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

Draft Principles and Rules prepared by
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PREFACE

Presented herewith is Discussion Draft No. 2 of Principles and Rules of Transnational Civil Procedure. The project has been circulated to consultants from many countries, as well as to the Advisers, Members Consultative Group, and, more recently, to the ALI/UNIDROIT Working Group.

There are, understandably, skeptics who think the idea premature at best that there can be “universal” procedural rules, and others who, though sympathetic to the idea, have serious reservations about the present execution of the concept. These reservations are at two levels. First, there is doubt that it is feasible to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, to cope with the peculiarities of the United States system. We think, however, that the reservations based on the civil-law/common-law distinction are unduly fearful. The United States system is unique among common-law systems in having broad discovery and jury trial and the more so in having the combination of these two procedures. Thus, a second-level reservation is that, if such a project is feasible, it is not feasible if it is based on characteristic United States procedure.

Our discussions have led us to accept the latter kind of reservation with important qualifications. We conclude that a system of procedure acceptable generally throughout the world could not include jury trial and would require much more limited discovery than is typical in the United States. This in turn leads us to conclude that the scope of the proposed Transnational Civil Rules should exclude personal-injury and wrongful-death actions, because barring jury trial in such cases would be unacceptable in the United States. Hence, the scope is now conceived in terms of “commercial disputes.” Obviously this definition will require some further specification, but we believe that it is adequate to frame the project for the present.

The worldwide reception given to the project generally has been very positive, but there has been strong dissent. Part of the dissent evidently reflects some irritation at “American cultural imperialism.” We hope that this work product of the Reporters reflects the fact that one of the ALI Reporters, Professor Taruffo, and one of the UNIDROIT Reporters, Professor Stürner, are civil-law scholars and lawyers, and that the Associate Reporter, Professor Gidi, is a civil-law scholar. We all endeavored to overcome the parochialism of our backgrounds.

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INTRODUCTION

I. INTERNATIONAL “HARMONIZATION” OF PROCEDURAL LAW

The human community of the world lives in closer quarters today than in earlier times. International trade is at an all-time high and is increasing steadily; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; ordinary citizens in increasing numbers live temporarily or permanently outside their native countries. As a consequence, there are positive and productive interactions among citizens of different nations in the form of increased commerce and wider possibilities for personal experience and development. There are also inevitable negative interactions, however, including increased social friction, legal controversy, and litigation.

In dealing with these negative consequences, the costs and distress resulting from legal conflict can be mitigated by reducing differences in legal systems, so that the same or similar “rules of the game” apply no matter where the participants may find themselves. The effort to reduce differences among national legal systems is commonly referred to as “harmonization.” Another method for reducing differences is “approximation,” meaning the process of reforming the rules of various legal systems so that they approximate each other. Most endeavors at harmonization have addressed substantive law, particularly the law governing commercial and financial transactions. There is now in place a profusion of treaties and conventions governing these subjects as well as similar arrangements addressing personal rights such as those of employees, children, and married women.¹

Harmonization of procedural law has made much less progress. It has been impeded by the assumption that national procedural systems are too different from each other and too deeply embedded in local political history and cultural tradition to permit reduction or reconciliation of differences among legal systems. There are, to be sure, some international conventions dealing with procedural law, notably the Hague Convention on the Taking of Evidence Abroad, the evolving Hague Convention on Jurisdiction and Judgments, and the European conventions on recognition of judgments.² Thus far, the international conventions on procedural law have addressed the bases of personal jurisdiction and the mechanics for service of process to commence a lawsuit on one end of the litigation process and recognition of judgments on the other end of the process.

However, the pioneering work of Professor Marcel Storme has demonstrated that harmonization is possible in such procedural matters as the formulation of claims, the development of evidence, and the decision procedure.³ This project to develop transnational rules for civil

1. See, e.g., Convention on the Rights of the Child, November 20, 1989, 28 I.L.M. 1448; United States-Egypt Treaty Concerning the Reciprocal Encouragement and Protection of Investments, September 29, 1982, 21 I.L.M. 927; Convention on the Elimination of All Forms of Discrimination Against Women, December 18, 1979, 19 I.L.M. 33; International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

2. See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 8 I.L.M. 37; Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, available at <http://www.hcch.net/e/conventions/draft36e.html> (last visited Apr. 16, 2001); Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229, reprinted as amended in 29 I.L.M. 1413; Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620. See also, e.g., Catherine Kessedjian, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Preliminary Document No. 7, Hague Conference on Private International Law, available at <http://www.hcch.net/e/workprog/jdgm.html> (April 1997).

3. See generally APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (Marcel Storme ed., 1994). See also *Anteproyecto del Código Procesal Civil Modelo para Iberoamérica*, 52 REVISTA DE PROCESO 134 (1988); *Anteproyecto del Código Procesal Civil Modelo para Iberoamérica* 53 REVISTA DE PROCESO 143 (1989).

procedure has drawn extensively on the work of Professor Storme.

International arbitration often is a substitute for adjudication in national courts. However, the international conventions on arbitration have the same limited scope as the conventions dealing with international litigation in judicial forums. Thus, the international conventions on arbitration address aspects of the commencement of an arbitration proceeding and the recognition to be accorded an arbitration award but say little or nothing about the procedure in an international arbitration proceeding as such.⁴ Instead, the typical stipulation concerning hearing procedure in international arbitration is that the procedural ground rules shall be as determined by the neutral arbitrator.⁵

This project endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions.⁶ The project is inspired by the desire to unite many diverse jurisdictions under one system of procedural rules as was accomplished in the United States a half-century ago with the enactment of the Federal Rules of Civil Procedure. The Federal Rules established a single procedure to be employed in courts sitting in forty-eight different, semi-sovereign states, each of which with its own procedural law, its own procedural culture, and its own bar. The Federal Rules thereby accomplished what many thoughtful observers thought impossible—a single system of procedure for four dozen different legal communities. Experience with the Federal Rules proves that it has been possible to establish a single procedure for litigation in Louisiana (civil law system), Virginia (common law pleading in 1938), and California (code pleading). The project to establish Transnational Rules conjectures that a procedure for litigation in transactions across national boundaries is also worth the attempt.

II. FUNDAMENTAL SIMILARITIES IN PROCEDURAL SYSTEMS

In undertaking international harmonization of procedural law, the Reporters have come to identify both fundamental similarities and fundamental differences among procedural systems. Obviously, it is the fundamental differences that present the difficulties. However, it is important to keep in mind that all modern systems of civil procedure have fundamental similarities. These similarities result from the fact that a procedural system must respond to several inherent requirements. Recognition of these requirements makes easier the task of identifying functional similarities in diverse legal systems and, at the same time, puts into sharper perspective the ways in which procedural systems differ from one another.

The fundamental similarities among procedural systems can be summarized as follows:

- Standards governing assertion of personal jurisdiction and subject-matter jurisdiction,
- Specifications for a neutral adjudicator,
- Procedure for notice to defendant,
- Rules for formulation of claims,
- Explication of applicable substantive law,
- Establishment of facts through proof,
- Provision for expert testimony,

4. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

5. See Alan S. Rau and Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 90 (1995).

6. See John J. Barceló III, *Introduction to Geoffrey C. Hazard, Jr. & Michele Taruffo, Transnational Rules of Civil Procedure: Rules and Commentary*, 30 CORNELL INT'L L.J. 493, 493-94 (1997).

- Rules for deliberation, decision, and appellate review, and
- Rules of finality of judgments.

Of these, the rules of jurisdiction, notice, and recognition of judgments are sufficiently similar from one country to another that they have been susceptible to substantial resolution through international conventions. Concerning jurisdiction, the United States is aberrant in that it has an expansive concept of “long-arm” jurisdiction, although this difference is one of degree rather than one of kind, and that it perpetuates jurisdiction based on simple presence of the person (“tag” jurisdiction). Specification of a neutral adjudicator begins with realization that all legal systems have rules to assure that a judge or other adjudicator is disinterested. Accordingly, in transnational litigation, reliance generally can be placed on the local rules expressing that principle. Similarly, an adjudicative system by definition requires a principle of finality. Therefore, the concept of “final” judgment generally is recognized, although some legal systems permit the reopening of a determination more liberally than other systems do. The corollary concept of mutual recognition of judgments is also universally accepted.

III. DIFFERENCES AMONG PROCEDURAL SYSTEMS

The differences in procedural systems are, along one division, differences between the common law systems and the civil law systems. The common law systems all derive from England and include Canada, Australia, New Zealand, South Africa, India, and the United States, as well as Israel, Singapore, and Bermuda. The civil law systems originated on the European continent and include those derived from Roman law (the law of the Roman Empire codified in the Justinian Code) and canon law (the law of the Roman Catholic Church, itself substantially derived from Roman law). The civil law systems include those of France, Germany, Italy, Spain, and virtually all other European countries, as well as those of Latin America, Japan, and China, whose legal systems are derived from the European model.

The significant differences between common law and civil law systems are as follows:

- The judge in civil law systems, rather than the advocates as in common law systems, has responsibility for development of the evidence and articulation of the legal concepts that should govern decision. However, there is great variance among civil law systems in the manner and degree to which this responsibility is exercised, and there is, no doubt, variance among the judges in any given system.
- Civil law litigation in many systems proceeds through a series of short hearing sessions—sometimes less than an hour each—for reception of evidence, which is then consigned to the case file pending a final stage of analysis and decision. In contrast, common law litigation has a preliminary or pre-trial stage (sometimes more than one), and then a trial at which all the evidence is received consecutively.
- A civil law judgment in the court of first instance (i.e., trial court) is generally subject to more searching reexamination in the court of second instance (i.e., appellate court) than a common law judgment. Re-examination in the civil law systems extends to facts as well as law.
- The judges in civil law systems serve a professional lifetime as judge, whereas the judges in common law systems are almost entirely selected from the ranks of the bar. Thus, civil law judges lack the experience of having been lawyers.

These are important differences, but they are not irreconcilable.

The American version of the common law system has differences from other common law systems that are of at least equal significance. The American system is unique in the following respects:

- Jury trial is a broadly available right in the American federal and state courts. No other country routinely uses juries in civil cases.
- American rules of discovery give wide latitude for exploration of potentially relevant evidence.
- The American adversary system generally affords the advocates far greater latitude in presentation of a case than is customary in other common law systems. In part, this is because of the use of juries.
- The American system operates through a unique cost rule. Each party, including a winning party, ordinarily pays its own lawyer and cannot recover that expense from a losing opponent. In most other countries, the winning party, whether plaintiff or defendant, recovers at least a substantial portion of litigation costs.⁷
- American judges are selected through a variety of ways in which political affiliation plays an important part. In most other common law countries, judges are selected on the basis of professional standards.

However, it should also be recognized that the procedures in American administrative adjudications, which are conducted by professional judges without juries, much more closely resemble their counterparts in other countries.

IV. RULES FOR FORMULATION OF CLAIMS (PLEADING)

The rules governing formulation of claims are substantially similar in most legal systems. The pleading requirement in most common law systems requires that the claimant state the claim with reasonable particularity as to facts concerning persons, places, times, and sequences of events involved in the relevant transaction. This pleading rule is essentially similar to the Code Pleading requirement that governed in most American states prior to adoption of the Federal Rules of Civil Procedure in 1938.⁸ The attempt in the Federal Rules of Civil Procedure to eliminate disputes over pleading through the technique of “notice pleading” has been largely unsuccessful because it simply postpones disputes concerning the legal sufficiency of a claim until later stages in the litigation. The Transnational Rules require that pleading be in detail with particulars as to the basis of claim and that the particulars reveal a set of facts that, if proved, would entitle the claimant to a judgment.

V. DISCOVERY

The pleading rule requiring specific allegations of fact reduces the potential scope of discovery, as it provides for tightly framed claims and defenses from the very beginning of the proceeding. Moreover, it contemplates that a party who has pleaded specific facts will be required to reveal, at a second stage of the litigation, the specific proof on which it intends to rely

7. See generally ALAN J. TOMKINS AND THOMAS E. WILLGING, *TAXATION OF ATTORNEY'S FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* (1986). See also, e.g., Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982).

8. Leland L. Tolman, *Advisory Committee's Proposals to Amend the Federal Rules of Civil Procedure*, 40 A.B.A. J. 843, 844 (1954); FLEMING JAMES ET AL., *CIVIL PROCEDURE* §§ 3.5, 3.6 (4th ed. 1992).

concerning these allegations, including documents, witnesses, and experts. The Rules require disclosure of these sources of proof prior to the plenary hearing. These requirements presuppose that a party properly may commence litigation only if the claimant has a provable case and not merely the hope or expectation of uncovering such a case through discovery from the opposing party.

The combination of strict rules of pleading and compulsory disclosure further reduces the necessity of further exchange of evidence. A party must show its cards, so to speak. Within that framework, the Rules attempt to define a limited right of document discovery and a limited right of deposition. These are regarded as improper in many civil law systems. However, in a modern legal system, there is a growing practical necessity—if one is serious about justice—to permit document discovery to some extent and, at least in some cases, deposition of key witnesses.

In most common law jurisdictions, pre-trial depositions are unusual and, in some countries, typically are employed only when the witness will be unavailable for trial. Documents are subject to discovery only when relevant to the proceeding. Relevance for this purpose is defined by reference to the pleadings in the case and, as noted above, the rules of pleading require full specification of claims and defenses.⁹ In contrast, wide-ranging pre-trial discovery is an integral part of contemporary American civil litigation, particularly in cases involving substantial stakes.

The rules for document production in the common law systems all derive from the English Judicature Acts of 1873 and 1875.¹⁰ In 1888, the standard for discovery was held in the leading *Peruvian Guano* decision to cover:

any document that relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party . . . either to advance his own case or to damage the case of his adversary . . . [A] document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences .¹¹

Under the civil law there is no discovery as such. A party has a right only to request that the court interrogate a witness or that the court require the opposing party to produce a document. This arrangement is a corollary of the general principle in the civil law system that the court rather than the parties is in charge of the development of evidence. Moreover, a party in some civil law systems cannot be compelled to produce a document that will establish its own liability—a civil equivalent of a privilege against self-incrimination. However, in many civil law systems, a party may be compelled to produce a document when the judge concludes that the document is the only evidence concerning the point of issue. This result also can be accomplished by holding that the burden of proof as to the issue shall rest with the party in possession of the document. In any event, the standard for production under the civil law uniformly appears to be “relevance” in a fairly strict sense.

9. See generally PRE-TRIAL AND PRE-HEARING PROCEDURES WORLDWIDE (Charles Platto ed., 1990).

10. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c.66; Supreme Court of Judicature Act, 1875, 38 & 39 Vict., c.77.

11. *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co.* 11 QBD 55, 63 (1882) (interpreting Order XXXI, rule 12, from the 1875 Rules of Supreme Court, which required production of documents “relating to any matters in question in the action”).

VI. PROCEDURE AT PLENARY HEARING

Another principal difference between civil law systems and common law systems concerns presentation of evidence. As is well known, judges in civil law systems develop the evidence with suggestions from the advocates, while in common law systems, the evidence is presented by the advocates with supervision and supplementation by the judge. Furthermore, in many civil law systems, the evidence usually is taken in separate stages according to availability of witnesses, while in common law systems, it generally is taken in consecutive hearings for which the witnesses must adjust their schedules. More fundamentally, the basic conception of the plenary hearing in civil law systems is that of an inquiry by the judge that is monitored by advocates on behalf of the parties, while the conception of a trial in common law systems is that of juxtaposed presentations to the court by the parties through their advocates.

In more pragmatic terms, the effectuation of these different conceptions of the plenary hearing requires different professional skills on the part of judges and advocates. An effective judge in the civil law system must be able to frame questions and pursue them in an orderly fashion, and an effective advocate must give close attention to that questioning and be alert to suggest additional directions or extensions of the inquiry. In the common law system, the required skills are more or less the opposite. The common law advocate must be skillful at framing and pursuing questions in orderly sequence, while the judge must be attentive to pursuing further development by supplemental questions.

VII. SECOND-INSTANCE REVIEW AND FINALITY

The Transnational Rules defer to the law of the forum concerning second-instance proceedings (“appeal”). The same is true for further review in a higher court, as is available in many systems. The Rules define conditions of finality that discourage the re-opening of an adjudication that has been completed. A case fairly conducted is the best approximation of true justice that human enterprise can achieve. On that basis, an adjudication should be left at rest even when there may be some reason to think that a different result could be achieved, unless there is a showing of fraud in the proceeding or of conclusive evidence that was previously undisclosed. The Rules adopt an approach to finality based on that philosophy.

VIII. ADOPTION OF THESE RULES

The Rules are designed to express basic principles of civil procedure recognized in modern societies. They seek to combine the best elements of adversary procedure, particularly that in the common law tradition, with the best elements of judge-centered procedure, particularly that in the civil law tradition. They are expressed in terminology and through concepts that can be assimilated in all legal traditions.

The procedure and legal authority for adoption of these Rules is a matter of the domestic and international law of states. Hence, these Rules may be adopted by international convention or by legal authority of a nation state for application in the courts of that state. In countries with a unitary legal system, that legal authority is vested in the national government. In federal systems, the allocation of that authority depends upon the terms of the particular federation. It might be, for example, that these Rules could be adopted for the federal courts in a federal system but only as prescribed by the state or province in the state or provincial courts. As used in the Rules, “state” refers to a sovereign state and not to a province or state within a federal system.

These Rules could be adopted for use in the first-instance courts of general competence,

in a specialized court, or in a division of the court of general competence having jurisdiction over commercial disputes.

These Rules could also be approved as Models that could be adapted to various basic procedural systems.

IX. PURPOSE OF THESE RULES

The objective of these Rules is to offer a system of fair procedure for litigants involved in legal disputes arising from transnational transactions. Appreciating that all litigation is unpleasant from the viewpoint of the litigants, the Rules seek to reduce the uncertainty and anxiety that particularly attend parties obliged to litigate in unfamiliar surroundings. The reduction of difference in legal systems, commonly called “harmonization” of law, is an aspect of achieving such fairness. However, a system of rules is only one aspect of fair procedure. Much more important, as a practical matter, is the independence and neutrality of judges and the competence and integrity of legal counsel. Nevertheless, rules of procedure are influential in the conduct of litigation. These Rules seek to express, so far as rules can do so, the ideal of disinterested adjudication. As such, they also can be terms of reference in matters of judicial cooperation, wherein the courts of different legal systems provide assistance to each other. By the same token, reference to the principles expressed herein can moderate the unavoidable tendency of practitioners in a legal system, both judges and lawyers, to consider their system from a parochial viewpoint.

The Rules herein, governing presentation of claims, development and presentation of legal argument, and the final determination by the tribunal (Rules 11 through 33), may be adopted or referenced in proceedings not otherwise governed by these Rules, particularly arbitration.

These Rules are proposed for adoption by states to govern litigation arising from transnational business, commercial, or financial transactions, as defined in Rule 2. The method of adoption could be treaty, convention or other international agreement, or statute or rule of court of a state or political subdivisions thereof. A court could refer to these Rules as generally recognized standards of civil justice when doing so is not inconsistent with its own organic or procedural law. It is contemplated that, when adopted, these Rules would be a special form of procedure applicable to these transactions, similar to specialized procedural rules that most states have for bankruptcy, administration of decedents’ estates, and civil claims against government agencies.

Where permissible by forum law, these Rules could also be adopted through contractual stipulation by parties to govern, with the consent of the forum, litigation arising from a contractual relationship. This form of implementation in substance is a party stipulation to waive the otherwise governing rules of procedure in favor of these Rules.

X. REVISIONS FROM PRIOR DRAFTS

Prior drafts of the Rules have been published.¹² These drafts, together with the previous Discussion Draft No. 1 and Preliminary Draft No. 2, have elicited valuable criticism and comments from legal scholars and lawyers from both civil and common law systems.¹³

12. See Geoffrey C. Hazard, Jr. & Michelle Taruffo, *Transnational Rules of Civil Procedure: Rules and Commentary*, 30 CORNELL INT’L L.J. 493, 495 (1997); Geoffrey C. Hazard, Jr. and Michele Taruffo, *Transnational Rules of Civil Procedure, Preliminary Draft No. 1*, 33 TEX. INT’L L.J. 499 (1998) [hereinafter Hazard and Taruffo, *Preliminary Draft No. 1*].

13. See, more recently, Rolf Stürner, *Règles Transnationales de Procédure Civile? Quelques Remarques d’un Européen sur un Nouveau Projet Commun de l’American Law Institute et d’UNIDROIT*, R.I.D.C 845 (2000); Rolf Stürner, *Some European*

Comparison will demonstrate that many modifications have been adopted as a result of discussions and deliberations following those previous publications, especially revision of the provisions on scope, composition of the tribunal, the incorporation of “principles of interpretation,” the sequence and scope of exchange of evidence, specification of a settlement-offer procedure, and provisions for special courts for transnational litigation, for amendment of pleadings, and for procedures for dealing with multiple parties or multiple claims. The net effect can be described as a new text.

Earlier drafts of the Rules were translated into German by Gerhard Walter from Bern University; into Japanese by Koichi Miki from Keio University; into French by Gabriele Mecarelli from Paris University; into Chinese by Terence Lau; into Italian by Francesca Cuomo and Valentina Riva from Pavia University; into Croatian by Eduard Kunštek; into Spanish by Evaluz Cotto from Puerto Rico University, Francisco Malaga from Pompeu Fabra University, Aníbal Quiroga León from Catholic University of Peru, Horácio Segundo Pinto from the Catholic University of Argentina, and Lorena Bachmaier from Universidad Complutense de Madrid; and into Portuguese by Associate Reporter Antonio Gidi from the University of Pennsylvania. It is hoped that there will be translations into additional languages in the future.

In addition to making numerous changes to the Rules, this new draft contains, more significantly, for the first time Fundamental Principles of Transnational Civil Procedure. The inclusion of the Principles constitutes a revision of the project suggested by the International Institute for the Unification of Private Law (UNIDROIT), in which The American Law Institute has happily concurred. The numerous revisions of the Rules emerged from discussions at several locations with Advisers from various countries, including meetings in Bologna and Rome, Italy; Vancouver, Canada; San Francisco, Washington, and Philadelphia, United States; Vienna, Austria; Tokyo, Japan; Singapore; and Paris, France. Criticism and discussion also were conducted through correspondence.

Remarks on a New Joint Project of The American Law Institute and UNIDROIT, 34 INT'L LAW. 1071 (2000); Antonio Gidi, *Presentación del Proyecto de Normas Transnacionales del Proceso Civil*, 52 DERECHO PUC 607 (1999); Antonio Gidi, *Normas Transnacionais de Processo Civil*, 8 REVISTA DOS MESTRANDOS EM DIREITO ECONÔMICO DA UFBA 54 (2000); José Lebre de Freitas, *O Anteprojecto Hazard-Taruffo para o Processo dos Litígios Comerciais Internacionais*, 2 THEMIS. REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE NOVA DE LISBOA 19 (2000); Eduard Kunštek, *Transnacionalna Pravila Gradanskog Postupka*, 21 ZBORNIK PRAVNOG FAKULTETA SVEUCILIŠTA U RIJECI 351 (2000); Antonio Gidi, *Apresentação às Normas Transnacionais de Processo Civil*, 8 REVISTA DOS MESTRANDOS EM DIREITO ECONÔMICO DA UFBA 40 (2000), also published in 52 DERECHO PUC 593 (1999); Gerhard Walter & Samuel P. Baumgartner, *Improving the Prospects of the Transnational Rules of Civil Procedure Project: Some Thoughts on Purpose and Means of Implementation*, 6 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL (2000), also published in 18 RITSUMEIKAN L. REV. (2000); Samuel P. Baumgartner, *Gaining a Worldly Perspective for the World in Our Courts* (unpublished manuscript, on file with the American Law Institute); Geoffrey C. Hazard, Jr., *Litigio Civil Sin Fronteras: Armonización y Unificación del Derecho Procesal*, 52 DERECHO PUC 583 (1999); Geoffrey C. Hazard, Jr., *Civil Litigation Without Frontiers: Harmonization and Unification of Procedural Law*, 52 DERECHO PUC 575 (1999).

See also Gary B. Born, *Critical Observations on the Draft Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998); Russell J. Weintraub, *Critique of the Hazard-Taruffo Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 413 (1998); Jacob Dolinger and Carmen Tiburcio, *Which Procedural Law Governs Proceedings to Be Performed in Foreign Jurisdictions: Lex Fori or Lex Diligentiae?*, 33 TEX. INT'L L.J. 425 (1998); Gerhard Walter and Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 TEX. INT'L L.J. 463 (1998); Catherine Kessedjian, *First Impressions of the Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 477 (1998); Geoffrey C. Hazard, Jr. and Michele Taruffo, *Preliminary Draft No. 1*, supra note 12; Michele Taruffo, *Drafting Rules for Transnational Litigation*, 110 ZEITSCHRIFT FÜR ZIVILPROZESS 449 (1997), Barceló, supra note 6, at 493.

For the previous drafts, we received written contributions from Mathew Applebaum, Stephen Burbank, Edward Cooper, Stephen Goldstein, Richard Hulbert, J. A. Jolowicz, Dianna Kempe, Mary Kay Kane, Ramón Mullerat, Ernesto Penalva, Thomas Pfeiffer, Hans Rudolf Steiner, Rolf Stürmer, Louise Teitz, Janet Walker, Gerhard Walter, Garry Watson, Des Williams, and others.

For the preceding draft, we received written contributions from Robert Byer, Robert Casad, Edward Cooper, José Lebre de Freitas, Richard Hulbert, Mary Kay Kane, Richard Marcus, Michael Stamp, Tom Rowe, and Ralph Whitten.

For this draft, we received written comments to the Principles from Robert Barker, Stephen Burbank, Michael Cohen, Edward Cooper, Frédérique Ferrand, Stephen Goldstein, Richard Hulbert, Mary Kay Kane, Dianna Kempe, Donald King, Anthony Jolowicz, Stephen McEwen, Jr., Tom Rowe, Amos Shapira, Laurel Terry, and Diane Wood.

We received written comments to the Rules from Robert Bone, Michael Cohen, Thomas F. Cope, Frédérique Ferrand, José Lebre de Freitas, Trevor Hartley, Mary Kay Kane, Donald King, Houston Putnam Lowry, Richard Marcus, Natalie Thingelstad, Lawrence Newman, William Reynolds, Janet Walker, Garry Watson, and Ralph Whitten.

The project was the subject of extensive commentary and much candid and helpful criticism at an October 27, 2000, meeting of French proceduralists in Paris, in which participants included Judges Guy Canivet, Jacques Lemontey, and Jean Buffet and Professors Bernard Audit, Georges Bolard, Loïc Cadiet, Philippe Fouchard, H  l  ne Gaudemet-Tallon, Serge Guinchard, Catherine Kessedjian, Pierre Mayer, Horatia Muir-Watt, Marie-Laure Niboyet, Jacques Normand, and Claude Reymond.

It is hoped that this long process of dialogue has made the Principles and Rules more understandable and therefore more acceptable from both common law and civil law perspectives.

XI. UNIDROIT PARTNERSHIP

Since 2000, after a favorable report from Professor Rolf St  rner, UNIDROIT joined the American Law Institute (ALI) in this project. It was at UNIDROIT's initiative that the preparation of Fundamental Principles of Transnational Civil Procedure was undertaken. The Fundamental Principles will inform the interpretation of the Rules, the more detailed body of procedural law. The project thus now encompasses both levels.

The Principles generally appeal to the civil law mentality. Common law lawyers may be less familiar with this sort of generalization and abstraction. Since the Principles and Rules are being developed simultaneously, the relation between generality and specification is illuminated more sharply. The Principles are interpretive guides to the Rules and could be adopted as principles of interpretation. They could also be adopted as guidelines in interpreting existing national codes of procedure. Correlatively, the Rules can be considered as an exemplification of the Principles.

During May 22-26, 2000, the ALI/UNIDROIT Working Group had a preliminary meeting in the UNIDROIT Headquarters in Rome. In this meeting, three proposals for Principles were extensively discussed. One was presented by Reporters Hazard, Taruffo, and Gidi, another by Reporter Rolf St  rner, and another by Neil Andrews of the Working Group. The group also extensively discussed the previous draft of the Transnational Rules. The current draft is the result of that meeting.

XII. FUTURE WORK

The Reporters are preparing Annotations that will correlate the provisions of these Rules with cognate provisions in various national-procedural systems.

This Discussion Draft is still a "work in progress." An intensive discussion of the Principles and Rules is to be held at UNIDROIT headquarters in Rome during July 2-6, 2001. We expect to have discussions of these texts in the coming year in China, Japan, Latin America, and Europe. We expect to present a further revision to the Institute sometime in the next year or two.

Subsequent drafts will incorporate the latest revisions of these Rules. The latest version will be accessible at The American Law Institute's website (<http://www.ali.org/ali/transrules.htm>).

The Reporters welcome suggestions and criticisms. Our address is as follows:

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FUNDAMENTAL PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE

1. Jurisdiction

Jurisdiction over parties, property, and the subject matter of legal disputes should be exercised within the limits of generally recognized principles of international law, including conventions adopted in the forum state.

2. Independence, Neutrality, and Competence of the Court

2.1 The court adjudicating a transnational legal dispute should be impartial and have judicial independence, including reasonable tenure in office and freedom from external influence.

2.2 The court should have a procedure for addressing contentions of judicial bias.

2.3 The judges adjudicating a transnational legal dispute should have substantial legal experience and adequate knowledge of applicable substantive and procedural law.

3. Equality of the Parties and Right to Be Heard

3.1 The court should ensure equal opportunity for litigants to assert or defend their rights. This includes the right to submit contentions of fact and law and to make presentations of evidence in accordance with applicable procedural law, regardless of the nationality of the litigants, their residence, or the nature of the legal dispute in which they are involved.

3.2 Nondomiciliaries of the forum state should not be required, by reason of that status, to post a security deposit for costs or liability.

3.3 Venue rules should assure that the court hearing the dispute is reasonably accessible to the parties and their counsel.

3.4 The court should afford the parties an opportunity to respond to evidence presented by another party.

3.5 The court should consider each significant contention of fact and law that has been put forward by a party.

3.6 The proceeding should be adjudicated in an expedited fashion.

4. Right to Assistance of Counsel

4.1 A party should have the right to engage legal counsel, both counsel admitted to practice in the forum nation and assistance of counsel practicing elsewhere.

4.2 The professional independence of legal counsel should be respected.

5. Due Notice

5.1 Parties should have reasonable notice of a proceeding involving their interests, both at the commencement of the proceeding and regarding important developments thereafter.

5.2 In particular, a defendant should receive formal notice, delivered by reasonably effective means, of the claims being asserted and of the possibility of default judgment upon failure of timely response.

5.3 A party should have notice and opportunity to respond to contentions of fact and law by another party.

5.4 When the court makes a decision upon application without notice to the respondent, the respondent should have a right to have the decision reconsidered de novo.

5.5 The parties should make known to each other in due course the elements of fact upon which their claims or defenses are based and the elements of law that will be invoked, so that each party has the opportunity to organize its case.

6. Choice of Law

Choice of law to govern the proceeding, including matters both of procedure and of substance, should be made according to generally recognized principles of private international law.

7. Structure of the Proceeding

7.1 The proceeding should be organized into three stages; Pleading Phase, Instruction Phase (“pretrial” in common-law terminology), and Plenary Hearing (“trial” in common-law terminology).

7.2 In the Instruction Phase the court should consider preliminary objections and substantive legal contentions, review the availability of evidence and possibilities for disclosure and discovery, and establish schedules for further proceedings.

7.3 In the Plenary Hearing relevant evidence not taken in the Instruction Phase should be presented in concentrated sequence.

8. Party Initiation of the Proceeding and Control of Its Scope

8.1 Litigation should be initiated by claim or claims by the plaintiff and not initiated by the court ex officio.

8.2 The scope of the proceeding should be determined by the claims and defenses asserted by the parties in the pleadings. The claims and defenses thus asserted also should be the basis for applying principles of lis alibi pendens and claim preclusion.

8.3 The parties should control the voluntary termination of the action by withdrawal, by admission of liability in whole or in part, or by settlement.

9. Responsibility of the Court for Direction of the Proceeding

9.1 The court should actively manage the litigation, exercising judicious discretion in order to achieve disposition of the dispute fairly and within a reasonable time.

9.2 The court should determine the relevancy of evidence and the validity of legal contentions.

9.3 The court should determine, upon consultation with the parties, the order in which issues are to be resolved, the dates and times of deadlines, and the schedule of hearings.

10. Judicial Powers of Control; Proportionality

10.1 The court should have authority to impose sanctions against failure or refusal of a party to comply with the court’s directions and other procedural abuse.

10.2 Sanctions should be reasonable and proportional to the importance and seriousness of the matter involved and the intentions of the persons whose conduct may be at issue.

11. Responsibilities of the Parties

11.1 The parties should observe standards of fair play in dealing with the court and with other parties.

11.2 Parties should refrain from spurious claims and defenses.

11.3 The parties are responsible for alleging facts, presenting evidence to sustain their respective claims and defenses, and for giving reasonable notice to the court and other parties of the evidence and the legal contentions they seek to have considered.

11.4 The parties should present detailed statements of fact and law in the statement of claims and defenses.

11.5 A party's failure to make a required answer to an opposing party's complaint, defense, or other statement in due time is a proper basis for considering that the statement is admitted.

11.6 The parties should cooperate in the court's management of the litigation and with the taking of evidence.

12. Right of Amendment

12.1 In the Instruction Phase a party should have the right, upon notice to the court and other parties, to reasonably amend statements of claim and defense and contentions of law.

12.2 When necessary to prevent injustice and when it would not prejudice an opposing party's ability to respond, there should be a similar right at the Main Hearing.

13. Right to Proof and Duties to Disclose Evidence

13.1 The parties have, generally, the right to unrestricted access to all relevant and nonprivileged evidence and information.

13.2 The parties should have the right to give statements that are accorded evidentiary effect and should have reasonable opportunity to present relevant evidence, including expert evidence.

13.3 Examination of witnesses, parties, and experts should proceed as customary in the forum, either with the parties conducting the primary examination (as in common-law systems) or with the judge doing so (as in civil-law systems).

13.4 A party should have the opportunity for supplemental questioning whenever the judge or an opposing party conducts the primary examination.

13.5 A party should have the right in the Instruction Phase to demand disclosure of directly relevant evidence in possession or control of another party. It should not be a basis of objection that evidence produced through such a demand may be adverse to the party or person upon whom demand is made.

13.6 A party should have the right to obtain reasonable discovery from third parties.

13.7 The court may draw adverse inferences from a party's failure to produce evidence that reasonably appears to be within that party's control or access, or from a party's failure to participate in accordance with the rules of procedure.

14. Evidentiary Privileges and Immunities

14.1 The court should give effect to generally recognized privileges of the parties, such as the privilege against self-incrimination and the privileges against disclosure of professional communications with legal counsel and inter-spousal communications.

14.2 The court should give effect to privileges of third parties in accordance with forum law, including choice of law.

15. Third Parties

15.1 Third parties that have an interest substantially connected with the claims or defenses of the original litigants should have the opportunity to participate on the same basis and with the same obligations as the original litigants.

15.2 Third parties should cooperate in the court's management of the litigation and taking of evidence. This obligation includes duties with respect to discovery.

16. Orality and Written Presentations

16.1 Testimony of witnesses, parties, and experts should be received orally whenever possible, except as the parties, with the consent of the court, may otherwise agree.

16.2 Oral testimony may be limited to supplemental questioning following presentation in written form of a witness's principal testimony or of an expert's report.

16.3 Pleadings, motions, and legal argument should be presented in writing, but the parties should have the right to present supplemental oral argument on important substantive and procedural issues.

16.4 The court may accept from nonparties written comments concerning issues presented in the proceeding.

17. Public Hearings

The Main Hearing and the case record should be open to the public except with respect to matter that is protected by a right of confidentiality.

18. Burden and Standard of Proof

It is the burden of a claimant to prove, according to the standard in forum law, the facts necessary to the success of the claim. A defendant has the same burden regarding affirmative defenses.

19. Judicial Responsibility for Determinations of Law and Fact

19.1 The court is responsible for determining, upon consultation with the parties, the correct legal basis for its decisions.

19.2 The court may rely on legal principles, facts, or evidence not advanced by the parties only upon giving them opportunity to comment and, if necessary, to amend their contentions.

19.3 The court may delegate the taking of evidence or the decisions of issues of law to one of its members or, in case of necessity, delegate the taking of evidence to a suitable delegate.

19.4 The court may order the taking of evidence on motion of the parties or on its own motion.

19.5 All types of nonprivileged evidence should be admissible according to relevance, including statements of parties.

19.6 The court should determine factual issues according to the principle of free evaluation on the basis of evidence received in the proceeding.

19.7 The court controls the consideration of evidence by giving directions as to the relevant issues on which it requires evidence, as well as to the nature of the evidence required to decide those issues.

19.8 The court may appoint an expert to testify on any relevant issue for which expert testimony is appropriate. A party may present expert testimony through an expert selected by that party on any relevant issue for which expert testimony is appropriate.

19.9 The Main Hearing should be held before the judge or judges who are to give judgment.

20. Decision and Reasoned Explanation

20.1 Upon completion of the hearings, the court should promptly give judgment, including specification of the remedy awarded.

20.2 The decision should be accompanied by a reasoned explanation of the legal and factual basis of the decision.

21. Settlement

21.1 Among the responsibilities of the judge is reconciliation of the parties when reasonably possible. The court should encourage the parties' participation in prelitigation procedures, alternative-dispute-resolution procedure, and voluntary settlement at any stage of the proceeding.

21.2 The parties should cooperate in reasonable settlement endeavors.

22. Costs

22.1 The prevailing party should be awarded its actual and reasonable expenditures in the proceeding, including attorneys fees, or such a substantial portion thereof as the court may determine to be fair and appropriate.

22.2 The court may withhold costs to the winning party when there is clear justification for doing so.

23. Finality

Subject to the right of appeal, a judgment should be final and, in general, immediately enforceable promptly after being rendered.

24. Appeal

24.1 The parties should have opportunity for appellate review on substantially the same terms as provided in similar litigation under the law of the forum.

24.2 The right to appellate review is limited to claims, defenses, counterclaims, and evidence adduced in the first instance.

RULES OF TRANSNATIONAL CIVIL PROCEDURE

A. Principles of Interpretation

1. Principles of Interpretation

1.1 These Rules must be interpreted in accordance with and to fulfill the purposes of the Fundamental Principles stated in the preamble.

1.2 These Rules must be construed to advance substantive and procedural fairness, having regard for the legal and cultural traditions of the litigants.

1.3 Each party must receive equal treatment and be granted the right to properly present its case.

1.4 The proceedings must fulfill reasonable expectations regarding fairness, and must be time- and cost-efficient.

1.5 The court must assure proper and professional conduct of all persons involved in the proceedings.

1.6 Use of procedural restrictions and penalties against parties and nonparties must be only in reasonable proportion to their purpose.

Comment:

C-1.1 The principles of interpretation correspond to similar principles incorporated in most procedural systems. As applied in transnational disputes, Rule 1.2 requires the court and the parties to apply the Rules with awareness of the differences in the legal systems with which the parties may be familiar. The term “having regard for the legal and cultural traditions of the litigants” does not mean that foreign law will supersede local law or that foreign parties may be excused from compliance with the Transnational Rules or the local rules. It means only an appreciation that every system has its own culture and tradition.

C-1. The primary guiding principle is that the evidence and legal contentions of the parties be fully considered and that procedural restrictions and penalties be imposed only as reasonably necessary to assure orderly determination of the dispute.

B. Scope of Applicability of These Rules

2. Disputes to Which These Rules Apply

2.1 Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, the courts of a state that has adopted these Rules must apply them in all disputes in which judicial relief is sought arising from a sale, lease, loan, investment, acquisition, banking, security, property, intellectual property, or any other business, commercial, or financial transaction in which:

2.1.1 The dispute is between a plaintiff and a defendant who are habitual residents of different states, and the transaction did not arise wholly within the forum state; or

2.1.2 The dispute concerns fixed property located in the forum state and at least one person who is a habitual resident of another state makes a claim of ownership, a security interest or other interest in that property.

2.2 A corporation, société anonyme, unincorporated association, partnership, or other organizational entity is considered a habitual resident both of the state from which it has received its charter of organization and of the state where it maintains its administrative headquarters.

2.3 In cases involving multiple parties or multiple claims, the court shall determine what are the principal matters in controversy. If those matters are within the scope of these Rules, the Rules apply to all parties and claims.

Otherwise, the court shall apply the rules of the forum. The court may also sever the proceeding when doing so would facilitate the efficient administration of justice.

2.4 Participation by additional parties, whether as claimant, defendant, or third party, is determined according to Rule 5.

2.5 Upon demand of all parties who are not habitual residents of the state, the litigation shall proceed according to the ordinary procedural law of the forum.

2.6 The forum state may exclude categories of matters from application of these Rules and may extend application of these Rules to other transnational civil matters.

2.7 A plaintiff who invokes the authority of a court under these Rules is thereby precluded from thereafter challenging that authority, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of authority was manifest.

2.8 A defendant or other party who does not object to application of these Rules until after that party has answered concerning the merits is precluded from making subsequent challenge, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of authority was manifest.

Comment:

C-2.1 Rule 2.1 defines the matters governed by these Rules. The Rules shall apply to contract disputes and disputes arising from contractual relations; injuries to property, including immovable (real property), movable (personal property), and to intangible property such as copyright, trademark, patent rights; and injuries resulting from breach of obligations and commercial torts in business transactions. The term “business, commercial, or financial transaction” includes a series of related events, such as repeated interference with property.

C-2.2 The scope of application of these Rules is limited to commercial disputes as a matter of comity in public policy, not because the Rules are inappropriate for other types of legal disputes. In many countries, for example, disputes arising from employment relationships are governed by special procedures in specialized courts. The same is true of domestic relations matters.

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

C-2.3 The term “dispute” as used in Rule 2.1 may have different connotations in various legal systems. For example, under Rule 20 of the Federal Rules of Civil Procedure in the United States, a dispute would be interpreted in accordance with the broad concept of “transaction or occurrence.” Under the civil-law systems, the term “dispute” would be interpreted in accordance with the narrower concept of dispute as framed by the plaintiff’s claim.

C-2.4 Rule 2.1.1 establishes that these Rules apply when a plaintiff and a defendant are habitual residents of different states. Thus, these Rules would apply in a dispute between a Japanese on one side and a Japanese and a Canadian on the other side. However, the transaction itself must be transnational. Accordingly, these Rules should not apply to disputes related exclusively to the forum state.

C-2.5 Rule 2.1.2 provides that these Rules apply in a dispute concerning fixed property located in one state as to which a claim is made by a plaintiff or a defendant who is a habitual resident of another state. Whether a legal claim concerns property and whether it is a claim of ownership or of a security interest is determined by general principles of private international law.

C-2.6 The habitual residence of an individual is determined by general principles of private international law. The definition in Rule 2.2 of residency of a juridical entity, such as a société anonyme, partnership, or unincorporated association, corresponds to generally accepted principles of private international law. When an organization is chartered in one state and has its administrative headquarters in another, both attributed residences must be different from the habitual residence of at least one opposing party.

C-2.7 Legal disputes may involve claims asserted on multiple substantive legal bases, one of which is under these Rules but another which is not. The court may entertain both the claim under these Rules and the other claim or claims and apply the Rules as provided in Rule 2.3.

C-2.8 A case may be one not included in Rule 2 at the outset of the litigation, but a claim or a party may later be joined that would justify application of these Rules. For example, in a claim based on contract by A against B, B could implead C on the basis of an indemnity obligation. If A and C or B and C are habitual residents of different states, and the claim between them did not arise wholly within the forum state, these Rules would apply. Rule 2.3 confers authority on the court to determine whether the principal matters in dispute are within these Rules and thereupon to direct that the dispute be governed by these Rules or forum law, according to that determination.

C-2.10 Rule 2.6 recognizes that the forum law may adopt provisions that enlarge or restrict the scope of application of the Rules.

3. Forum for Transnational Civil Proceedings

3.1 A Transnational Civil Proceeding must be conducted in the forum state's first-instance courts of general jurisdiction, unless a special court or special division has been established for such proceedings.

3.2 Appellate jurisdiction of a Transnational Civil Proceeding shall be in the forum-state appellate court having jurisdiction of the first-instance court of general jurisdiction, unless the forum state has provided otherwise.

3.3 To facilitate efficient determination of a dispute governed by these Rules, the court having jurisdiction of a Transnational Civil Proceeding may delegate judicial functions to another court of the forum state or to a court of another state that has authority to accept the delegation or to a judicial officer specially appointed for the purpose.

3.4 The court may conduct hearings at a location remote from its seat and may use telecommunications devices, but shall not thereby deprive a party of the right to address questions to an adverse witness.

Comment:

C-3.1 Typically it would be convenient that a specialized court or division of court be established in a principal commercial city, such as Milan in Italy or London in the United Kingdom. Committing disputes under these Rules to specialized courts would facilitate development of a more uniform procedural jurisprudence.

C. Personal Jurisdiction, Joinder, and Venue

4. Personal Jurisdiction

4.1 A proceeding under these Rules may be maintained in the courts of a state:

4.1.1 Designated by mutual agreement of the parties; or

4.1.2 In which a defendant is subject to the compulsory judicial authority of that state, as determined by principles governing personal jurisdiction or by international convention to which the state is a party; or

4.1.3 Where fixed property is located when the application of these Rules is based on Rule 2.1.2; or

4.1.4 In aid of the jurisdiction of another forum in which a Transnational Civil Proceeding is pending.

Comment:

C-4.1 Rule 4.1 states rules of jurisdiction that are recognized in virtually all legal systems. A court whose jurisdiction is established by agreement among the parties, as provided in Rule 4.1.1, may decline to exercise jurisdiction if the transaction has no relationship to that forum. A plaintiff submits to the court's authority by commencing the proceeding under these Rules. That

submission extends to counterclaims and third-party claims permitted under these Rules.

C-4.2 Rule 4.1.2 incorporates by reference the domestic law of the forum concerning exercise of personal jurisdiction. This provision could apply, for example, to a defendant who has committed a legal wrong while temporarily present in the state or who conducted a commercial transaction in the state, etc. It applies to organizations, such as corporations, as well as to individuals. Domestic law may be superseded by international law or by international convention, for example the Brussels and Lugano Conventions.

C-4.3 Rule 4.1.3 provides that the court where fixed property is located has authority over the parties who make claims to the property, whether of ownership or a security interest. This expresses a concept that is almost universally recognized.

5. Joining Additional Parties or Claims

5.1 Jurisdiction may be exercised over another person that is subject to the compulsory jurisdiction of the court and that is so connected with the dispute that, in the interest of efficient administration of justice, the person should be made a party.

5.2 A third person made a party as provided in 5.1 should be summoned as provided in Rule 10.

5.3 A third person not subject to the compulsory jurisdiction of the court may be given notice of the proceeding and invited to intervene. The forum rules concerning intervention shall thereafter apply concerning that party.

5.4 Jurisdiction under these Rules may be exercised over claims arising from the same transaction as the original dispute, other than those within the scope of these Rules, subject to the provisions of Rules 2.2 and 5.5.

5.5 Additional parties who are subject to the jurisdiction of the court may be joined in accordance with the law of the forum. Application of these Rules is not affected by joinder of claims or participation of additional parties, except as provided in Rule 2.5.

5.6 If, prior to plenary hearing, there is joinder of claim or an additional party whose presence as a party would render Rule 2 applicable, these Rules shall apply, unless in accordance with Rule 2.3 the court orders otherwise in the interest of orderly administration of justice.

Comment:

C-5.1 It is a generally recognized principle that a plaintiff may, at its option, join as defendant any person against whom a claim is asserted concerning the transaction involved in the dispute. In addition, other parties may be added under the principle of intervention and the principle of necessary party.

C-5.3 Rule 5 states the concept of necessary party. The precise definition of this concept varies somewhat among legal systems. However, in general, a person (whether individual or juridical entity) is a necessary party when it would be difficult for the court to adjudicate the dispute among the existing parties without taking into account the legal interests of that person. If a necessary party cannot be brought into the proceeding, the proceeding should not continue unless the existing parties have a definite need for a resolution of the dispute.

C-5.4 When a necessary party is not subject to the compulsory authority of the court, that person may nevertheless be interested in participating in the case. Rule 5.2 specifies the procedure for giving notice to a necessary party. Even if that person does not participate, it may be useful to send a copy of the decision to that person.

C-5.5 Rule 5.4 permits, for example, a party to join a noncommercial claim along with a claim that is within the scope of these Rules, so long as the additional claim arose from the same dispute. However, under Rule 2.3 the court may determine that the additional claim is the principal subject of the dispute and adjudicate the dispute according to the law of the forum.

C-5.6 Rule 5.5 permits a party to employ procedures of the forum to add additional parties, but it does not authorize class-suit procedure. Whether class-action procedure is permitted

depends on the law of the forum. If a defendant asserts in another forum a claim that could be a counterclaim in the proceeding under these Rules, the other forum may apply its own rules of deference to require the claim to be asserted as a counterclaim in the proceeding under these Rules.

C-5.7 Rule 5.5 provides that the Rules have precedence over the forum's ordinary procedure when additional parties participate in the litigation. However, the court has authority to apply the forum's ordinary procedure when, for example, the dispute involving the additional parties is more complex or significant than the original dispute. See Rule 2.3.

6. Intervention

6.1 A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims

6.1.1 An interest in the subject matter of the proceeding;

6.1.2 That the person may be adversely affected by a judgment in the proceeding; or

6.1.3 That there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

6.2 On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the court may add the person as a party to the proceeding and may make such order as is just.

6.3 Any person, private or public, may file an amicus curiae brief containing data, information, remarks, legal analysis, social background and, considerations that may be useful for a fair and just decision of the case. The court may invite a third party to file an amicus brief. The parties shall have the opportunity to submit written comment addressed to the matters in an amicus brief before the brief is considered by the court.

Comment:

C-6.1 Rule 6 states the concept of intervention by a third party. The precise definition of intervention varies somewhat among legal systems. However, in general a person (whether individual or juridical entity) who has some interest that could be affected by the proceedings, and who seeks to participate, should be allowed to do so.

C-6.2 The amicus curiae brief is a useful means by which any nonparty may supply the court with information and legal analysis that may be useful to achieve a just and informed disposition of the case. Therefore, any person should be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention. It is in the court's discretion whether such a brief may be taken into account. A judge has authority to refuse an amicus curiae brief when such a brief would not be of material assistance in determining the dispute. An amicus curiae does not become a party to the case but is merely an active commentator. Factual assertions in an amicus brief are not evidence in the case.

C-6.4 In civil-law countries there is no established practice of allowing third parties without a legal interest in the merits of the dispute to intervene in a proceeding. However, the amicus curiae brief is an important device, particularly in cases of public importance.

7. Venue

The proceeding shall be brought in the court of first instance in the locality determined according to the state's rules of territorial competence.

Comment:

C-7 This Rule specifies the locality within a state where the proceeding is to be conducted. In common law this concept is called "venue"; in the civil law it is called territorial competence. The locality is to be determined by the domestic procedural law of the state where the proceeding is conducted.

D. Composition and General Authority of the Court

8. Composition of the Court

8.1 The court shall be composed as ordinarily provided by the law of the forum. In cases involving technical or scientific issues, the court of first instance may appoint not more than two neutral assessors, who are experts in that subject matter. In choosing the assessors, the court shall consider recommendations from the parties. The assessors have no vote.

8.2 In its deliberations the court may confer with the assessors only in the presence of the parties or through written communication, copies of which are provided to the parties. The fees and expenses of the assessors shall be paid by the parties or as otherwise directed by the court.

Comment:

C-8.1 In most legal systems today the courts of first instance are constituted of a single judge. However, many civil-law systems normally use three judges in courts of general authority. In some legal systems the composition of the court may be one or three judges, according to various criteria.

C-8.2 Lay experts or assessors are included in a tribunal under various procedures in various systems. This Rule authorizes neutral assessors in cases involving technical or scientific issues, or any other situation in which specialized knowledge is relevant. The assessors sit with the judge only when necessary. If there is a need for an assessor to understand a technical issue, the assessor does not have to sit with the court and hear oral evidence of a different issue.

The appointment of assessors does not preclude use by the parties of expert witnesses or appointment by the court of a neutral expert. See Rule 26. The assessors are to help the judge understand the case and the evidence, not to conduct investigation or research, which could be a function for a neutral expert. The assessor sits with the judge, the expert sits in the witness stand.

C-8.3 Since the parties have no opportunity to ask questions of assessors, the parties should be enabled to comment and challenge the assessors' opinions before they are considered by the court.

C-8.4 The court has discretion to allocate the costs of the assessors. However, this allocation is provisional, because the loser is liable for the costs and expenses of the winner. See Rule 33.

C-8.5 Rule 8 excludes the use of juries, notwithstanding that jury trial is a matter of constitutional right under various circumstances in some countries, notably the United States. Where jury trial is of right, the parties may waive the right or these Rules can apply with the use of a jury. See Rule 2.1.

9. General Authority of the Court

The court in a Transnational Civil Proceeding has authority to give direction to the proceedings, including establishing the schedule of hearings, and to give effect to the Fundamental Principles stated in the preamble.

Comment:

C-9 Rule 9 confers general judicial authority on the court to give direction to the proceedings. All judicial systems have a concept of a court's general authority. In common-law jurisdictions, it is expressed as "inherent authority." In most civil-law systems a similar concept is implied from general terms in the codes of civil procedure. In some civil-law systems, the court's authority is specified in detail. When confronted with a question of its own authority, a court should refer to the concepts of authority in its domestic legal system.

10. Forum Procedure

Subject to the provisions of Rule 1, the procedural law of the forum shall be applied in matters not addressed in these Principles and Rules.

Comment:

C-10.1 The Transnational Rules of Civil Procedure are not a comprehensive “code” in the civil-law sense of the word. They are a set of rules to supersede inconsistent local law and to be supplemented by local law whenever local law is not inconsistent with the Transnational Rules system.

C-10.2 Rule 10 is a rule of interpretation. It does not authorize nationals to use local concepts to interpret these Rules. The Transnational Rules should develop an autonomous style of interpretation.

E. Preparatory Stage

11. Commencement of the Proceeding and Notice

11.1 The plaintiff shall submit to the court a statement of claim, as provided in Rule 12. The court shall thereupon give notice of the proceeding to the parties named as defendant. The proceeding shall be designated a Transnational Civil Proceeding.

11.2 The notice to the defendant shall be in accordance with an applicable international convention or, if no such convention is applicable, by transmitting a copy of the statement of claim and a request to appear in response within a reasonable time.

11.3 The notice shall specify the time within which the defendant must respond and that the proceeding is brought under these Rules, and shall state that default judgment may be entered against the defendant if the defendant does not respond within the specified time.

11.4 The notice must be in the language of the forum, and in the language of defendant, except when it is not known what language the defendant speaks.

11.5 In determining whether the proceeding has been brought within the time permitted by the applicable rule of prescription or statute of limitation, or *lis pendens*, the proceeding is considered commenced on the date that the plaintiff submitted the statement of claim to the court as provided in Rule 11.1.

Comment:

C-11.1 Rule 11 specifies the rule for commencement of suit for purposes of determining the competence of court, *lis pendens*, interruption of statutes of limitations, and other purposes as provided by the forum law. The competence of a court, once established, is not ousted by subsequent changes in the facts supporting jurisdiction. Designation of the suit as a Transnational Proceeding provides notice to the defendant that these Rules will govern the matter.

C-11.2 Rule 11 also provides for giving notice of the proceeding to the defendant, or “service of process” as it is called in common-law procedure. The Hague Service Convention specifies rules of notice that govern proceedings in countries signatory to that Convention. When judicial assistance from the courts of another country is required in order to effect notice, the procedure for obtaining such assistance should be followed. In any event, the notice must include a copy of the statement of claim, a statement that the proceeding is conducted under these Rules, and a warning that default judgment may be taken against a defendant that does not respond. See Rule 15. Requiring notice to be in the language of the defendant is designed to assure that it will be understood. Beyond these requirements, the rules of the forum govern the mechanisms and formalities for giving notice of the proceeding. In some states it is sufficient to mail the notice; some states require that notice, such as a summons, be delivered by an officer of the court.

12. Statement of Claim

12.1 The plaintiff shall state the facts on which the claim is based, the plaintiff's contentions concerning the legal grounds that support the claim, including foreign law, and the basis upon which these Rules are applicable. The statement of facts shall, so far as reasonably practicable, set forth detail as to time, place, participants, and events. If applicable law requires that plaintiff have first resorted to an arbitration or conciliation procedure or the like, plaintiff shall describe the effort to do so.

12.2 The plaintiff shall state the judgment demanded, including, so far as practicable, the monetary amount claimed and any other remedy sought.

Comment:

C-12.1 Rule 12.1 requires the plaintiff to state the facts upon which the claim is based. This Rule calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions and traditionally required in American "code pleading." In contrast, some American systems, notably those employing the "notice pleading" under Federal Rules of Civil Procedure, permit very general allegations. In these Rules, the facts pleaded in the statements of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings. See Rule 20.4.

In addition, the complaint must refer to the legal grounds on which the plaintiff relies to support the claim. Reference to such grounds is a common requirement in many legal systems and is especially appropriate when the transaction may involve the law of more than one legal system and present problems of choice of law. Rules of procedure in many national systems require a party's pleading to set forth foreign law when the party intends to rely on that law. However, according to Principle 19.1, the court has responsibility for questions of law and is responsible for determining, upon consultation with the parties, the correct legal basis for its decisions.

C-12.2 Rule 12.2 requires a statement of the amount of money demanded and, if injunctive or declaratory relief is sought, the nature and terms of the requested remedy. If the defendant defaults, the court may not award an amount greater than that demanded in the complaint, so that the defendant can calculate on an informed basis whether to dispute the claim. See 15.3. It is a general principle that a default judgment may be entered only when the plaintiff has offered sufficient proof of the claims for which judgment is awarded. See Rule 15.2.3. Forum procedure in many systems requires that, after a defendant has failed to respond, an additional notice be given to the defendant of intention to enter default judgment.

13. Statement of Defense; Counterclaims

13.1 A defendant shall, within [30 consecutive] days from the date of service of process, answer the claim by admissions and denials of the allegations. The time for answer may be extended for [30 days] upon request of the defendant, or for a reasonable time by agreement of the parties or by court order. The answer shall:

13.1.1 Deny such allegations of the statement of claim as the defendant wishes to dispute;

13.1.2 Admit, or admit with explanation, such allegations as the defendant does not wish to dispute as thus explained, or assert an alternative statement of facts;

13.1.3 State the facts and contentions as to legal grounds upon which any affirmative defenses are based.

13.2 The defendant may state a counterclaim, seeking relief from a plaintiff or against a co-defendant or third party, that is connected to the dispute in the plaintiff's complaint, for example a claim for indemnity or contribution. The party against whom a counterclaim is stated must submit an answer thereto.

13.3 The provisions of Rule 12 concerning the detail of statements of claims are applicable to the statements of other claims and of defense.

13.4 A party shall explicitly deny the allegations it intends to controvert. Failure to make an explicit denial is considered an admission. Facts admitted or deemed admitted need no proof, except as provided in Rule 15.2 with respect to a default judgment.

13.5 A party against whom a claim is stated may in the answer present objections referred to in Rule 18.1. Submitting an answer or asserting a counterclaim does not waive such objections.

Comment:

C-13.1 Rule 13.1 requires that the defendant's response address the allegations of the complaint, denying or admitting with explanation those allegations that are to be controverted. Allegations not so controverted are admitted for purposes of the litigation. An "alternative statement of facts" is simply a different narrative of the circumstances that the defendant presents in order to clarify the dispute. Whether an admission in a proceeding under these Rules has effect in other proceedings is determined by the law governing such other proceedings. An "affirmative defense" is the allegation of additional facts or arguments that avoid the facts and arguments raised by the plaintiff, rather than contradict them directly. An example is the defense that an alleged debt has previously been discharged in bankruptcy. The most important example of a "negative defense" is the denial.

C-13.2 A period of 30 days in which to respond generally should be sufficient. However, if the defendant is at a remote location, additional time may be necessary and should be granted as of course.

C-13.3 Rule 13.3 applies to the defendant's answer the same rules of form and content as Rule 12 provides with respect to the statement of claim. Thus, additional facts stated by the defendant, by way of affirmative defense or alternative statement, must be in the same detail as required by Rule 12.1. If a counterclaim is asserted, the defendant must make a demand for judgment as required by Rule 12.2.

C-13.4 This subsection applies to counterclaims, third-party claims, cross-claims, and other claims available in the proceeding. Such claims are permissive. These Rules do not provide for compulsory counterclaims, so that omission to interpose a counterclaim does not result in a preclusion.

C-13.5 Rule 13.2 permits the defendant to assert a counterclaim, third-party claim, or cross-claim. In most civil-law systems, a counterclaim is permitted only for a claim arising from the dispute addressed in the plaintiff's complaint. See Comment *C-2.3* for reference to the civil-law concept of "dispute." In common-law systems a wider scope for counterclaims is generally permitted, including a "set off" based on a different transaction or occurrence. Compare United States Federal Rules of Civil Procedure, Rule 13.

C-13.6 Rule 13.4 requires a plaintiff, third party, or co-defendant to submit an answer to a counterclaim or cross-claim. No such response is required to an affirmative defense or other allegations in the answer that do not constitute a counterclaim or cross-claim.

C-13.7 Rule 13.5 authorizes a defendant to make objections referred to in Rule 18.1 either by a motion pursuant to that Rule or by answer to the complaint. Rule 13.5 further provides that making such objections by answer does not result in waiver of any such objection. Traditionally, in common-law procedure, a defendant waived objection to jurisdiction over the person unless that objection was asserted in a preliminary "special appearance." Similar waiver of objection to venue is imposed in some civil-law systems. These Rules do not impose such a waiver.

14. Amendments

14.1 In the preparatory stage, a party may amend a pleading upon such terms as the court may permit. If the amendment refers to events occurring subsequent to those alleged in the party's previous pleading, or on the basis of newly discovered facts or evidence that could not previously have been obtained through reasonable diligence, permission to make reasonable amendment shall be afforded if the amendment will not impose unfair prejudice on another party. After obtaining evidence under Rules 19 and 20, a party may amend a pleading to address allegations based on information thus obtained.

14.2 The court must grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for in costs or an

adjournment.

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

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

14.5 Any party may request that the court order another party to provide a more specific statement of that party's claim or defense on the ground that the challenged statement does not comply with the requirements of these Rules.

Comment:

C-14.1 The scope of permissible amendment differs among various legal systems, the rule in the United States, for example, being very liberal and that in many civil-law systems being less so. In many civil-law systems amendment of the legal basis of a claim is permitted, as distinct from the factual basis, but amendment of factual allegations is permitted only upon a showing that there is newly discovered probative evidence and that the amendment is within the scope of the dispute. See Comment C-2.3, *supra*, for reference to the civil-law concept of "dispute."

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

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

C-14.4 Rule 14.5 permits a party to request that another party be required to state facts with greater specificity or to admit or deny specific material facts. Failure to comply with an order so requiring may be considered as a concession as to those facts. Making such a request for more specific allegations temporarily suspends the duty to answer.

15. Default Judgment

15.1 Default judgment shall be entered against a plaintiff who fails to prosecute the proceeding, or against another party who, without reasonable justification, does not answer within the time provided in these Rules, fails to offer a substantial answer, or fails to proceed after having answered.

15.2 Before entering a default judgment, the court shall determine that procedural requirements of any applicable international convention have been observed and:

15.2.1 If default is to be against a plaintiff for failure to prosecute, give reasonable warning to the plaintiff that default may be granted;

15.2.2 If default is to be against another party, determine that the procedure for giving notice to that party has been properly followed and that the party had sufficient time to respond;

15.2.3 Determine that the claim is legally justified concerning liability and remedy, including the amount of damages and any claim for costs sought under Rule 30.

15.3 The remedy awarded in a default judgment shall be no greater in monetary amount or in severity of other remedy that was demanded in the statement of claim.

15.4 A party who has answered after the time provided in these Rules, but before judgment, shall be permitted to appear upon offering justifiable excuse, but

the court may order compensation for costs resulting to the opposing party.

Comment:

C-15.1 Default judgment permits termination of a dispute if there is no contest. It is a mechanism for compelling a defendant to acknowledge the court's authority. If the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding and later dispute the validity of the judgment. It is important to analyze the reason why the party did not answer or did not proceed after having answered. For example, a party may have failed to answer because that party was not found and did not receive personal notice, or because the party was obliged by his or her national law not to appear by reason of hostility between the countries.

C-15.2 Reasonable care should be exercised prior to entering a default judgment because notice sometimes may not have been given to a defendant, or the defendant may have been confused about the need to respond. Rule 15.3 limits a default judgment to the amount and kind demanded in the statement of claim. See Rule 12.2.

This Rule is important in common-law systems in which the judge is normally not limited to the original claims made by the parties on the pleadings. In civil-law systems and some common-law systems, however, there is a traditional prohibition against a judgment that goes beyond the pleadings (ultra petita or extra petita prohibition).

C-15.3 The decision about whether the claim is legally justified does not require a full inquiry on the merits of the case. The judge must only determine whether the default judgment is not inconsistent with the evidence on file and is not legally unconscionable. For that decision, the judge must analyze critically the evidence supporting the statement of claims. See Rule 19.1. For this purpose, the judge may request production of more evidence or schedule an evidentiary hearing.

C-15.4 The absence of a substantial answer may be treated as no answer at all.

C-15.5 The party who has defaulted should not be permitted to produce evidence in an appeal, unless to prove that the notice was not proper.

16. Transnational Dispute Settlement Offer

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

16.2 The offeree may deliver a counter-offer, which shall remain open for at least [30 days]. If the counter-offer is not accepted, the party may accept the original offer, if still open.

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

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

16.5 Within 10 days after entry of judgment, a party may reveal the offer to the court. If the offeree fails to obtain a judgment that is more advantageous than the offer, the court must impose an appropriate sanction, considering all the relevant circumstances of the case.

16.6 Unless the court finds that special circumstances justify a different sanction, the sanction shall be the loss of the right to be reimbursed for the costs, plus reasonable costs incurred by the offeror from the date of delivery of the offer. That sanction shall be in addition to the costs determined in accordance with Rule 33. An offeree is entitled to costs up to the date upon which the offeror serves notice of acceptance, unless the offer states otherwise.

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

with the proceeding.

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

Comment:

C-16.1 Rule 16 is based on a similar rule under Ontario (Canada) civil procedure and Part 36 of the new English Procedural Rules. The detailed protocol is designed to permit submission and consideration of serious offers of settlement, from either a plaintiff or a defendant. At the same time, the protocol prohibits use of such offers or responses to influence the court and thereby to prejudice the parties. Experience indicates that a precisely defined procedure, to which conformity is strictly required, can facilitate settlement. The law of the forum may permit or require the deposit of the offer into court.

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

This Rule departs from traditions in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party.

C-16.2 This Rule aims at encouraging compromises and settlements and also deters parties from pursuing or defending a case that does not deserve a full and complete proceeding.

C-16.3 The offeree may deliver a counter-offer. A counter-offer is regulated by the same rules of the offer.

C-16.4 Rule 16.4 prohibits public disclosure of the offer or disclosure to the court before the entry of judgment. Parties might be reluctant to make a settlement offer if that could be interpreted as an admission of liability or of weakness of one's position.

C-16.5 If the offeree fails to obtain a judgment that is more advantageous than the offer of settlement under this Rule, that party loses the right to be reimbursed for the costs and expenses incurred from the date of rejection of the offer. Instead, the winning party must pay the costs and expenses thereupon incurred by the loser.

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

17. Provisional Measures

17.1 In accordance with forum law and subject to applicable international conventions, the court may issue an injunction to restrain or require conduct of any person who is subject to the court's authority where necessary to preserve the status quo or to prevent irreparable injury pending the litigation. The extent of such a remedy shall be governed by the principle of proportionality.

17.1.1 A court may issue such an injunction, before the opposing party has opportunity to respond, only upon proof showing urgent necessity and a preponderance of considerations of fairness in support of such relief. The party or person to whom the injunction is directed shall have opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.

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

17.1.3 The applicant is liable for full indemnification of the person against whom an injunction is entered if it turns out that the injunction was wrongly granted.

17.1.4 The court may require the applicant for relief to post a bond or to assume a duty of indemnification of the person against whom an injunction is entered.

17.2 An injunction may restrain a person over whom the court has jurisdiction from transferring property or assets, wherever located, pending the conclusion of the litigation and require a party to promptly reveal the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant.

17.3 When the property or assets are located abroad, recognition and enforcement of an injunction under the previous subsection is governed by the law of the country where the property or assets are located, and by means of an injunction by the competent court of that country.

Comment:

C-17.1 The term “injunction” refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Rule 17.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. Availability of other provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law.

C-17.2 Rule 17.1.1 authorizes the court to issue an injunction without notice to the person against whom it is directed where doing so is justified by urgent necessity. “Urgent necessity,” required as a basis for an ex parte injunction, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of “balance of equities.” Considerations of fairness include the strength of the merits of the applicant’s claim, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an ex parte injunction. In common-law procedure such an order is usually referred to as a “temporary restraining order.”

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

C-17.3 Rules of procedure or ethics generally require that a party requesting an ex parte injunction make full disclosure to the court of all aspects of the situation, including those favorable to the opposing party. Failure to make such disclosure is ground to vacate an injunction and may be a basis of liability for damages against the requesting party.

C-17.4 As indicated in Rule 17.1.2, if the court had declined to issue an injunction ex parte, it may nevertheless issue an injunction upon a hearing. If the court previously issued an injunction ex parte, it may renew or modify its order in light of the matters developed at the hearing. The burden is on the plaintiff to show that the injunction is justified.

C-17.5 Rule 17.1.4 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction. The particulars of such indemnification should be determined by reference to the general law of the forum.

C-17.6 Rule 17.2 permits the court to restrain transferring property located outside the forum state and to require disclosure of the party’s assets. In the law of the United Kingdom this is referred to as a *Mareva* injunction. The Brussels Convention requires recognition of such an injunction by signatories to that convention because an injunction is a judgment. This subsection also authorizes an injunction requiring disclosure of the identity and location of persons to facilitate enforcement of an eventual judgment.

C-17.7 Rule 34.2 provides for the review of an order granting or denying a preliminary injunction, according to the procedure of the forum. Review by a second-instance tribunal is regulated in different ways in various systems so that only a general principle providing for an immediate review is stated here. The guarantee of a review is particularly necessary when the

injunction has been issued ex parte. However, it should also be recognized that such a review may entail a loss of time or procedural abuse.

C-17.8 Rule 17.3 deals with a preliminary injunction that concerns property or assets located in another country. In transnational litigation property or assets may need to be “blocked” or “disclosed” in a country different from the one of the court having jurisdiction of the case. A further problem concerns the enforcement of such an injunction. Whether the injunction should be recognized depends on the rules and principles of the law of the country where the property or assets are located.

18. Preliminary Determinations at the Preparatory Stage

18.1 On motion of a party or on its own motion or in connection with a conference under Rule 23.2, the court in the preparatory stage may determine:

18.1.1 That the dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or, on motion of a party, that the court lacks jurisdiction over a party;

18.1.2 That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules;

18.1.3 That the dispute involves only questions of law, or that a complete or partial decision can be made with the evidence available in the record with no need for an evidentiary hearing, but the court shall have regard for the opportunity for obtaining evidence under these Rules before making such a determination;

18.1.4 That a determination of liability should be made prior to consideration of the amount of damages or other remedy;

18.1.5 Other matters of substantive law or procedure necessary to advance the proper adjudication of the merits.

18.2 Upon having made a determination as provided in the previous subsection, the court must allow the party against whom the determination is made a reasonable opportunity to amend its statement of claims or defense when it appears that the deficiency could be remedied by amendment.

18.3 If necessary, before an adjudication under this Rule, the court shall order each party to reveal information as described in Rules 19 and 20.

Comment:

C-18.1 It is a universal procedural principle that the court may make determinations of the sufficiency of the pleadings and motions, concerning either substantive law or procedure, that materially affect the rights of a party or the capability of the court to render substantial justice. In the civil-law systems, the court has an obligation to scrutinize the procedural regularity of the proceeding. In the common-law systems, authority to make such determinations ordinarily is exercised only upon initiative of a party made through a motion. However, the court in common-law systems may exercise that authority on its own initiative and in civil-law systems the court may do so in response to a suggestion or motion of a party.

According to Rule 13.5, the objections referred to in this subsection can be made by defendant either by a motion or by answer to the complaint. See Comment *C-13.7*.

C-18.2 Rule 18.1 expresses a universal principle that the court’s competence over the dispute and its jurisdiction over the parties may be questioned. A valid objection of this kind usually requires termination of the proceeding. A similar objection may be made that the dispute is not within the scope prescribed in Rule 2 and hence is not governed by these Rules. Among factors that may be considered under Rule 18.1.1 is dismissal for forum non conveniens in jurisdictions that recognize that principle. Procedural law varies as to whether there are time limitations or other restrictions on delay in making such an objection, and whether participation in the proceeding without making such an objection results in its waiver or forfeiture. Subject to the provision of Rule 13.5, reference should be made to the forum’s procedural law concerning such issues.

C-18.3 Rule 18.1.2 empowers the court to adjudicate procedural irregularities. Ordinarily amendment should be permitted in order to correct such an irregularity, except when such

permission would result in substantial injustice. See Rule 18.2.

C-18.4 Rule 18.1.3 empowers the court to adjudicate the merits of a claim or defense at the preliminary stage. Such an adjudication may be based on matters of law or matters of fact, or both. Judgment is appropriate when the claim or defense in question is legally insufficient as stated. Judgment is also appropriate when, although the statement of claim or defense as stated is legally sufficient, it is demonstrated that evidence to support the claim or defense is lacking. In the latter case, the court should consider whether exchange of evidence may disclose sufficient evidence.

C-18.5 In the civil-law systems, the foregoing powers are exercised by the court as a matter of course. In the common-law systems, the power to determine that a statement of claim or defense is substantively insufficient derives from the old common-law demurrer and is usually exercised on the basis of a motion by a party. Examples of claims that typically may be so adjudicated are claims based on a written contract calling for payment of money, or to ownership of specific property, to which no valid defense is offered. Examples of defenses that typically may be so adjudicated are the defense of elapse of time (statute of limitations or prescription), release, and *res judicata*. In common-law systems, the power to determine prior to trial that a claim or defense is not supported by evidence is usually exercised on the basis of a motion for summary judgment.

C-18.6 Rule 18.1.5 confers authority on the court to make necessary procedural rulings. In some civil-law systems these powers are specified in detail. In the common-law system they are within the court's inherent powers.

C-18.7 Under civil-law procedure discovery obligations ordinarily are imposed by order of the court. In common-law systems the procedural rules impose discovery obligations directly on the parties. Under Rule 20 the court has a duty to order exchange of evidence as provided in that Rule.

19. Disclosure

19.1 A party shall attach to a pleading copies of principal documents, such as contracts and relevant correspondence, on which the party intends to rely, and list all witnesses, including parties, nonparty witnesses, and expert witnesses, then known to the party and through whom the party intends to present evidence. So far as practicable, witnesses shall be identified by name, address, and telephone number.

19.2 A party may amend the specification required in the previous subsection to include documents or witnesses not known when the list was originally prepared. Any change in the list of documents or witnesses shall be communicated in writing to other parties not later than [30 days] before the plenary hearing, unless the court orders otherwise.

19.3 Within [45 days] after the answer, each party shall supply to all other parties a summary of the testimony expected of each witness it intends to present. The court may reduce or augment this time when appropriate in the circumstances of the case. If pleadings are amended, or there is change in the expected testimony, the parties shall supply amended summaries of testimony.

19.4 In lieu of the summary referred to in the previous subsection, not later than [15 days] prior to the plenary hearing, a party may present a statement of sworn written testimony by any witness it intends to present. If the examination of that witness is necessary, it will begin with supplemental questioning by the opposing party or the court.

19.5 An advocate for a party to a proceeding under these Rules may interview potential witnesses to ascertain potential evidence and to identify potential parties, but may not interview another party or a person represented by another counsel.

Comment:

C-19.1 Rule 19.1 requires that a party attach documents on which that party relies in support of the party's position. This is a common requirement. A party must also list the witnesses

upon whom it intends to rely. If a party later ascertains that there are additional documents or witnesses, it can exercise the opportunity to submit an amended list, as provided in Rule 19.2.

C-19.2 Under the rules of ethics or procedure in some systems, an advocate is not permitted to discuss the matters in dispute with prospective witnesses (other than the advocate's own client). That rule is designed to protect testimony from improper manipulation, but it also has the effect of limiting the effectiveness of an advocate in investigating and organizing evidence for consideration by the court. Under systems in which discussion is permitted with prospective witnesses, rules of ethics and procedure prohibit a lawyer from suggesting to a witness what the testimony should be, or offering inducements to witnesses. Recognizing that there is some risk of abuse in allowing lawyers to confer with prospective witnesses, these Rules consider that the risk of manipulation is less injurious to fair adjudication than is the risk that relevant and important evidence may remain undisclosed.

C-19.3 The summary of testimony referred to in Rule 19.3 should address all propositions to which the witness will give testimony and should be reasonably specific in detail.

20. Exchange of Evidence

20.1 A party who has complied with disclosure duties prescribed in Rule 20 may, on notice to the opposing party, request the court to order production by any person, including third persons as provided in Rule 30, of any matter, not privileged under applicable law, that is directly relevant to the case, not already produced in disclosure and that may be admissible in the dispute, as follows:

20.1.1 Documents and other records of information that are specifically identified or identified within specifically defined categories and which are relevant to an issue as to which the demanding party has the burden of proof;

20.1.2 The identity and address of persons having personal knowledge of matters in issue;

20.1.3 The identity of any expert that another party intends to designate under Rule 26.3 and a statement expressing the opinion of the expert concerning controverted issues, including analysis and conclusions.

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

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

20.4 The facts alleged in the pleadings determine relevance.

20.5 Unless otherwise agreed or ordered by the court, demands for evidence may be made as follows:

20.5.1 Initial demands by the plaintiff shall be made in the complaint or within [60 days] after the defendant has answered. Initial demands by defendants shall be made in the answer or within [30 days] after the plaintiff's demands.

20.5.2 A second demand may be made within [30 days] after the opposing party has complied with initial demands.

20.5.3 The court may order additional exchange of evidence directed toward any relevant matter, not privileged, whose production appears necessary to prevent substantial injustice, including oral or written deposition of a party or other witness. Such a deposition shall be taken as provided in Rule 21.

20.5.4 A party must respond to such an order within [30 days].

20.6 A party that did not have the possession of demanded evidence when the demand was made, but that thereafter comes into possession of it, must thereupon comply with the demand.

20.7 Any person may invoke a protection against self-incrimination recognized according to the applicable law, but it is not a valid objection that the information is adverse to the interest of the party to which the demand is directed.

20.8 On its own motion or at the request of a party, the court may appoint a neutral special officer to preside at a deposition or to supervise document production or otherwise to assist in supervising compliance with this Rule. In fulfilling that function, the special officer has the same power and duties as the judge. Decisions made by the special officer are subject to immediate review by the court.

20.9 To give effect to a proper demand for evidence, and subject to the principle of proportionality, the court may:

20.9.1 Draw adverse inferences concerning facts in issue against a party that failed to comply with the demand;

20.9.2 Employ the measures authorized by Rules 28 and 29;

20.9.3 Dismiss claims, defenses, or allegations to which the evidence is relevant;

20.9.4 Enter judgment in accordance with Rule 15.

Comment:

C-20.1 These Rules adopt, as a model of litigation, a system consisting of preliminary hearings followed by a concentrated form of plenary hearing. The essential core of the first stage is preliminary disclosure and clarification of the evidence. The principal consideration in favor of a unitary plenary hearing is that of expeditious justice. To achieve this objective, a concentrated plenary hearing should be used, so that arguments and the taking of evidence are completed in a single hearing or in a few hearings on consecutive judicial days.

C-20.2 Rules 19 and 20 define the roles and the rights of the parties, the duty of voluntary disclosure, the procedure for exchange of evidence, the role of the court, and the devices to ensure that the parties comply with demands for evidence. Proper compliance with these obligations is not only a matter of law for the parties, but also a matter of professional honor and obligation on the part of the advocates involved in the litigation.

C-20.3 The philosophy expressed in Rules 19, 20, 22, and 30 is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited, as in Rules 19 and 20. However within those specifications disclosure is generally a matter of right.

C-20.4 Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that “appears reasonably calculated to lead to the discovery of admissible evidence.” This broad discovery is often criticized as responsible for the increasing costs of the administration of justice. However, reasonable disclosure and exchange of evidence facilitates discovery of truth.

C-20.5 Discovery under the civil-law systems is generally much more restricted, or nonexistent. In particular, a much broader immunity is conferred against disclosure of trade-and-business secrets. This Rule should be interpreted as seeking to strike a balance between the restrictive civil-law systems and the broader systems in common-law jurisdictions.

C-20.6 Rule 20.1 requires the parties to make the disclosures required by Rule 19 prior to demanding production of evidence from an opposing party. It also requires the parties to provide summaries of the testimony of the witnesses a party intends to present, according to Rule 19.3.

C-20.7 Rule 20.1 provides that every party is entitled to obtain from any person the disclosure of any relevant evidence, not privileged, in possession of that person. Ideally, full disclosure of relevant evidence should result through dialogue among the parties, whereby the parties voluntarily satisfy each other’s demands without intervention of the court.

C-20.8 According to Rule 20.5, compulsory exchange of evidence is limited to matters directly relevant to the issues in the case as they have been stated in the pleadings. A party is not entitled to disclosure of information that “appears reasonably calculated to lead to the discovery of admissible evidence,” which is the broad scope of discovery under Rule 26 of the Federal Rules of

Civil Procedure in the United States. “Relevant” evidence is that which supports or contravenes the allegations of one of the parties. This Rule is aimed at preventing overdiscovery or “fishing expeditions.”

C-20.9 Exchange of evidence may concern documents and any other things (films, pictures, videotapes, recorded tapes, or objects of any kind), including any records of information, such as computerized information (disks, data, printings, or software systems). The demanding party must show the relevance of the information, document, or thing to prove or disprove the facts supporting a claim or a defense, and identify the document or thing to be disclosed, specifically identified, or defined by specific categories. Thus, a document may be identified by date and title or by specific description such as “correspondence concerning the transaction between A and B in the period February 1 through March 31.” A party is not obliged to comply with a demand that does not fulfill these conditions. Disputes concerning whether the conditions of the demand have been satisfied, and whether the demand should be complied with, are resolved by the court on motion by any party. The court may declare the demand invalid or order production of the document or thing, and if necessary specify the time and mode of production.

C-20.10 Exchange of evidence may concern the identity of a potential witness. As used in these Rules, the term “witness” includes a person who can give statements to the court even if the statements are not strictly speaking “evidence,” as is the rule in some civil-law systems concerning statements by parties. Under Rule 19.3 a summary of the expected testimony of a witness whom a party intends to call or nominate to the court must be provided to other parties. A party is not allowed to examine a witness through deposition except when authorized by the court under Rule 20.5.3.

C-20.11 Rule 20.1.3 provides that any party is entitled to discover the identity of a prospective expert that another party intends to designate, and to obtain a written statement of the expert’s opinion concerning the matters in dispute.

C-20.12 Rule 20.2 provides a detailed protocol for demands for exchange of evidence and for compliance with these demands. The time requirements are related to the pleadings, so that parties can make their demands in light of the information and allegations in the pleadings. When the plaintiff’s demand is made in the complaint, the defendant’s demand ordinarily will be made in the answer. If the plaintiff’s demand is made within the period of 60 days, however, the defendant’s demand shall be made within 15 days after receipt of the plaintiff’s demand.

Ordinarily these demands provide sufficient opportunity for exchange of evidence. However, Rule 20.5.3 authorizes the court to order additional exchange upon a showing of justification, unless doing so would unfairly delay the proceeding.

C-20.13 The general principle in the preliminary stage is that the parties bear the burden of obtaining evidence they need in preparation for plenary hearing. However, disclosure obtained by the parties on their own motion may be incomplete, resulting in insufficient evidence or surprise to the court or other parties. To deal with such inconvenience, the court may in its discretion order additional disclosure on its own initiative or on motion of a party. For example, the court may order that a party or a prospective witness submit a written deposition concerning the facts of the case. The court may also subpoena a hostile witness to be orally deposed. See Rule 21.

The court may not order additional disclosure simply because it might reveal relevant evidence. The term “to prevent substantial injustice” is a narrower standard than “relevant to prove the matters in issue.” Moreover, the court cannot order exchange of irrelevant or privileged evidence. See also Rule 27.3.

C-20.14 The right to refuse to answer questions that may incriminate a person is universally recognized. However, this right does not necessarily include the right to refuse to produce documents that may be incriminating, an issue that should be determined according to forum law.

The law in some systems permits a party also to refuse to answer questions or to produce documents that tend to establish the person’s civil liability or to negate or mitigate a civil claim. This Rule does not permit such a refusal based on civil as opposed to criminal liability.

C-20.15 In cases involving voluminous documents or remotely situated witnesses, or in similar circumstances of practical necessity, the court may appoint someone as a special officer to supervise exchange of evidence. This will free the judge from the responsibility for personally supervising such

exchange. Such an assistant may be appointed by another court through judicial assistance. A person so appointed should be impartial and independent, and have the same powers and duties as the judge, but decisions by such an officer are reviewable by the appointing court.

C-20.16 If a party fails to comply with a demand for exchange of evidence, Rule 20.9 provides that the court may impose sanctions to make disclosure effective. The determination of sanctions is within the discretion of the court, taking into account relevant features of the parties' behavior.

The sanctions are:

1) Adverse inferences against the noncomplying party about facts supporting that party's claims or defenses, including conclusive determination of the facts. See Comment to Rule 29.

2) A monetary penalty, fixed by the court in its discretion, or other means of legal compulsion permitted by forum law, including contempt of court. The court should graduate the penalty or contempt sanction according to the circumstances of the case. When the exchange of evidence concerns a document or other thing, the court may enter orders concerning the document or thing, in accordance with Rules 17, 29, and 30.

3) Dismissal of claims, defenses, or allegations to which the evidence is relevant. This sanction is more severe than the drawing of an adverse inference. The adverse inference does not necessarily imply that the party loses the case on that basis, but dismissal of claims or defenses ordinarily has that result.

4) The most severe sanction against noncompliance with disclosure demands or orders is entry of adverse judgment with respect to one or more of the claims. The court may enter a judgment of dismissal with prejudice against the plaintiff or a judgment by default against the defendant.

These sanctions are to be applied according to the principle of proportionality stated in Rule 1.6, according to which procedural sanctions must be applied in reasonable proportion to their purpose. Therefore, unless the court finds that special circumstances justify a different sanction, the preferred sanction is to draw adverse inferences. Dismissal and entry of adverse judgment is a sanction of last resort.

21. Deposition and Testimony by Affidavit

21.1 A deposition may be taken when the court so orders in the interest of efficiency as provided in Rule 20.5.3.

21.2 The testimony shall be upon affirmation as provided in Rule 28.3.1 and shall be transcribed verbatim or recorded by audio or video recording, as the parties may agree or as the court orders. The cost of the transcription shall be paid by the party that requested the deposition, unless the court orders otherwise.

21.3 The deposition shall be taken at such time and place as the parties may agree or as the court orders. All parties and the court shall be given written notice, at least [30 days] in advance, of the time and place of the deposition. The examination shall be conducted as provided in Rule 28 and may be conducted before a judicial officer specially appointed as provided in Rule 3.3. During or prior to the deposition the court may submit supplemental questions to be answered by the person deposed.

21.4 A deposition may be presented as testimony in the record by agreement of the parties or by order of the court.

21.5 A party may present an affidavit signed by a nonparty who makes an affirmation to tell the truth, containing statements about relevant facts of the case. The court, in its discretion, may consider such statements as if they were made by oral testimony. If another party denies the truth of the statements made by affidavit, that party may move for an order of the court requiring the personal appearance of the affidavit's author.

Comment:

C-21.1 A deposition is a form of taking testimony employed in common-law and in some civil-law systems. It consists of sworn testimony of a potential witness, including a party, taken

outside of court prior to the plenary hearing. A deposition may be given orally in response to questions by lawyers for the parties or by questions from a judicial officer appointed by the court. A deposition may be conducted by electronic communication, for example by telephone conference. It may also be given through written responses to written questions. Ordinarily, a deposition is given after commencement of litigation but also, in accordance with the law of the forum, may be given *de bene esse*, i.e., to preserve testimony when the witness is expected to be unavailable after litigation has commenced. Questioning may seek to gather information and to test the witness's recollection and credibility. The testimony of a witness in a deposition may be presented as evidence, either in lieu of the witness or as direct testimony, but the court may require the presence of a witness who can attend in order to permit supplemental questioning. Under these Rules a deposition may be used in limited circumstances for exchange of evidence before trial. See Rule 20.5.3.

C-21.2 Rule 21.2 provides that deposition testimony be taken on affirmation, as at a hearing before the court. It is to be transcribed verbatim or recorded on audio or video. The parties may agree about the form of transcription or recording, but the court may nevertheless itself determine what form is to be used. The party who requests the deposition must pay the cost of transcription or recording, unless the court orders otherwise.

C-21.3 Rule 21.3 specifies the procedure for a deposition. In general, the procedure should be similar to a presentation of the witness before the court, except that the questioning is conducted by the parties. In some more complex or disputed cases, a deposition may be presided over by a special officer appointed by the court. See Rule 20.8.

C-21.4 The deposition will follow, as far as possible, the procedure for taking testimony before a judge. Thus the party taking the deposition will examine the witness first, and the other parties will ask supplemental questions thereafter. As stated in Rule 21.3, before the deposition the court may specify questions that it requires to be asked of the witness. Time and place of the deposition may be agreed upon by the parties, or may be prescribed by the court. A written notice of the deposition must be given to all the parties at least 30 days in advance to enable any party to be present and participate in the deposition. Notice will also be given to the court.

C-21.5 The general principle governing presentation of evidence is that evidence will be presented orally at the plenary hearing. See Rule 28. However, oral examination of a witness at the plenary hearing may be impossible, burdensome, or impractical. Rule 21.4 permits the transcript of a deposition taken in accordance with Rule 21.3 to be presented to the court as a substitute for reception of testimony of a witness who cannot conveniently be present in court, for example by reason of illness or because the witness is in a remote location or cannot be compelled to attend to give testimony. A deposition may also be convenient for presenting testimony in a language other than that of the court. A deposition in any event may yield a statement against interest that is admissible under Rule 28.3.6.

C-21.6 Since the deposition procedure is an exception to the general rule of direct presentation of evidence at the hearing, a party who wants to present testimony by deposition must obtain agreement from the opposing party or apply to the court for authorization, stating the reasons why a deposition should be preferred. The court has discretion in deciding the request. Any party is entitled to contest the fidelity of the transcription or record. If such an objection is sustained, the court may set aside the deposition and order that the party or the witness be examined directly at the hearing or order a new deposition.

C-21.7 Rule 21.5 permits the presentation of testimony by means of written affidavits containing statements about relevant facts of the case. Such a statement, although upon affirmation, is *ex parte* in that neither the court nor opposing parties has been permitted to question the witness. The statement may be regarded with corresponding skepticism by the court. However, facts not in serious dispute often may be conveniently proved by this procedure.

The practice of producing written affidavits instead of witnesses for an oral examination is becoming common in several systems. Reasons of efficiency explain this trend: quicker availability of testimony, less trouble and expense for the nonparty, and less time required for the court. These factors may be specially important in transnational litigation, for instance when a witness would be required to travel from a distant country to be examined in court. However, the

court may, in its own discretion or on motion by a party, order that the author of an affidavit be examined orally at the hearing. There are also means of taking evidence provided by international law and conventions on judicial assistance: requests by diplomatic channels, rogatory letters, etc. (see, e.g., The Hague Convention on the Taking of Evidence Abroad).

22. Confidentiality of Matters Concerning Disclosure and Exchange of Evidence

22.1 Information obtained under these Rules but not presented at trial must be maintained in confidence by those receiving it.

22.2 When the information sought to be revealed is a trade or business secret, is protected by a duty of confidentiality under applicable law, or is such that its public disclosure would otherwise cause injury or embarrassment that could be avoided or mitigated by a protective order, the court should issue a suitable order imposing obligation of confidentiality on the parties, their counsel, and witnesses.

22.3 When it would assist the court in exercising its authority under this Rule, the evidence that is sought may be examined by the court in camera.

Comment:

C-22.1 A hearing in camera is one closed to the public and, in various circumstances, closed to others except advocates for the parties. As the court may direct according to the circumstances, such a hearing may be confined to counsel without the parties or it may be ex parte, e.g., confined to a party and that party's counsel, for example when trade secrets are involved.

23. Case Management

23.1 In order to further the due administration of justice, the court should assume an active management of the proceeding.

23.2 The court may schedule one or more conferences during the preparatory stage. The advocates for the parties shall attend such conferences and other persons may be ordered to do so in accordance with forum law. The court may conduct a conference by any available means of communication.

23.3 After consultation with all parties, the court may:

23.3.1 Order amendment of the pleadings for the addition, elimination, or revision of claims, defenses, and issues in light of the parties' contentions at that stage;

23.3.2 Order the isolation for separate hearing and decision of one or more issues in the case. The court may enter an interlocutory judgment addressing that issue and its relation to the remainder of the case;

23.3.3 Order the consolidation of cases pending before itself, whether under these Rules or those of the forum, when they deal with the same or related transactions, and when consolidation may facilitate the proceeding and decision. The final judgment shall address all the cases;

23.3.4 Make rulings concerning admissibility and exclusion of evidence and other procedural matters;

23.3.5 Prescribe the sequence for hearing witnesses and experts;

23.3.6 Fix the date for the plenary hearing;

23.3.7 Enter other orders to simplify or expedite the proceeding;

23.3.8 In accordance with the law of the forum, order any person subject to the court's authority to produce documents or other evidence or to submit to deposition as provided in Rule 21.

23.4 The court may suggest that the parties consider settlement, mediation, or arbitration or any other form of alternative dispute resolution. The court may stay the proceeding and direct the parties to an Alternative Dispute Resolution procedure, such as settlement or mediation.

Comment:

C-23.1 This Rule determines the role of the court in preparing the case for the plenary hearing, when exchange of evidence has come to an end and the terms of the dispute may be finally defined. The court has wide discretion in deciding how to conclude the preliminary phase, or phases, and in determining how to provide for the following plenary phase of the proceedings.

C-23.2 The court may decide that, in order to clarify the issues and to specify the terms of the dispute at the plenary hearing, one or more conferences may be useful. The court may conduct a conference by any means of communication available such as telephone, videoconference, or the like.

C-23.3 The court fixes the date or dates for such conferences. The parties' lawyers are required to attend. Participation of advocates for the parties is essential to facilitate orderly progression to resolution of the dispute. Advocates in many systems have some authority to make agreements concerning conduct of the litigation. Parties may have additional authority in some systems. If matters must be discussed that are outside of the scope of the advocates' authority, the court has authority to require the parties themselves to attend in order to discuss and resolve matters concerning progression to resolution, including discussion of settlement. The rule does not interfere with the possibility of pro se litigants.

C-23.4 In the conference, the court should discuss with the parties' lawyers, and, as appropriate, with the parties personally the issues of the case; which facts, claims, or defenses are no longer disputed; whether new disputed facts have emerged from disclosure or exchange of evidence; whether new claims or defenses have been presented; and what evidence will be admitted at the plenary hearing. The principal aim of the conference is to exclude issues that are no longer disputed and to identify precisely the facts, claims, defenses, and evidence concerning those issues that will be addressed at the plenary hearing.

The court may decide that a conference is unnecessary, and that the plenary hearing may proceed simply on the basis of the parties' pleadings and stipulations.

C-23.5 After consultation with all parties, the court may give directives for the plenary hearing as provided in Rule 23.3. The court may sum up the terms of claims and defenses and order corresponding revision of the pleadings. Having defined the issues for the hearing, the court may rule on issues concerning admissibility of evidence, specify the items of admissible evidence, and determine the order of their examination. The court may also resolve disputed claims of privilege. The court should fix the date for plenary hearing and enter other orders to ensure that it will be carried on in a fair and expedited manner.

Rule 23 authorizes various measures by the court to facilitate an efficient hearing. Claims and defenses withdrawn or abandoned by the parties should be excluded. It is often useful to isolate one or more issues for hearing upon one occasion, with other issues reserved for consideration later if necessary. So also, it is often useful that a hearing be consolidated with another case when the same or substantially similar issues are to be considered. As recognized in Rule 23.3.4, it is often convenient for the court to rule on admissibility of evidence prior to its presentation, especially evidence that is complicated, for example voluminous documents.

C-23.6 The court may consider the possibility that the parties may settle the dispute or refer it to a mediator. In such a case the court, before entering the rulings described in Rule 23.3, may fix a hearing calling the parties' lawyers and the parties personally to explore the possibility of a settlement, if necessary with the mediation of the court itself or a deferral of the dispute to mediation or any other form of alternative dispute resolution. This subsection authorizes the court to encourage discussion between the parties, but not to exercise coercion.

C-23.7 If a settlement is reached, the proceedings are terminated and judgment entered. If the parties agree about a deferral to mediation or arbitration, that agreement should be put into the record of the case and the proceeding suspended.

24. Languages

24.1 The proceedings, including documents, oral proceedings, and evidence, shall be conducted in the language of the court.

24.2 If there is no prejudice to the parties, the court may allow the use of one or

more foreign languages in all or part of the proceedings.

24.3 Translation of documents that are lengthy or voluminous shall be limited to relevant portions, as selected by the parties or determined by the court.

24.4 Translation should be made by a neutral translator selected by the parties or appointed by the court.

24.5 The cost of translation shall be paid by the party presenting the pertinent witness or document unless the court orders otherwise.

Comment:

C-24.1 The language in which the proceeding is conducted should be that in which the court is fluent. Ordinarily this will be the language of the state in which the court is situated. However, if the court and the parties have competence in a foreign language, they may agree upon or the judge may order some other language for all or part of the proceeding, for example the reception of a particular document or the testimony of a specific witness in the witness's native language.

C-24.2 In transnational litigation, it happens frequently that witnesses and experts are not fluent in the language in which the proceeding is conducted, i.e., that of the country where the case is tried. In such a case translation is required for the court and for other parties. The testimony shall be taken at the hearing with the aid of an interpreter, with the party presenting the evidence paying the cost of the translation unless the court decides otherwise.

C-24.3 A second possibility is examining the witness by way of deposition, as provided in Rule 21.4, under agreement of the parties or by order of the court. See Rule 21.1. The deposition can then be translated and submitted at the hearing. The procedure and cost of the deposition are determined according to Rule 21.

25. Relevance and Admissibility of Evidence

25.1 Except as provided in Rule 27, all evidence relevant to prove the facts in issue is admissible, including circumstantial evidence.

25.2 The competency of a witness generally is determined by forum law, but parties are in any event entitled to make statements that will be accorded probative weight.

25.3 A party has a right to proof through testimony, not privileged under applicable law, of any person whose testimony is relevant, admissible, and the production of which is subject to the court's authority. The court may call any witness having these qualifications.

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

Comment:

C-25.1 This Rule states principles concerning evidence, defining generally the conditions and limits of what may be properly considered as proof at the hearing. The basic principle is that any factual information, not privileged, that is rationally useful in reaching judgment on the relevant facts of the case should be admissible as evidence. Evidence governed by a privilege is not admitted and the court may refuse to accept evidence that is redundant. Common-law concepts of hearsay and parole evidence as exclusionary rules are inappropriate in a nonjury case, except as they affect the credibility and weight of evidence.

C-25.2 In applying the principle of relevance, the primary consideration is the usefulness of the evidence. In deciding upon admissibility of the evidence, the court makes a hypothetical evaluation connecting the proposed evidence with the issues in the case, i.e., a hypothesis concerning the possible outcome of the presentation of the evidence. If a probative inference may be drawn from the evidence to the facts, then the evidence is logically relevant.

C-25.3 In some legal systems there are rules limiting in various ways the use of circumstantial evidence. However, these rules seem unjustified and are very difficult to apply in

practice. More generally, there is no valid reason to restrict the use of circumstantial evidence when it is useful to establish knowledge of a fact in issue. Therefore under the general principle, the court may consider any circumstantial evidence provided it is relevant for the decision on the facts of the case.

C-25.4 Rule 25.2 defines who can properly give evidence or present statements. In some national systems the rules exclude parties or “interested” nonparties as witnesses. However, even in such systems the trend favors admitting all testimony. A general rule of competency also avoids the complex distinctions that exclusionary rules require. The proper standard for the submission of evidence by a witness is the principle of relevancy. This does not mean, however, that subjective or objective connections of the witness with the case must be disregarded, but only that they are not a basis for excluding the testimony. These connections, for example kinship between the witness and a party, may be meaningful in evaluating credibility.

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

C-25.5 Rules 25.3 and 25.4 govern the parties’ right to proof in the form of testimony, documentary evidence, and real or demonstrative evidence. A party may testify in person, whether called by the party, another party, or the court. That procedure is not permitted in some civil-law systems, where the party is regarded as too interested to be a witness on its own behalf. The court may exercise an active role in the taking of testimony or documentary, real, or demonstrative evidence. For example, when the court knows that a relevant document is in possession of a party or of a nonparty, and it was not spontaneously produced, the court may on its own motion order the party or the nonparty to produce it. The procedural device is substantially an order of subpoena. The court in issuing the order may establish the sanctions to be applied in case of noncompliance. See Rule 30.

26. Expert Evidence

26.1 The court must appoint a neutral expert or panel of experts whenever required to do so by forum law and may do so when the court determines that expert evidence may be helpful in resolving issues in the case. Expert testimony may address issues of foreign law and international law.

26.2 The court determines the issues that are to be addressed by the court’s expert and may provide directions concerning tests, evaluations, or other procedures to be employed by the expert. The court may issue orders necessary to facilitate the inquiry and report by the expert and may specify the form in which the expert shall make its report.

26.3 A party may on its own initiative designate an expert or panel of experts on an issue. An expert so designated is governed by the same standards of objectivity and neutrality as govern an expert appointed by the court. The parties’ experts and advocates are entitled to participate in or observe the tests, evaluations, or other investigative procedures conducted by the court’s expert. The court may order all the experts to confer with each other before presenting their opinions. Experts designated by the parties may submit their own opinions to the court in the same form as the report made by the court’s expert. Each party pays initially for an expert designated by that party.

Comment:

C-26.1 These Rules adopt the basic civil-law system concerning experts, according to which the court appoints a neutral expert or panel of experts. The court decides on its own motion whether an expert is needed in order to evaluate or to establish facts that because of their scientific, legal, or technical nature, the court is unable to evaluate or establish by itself. The court appoints

the expert or the experts (if possible using the special lists that exist in many countries) on the basis of the expert's competence in the relevant field. If the expert's neutrality is disputed, that issue is for the court to resolve. The court, informed by the parties' recommendations, should specify the technical or scientific issues on which the expert's advice is needed and formulate the questions the expert should answer. The court also should determine which techniques and procedures the expert will apply, regulate any other aspect of the tests, inquiries, and research the expert will make, and determine whether the expert will respond orally or by submitting a written report. In making such determinations, the court should consult with the experts as well as the parties in determining the tests, evaluations, and other procedures to be used by the experts.

C-26.2 The court's expert is neutral and independent from the parties and from other influence. The court is expected to rely on the expert's advice when it appears sound and credible; if the advice does not appear reasonable, the court may appoint another expert. However, the court is not obliged to follow the expert's advice. In such a case, the court ordinarily should explain specifically the reasons why the expert's advice is rejected and the reasons supporting the court's different conclusion.

C-26.3 Rule 26 recognizes that the status of an expert is somewhat different from that of a percipient witness and that experts have somewhat different status in various legal systems. In common-law systems an expert is presented by the parties on the same basis as other witnesses, recognizing that the role is one of interpretation rather than recounting first-hand observations. In civil-law systems the parties may present experts but ordinarily do so only to supplement or dispute testimony of a court-appointed expert.

This Rule adopts an intermediate position. The court may appoint experts but the parties may also present experts whether or not the court has done so. The court-appointed expert provides the court with technical, legal, or scientific information and analysis. Such an expert is obliged to perform this task in good faith and according to the standards of the expert's profession. A party's expert is subject to cross-examination.

C-26.4 In cases in which the court has appointed neutral assessors according to Rule 8, it may not be necessary to appoint a neutral expert. In more complex cases, however, especially when a formal investigation is needed, it may be necessary to have both. The judge has discretion to decide which device to use in light of the circumstances of the case.

C-26.5 Rule 26.3 provides that the parties are entitled to appoint their own experts, but party experts participate under supervision by the court. The role of a party expert may be limited to advising the party about the technical and scientific matters involved and commenting on the activity of the court's expert. The parties' experts are entitled to be informed about any test, experiment, or inquiry carried on by the court's expert. They may raise problems, ask questions, and submit comments, data, and information to the court's expert.

However, when the court receives oral testimony from the court's expert, the parties' experts should be similarly heard. When the court's expert submits a written report, the parties' experts should also be allowed to do so. The court may order all the experts to confer with each other in order to clarify the issues and to focus their opinions. The advice of the parties' experts may be taken into account by the court and the court may adopt a party's expert advice instead of that of the court's expert.

When an expert is examined orally, the provisions in Rule 28 generally apply. However, under Rule 26.2 the court may require a written report from the expert and oral examination of the expert after the report has been submitted.

27. Evidentiary Privileges

27.1 Privilege against disclosure or exchange of evidence must be recognized with respect to:

27.1.1 Legal profession privilege;

27.1.2 Communications between counsel in settlement negotiation;

[27.1.3 National defense and security].

27.2 Evidence cannot be compelled if it consists of information covered by other privileges under applicable law. If evidence is not so privileged but would be privileged

under other law, the evidence shall be produced in closed session of the court but in the presence of the parties and their lawyers. The court shall order protection of the secrecy concerning the privileged material.

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

27.4 A privilege may be waived by or on behalf of the person that is entitled to take advantage of it. A party waives a privilege, for example, by omitting to make a timely objection to a question or demand seeking evidence or information covered by a privilege. The court in the interest of justice may relieve a party of waiver of a privilege.

Comment:

C-27.1 Privileges exclude relevant evidence. They evolve over time and reflect various social interests. Organized professions (e.g., doctors, psychiatrists, accountants, lawyers) are interested in protecting their members' professional activities by means of the privilege not to disclose information acquired during such an activity. Statutory law and case law have extended the list of professional privileges. However, the protection of such privileges has significant cost in the quality of proof and discovery of truth.

C-27.2 Rule 27.1.1 gives full effect to a "legal profession" privilege. The concept of this privilege is different in the common-law and civil-law systems but this Rule includes both concepts. The common law recognizes an "attorney-client privilege," which enables the client to object to inquiry into confidential communications between client and lawyer that were made in connection with the provision of legal advice or assistance. Under United States law a similar protection, called the "lawyer work product" immunity, additionally shields materials developed by a lawyer to assist a client in litigation. The civil law recognizes the same protections but under the concept of a professional right or privilege of the lawyer.

C-27.3 Rule 27.1.2 reflects the universal principle that confidentiality should be observed with regard to communications in the course of settlement negotiations in litigation. Some systems presume that only correspondence between advocates is confidential, whereas many other systems extend this privilege to party communications concerning settlement. The precise scope of confidentiality of communications concerning settlement is determined by the law governing the communications, but the general principle stated above should be considered in determining the matter. See also Rule 22.

C-27.4 Rule 27.2 accords protection to other privileges, such as those involving financial advisers or other professionals. In general, the civil-law systems accord privacy to the communications of many professionals. Many legal systems recognize additional privileges, usually in qualified form. Thus, the European Court of Human Rights has recognized various professional privileges, e.g., for bankers, accountants, and journalists, and many countries also recognize a privilege for communications between family members. Many state jurisdictions in the United States recognize an accountant privilege and some recognize a "self-evaluation privilege" on the part of hospitals and some other organizations. However, in some civil-law systems the court may examine such confidences if they appear highly relevant to the matter in dispute. Such an approach is known in the common law as a conditional privilege. However, if the court permits receipt of such evidence, it should protect the confidential information from disclosure except as required for consideration in the dispute itself.

C-27.5 The court may make a determination whether to receive conditionally privileged information through an *in camera* hearing, in which the participants are limited to the court itself, the parties, and the parties' lawyers. See Rule 22.3. The same device may be used concerning nonprivileged information when the court finds that publication could impair some important private or public interests, such as a trade secret. The taking of evidence in a closed hearing should be exceptional, having regard for the fundamental principle of the public nature of hearings.

C-27.6 Rule 27.3 prescribes a procedure for claims of privilege with respect to documents. The claimant is required to identify the document in sufficient detail to permit an opposing party to make an intelligent disputation of the claim of privilege, for example that the document had been distributed to third persons.

C-27.7 A person who is entitled to a privilege may waive it, in which event evidence in the privileged communication is received without limitation. The privilege may be waived by means of an explicit statement or tacitly; a tacit waiver results when the party does not timely claim the privilege. However, the court may decline to enforce a waiver when necessary in the interest of justice.

F. Plenary Hearing (Trial)

28. Concentrated Plenary Hearing

28.1 Documentary evidence not earlier produced to the court and other parties shall be produced prior to the plenary hearing by the party intending to rely on such evidence.

28.2 Receipt of oral evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except if the court orders otherwise for the convenience of the parties or persons giving evidence or in the administration of justice.

28.3 Evidence at plenary hearing will be received according to the following rules:

28.3.1 Evidence given orally or through written testimony must be truthful, under penalty of perjury, in accordance with forum law.

28.3.2 A person giving evidence is directly questioned by the lawyer of the party who called the person. The lawyers of the other parties are then permitted to ask supplemental questions. Further direct and supplemental questioning may be permitted by the court. The court shall exclude, on objection or on its own motion, irrelevant evidence and improperly leading questions. The court shall prevent unnecessary embarrassment and harassment of persons giving evidence.

28.3.3 The court may at any time conduct questioning in order to clarify the testimony, including additional questions after the questioning by the parties.

28.3.4 A person called to give evidence by the court may be examined by the court first. The person then may be questioned by the lawyers for the parties.

28.3.5 Direct questions may deal with any relevant issue in the case. Supplemental questioning may deal with any issue addressed in the direct questioning, unless the court permits a more extensive scope.

28.3.6 A statement made by a party outside of the record against that party's own interest is admissible as evidence.

28.3.7 Any party may challenge the credibility of a witness or an expert by means of questioning or consideration of prior inconsistent statements or other evidence that may affect the credibility of the witness. The court may ask questions that affect the person's credibility.

28.3.8 The court may permit similar contest of the authenticity or accuracy of a document or an item of real or demonstrative evidence.

Comment:

C-28.1 Rule 28.2 establishes a general principle concerning the structure of the plenary proceeding. It is consistent with the common-law "trial" model, according to which the taking of evidence should be made in a single hearing; when one day of hearing is insufficient the plenary hearing should continue in consecutive days. In civil-law systems a similar structure is reflected in "concentrated" proceedings. The concentrated hearing is the better method for the presentation of evidence, although several systems still use the older method of separated hearings. Exception to the rule of the concentrated hearing can be made in the court's discretion when there is good reason, for example when a party needs an extension of time to obtain evidence. In such a case the delay should be as limited as possible. Dilatory behavior of the parties should not be permitted.

C-28.2 In most civil-law systems, a party's statement is regarded as having lesser standing than testimony of a nonparty witness; in some civil-law systems, a party may not be compelled to

give testimony at the instance of another party; and in some systems a party cannot call itself as a witness. The common law treats parties as fully competent witnesses and permits parties to call themselves to the stand and obliges them to testify at the instance of an opposing party, subject to privileges such as that against self-incrimination. This Rule adopts the common-law approach, so that a party has both an obligation to testify if called by the opposing party and a right to testify on its own motion. See Rule 25.2. Failure without explanation or justification to testify may justify the court's drawing an adverse inference concerning the facts, or, if a party disobeys an order to testify, holding the party in contempt. However, a party's failure to comply may have some reasonable explanation or justification. Sanctions may be gradually increased until the party decides to comply, according to the model of the French *astreintes*. See also Rule 1.6.

This procedure entails a departure from the "free examination" of the parties permitted in some continental systems, whereby parties make statements but are not witnesses in the strict sense because they are under no obligation to tell the truth and do not take an oath.

C-28.3 Rule 28.3.2 governs the examination of witnesses. The traditional distinction between common-law systems, which are based upon direct and cross-examination, and civil-law systems, which are based upon examination by the court, is well known and widely discussed in the comparative legal literature. Equally well known are also the limits and defects of both methods. The chief deficiency in the common-law procedure is excessive partisanship in cross-examination, with the danger of abuses and of distorting the truth. In the civil law the chief deficiency is passivity and lack of interest of the court while conducting an examination, with the danger of not reaching relevant information. Both procedures require efficient technique, on the part of the judge in civil-law systems and the advocates in common-law systems. The problem is to devise a method effective for a presentation of oral evidence aimed at the search for truth. The rules provided here seek such a balanced method.

C-28.4 For a witness called by a party, the common-law system of direct and supplemental examination by the parties is the most suitable for a thorough examination. The witness is first questioned by the lawyer of the party who called him or her, and then questioned by the lawyers for the adverse parties. Further questioning may be permitted by the court when useful. To prevent abuses by the lawyers, the court should exclude, on the other party's objection or ex officio, questions that are irrelevant or improper or which subject the witness to embarrassment or harassment. If the court is too passive, it will be ineffective in preventing improper behavior by the lawyers. On the other hand, lawyers unaccustomed to questioning may have difficulty conducting an effective interrogation.

C-28.5 The civil-law method, in which the court examines the witness, has advantages in terms of the neutral search for the truth and of eliciting facts that the court considers especially relevant. The court therefore is afforded an active role in the examination of witnesses, an authority that is also recognized in common-law systems. The court may play such a role to clarify testimony during the questioning by the parties or may independently examine the witness after the parties' examinations when it seems useful to elicit or clarify facts or circumstances that have not emerged sufficiently.

C-28.6 A witness called ex officio by the court is examined first by the court and then by the parties. This is the equivalent of a direct examination of a witness called by a party. After that, the parties have the right to question the witness. The court may therefore conduct a further examination of the witness when it seems necessary to clarify, control, or further develop the testimony given.

C-28.7 If a party, during questioning as a witness, makes a statement, the content of which is contrary to the party's own interest, the statement is to be treated as ordinary evidence and does not have any special probative weight. Such a statement is not to be treated as a "confession" having binding effect. Also, under Rule 28.3.6 a statement by a party outside court, for example in a deposition, that is contrary to his or her interest is admissible as evidence if duly proved at the hearing. Such a statement is also to be treated as ordinary evidence to be freely evaluated by the trier of fact.

C-28.8 The opinion of a witness may be admitted when it will clarify the witness's testimony. In the recollection of facts, knowledge and memory are often inextricably mixed with

judgments, evaluations, and opinions, often elaborated unconsciously. Sometimes a “fact” implies an opinion of the witness, as for instance when the witness interprets the reasons for another person’s behavior. Therefore the rule excluding the opinions of witnesses is properly understood as prohibiting comments that do not aid in the reconstruction of the facts at issue.

C-28.9 Rule 28.3.7 permits disputation of the credibility of any witness, including experts and parties when examined as witnesses. The best opportunity to cast doubt upon the credibility of a witness is through examination in court. The credibility of any witness can be disputed on any relevant basis, including adverse questioning, prior inconsistent statements, or any other circumstance that may affect the credibility of the witness, such as interest, personal connections, employment or other relationships, incapacity to perceive and recollect facts, and inherent implausibility of the testimony. Such prior statements may have been made in earlier stages of the same proceedings (for instance, during deposition) or made out of the judicial context, for instance before the beginning of the litigation.

However, the right to challenge the credibility of an adverse witness may be abused by harassment of the witness or distortion of the testimony. The court should prevent such conduct. The challenge of the credibility of a witness should be allowed only when there are serious reasons for doing so.

C-28.10 The authenticity or the reliability of other items of evidence, either documentary or real and demonstrative, may also be disputed by any party. Special subproceedings to determine the authenticity of public or private documents exist in many national systems. They should be used when the authenticity of a document is doubtful or contested. Scientific and technical evidence may also be scrutinized if its reliability is doubtful or disputed.

29. Powers and Remedies Concerning Evidence

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

29.1 Make rulings on matters described in Rule 23;

29.2 Exclude irrelevant or redundant evidence, or evidence whose presentation involves unfair prejudice, excessive cost, burden, confusion, or delay;

29.3 Draw adverse inferences from a party’s failure to give testimony or to present a witness, or to produce a document or other item of evidence that the party was in a position to present;

29.4 Impose sanctions authorized by forum law, including fine or contempt of court, on any person who, upon lawful order and without justification, fails to attend to give evidence, to answer proper questions, or to produce a document or other item of evidence, or who otherwise obstructs the administration of justice;

29.5 Relieve a party, in the interest of justice, from a failure to comply with the rules concerning evidence.

Comment:

C-29.1 Rule 29 specifies various aspects of the authority of the court with reference to evidence. The court may exercise such powers on its own motion or on a motion of a party.

Rule 29.2 gives the court the power to exclude evidence on various grounds. The first is irrelevancy of the evidence or its redundant or cumulative character. Redundant or cumulative evidence is theoretically relevant if considered by itself but not when considered in the context of the other evidence adduced. The court may in the course of a plenary hearing admit evidence that was preliminarily excluded because it had appeared irrelevant, redundant, or cumulative. The standard of exclusion by reason of “unfair prejudice, excessive cost, burden, confusion, or delay” should be applied very cautiously. This power should be used by the court primarily when a party adduces evidence with the apparent aim of delaying or confusing the proceedings.

C-29.2 Rule 29.3 and 29.4 provide for various other sanctions, including *astreintes*. The court may draw adverse inference from the behavior of a party such as failing to give testimony or present a witness or produce a document or other item of evidence that the party could present. Drawing adverse inference means that the court will interpret the party’s conduct as circumstantial evidence contrary to the party.

Drawing adverse inference is obviously a sanction appropriate only against a party.

Sanctions applied to nonparties include contempt of court and imposing a fine, subject to the limitation in Rule 38.2.4. The conduct that may be sanctioned includes failing to attend as a witness or answer proper questions and failing without justification to produce documents or other items of evidence.

C-29.3 While failure to comply with rules and orders concerning evidence is always subject to sanction, the court has discretion concerning the importance and the nature of the noncompliance and the kind and measure of the sanction that will be imposed. Rule 29.5 provides that the court may excuse a party's failure to comply with the rules concerning evidence or with court orders applying the rules, according to the discretion of the court. The court's authority should be exercised reasonably and with regard to the principle of proportionality. See Rule 1.6.

30. Orders Directed to a Third Person

30.1 The court may, upon reasonable notice to the person to whom an order is directed and in accordance with forum law, order persons subject to its jurisdiction who are not parties to the proceeding:

30.1.1 To comply with an injunction issued in accordance with Rule 17.1;

30.1.2 To retain funds or other property the right to which is in dispute in the proceeding, and to disburse the same only in accordance with an order of the court;

30.1.3 To give testimony as provided in Rules 21 and 28;

30.1.4 To produce documents or other things as evidence.

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

30.3 An order directed to a third person may be enforced by means authorized against such persons by forum law, including imposition of cost sanctions, a monetary penalty, contempt of court, or seizure of documents or other things.

Comment:

C-30.1 The court has broad authority to order nonparties as well as parties to act or to refrain from acting during pendency of the litigation, to preserve the status quo, and to prevent irreparable injury. In various situations a person may be involved in a suit without being a party, but should be subject to orders in the interest of justice in the proceeding. The right of contradiction stated in Principle 5 should be respected at all times. Therefore, interested persons should be notified and afforded a reasonable opportunity to respond.

C-30.2 A preliminary injunction issued in accordance with Rule 17.1 may involve nonparties insofar as their cooperation is needed in order to carry the injunction into effect, particularly to maintain the status quo, to prevent irreparable injury, and to assure an effective remedy. The court should determine the kind of cooperation required by nonparties and provide orders accordingly.

C-30.3 When funds or other property is involved, the court may require that they be preserved against dissipation until the case is finally decided. The court may order the person in possession of the property to retain it until a further order of the court.

C-30.4 When a nonparty's testimony is required, on a party's motion or on the court's own motion, the court may direct the witness to give testimony in the hearing or through deposition.

C-30.5 When a document or any other relevant thing is in possession of a nonparty, the court may order its production at the preliminary stage or at the plenary hearing.

C-30.6 An order directed to the third party is enforced by sanctions for noncompliance authorized by forum law. These sanctions include a monetary penalty or other legal compulsion, including contempt of court. When it is necessary to obtain evidentiary materials or other things, the court may order a direct seizure of such materials or things, and define the manner of doing it. See Rule 1.6.

31. Record of the Evidence

31.1 A summary record of the hearings must be kept by the court's clerk under

the court's direction.

31.2 A verbatim transcript of the proceeding or an audio or video recording must be kept upon order of the court or demand of any party. A party demanding a transcript shall pay the expense thereof.

Comment:

C-31.1 With regard to the record of the evidence, two principal methods can be used. One is typical of some common-law jurisdictions and consists of the verbatim transcript of everything said in the presentation of evidence; the other is typical of civil-law systems and consists of a summary of the hearing that is written by the court's clerk under the direction of the court, including the matters that in the court's opinion will be relevant for the final decision. In most civil-law systems there is no procedure for making a verbatim transcript. A verbatim transcript is complete and provides a good basis both for the final decision and for the appeal, but in many cases it is exceedingly burdensome and expensive.

C-31.2 These Rules regard the more desirable practice to be a summary record written by the court's clerk under direction of the court. The court should require the summary record to include all relevant statements made by the parties and the witnesses, and other events that might be useful for the final evaluation concerning the credibility of witnesses and the weight of proofs. The parties are entitled to ask for inclusion of specific statements and the court has discretion to permit their reception.

C-31.3 If a party requests a verbatim transcript or audio or video recording of the plenary hearing, the court should so order. The party or parties requesting the transcript should pay the expense. The court should be provided a copy of the transcript and the other parties are entitled to have a copy upon paying their share of the expense. The court may, on its own initiative, order a verbatim transcript of the hearing. A verbatim transcript does not take the place of the official record that must be kept according to Rule 31.1 unless ordered by the court.

32. Final Discussion and Judgment

32.1 After the presentation of all evidence, each party is entitled to present a written submission of its contentions concerning issues of facts and law. With permission of the court all parties may present an oral closing statement. The court may allow the parties' advocates to engage with each other and with the court in an oral discussion concerning the main issues of the case.

32.2 The court may invite advocates for the parties to submit their proposed judgments. The court may issue an oral decision or must without delay publish a written judgment and an explanatory opinion. The judgment shall include findings of fact based upon the relevant evidence and the supporting inferences and the principal legal propositions supporting the decision. The judgment shall be dated. Issues of fact shall be determined according to the applicable law governing burden of proof.

Comment:

C-32.1 The plenary hearing ends when all the evidence has been presented. At this point the case is almost ready for decision, but the parties may request permission to present oral closing statements, the plaintiff first and then the defendant. In such closing statements the parties will suggest the conclusions to be drawn from the evidence presented, and may restate their "theories of the case" both from the factual and the legal point of view, briefly summing up their contentions and claims and stating their requests. The court may allow the parties to discuss briefly among themselves and the court the main issues of the case. The court may put questions to the parties' lawyers in order to clarify the contentions and claims.

C-32.2 A party has a right to present a written submission of contentions and the legal rules upon which the contentions are based. The court should fix a date for written submissions and the date of a further hearing in which the closing statements will be presented and the oral discussion will take place.

C-32.3 Rule 32.2 requires the court to publish a written opinion justifying its decision. The publication is made according to the local practice, but a written notice must be sent to the parties. All parties are entitled to obtain a copy of the entire judgment. The date of the judgment, determined according to forum law, is the basis for determining the time for appeal and for enforcement.

The justificatory opinion shall include the findings of fact supported by reference to the relevant proofs and the evaluations of evidence by which the court has found the facts and the principal legal propositions supporting the decision, with reference to the relevant legal rules, principles, and precedents and to the arguments supporting the interpretation adopted by the court.

C-32.4 If the court is composed of more than one judge, in some countries a member of the tribunal may give a dissenting or concurring opinion, orally or in writing. Such opinions, if in writing, are published together with the court's opinion.

C-32.5 The standard of proof generally applied in civil cases at common law is that of preponderance of the evidence. In civil-law systems the standard is that the judge must be convinced. Many systems impose a higher standard of proof for certain issues in civil cases, notably proof of fraud. These standards contrast with the higher standard, such as "beyond a reasonable doubt," in criminal cases. Rule 32.2 defers to the standard under forum law.

In addition to the standard of proof is the problem of burden of proof. In general, it is universally recognized that a plaintiff has the burden of proof for all issues essential to his claim and that the defendant correlatively has the burden of proof as to issues of affirmative defense. In civil-law systems the allocation of burden of proof is considered to be a matter of substantive law for purposes of choice of law. The rules of burden of proof applicable to various types of claims are in turn considered to be derived from substantive considerations, such as the nature of the claim and the relative capabilities of parties in transactions of the kind presented in the case. Thus, the forum would look to the law governing the transaction to determine the rules of burden of proof.

In common-law systems the allocation of burden of proof is generally considered to be "procedural" so far as concerns choice of law. The forum therefore applies its own rule of burden of proof. Common-law systems recognize exceptions according to which the claim is based on a statute of another jurisdiction whose law governs the transaction, at least if the statute provides a special allocation of burden of proof. In any event, the rules of burden of proof in common-law systems generally reflect the same kinds of "substantive" policy considerations as underlie the rules of burden of proof in the civil-law systems.

A classically vexing problem is the classification of issues in allocation of burden of proof, i.e., whether a specific issue is part of plaintiff's case or a matter of affirmative defense. That problem should be resolved according to the applicable law recognized by the forum.

33. Costs

33.1 Each party initially pays its own costs and expenses, including court fees, attorney's fees, fees of a translator appointed by a party, and incidental expenses.

33.2 The interim costs of the fees and expenses of an assessor, expert, other judicial officer, or other person appointed by the court shall be provisionally paid equally by the parties or as otherwise ordered by the court. The court shall order final payment according to this Rule.

33.3 The prevailing party shall be reimbursed its reasonable costs and expenses from the losing party, but determination of costs may be stayed with a stay of enforcement as provided in Rule 38.3.

33.4 The prevailing party shall within [30 days] after rendition of the judgment submit a statement, certified by the party or its attorney, of its costs and expenses. The losing party shall promptly pay the amount requested except for such items as it disputes. Disputed items shall be determined by the court or by such other procedure as the parties may agree upon.

33.5 At the time of judgment, the court may reduce or preclude recovery of costs and expenses against a losing party that had reasonable factual or legal basis

for its position. The court may also impose a penalty not to exceed twice the amount provided by Rule 33.3 against a party whose disputation the court determines was conducted in bad faith.

33.6 If there is appellate review, the rules and procedure stated above shall apply to costs and expenses incurred in connection with the appeal.

33.7 If authorized by the law of the forum, the court may require a party to give security for costs and expenses.

Comment:

C-33.1 The rule governing allocation of costs and expenses of litigation in ordinary civil proceedings, recognized universally except in the United States, is that the prevailing party is entitled to reimbursement from the losing party. That principle is adopted here, and the prevailing party shall be reimbursed for costs and expenses independently of request. The party need only submit the statement referred to in Rule 33.4.

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

However, the rules concerning costs in common-law systems and some civil-law systems confer authority on the court to modify the normal allocation of costs to the losing party. Rule 33.5 adopts such a position. This Rule also allows the court to impose penalty costs on a party that has engaged in bad-faith disputation. “Bad faith” includes disputation of factual issues as to which there is no substantial evidentiary dispute and assertion of legal contentions for which no professionally responsible argument can be offered.

C-33.2 The parties are permitted, in accordance with applicable law, to contract with their lawyers concerning their fees. Costs awarded should be reasonable, not necessarily those incurred by the party or the party’s lawyer. If it was reasonably appropriate that a party retained more than one firm of lawyers, those fees and expenses may be recovered. The party seeking recovery of costs has the burden of proving their amount and their reasonableness. The award belongs to the party, not the lawyer, subject to any contractual arrangement between them.

C-33.3 Rule 33.7 recognizes that, if it is authorized by the law of the forum, the court may require posting of security for costs. In several legal systems the security for costs is considered as a violation of the due-process guarantee in connection with the principle of the equal treatment under the law. Security for costs could entail discrimination against parties not having enough money to give such a security, and, correspondingly, constitute preferential treatment for parties having money. On the other hand, in some countries it is considered as a normal means to ensure the recovery of costs.

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

G. Subsequent Proceedings

34. Appellate Review

34.1 Except as stated in the following subsection, an appeal may be taken only from a final judgment of the court of first instance. The judgment shall be enforceable pending appeal, subject to the provisions of Rules 38.3 and 38.4.

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

34.3 Orders of the court other than a final judgment and an order appealable

under the previous subsection are subject to immediate review only upon permission of the court of first instance or of the appellate court. Such permission may be granted when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.

34.4 Appellate review is limited to the claims, defenses, and counterclaims asserted in the court of first instance. No additional previously available evidence should be admitted except to prevent manifest miscarriage of justice.

Comment:

C-34.1 A right of appeal is a generally recognized procedural norm. It would be impractical to provide in these Rules for the structure of the appellate courts and the procedure to be followed in giving effect to this right. It is therefore provided that appellate review should be through the procedures available in the court system of the forum. "Appeal" includes not only appeal formally designated as such but also other procedures that afford the substantial equivalent, for example, review by extraordinary order (writ) from the appellate court or certification for appeal by the court of first instance.

C-34.2 Rule 34.1 provides for a right of appeal from a final judgment. The only exceptions are those stated in Rules 34.2 and 34.3. Thus, interlocutory appellate review is not permitted from other orders of the first-instance court, even though such review might be available under the law of the forum. In some countries, especially those of common-law tradition, some of the decisions in a proceeding are made by adjuncts, such as magistrate judges. These decisions are normally appealable to the first-instance judge who delegated the issue. This subsection does not interfere with this practice. The restrictions on appeal set forth in this Rule do not apply to the relationships between a court of first instance and its adjuncts. See Rule 20.8.

C-34.3 Rule 34.2 permits pendente lite interlocutory appellate review of orders granting or denying an injunction. See Rule 17. The injunction remains in effect during the pendency of the review, unless the reviewing court orders otherwise. The court may determine that an injunction should expire or be terminated if circumstances warranted.

C-34.4 Rule 34.3 permits interlocutory appeal of orders other than the final judgment at the initiative of either the first-instance court itself or the appellate court. The judges of the first-instance court or the appellate court, as the case may be, must determine that the order is of the importance defined in Rule 34.3. Permission for the interlocutory appeal may be made by motion addressed to the court from which permission is sought.

C-34.5 Rule 34.4 permits appellate review of factual issues on the basis only of evidence previously presented to the court of first instance. This limitation accords with the principle followed in the common-law tradition and is also recognized in some civil-law systems. Within the foregoing limitation the appellate court may determine that evidence should have been received that was excluded by the first-instance court or require that evidence which was received be disregarded, for example, where the first-instance court made an erroneous ruling concerning a claim of evidentiary privilege. When the appellate court has determined that evidence was improperly excluded or received and that the effect was prejudicial, it may direct judgment where justified or order further proceedings in the court of first instance.

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

35. Further Appellate Review

An appeal or other form of review may be taken from the decision of a court of second instance in accordance with the law of the forum. The review performed by the court of second appeal may deal only with issues of substantive or procedural law. The facts in issue will not be reconsidered. No evidence or additional claims or defenses will be admitted.

Comment:

C-35.1 Most modern court systems are organized in a hierarchy of at least three levels. In many systems, after appellate review in a court of second instance has been obtained, further appellate review is available only on a discretionary basis. The discretion may be exercised by the higher appellate court, for example, on the basis of a petition for hearing. In some systems such discretion may be exercised by the second-instance court by certifying the case or an issue or issues within a case to the higher appellate court for consideration.

C-35.2 This Rule adopts by reference the procedure in the courts of the forum concerning the availability and procedure for further appellate review. It is impractical to specify special provisions in these Rules for this purpose.

36. Expiration of Time to Appeal

Except as stated in Rule 37, a judgment is not subject to reexamination for procedural regularity or substantive propriety upon expiration of the time for appellate review of such a judgment.

Comment:

C-36.1 The rule of finality is recognized in the common-law systems and many civil-law systems. However, procedure in many systems permits reconsideration or correction of a judgment under specified conditions. In some common-law systems a “new trial” may be granted. All systems impose time limits on use of such procedures and generally require that they be invoked before the time to appeal has expired. The forum rules in such matters should govern finality.

37. Nullification of Judgment

37.1 A judgment may be nullified only through a new proceeding and only upon showing that the applicant acted with due diligence and that:

37.1.1 The judgment was procured without jurisdiction over the party seeking relief; or

37.1.2 The judgment was procured through fraud; or

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

37.1.4 The judgment constitutes a manifest miscarriage of justice.

37.2 An application for nullification of judgment must be made within [one year] from the date of judgment. An objection based on fraud on the court is not subject to that time limit.

Comment:

C-37.1 As a general rule a final judgment should not be reexamined except in appellate review according to the provisions included in Rules 34 and 35. Only in exceptional circumstances may it be nullified through a new proceeding.

C-37.2 Reexamination of a judgment may be requested in the court that rendered the judgment. In seeking such a reexamination a party must act with due diligence. The grounds for such an application are: (1) the court had no jurisdiction over the party asking for reexamination; (2) the judgment was procured by fraud on the court; (3) there is evidence not previously available that would lead to a different outcome; or (4) there has been a manifest miscarriage of justice.

C.37.3 The challenge under Rule 37.1.1 should be allowed only in case of default judgments. If the party contested the case on the merits without raising this question, the defense is waived and the party should not be allowed to attack the judgment on those grounds.

C-37.4 The court should consider such an application cautiously when Rule 37.1.3 is invoked. The applicant should show that there was no opportunity to present the item of evidence at the plenary hearing and that the evidence is decisive, i.e., that the final decision should be

changed.

C-37.5 In interpreting Rule 37.1.4, it should be recognized that the mere violation of a procedural or substantive legal rule, or errors in assessing the weight of the evidence, are not proper grounds for reexamining a final judgment, but are proper grounds for appeal (see Rules 34 and 35). A miscarriage of justice is an extreme situation in which the minimum standards and prerequisites for fair process and a proper judgment have been violated.

38. Enforcement of Judgment

38.1 A final judgment, including judgment for a provisional remedy, is immediately enforceable, unless it has been stayed as provided in Rule 38.3. In particular, a final judgment may be enforced through attachment of property owned by or an obligation owed to the judgment obligor.

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

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

38.2.2 The penalty for noncompliance may include the cost and expense incurred by the party seeking enforcement of the judgment, including attorney's fees, and may also include a penalty for defiance of the court, not to exceed twice the amount of the judgment.

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

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

38.2.5 The court may order third parties to reveal information relating to the assets of the debtor.

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

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

Comment:

C-38.1 Rule 38.1 provides that a final judgment is immediately enforceable. If the judgment has to be enforced in the country of the court in which the judgment was entered, the enforcement will be based on the forum's law governing the enforcement of final judgments. Otherwise, the international rules including international conventions such as the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments will apply. When a monetary judgment is to be enforced, attachment of property owned by the judgment obligor, or obligations owed to the obligor, may be ordered. Monetary penalties may be imposed by the court for delay in compliance, with discretion concerning the amount of the penalty. See Rule 1.6.

C-38.2 Rule 38.2 authorizes the court, upon request of the judgment holder, to impose monetary penalties upon the judgment obligor in the case of noncompliance with a judgment. These penalties may become effective if the judgment obligor does not pay the obligation within the time specified, or within 30 days after the judgment has become final if no time is specified. The monetary penalties are to be imposed according to the following rules:

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

2) Enforcement costs include the probable fees required for the enforcement, including the attorney's fees, and including a conditional penalty in case of defiance of the court. A conditional

penalty may not exceed twice the amount of the judgment. The court may require the penalty to be paid to the person obtaining the judgment or to the court or otherwise.

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

4) No penalty shall be imposed on a person who satisfactorily demonstrates to the court an inability to comply with the judgment. See Rule 1.6.

5) "Third parties" includes any institution which holds an account of the debtor.

C-38.3 Rule 38.3 permits either the first-instance court or the appellate court to grant a stay of enforcement in exceptional cases. Rule 38.4 authorizes the court to require a bond or other security as a condition either to permit or to stay the immediate enforcement.

39. Judicial Assistance

The courts of a state that has recognized these Rules must, and courts of other states may, enforce orders in aid of proceedings in another state.

Comment:

C-39.1 It is a general principle of private international law that judgments of one state will be recognized and enforced in the courts of other states. This principle is being given expression in The Hague Convention on Jurisdiction and Judgments, now in the drafting process. The same principle has been recognized with respect to interlocutory orders, such as orders directing testimony from third-party witnesses. The extent of such assistance and the procedures by which it may be provided are governed in many respects by the Brussels and Lugano Conventions.

C-39.2 Rule 39 provides that, as a matter of the domestic law of the forum, assistance to the courts of another state is to be provided to such extent as may be appropriate. The general governing standard is the measure of assistance that one court within the state would provide to another court in the same state.