (e) whether compensation or other collective redress remedies are sought;
 - (f) the financial and other resources available to the qualified claimant to pursue the collective redress action;
 - (g) evidence of the qualified claimant's attempt to settle the group members' claims.
- (2) A defendant may not, at any time after he has been formally notified by a qualified claimant of the claimant's intention to negotiate a collective settlement under Rule X4(1)(g), commence an action against the qualified claimant or any group member in respect of the same mass harm event unless the defendant can show that good faith negotiations have irretrievably broken down.

Rule 222 [X4bis] Registration of Collective Redress Actions

- (1) Upon receipt of a claim for a collective redress action as defined under Rule X1 the court must enter the claim into a publicly accessible electronic register.
- (2) After registration of a claim any other court must dismiss any collective action against the same defendant(s) in respect of the same mass harm event and in the interest of the same group.

B. Admissibility of Collective Redress Actions

Rule 223 [X5] Conditions of Admissibility

- (1) The court may admit a collective redress action, if:
- (a) the collective action will resolve the dispute more efficiently than a joinder of the group members' individual claims;
 - (b) all of the claims made in the action arise from the same event or series of related events causing mass harm to the group members;
 - (c) the claims advanced in the collective redress action are similar in law and fact; and
 - (d) except in cases of urgency, the qualified claimant has allowed the defendant(s) at least three months to respond to the qualified claimant's settlement proposal.
- (2) Upon application, the court may order any action to continue as a collective
- (3) redress action.

Rule 224 [X6] Collective Action Order

- (1) An order made under Rule X5 must include the following information:
 - (a) the name and address, and other relevant contact details of the qualified claimant
 - (b) a concise description of the event of mass harm giving rise to the collective redress action;
 - (c) the names or a description of all of the persons allegedly affected by the mass harm. The description must contain sufficient detail to enable any person allegedly affected by the mass harm event to know if he is within the group or not;
 - (d) the type of collective redress action under Rule X8(1) or (2).
- (2) Before making an order under Rule X5 the court shall advertise a draft of the order and set a deadline for any other potential qualified claimants to apply under Rule X1.
- (3) The court shall determine which of several applicants shall become the qualified claimant on the basis of the criteria in Rule X3. Where more than one qualified claimant is selected they must act jointly.
- (4) The collective action order shall be advertised in a manner which the court considers will best bring it to the attention of any person likely to be affected by the mass harm event on which the collective redress action is based. The advertisement shall invite such persons to opt-in to the collective redress action and shall give information on how to do so.

Rule 225 [X7] Obligation of Qualified Claimant

A qualified claimant must at all times act in the best interests of the whole group or of the sub-group.

Rule 226 [X8] Types of Collective Redress Action

- (1) A collective redress action shall use the opt-in system unless the court makes an order under (2).
- (2) The court may decide that the collective redress action will include those group members who have not opted out of the action under paragraph (3) if the court considers:
 - (a) that the group members' claims cannot be made in individual actions because of their small size; and
 - (b) that a significant number of group members would not opt-in to the collective redress action.
- (3) The court shall set a deadline for group members to notify the court that they wish to opt-out. In exceptional circumstances the court may permit opting out after the deadline.

Rule 227 [X9] Opt-in System

- (1) Under the opt-in system group members shall notify the court if they wish to join the collective redress action in the manner laid down by the court.
- (2) The court shall ensure that the notifications of group members are properly recorded in a public register, which may be set up in accordance with Rule X13.

Rule 228 [X10] Individual Actions

(1) Group members who have opted in under Rule X9 or who have not opted out under Rule X8 (3) cannot bring an individual court action in respect of the same event of mass harm against a defendant to the collective redress action.

(2) In cases under Rule X8 (2) any group member who brings an individual action against a defendant to the collective redress action during the opt-out period shall be treated as having opted-out of the collective redress action.

(3) Any time limit provided in national law for individual actions to be brought by a group member in respect of loss caused by the event of mass harm shall be suspended from the date of the commencement of the collective redress action.

The period of suspension shall end when

- (a) the collective redress action is withdrawn or dismissed; or
- (b) the group member opts out under Rule X8 (2)-(4).

(4) Where (3) (a) or (b) apply, the remaining limitation period for individual claims will start six months after the withdrawal, dismissal or opting-out.

C . Case Management of Collective Redress Actions

Rule 229 [X11] Case Management Powers

The court shall have the following additional case management powers in a collective redress action:

- (a) to remove a qualified claimant if he no longer satisfies the conditions in Rule X2 and Rule X3 or he does not act in the interest of all group members. This paragraph also applies for a removal of the qualified claimant of a sub-group;
- (b) to authorize a new qualified claimant with his agreement;
- (c) to modify the description of the group;
- (d) to divide a group into sub-groups and to authorize a qualified claimant for each sub-group with his agreement; .
- (e) to dismiss the collective redress action if there is no longer a qualified claimant
- (f) to direct the correction of the group register (Rule X9 [2], X13).

The court may hear any person it considers has an interest in the management of the case before making any case management order under this rule.

Rule 230 [X12] Advertisements

(1) In a collective redress action the court shall advertise or shall require advertisement

- (a) when a qualified claimant is removed or authorized;
- (b) when the description of the group is modified or the group is divided into sub-groups;
- (c) when a collective redress settlement is offered;
- (d) when any order or judgment is made;
- (e) of information about the electronic platform under Rule X13; and
- (f) if the collective redress action is dismissed or withdrawn.

(2) The advertisement shall be placed in a manner which the court considers will best attract the attention of any person likely to be affected by the event causing mass harm and in sufficient time to allow affected persons a reasonable opportunity to participate in the collective redress action as they see fit.

Rule 231 [X13] Communication – Secure Electronic Platform

The court must create or must authorize the creation of a secure electronic platform for the efficient management of the collective redress action.

Rule [X14] Settlements

The court shall use its case management powers to facilitate the settlement of the collective redress action using appropriate methods of alternative dispute resolution.

D . Settlements in Collective Redress Actions Already Commenced

Rule 232 [X15] Court Approval

A group member will not be bound by any agreement settling a collective redress action in whole or in part unless that agreement is approved by the court.

Rule 233 [X16] Application for Approval

(1) A party to a proposed settlement agreement may make an application to the court for approval under Rule X15.

(2) The application for approval shall include:

- (a) the description of the group whose members will be bound by the settlement;
- (b) a copy of the proposed settlement agreement. In a collective redress action for compensation, the proposed agreement shall include the total amount of compensation payable, and the criteria for distributing the compensation to each group member;
- (c) the proposed administration of the compensation fund and method of distributing the compensation payment to group members; and
- (d) a concise statement of reasons showing why the terms of the settlement agreement are fair and adequate.

Rule 234 [X17] Procedure for Approving Settlements

(1) Before approving a settlement the court may

- (a) make any order necessary to obtain further information in order to assess the fairness of the proposed settlement;
- (b) appoint an expert to assist the court.

(2) The court must

- (a) advertise the proposed settlement according to Rule X12, ensuring that it is clear that the court has not reached a conclusion on the fairness of the settlement;
- (b) fix a period within which any comments may be made; and
- (c) consider all comments made by the group members and the parties.

(3) The court may consider all other relevant comments received.

Rule 235 [X18] Settlement Approval Orders

The court shall not make an order approving the settlement agreement where

- (a) the amount of compensation agreed for the group or any sub-category is manifestly unfair;
- (b) the terms of any other undertaking by a defendant are manifestly unfair;
- (c) the settlement is manifestly contrary to *ordre public*; or
- (d) the terms, whether contained in the proposed settlement agreement or not, as to the payment of legal and other associated costs of the action are manifestly unreasonable.

Rule 236 [X19] Approved Settlements in Opt-in Actions

The approved settlement binds all group members who have opted in at the time the approval order is made.

Rule 237 [X20] Approved Settlements in Actions under Rule X8 (2)

The approved settlement binds all group members unless they have opted out of the collective redress action by the time the approval order is made.

E. Collective Redress Judgments

Rule 238 [X21] Effect of Final Judgments

- (1) The final judgment of the court in a collective redress action binds
 - (a) all of the parties, and all group members who have opted in to the collective redress action; or
 - (b) in a collective redress action under Rule X8 (2) all of the parties, and all of the group members resident in the forum state who have not opted-out within the period set by the court.
- (2) No other collective redress action may be admitted in respect of any claims determined in the final judgment of the court.
- (3) The final judgment may be enforced by the qualified claimant. If the qualified claimant does not enforce the final judgment within reasonable time any group member may enforce the final judgment with the permission of the court.

Rule 239 [X22] Separation of Judgments and Partial Judgments

- (1) The court may, in a collective action for compensation, give separate final judgments on the liability of some or all of the defendants and on the amount of compensation payable.
- (2) Both judgments shall bind the persons as specified in Rule X21(1).

Rule 240 [X23] Amount of Compensation

The final judgment of the court which sets the amount of compensation in a collective redress action shall include

- (1) the total amount of compensation payable in respect of the group or sub-group. If an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount;
- (2) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

F. Collective Settlements outside Collective Actions

Rule 241 [X24] Standing to Reach Settlement

(1) Any entity fulfilling the requirements in Rule X2 (a) and (b) to be a qualified claimant may reach a collective settlement agreement for a group even where a collective action order has not been made.

(2) Any such collective settlement agreement shall be negotiated in good faith for the benefit of all group members.

Rule 242 [X25] Application for Approval of Collective Settlement

An application to the court for approval of the collective settlement agreement must be made by all of the parties to it. The application shall include all of the information required under Rule X16 (2). The application shall also specify whether the settlement proposes the use of an opt-in or an opt-out system.

Rule 243 [X26] Approval Procedure

The court must follow the procedure set out in Rule X17 in order to approve a collective settlement following an application under Rule X25.

Rule 244 [X27] Approval Order and Procedure for Opting in or Opting out

(1) The court must approve the proposed collective settlement on the basis of Rule X18.

(2) If the court does not approve the proposed collective settlement it must give reasons and must remit the agreement to the parties.

(3) The court must advertise the approved collective settlement in accordance with Rule X12 (2), give information on whether the settlement shall be binding based on an opt-in or opt-out procedure, and fix a period of at least three months for the group members to opt-in or opt-out. The court must decide to whom and how all notifications to opt-in or to opt-out shall be given. If the terms of the settlement require a fixed number or percentage of group members to accept the settlement before any compensation is paid this must also be clearly communicated.

(4) After expiry of the period fixed for opt-in or opt-out notifications and, where applicable, if the necessary number or percentage of group members have opted-in or have not opted-out, the court must declare the approved settlement binding. Otherwise the court must declare the proceedings under Part VI terminated without a binding settlement.

(5) The approved settlement shall bind all of the persons who have opted in, in the case of an opt-in proceeding or who have not opted out, in the case of an opt-out proceeding.

G. Cross Border Issues

1. Within the European Union

Rule 245 [X28] Recognition of Qualified Claimant

The recognition of a claimant as a qualified claimant by a court in an order made under Rule X6 (1) (a) binds every other court in the Member States without the need for further application for recognition in relation to actions arising from the same mass harm event.

Rule 246 [X29] Judicial Coordination

(1) When the mass harm has cross border effects, the registry entries for each collective redress claim shall be made available on the European e-justice platform.

(2) Courts must use their best effort to coordinate collective actions in different Member States in order to avoid irreconcilable judgments or settlement approvals.

Rule 247 [X30] Group Members outside the Forum State

(1) The court shall ensure that group members outside the forum state are informed of the collective redress action in accordance with Rule X12.

(2) No order made under Rule X8 (2) binds group members outside the forum state.

(3) Group members outside the forum state must be allowed to opt-in.

(4) Sub-paragraphs (1) – (2) also apply to collective settlement proceedings under Part VI.

Rule 248 [X31] Multiple Substantive Laws

(1) Even if the claims of group members are subject to different substantive laws, this does not in itself prevent those group members from participating in a single collective action.

(2) In this case, the court may divide the group into sub-groups.

2. Outside the European Union

Rule 249 [X31a] Group Members outside the EU

Rules [X 30] and [X 31] apply also with respect to cases having cross-border effects outside the European Union.

H. Costs, Expenses and Funding

Rule 250 [X32] Funding of Collective Actions

(1) Qualified claimants may use third party litigation funding.

(2) Qualified claimants must disclose the source of funding.

(3) Upon the court's or on a party's request, disclosure of the details of any funding agreement may be made in confidence to the court.

Rule 251 [X33] Costs and Expenses of Collective Actions

- (1) Only the qualified claimant is liable for costs and expenses if the collective redress action is unsuccessful.
- (2) If the action is successful, the total amount of compensation received by the qualified claimants shall form a common fund.
- (3) Costs and expenses must be paid from the common fund before any distribution of compensation to group members.

PART XII – COSTS

(To be added)

DRAFT