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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

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

Report on the Second Session  
Rome, 2 to 6 July 2001

(Prepared by Professor Antonio Gidi, Secretary to the Working Group)

Rome, October 2001

1. The second session of the **Joint ALI/UNIDROIT Working Group for the preparation of Transnational Rules of Civil Procedure** was held from 2 to 6 July 2001 in Rome at the seat of the Institute. The session was chaired by Mr. Ronald T. Nhlapo (South African Law Commission; Member of the Governing Council of UNIDROIT) and was attended by all members of the Working Group: Mr. Neil Andrews (Cambridge University, U.K.), Ms. Aída Kemelmajer de Carlucci (Supreme Court of Justice of Mendoza, Argentina), Ms. Frédérique Ferrand (Université Jean Moulin, Lyon, France), Mr. Geoffrey C. Hazard, Jr. (University of Pennsylvania Law School; former Director of ALI), Mr. Masanori Kawano (Nagoya University, School of Law, Japan), Mr. Pierre Lalive (Lalive & Partners and Geneva University, Switzerland), Mr. Rolf Stürner (Freiburg University, Germany), and Mr. Antonio Gidi (Brazil and University of Pennsylvania Law School, and Secretary to the Working Group). The meeting was also attended by observers, such as Mrs. Luigia Maggioni (representing the Court of Justice of the European Community). The UNIDROIT Secretariat was represented by Mr. Herbert Kronke (Secretary-General of UNIDROIT) and Mr. Joachim Bonell (Consultant).

2. Reference documents for the session were:  
Study LXXVI – Doc 3 (Report on the First Session, prepared by Secretary Gidi)  
Study LXXVI – Doc 4 (Draft prepared by Hazard, Stürner, Taruffo, and Gidi)  
Study LXXVI – Doc 5 (Remarks and Comments prepared by Stürner)  
(Documents not numbered are presented as attachment to this Report)

3. The Chairman opened the session with a warm welcome to the Working Group, reminding that the group had left the room a year before and recognizing that a lot of work has gone in this year. The Chairman invited the Secretary to offer an update of the work done during the past year, between the previous and the present meeting.

4. The Secretary said that a couple of months after the first session, the University Paris II organized a meeting in Paris about the Transnational Rules of Civil Procedure. The participants of this meeting were skeptical and made serious criticisms to the project. Some participants, although not accepting the full content of the project, received it with declared hope. The meeting was successful because the project was seriously studied by several experts and the debate was of high level.

One of the most important consequence of this meeting is the book edited by Professor Philippe Fouchard, entitled “Vers un Procès Civil Universel? Les Règles Transnationales de procédure Civile de L’American Law Institute.» Mr. Fouchard and Mr. Mecarelli send one copy to each member of the Working Group as a gift. In this book, they published not only the previous version, which was the object of discussion last year both in Paris and Rome, but also the current version, i.e., the version the group will discuss in this meeting. Both versions were published in English and in French, translated by Mr. Mecarelli. The book contains not only the papers presented in the Paris meeting, but also an edited transcript of the debate.

Another publication about the ALI/UNIDROIT project is the Revista Derecho PUC, from Peru. Dr. Aníbal Quiroga León edited a Special Issue of the Law Review,

containing a previous version of this project, a paper from Hazard and a paper from Gidi. The project and the papers are published in Spanish, English, and Portuguese. The Spanish translation was done by Dr. León, and the Portuguese translation by Gidi.

There were also other meetings about the project, such as the ALI Annual Meeting, in which Mr. Nhlapo and Andrews were present, and the ALI Advisory Group meeting, in which Mr. Sturner was present.

Also, Professor Carlucci spoke in Padova last May about the Rules, and went to the University of Pennsylvania, in United States for a couple of months in order to study American law.

Several translations have already been prepared, such as the Spanish, Portuguese, Chinese, and Japanese.

The project was also published in the New York University Journal of International Law and Politics. The Spanish translation by Mrs. Lorena Bachmaier will be published in *Tribunales de Justicia*, in Spain, edited by Mr. Diez Picazo. Also, several papers and/or translations were published in Croatia, Portugal, France, United States, Italy, and Brazil.

4. It was agreed that the Principles are much more likely to receive universal approval than the Rules.

We do not want to make civil procedure identical throughout the world, but harmonize it. The Principles will help achieving this goal. The Rules are also worth pursuing and the Working Group should give its full attention to both of them.

### **Relationship Between Principles and Rules**

On the issue of the relationship between the Principles and the Rules, it was said that the Rules might be considered an implementation or illustration of the Principles. They should not be recommended for adoption in any country, but they are consistent with the Principles and are a reasonable implementation of the Principles, but which would also be true of the French Code of Civil Procedure, the English Rules, the ZPO in Germany, etc. Those are all examples of procedures consistent with the Principles. The final product of this Working Group should be the Principles, and the Rules should be an illustration. The Rules are not an exclusive way of giving effect of the Principles.

The Rules are written in a level of detail that would attract more objection than the Principles. Developing countries might welcome the detail contained in the Rules. However, some countries with a sophisticated system of procedure might welcome the Principles, but might be skeptical with the level of detail in the Rules. The ALI and UNIDROIT may not be comfortable in suggesting such detailed rules. This is a reasonable, if somewhat ambiguous characterization of the project. We should pursue the Rules in that light but pursue the Rules with the same attention as we have given to the Principles.

The reason for having the Rules is twofold. First, they are a kind of “test” of the Principles. It is possible, given the principles, to conceive a fairly specific set of Rules, and the Rules are an indication that the Principles are realistic, that they are meaningful. The Rules are a reasonable validation test, explication. It is a way of checking against the coherence and soundness of the Principles. If we cannot implement something in a

coherent rule, than the Principles are not very sound. The second reason is that there are many countries in the world now, particularly in the former socialist countries that realize that in order to promote foreign investment and economic activity, they must have an independent court system in which contracts can be enforced and a fair procedure. The most important is an independent judiciary, but having also a model of rules that may be employed in a court system with an independent judiciary would be very helpful, they would feel confident that that kind of system would be reassuring to foreign investors. It would be useful. Those are adequate justification to give full attention to the Rules.

This model will also have influence in the United States. Another aspect is that the project has not been greatly advertised in the United States. Many observers in the United States believe that there should be greater specificity of the pleadings and more definite limitation of discovery. There is also the concern of Europeans, who think that American discovery is conducted without any limits, which is essentially true. Broad discovery is important in some kinds of domestic disputes, not necessarily essential in international commercial disputes. The scope of discovery will be very controversial in the United States, but it is a legitimate and important question to be presented for discussion.

This explanation of the relationship between the Principles and the Rules is in contrast with previous ideas expressed in last year's meeting and described in the Report prepared by the Secretary. It may not be possible to do both at the same time, but it is possible to achieve both in the long run. The problem is how to go about doing it. The Rules is an important part of the Project and it should be pursued with as much care as the Principles.

According to a member, if the Principles should be a first chapter, they should be shorter and more fundamental. If the Principles have more detail they could be very similar to a code, with the difference that the code describes the procedure in greater detail. This will be very difficult to do, because we have to study the different cultures. The description of an ongoing procedure, could only be a proposal, a model. The Principles, however, could be a guideline for all legal cultures. Maybe the solution would be to have Principles more detailed than we have now and to have separate Rules detailing the ongoing procedure.

According to a member, the Principles herein presented are in reasonable degree of detail. It is more detailed than a conventional conception of Principles. The devil is in the details. Stating Principles with some degree of detail forces attention to the difficult problems of an universally fair procedure and the difficult problems arising from differences between legal systems. We should wait until the last day to talk again about the relationship between the Principles and the Rules. This approach will reveal the tension between the attempt at general agreement in the Principles and implementation or specification in a system of rules. It is a mistake to aim at agreement on Principles by means of ignoring the difficulties. The difficulties are revealed when you look at some of the Rules.

Some members still have no firm idea about the relationship between Principles and Rules and this is a very important issue. We should be very open regarding the final product.

Are there differences between the meaning of principles and the meaning of rules? A detailed principle is a rule. Principles must be distinguished from rules. For

example, some of the principles in the UNIDROIT Principles of International Contracts are in reality rules. In procedure, the situation is much more difficult.

A member noted that these Principles are much too detailed. However, as another member noticed, we must understand that the meaning of “principle” in this project is not the same meaning used in the philosophical point of view. If we are thinking of “principle” from the philosophical point of view, none of them are principles. We will give the meaning of “principle” for the purposes of this project.

The group decided to study the Principles first (hereinafter, original draft), having Stürner’s remarks (Doc 5) (hereinafter Stürner’s remarks) as a frame of reference. Then the group would focus its attention on the Rules.

## **FUNDAMENTAL PRINCIPLES**

### **Principle 1**

#### **Jurisdiction**

According to one member, this principle has little content. It is doubtful that there are “recognized principles of international law.” If these principles exist, it would be better to describe them than to make only a reference. If they do not exist, we should say nothing. The principles enunciated in Stürner’s proposal are acceptable all over the world. The only controversy is on the detail of these principles.

Another member had a preference for the original text. For example, physical presence cannot be put in the same level as domicile and residence. Domicile and residence are fundamental. Physical presence is not accepted everywhere and is a very doubtful basis for general jurisdiction. Another example is property located in the forum, which may give rise to jurisdiction over claims related to that property, but should not give rise to general jurisdiction. A famous and old example is the foreigner who forgot his umbrella at the airport and was subjected to general jurisdiction in Germany. There is also the example that service of process while exchanging planes in an airport would be enough to create jurisdiction. Therefore, instead of one principle, there should be a hierarchy among the different levels. The way it is, it creates more difficulties than it solves. A few changes would be sufficient.

On Stürner’s Principle 1(2), a member said that there should be no reference to “sufficient”. This expression says nothing. If the connections are substantial, they are sufficient. Another member said that if we decide to keep the word sufficient, it should become an adverb: “sufficiently substantial.”

What about “forum non conveniens”? Stürner’s Principle 1(1) says “such as”. Is there a general consensus in international practice about declining jurisdiction?

If we decide to keep the concept of physical presence, at least it should be “personal presence.” The order of words “provided or supplied” should be inverted to “supplied or provided.” “Consent” should be substituted by “agreement or contract.” The lacuna is “unjust enrichment.”

In response, it was said that jurisdiction by consent does not require necessarily a contract or an agreement. Consent is a broader term than agreement or contract. Submission to jurisdiction, where a party appears in litigation without objecting is a form of implied consent. It is a universal principle that, if the defendant make an appearance without objecting to jurisdiction, the defendant cannot later say that it was not subject to jurisdiction. That is also a basis for jurisdiction, different from contract stipulations. Both situations are covered by the term “consent.”

In defense of the word “sufficient,” it was said that sufficient is a second limitation. The test is substantial **and** sufficient, not substantial **or** sufficient. It may be that the connections are substantial, but not sufficient in a specific case.

In defense of physical presence, it may be said that domicile and residence are a type of physical presence.

In Stürner’s remarks, it was said that the original draft said “subject matter jurisdiction,” which is an American peculiarity, reflecting the division of power between state and federal courts. However, the original draft does not mention “subject matter jurisdiction.” The term “subject matter competence” which is a civil law equivalent.

A member suggested the term “corporate or organizational presence,” because we have to take into account partnership, joint ventures, etc.

Another question is whether we want to make reference to “habitual residence” instead of “domicile or residence.”

With reference to “place where goods are provided,” we should also consider the important category of product liability. Should BMW subject to personal jurisdiction in the United States for an injury resulting in an accident in an automobile sold in the United States? We should also think of pharmaceuticals. This is a very important problem.

Property “located” within the forum is particularly difficult concept in today’s world of electronic property, such as bank accounts, databases, etc. Where are they? In the electric circuit somewhere. A related problem is the question of whether the litigation concerns questions of ownership over the property or whether a seizure of property for sequestration. If we imply sequestration, we need to have a separate heading, because attachment of property is a controversial problem. The recent evolution in Europe with Brussels and Lugano conventions and the Swiss private international law statute make sequestration very exceptional, much to the displeasure of practitioners. The location of property may well be a proper forum, but within limits. We could say: jurisdiction based on property that is sequestered is appropriate only if no other forum is conveniently available. That really is the idea now in American law and it could be a universal principle. It is peculiar to have a conditional principle of jurisdiction, but it reflects a principle of justice. In some situations, the judgment is unenforceable if there is no treaty with a certain country.

There are two forms of jurisdiction based on property. The first is in rem jurisdiction based on property. This is accepted all over the world. The other is quasi in rem jurisdiction, i.e., sequestration. The question whether the main proceeding may follow in the same forum as the sequestration proceeding. All over the world sequestration is possible, but not always the main proceeding can follow this. The general rule is that the sequestration proceedings are in the state where the property is but the main proceeding is where there is general jurisdiction. The rules are not set yet. Perhaps it is not possible to decide as a matter of principle whether the main proceeding might

follow the sequestration proceedings. Stürner's proposal does not distinguish between them because, in the following subdivision, the principle says that there must be a substantial and sufficient connection between the forum state and the subject matter of the action.

All these discussions prove the need for a greater level of detail. If we use general words concerning jurisdiction, we are inviting a wide arrange of interpretations.

The idea of hierarchy was well accepted. The problem is how to do it.

Nothing in Stürner's 1(1) should delay developments in international cooperation with respect to fraud. A recent decision of the American Supreme Court, in the *Grupo Mexicano* case, the Court turned its back to this facet of civil procedure, which is a very regrettable and surprising decision. Art. 24 of Brussels convention should be preserved.

Stürner's 1(2) should become 1(1), because it is the general idea. The current 1(1) are enumerations, specifications, that are subsidiary to the general principle of substantial and sufficient.

## **Principle 2**

### **Independence, Neutrality, and Competence of the Court**

The expression "external influences" is too restrictive. Reasonable and normal are extremely ambiguous words. The underlining idea is very sound. There should be a long enough period, because judges that want to be reelected are not independent.

A special procedure for challenging biased judges is necessary. It is a natural consequence of 2.1. There are many proceedings without those rules and for the parties, it is a good thing to have those rules.

Principles connote generality. What we see in 2.2 is the creeping towards rules, which happens when you lose confidence in your ability to state principles in generality. It is meaningless to speak of judicial bias, unless the court will have some means by which to apply that norm, but that reasoning could be applied to every single reasoning that we see in this project. Below the surface, there must be a lot of regulation. If we do this, the Principles will be a hybrid form, a form of insurance against the Rules never happening. We should instead, be more confident and state principles of true generality.

Another member, however, considered 2.2 very important. Once a matter is assigned to a judge, this assignment means that the Judiciary considers this judge independent and impartial. Therefore, there must be a procedure to challenge that supposition, when it is wrong.

It would be important to have a bilingual version of this project. It would improve the substance of the text when we discuss it in two languages. It would avoid ambiguities. The Secretary informed the group of the existence of a French translation prepared by Mr. Mecarelli. It is not an official translation, but it is a start. The translation is in the book recently published in France about the Rules.

"Reasonable tenure in office." This is not applied to arbitration proceedings. Impartiality and independence should be enough.

"Having legal experience." When one starts one's career, that person does not have experience. It would be better, instead of "experience", it would be better "legal knowledge." Another member, however, considered important in international legal

disputes to require judges who have experience. “Legal knowledge” is not enough to function in a transnational case. However, legal knowledge does not necessarily mean that the project prohibits lay judges. Legal knowledge can be acquired by lay persons.

What takes priority is the identification of the relevant tribunal, and only then an evaluation of its qualities, such as independence and impartiality. But you can only attribute those qualities after you identify the beast, which is on 2.3. Therefore, 2.3 should be before 2.1.

The heading of this principle includes two different things: one is the professional qualification of the judge or court, which should come before independence and impartiality of the court, but this is not so important. The point is that independence and neutrality is one subject and professional qualification is another. Another member considered it important to keep those two different issues together, because it is access to justice, access to an independent, impartial, competent court.

It is debatable, however, said another member in disagreement, if experience and knowledge precedes independence and impartiality. Independence is much more important than experience and knowledge and should precede it. Independence means both that the institution is independent and that the judge is personally independent. We may be able to differentiate those two ideas in the text.

We should also take account of undue influence coming from within the judicial establishment because it is a fact and because that is the way external influence often is brought to bear. We also need to recognize that internal pressure is also important.

What is reasonable tenure? In Scotland, one year is considered not enough, but three years is considered sufficient. This might also be a problem for arbitrators, special officer, referee, independent auditors called by the court in assistance. Those appointees should not necessarily be tenured.

Regarding Principle 2.3, we should add the word “relevant” before the word “legal”, because we want the courts to have substantial legal experience in the relevant context. One of the virtues of the English system is to have a specialized system of commercial courts. A lot of people are attracted to London because of the commercial court system and its highly specialized judges.

### **Principle 3**

#### **Equality of the Parties and Right to Be Heard**

Should Principle 3.1 include other forms of discrimination? We could use the wording of art. 14 of the European Convention of Human Rights.

It was agreed that “reasonable time” is a principle that should be developed independently. This only proves that more elaboration is necessary.

A member doubted the need for Principle 3.3.

Venue rules may not be a problem in Germany, or anywhere in Europe, because of the relative small size of the nation states and their excellent internal transportation systems, but it might be a problem elsewhere. There are large countries, like Russia, China, Argentina, Brazil, and the United States, in which venue might pose a problem of access to justice.

The problem is that when the rules are based normally on domicile, and if you want to avoid that the foreign party travel, you must have special venue rules for international cases, which would be different from the normal rules. This might pose a problem. The text is a soft wording, but it signifies that there must be two different venue rules in a country: one for domestic cases and another for international litigation.

In many states in the United States, if the defendant does not live in the United States, the plaintiff can lodge the case anywhere and therefore can select a quite inconvenient venue. That may be a problem peculiar to the United States.

The problem of Principle 3.2 is very interesting and difficult and arises even in arbitration. Some systems require nondomiciliaries to provide security deposit. A Principle against it might not be a good thing because in comparative law there is not yet a solution to this problem, and we should leave this to special regulation. There is no uniform treatment of this matter. We must also bear in mind that the parties in an international commercial dispute are in a different position than the normal foreign claimant.

A member, hesitantly, suggested that this principle might not be very useful and should be deleted. Another member would prefer to keep 3.2 because it is a principle of equality among the parties. Another member added that nowadays, it is impossible to defend otherwise.

An alternative to delete the principle is to soften the text, for example, to say that the court should be aware that a duty to post security for costs should not bar a party from justice. The current wording is too strict, and we should balance the interests of the parties. Yet, having no deposit for costs may result in injustice for the defendant. If the claimant is not domiciled, he or she can disappear instantly after losing the case, leaving no property in the forum, and the winning party will have to bear the full cost of litigation. This is an objective inequality of situation. There is no discrimination in the basis of nationality. Another member remembered that this situation is not different from the fact that a person domiciled in the state may not have property at all.

The easiest route would be to delete any reference to security for costs. However, if we want to take a slightly harder route, we should redraft it, and say “solely [or only] by reason of that status.” This way, we do not prohibit security for costs, but we say that the fact of being a foreigner does not mean that the person has automatically to provide security for costs. A nondomiciliary might or might not have property in the state. The security for costs should not be granted solely because he is a nondomiciliary, but because he does not have property in the state. The reason for being hostile to that is that this is a form of discrimination related to nationality, which is prohibited by art. 14 of the European Convention of Human Rights. The underlined idea of security for costs is very clear: fear that the claimant loses the cases, the winning defendant will have to bear the costs.

In England, for example, it is a flagrant act of discrimination to force the plaintiff to provide security for cost only because he or she is a foreigner. In England, courts do not impose security for costs against a plaintiff who is habitually resident in a Brussels or Lugano Conventions state because a cost order awarded against the plaintiff will be readily recognized and enforced according to the Brussels and Lugano rules. If the plaintiff is a Japanese, American, Argentinean company suing in England, the position is that security for costs is not imposed automatically against such plaintiff because this

would be direct discrimination in violation of art. 14 of the European Convention of Human Rights. What can be done is objectively inquire of the likelihood that an English cost rule against such plaintiff being recognized and enforced in the relevant foreign jurisdiction. What the court is required to do is to conduct a fast and superficial comparative exercise to determine how quickly and how readily the cost order will be recognized and enforced in the relevant jurisdiction. That why “by reason only” is an important revision, which leaves open to impose such a provision in other plaintiffs from countries hostile to the English cost award.

The forum is chosen by only one party. The weak party goes to the forum chosen by the strong party and also must provide a security for court. Access to justice will be prejudiced. Principle 3.2 is very important.

The first sentence in 3.1 is very general and acceptable. The second sentence is more problematic. The words “This includes the right to submit contentions of fact and law and to make presentations of evidence in accordance with applicable procedural law” should be deleted because there is an overlap with 3.4. The rest of the sentence, the focus sharpen, and introduce the notion of discrimination. We need to preserve both things, but to present them in a separate form because there is a conceptual difference between the first and the second ideas. For example, under art. 14 of the European Convention of Human Rights, there is a provision concerned with the avoidance of discrimination in the procedural context, by reference to all sorts of things, including nationality and residence. In England, they apply this article against discrimination and it is starting to affect the contents of English rules, including the rules about securities for costs. There is a recent case: *Nassea v. Saudi United Bank* there was a very interesting discussion.

Principle 3.4 does not belong to this heading. Principle 3 has to do with equality of the parties. It is the responsibility of the court to be attentive to the representations of the parties. That is closer in content to the requirements under due notice rather than being an expression of the notion of equality. Therefore, it should be in Principle 5.

In 3.1, the expression “in accordance with applicable procedural law” does not add anything. It could be added to any other principle. There is no need to add this in 3.1 and not everywhere. It would be even dangerous to mention the applicable law. If this is a principle, the applicable law should not be able to restrict it.

The group then proceeded to discuss Stürner’s proposition of a new principle of “justice within a reasonable time.”

It was said that the subdivision (3) is an exception to the principle of justice within a reasonable time, because all amendments mean some sort of delay. There is also the question whether subdivision (4) about provisional measures should be discussed within this principle, or if there is a need for a new provision.

According to several members, provisional measures (4) are indeed very important. However, their purposes are much broader than accelerated justice. Therefore, there should be a separate provision on provisional measures, *ex parte* injunctions, *référé*, freezing injunction, search orders.

The relevant part of subdivision (4) is the first part “the court may grant accelerated justice.” We might want to specify “including...” We could have a procedure for dismissing the pleadings which are incorrect in law. We could also have a provision for a summary resolution of the case, or part of a case, or a procedure to give an interim injunction, such as search orders, or freezing injunction.

It was also said that subdivision (3) is only marginally connected to this principle. Amendments should be in a separate and new provision in the Principles about “pleadings.”

Subdivision (2) should read “may be imposed” and not “must be imposed.” Another question is: what are those sanctions? One drastic sanction is to dismiss the case against a party that violates the time schedule rule.

A member asked whether subdivision (2) is a principle, or if it is necessary as a principle. It depends on what our Principles are becoming. Time schedules are already in the Rules. Other member thinks that case management by time schedule is important. The English judiciary is highly supportively, in contrast to the chaotic situation when there was no discipline. Unless there are time schedules, disposition in reasonable time becomes meaningless.

Subdivision (2) must be compared to other Principles. See, for example, Principle 9.1, which has a more attractive language. The kind of litigation in those Rules will be pretty complex. The mechanism to ensure that the court has control of the progress of the case is not going to be procedural rules, except in unusually simple cases; but it is going to be the process of ad hoc specific time tables to suit the specifics of the case. The language of 9.1 needs to be echoed in this Subdivision (2). Principle 9.3 is also relevant. There is more detail in that language. The process of prescribing a schedule should not be done ex cathedra, but should involve a process of discussion between the judge and the parties. This is the essence of good case management. The words “upon consultation with the parties” is very important. It reflects the modern English practice. The other aspect of 9.3 is that time schedules are excellent, but they are not the only way for the court to assure discipline in the case. One feature of modern English practice is that the courts are now required to consider the appropriateness of addressing a “preliminary issue.” The classic example is a complex commercial litigation in which there is a question of statute of limitation. There is no point to let the case go several years, if the judge can decide the question of limitation. The suggestion is that it is not sufficient to impose time schedules. The judge needs to support that by a further requirement that the court should be aware of what Principle 9.3 now says: the order in which issues are resolved, the dates and times of deadlines, and the schedules of hearings. It was answered that Principles 9 and the new principle of justice within a reasonable time are different and that some overlap is unavoidable.

Subdivision (1) is an interesting concept and should be given prominence. The word “cooperation” may not be strong enough. The courts in England now speaks strongly in terms of “duties” and require that the parties cooperate to promote the overriding objectives, which includes the speedy resolution of civil cases. It is the language of mandatory duties imposed jointly and severally in both courts and parties. The national cooperation does not capture this, because it suggests that the obligation is confined to courts and parties who happen to come together. We need something stronger than that. [No suggestion was made, however.]

It was also said that the parties should cooperate with the court and between themselves. There is a difference, however, between a party who accepts and a party who rejects jurisdiction. This often happens in international arbitration. In addition, there are situations in which the duty of the counsel is to resist the attempts of the court to impose its will to restrict the right to be heard, not only when the parties have grounds to

challenge the jurisdiction of the court, but also it is known that a number of judges try to restrict the right to be heard orally, to oral arguments. The court of human rights has recognized that a fair trial implies the rights to present arguments not only in writing, but also orally. Both the claimant and the defendant may have the duty to no longer cooperate and facilitate, but even challenge the judge. There is no solution, but the draft should be balanced, keeping this possibility in mind.

The court has an obligation to complete the dispute within a reasonable time. In the adversarial system, until quite recently, it was the responsibility of the lawyers. Some lawyers may have interest not to push the case ahead. To achieve that duty, through procedural rules, or specific orders, the court might issue time schedules. The court might call for accelerated disposition when required, for example, by provisional measures or motions for prompt interlocutory resolution. There are a lot of reasons why one might need to accelerate.

The court might also modify a schedule when necessary to take account of unanticipated complexities, such as an amendment, a joinder of additional parties, or a proof that turns out to be difficult to find. There are many situations in which a court might want to reconsider its schedule. All those are practical adjustments.

Both parties have a duty to facilitate the court's achievement of resolution within a reasonable time. This should not be put in terms of "cooperation" because this is not a friendly matter. It is duty to facilitate the achievement of this objective and one is subject to sanctions for failure to fulfill that duty.

Another problem is where to put this Principle. Should it be in the beginning, or before the Principle about judgment?

## **Principle 4**

### **Right to Assistance of Counsel**

Principle 4.2 says that "The professional independence of legal counsel should be respected." What exactly does this mean? It was answered that this may be one of those things that either we say more or we say nothing. Some regimes require counsel to give deference to the interest of the state. We could say that the counsel should be permitted to observe the obligation of loyalty to client and maintenance of confidence. That would express the main features of professional independence. This is a generally recognized principle. There have been times, including in the United States, where lawyers have been intimidated. For example, in the period of McCarthy hearings, in the fifties, there was a severe challenge of the independence of the lawyer. The United States had the same problem in the sixties, but not since then.

This is a very important principle everywhere. There may be in any country a temptation to restrict the personal and professional independence of legal counsel.

A shorter way should be "A party should have the right to engage legal counsel, admitted to practice either in the forum nation or elsewhere." It connotes the same idea and it is much simpler.

In response to this proposal, it was said that there is a difference between "representation" by counsel and "assistance" of counsel. Those are different functions. If the attorney is not authorized to practice in the forum, that attorney cannot represent the party, but

could at least assist that party. The proposed way would be interpreted to revolutionize existing rules concerning the legal profession, in which states should decide who can and cannot practice. After the proposal, the suggestion was withdrawn.

A member said that the right to be assisted by counsel not authorized to practice in the state is not universally accepted. Do we really want to be so progressive and choose the best rule, or a common core? Another member said that normally, a court would accept that the local counsel be helped by a foreign counsel. It is doubtful that the court would expel the foreign attorney from the courtroom. In any event, the foreign counsel should be permitted to sit side by side with the local counsel.

This is a good rule. In practice, the foreign counsel is not allowed to practice without the admitted counsel. He is just a guest.

A member disagreed with the word “counsel”, which, in England, means “barrister.” We should use a neutral word, such as lawyer or legal representative.

The first phrase in Principle 4.1 should be clarified to add “of his or her choice.” Otherwise, this might be considered a “right” to have free representation at public expense. This is not what the drafters had in mind.

We could also add “counsel admitted to practice who enjoy a right of audience.” That is to say that it is not sufficient that you are admitted to practice in the forum nation, it is an additional requirement that you enjoy recognition from the bar and the right to address the court directly. We do not wish to supersede national rules related to right of audience.

In the final phrase, we might soften by saying “so far as compatible” before “and assistance of counsel practicing elsewhere.” Otherwise, it might be perceived as too strong.

The right to engage counsel of one’s own choice is a principle. The right to be assisted by a foreign lawyer should be in the comments or in the Rules. We are moving from a fundamental principle to a rule. Those are not on the same level. In disagreement, it was said that this is a fundamental principle in international litigation. It gives great comfort to the party to have his own national lawyer present in court and whispering in the ears of the local counsel. The immediate spokesperson should be the local lawyer, but the party should have advice of his or her counsel immediately at hand.

## **Principle 5**

### **Due Notice**

We should bring under Principle 5 some elements that are now under Principle 3, related to submission of contentions of fact and law, presentation of evidence, the courts have a duty to consider each significant contention, and so on. The theme in Principle 3 should be equality and non-discrimination.

In Principle 5, we may wish to divide the concepts into two. The first is notice, particularly to a defendant, and the second part, which could be a separate section or moved over to include it in Principle 13, would be the right to make contentions of fact and law and have the court consider them. Principle 5 may include the substance of 5.1, 5.2, and 5.4, which are all elements of notice. We could then begin a new section about “presentation of contentions,” which would include 5.3 and the elements from 3.1, 3.5 and 5.5. The idea is that one is entitled to notice and also to assert contentions and to respond to an opposing party contentions and the court should consider all significant

contention. To some extent, that would implicate some of the matter talked about in Principle 13. However, Principle 13 has some subordinate ideas and is independent. This proposal was accepted.

The core of the principle of due notice is expressed in the first part of Principle 5.1. The second part is just fleshing out. The essence of this principle is not only the receipt of notice, but a fair opportunity to respond.

Claims, amendment and judgments deserve formal notice. For other simpler things, there are simpler methods available, such as fax. It may not be useful to explain this here in the Principles.

About the expression “involving their interest” or “affecting their interest”, it is important to see that if they are parties, it is obvious that their interests are involved in the controversy. Any proceeding might involve the interest of persons who are not formally parties, but may like to intervene. There may be a certain contradiction between the concept of parties. It is perhaps pleonastic to say that it is involving or affecting their interests.

One member considered that there should not be a reference to “reasonable notice” in Principle 5.1, because this might be interpreted restrictively in a way to deny effective notice. We should say only “notice” and let the judge decide if it is reasonable. Other members considered the expression useful. The problem seems to be that the definition of the expression “reasonable notice” is not well understood by all members. Reasonable notice is a good formulation because after formal notice at the commencement of the suit, fictitious notice might be enough.

Another member added that “reasonable notice” refers both to the form and to the time element. A notice with an unduly short time is not a reasonable notice. In a number of systems, in the absence of defendant, it is enough to notify the attorney general of the Public Ministry. That may seem reasonable in the country, but it is not actual notice.

Instead of “a defendant should receive formal notice”, should it not be better to say that “formal notice should be given (or sent)”? This is a very real practical problem. If we go so far as to require affirmative proof of actual receipt or reading, this seems to be put the other way around. A member disagreed. There are basically two systems of foreign service: the French (fictitious) service, whereby a claim is served when it has been sent, not when it is received. The other system is where the defendant must have received the claim. We choose the second one. In international disputes, it is not enough that notice was given; defendant must have received it. This is a very important issue. There is a gap that cannot be closed. If everything has been done in compliance with the requirements of giving notice and there is a dispute whether it was actually received. This is a critical question of fact. If it was received, it is default, otherwise the whole proceeding is a nullity. This is a common problem. We cannot require that notice be actually received, but we will get as close to that as possible. The phrase in American law is that notice shall be transmitted in a way reasonably calculated to give actual notice. We could adopt that formula.

A member thinks that, when we say, in Principle 5.2: “delivered by reasonably effective means,” it looks like we are saying “sending” rather than “receiving.” If one has received, the means was effective. There is a lack of logic.

Principle 5.2 has unnecessary words. The reference to “delivered by reasonably effective means” is redundant.

Formality is one thing and the actuality is another, and both elements must be acknowledged.

In 5.4, concerning ex parte applications, after “when” there should be “exceptionally.” We have to stress that ex parte relief should always be regarded as measures of last resort, only justified in emergency situations. We should emphasize that, because of the exceptional nature of this form of proceeding, which is a manifest derogation of the principle of due notice, we should assure that there should be adequate safeguards to ensure that the person affected detrimentally is not the victim of gross injustice. The only existing safeguard is the rather vague suggestion that the absent party should have an opportunity to have the decision reconsidered de novo. Maybe we should say that the person affected (respondent) should receive notice as soon as possible and then should have the right to have the decision reconsidered de novo with the view to either being discharged or varied.

### **Principle 6**

#### **Choice of Law**

There is a good case for deleting this Principle. At the same time, we are aware that this project attracts the attention to an unusual degree of experts in the field of comparative law and private international law. They immediately spot those problems of choice of law, for example, concerning effectiveness of notice, privileges, etc. The Principle says little if anything. The point is to recognize that there are problems of choice of law and that it is inappropriate in this project to try to solve them.

The only domain in which the parties can choose the rules of procedure is in arbitration. In courts, the parties cannot choose the procedure. We should combine choice of law related to substance and choice of law related to procedure. One member, however, was wondering why people accept conventions in substantive law and do not accept conventions in procedural law.

It was observed, however, that “choice of law,” in this context, means conflict of laws. It does not mean the choice of law by parties. Here, it is used in a much broader sense. Should the court, in international settings, disregard its own conflict of law rules in favor of supposed “generally recognized” principles of conflict of laws? This is the real point in this principle. It is wrong to say that it says little, because it says a lot. It is doubtful, however, that there are generally recognized principles.

Even if we delete this, our comment might discuss the problem. If the parties have a contractual relation, they often stipulate some body of law. Some of the difficulties of the classification between procedure or substance, this should go to the comments to demonstrate that we thought about the problem, but concluded that this is not the place to resolve it.

### **Principle 7**

#### **Structure of the Proceeding**

Some colleagues from civil law countries may think that this is an imposition of common law approach, because in civil law there is a single, integrated procedure, rather than phases. However, when we see the role of players, it turns out that in the pleading stage, the parties have great initiative because they frame the claims and defenses, and in general the courts do not have license to wander around the dispute beyond what was pleaded by the parties.

The instruction stage is becoming recognized in many civil law systems. There are matters to be considered before a plenary hearing, for example, defenses such as statute of limitations, etc. The new French procedure that facilitates decision of issues that may end the case at an early stage is another example. This is useful because it establishes a frame of reference for the sections that follow thereafter.

A member considered that we should add a new subdivision about the pleading phase, only for symmetry with the rest of the Principle.

Another member considered important also the inclusion of a new principle about pleading, including amendment of pleading.

A couple of members thought that this was not a principle, but a rule. Structure cannot be put in the same level as equality of the parties or right to be heard. This weakens other important principles. The members did not show opposition to the rule, they were just against considering this a principle instead of a rule. This is a good guideline even in civil law countries.

Another member understood the dilemma faced by the Reporters, because we are trying to find principles understood by both common and civil law lawyers. It might well be that this is an example in which we have to suppress our instinctive sense of what is a principle. This may not be a principle, but in the interest of pragmatic communication of what we are trying to achieve, which is a workable system of procedure, it might be accepted in the principles. This is a prescription of the organization of the proceeding and it is very important to have an organizational frame for the principles. It is impossible to organize principles without an organization of the procedure. This document will be used by attorneys. We must prime for being informative. This will be useful.

One Reporter accepted deleting this Principle and creating new headings with titles like pleadings, instruction phase and final judgment. The other Reporter considered that this would not be a good solution because we would still need to have an organization, in order to make other principles understood, especially when these terms are used in a specific Principle or Rule.

The group was equally divided on this matter.

In addition, this structure might be inaccurate. We might need five stages, because we could have a pre-action stage and a post judgment stage, which is the enforcement. It is important to focus on the pre-action stage. In Principle 21.1, for example, there is a reference to pre-litigation procedures. We could mention this in the comments.

In disagreement, it was said that pre-action phase is not well developed in many systems and that the post-judgment phase is enforcement, which is something outside the scope of this project.

In disagreement, it was questioned how could there be principles without reference to the enforcement. We could say that there is a principle of effectiveness, in which the party that is victorious should further be entitled to a set of enforcement procedures, the aim of which is to give effect to the judgment obligations recognized by

the court. Without that, the system is only a collection of declaratory judgments. This is related to the effectiveness of justice, and justice within a reasonable time.

We could add that “a party obtaining judgment should have reasonable mechanisms for obtaining actual enforcement.” We could then try to elaborate whether it means. There are many kinds of judgments, money damages against a solvent defendant, injunction, and so on. A judgment is just a piece of paper, unless there is a realistic possibility of enforcement.

Plenary hearing is not appropriate. We should call it final hearing.

## **Principle 8**

### **Party Initiation of the Proceeding and Control of Its Scope**

We should interject in this principle the contents of Principles 11.3 and 11.4. The basic idea is that the parties not only initiate the proceeding, but they must initiate with a high degree of specification. This specification will give shape to the proceeding. This is the most important responsibility of the parties in the initial stage. We could have a heading called “pleading phase.” This is essential to the conception of this project. In American procedure, the proceeding can be commenced only with a general statement of its purposes stated in very general terms. Americans have permitted very general pleadings and the development of the contentions by discovery. This project rejects that approach and we should demonstrate that explicitly.

In former socialist countries, it is possible to commence proceedings by the prosecutor or other state organizations, not by the parties, or the court can comment some proceedings sua sponte. This is the “principe dispositif” and it is very important.

There is a hybrid set of propositions here. 8.1 and 8.3 in one hand and 8.2 on the other hand. One principle is that civil litigation should be commenced solely by private decision, and not by public official on behalf of private individuals or interests (principle of voluntary commencement.) The corollary of that principle is in 8.3, in which the parties have the power to abandon or discontinue the proceeding, whether in whole or in part. Those two are intimately connected under the principle of private autonomy. Principle 8.2 is something distinct, the role of the parties in trying to shape the proceeding. They should be separated and 8.2 should go to a different Principle about pleadings.

In response, it was said that 8.2 does not differ much from the other two principles. If the party has the monopoly of commencing a suit, it has the monopoly to shape its content. These Principles belong together, and there is a logical link between them. They reflect the control of the proceeding in the beginning, in the scope and in the end of litigation. This discussion might be a conflict between common law and civil law reasoning. Common law lawyers discuss them separately, however, there is a narrow connection.

The second part of 8.2 is too restrictive for common law lawyers. In common law, the claim preclusion is broader and there is also issue preclusion. Common law gives more effect to a judgment than the parties may want it to have. In some common law systems in the United States, such as California, Illinois, and until recently, Louisiana, the rules of issue and claim preclusion are much narrower than the one in the Federal Rules

of Civil Procedure. They apply a system of preclusion similar to civil law procedure, tightly bound by the pleadings. Moreover, there are important differences regarding issue preclusion. A number of states, such as Virginia, have a narrower concept than the Federal System. Similarly, numerous American jurisdictions approach the problem in terms of cause of actions. Japan is changing from the narrow German concept to the broader common law concept of claim preclusion.

Should we try to state anything here about the effect in *lis alibi pendens* and claim preclusion? Those are events of future litigation. Should we try to determine the consequences in later proceedings? Alternatively, we could leave that for the commentary.

Under the common law systems, the party has to consider that they may have to bring all their claims in the proceeding. Under the continental procedure, a party can bring only a part of a controversy. It is the traditional tension between justice and security. It is essential to deal with this in the principles. *Lis alibi pendens* and claim preclusion are very important matters in international disputes. We should arrive at a rule, even if we do not include it in this Principle but in another one. We cannot ignore it. Preclusion is significant not only after the case, but also the ongoing procedure is influenced by this problem. It would be malpractice to forget to make a claim and after the proceeding your client is precluded to bring it to court. In the present proceeding the parties have to be mindful of the scope of preclusion that will be imposed according to the law that governs the judgment. The question is: the law that governs the judgment is the rendering court or the recognition court? For instance, an American court may give preclusive effect to a German judgment that the German court would not give itself.

Another member considered that the second sentence of Principle 8.2 should be put in a different provision. We could put it towards the end, in finality.

It was mentioned that the civilian concept of party control of content of litigation can give rise to difficulty because this project calls for the court to be more active in investigating questions of evidence, of fact, and rewrite the legal agenda, which is a departure from the historical adversarial common law passive tradition. From the perspective of common law, the parties have a right to control the content of the litigation. We have to reconcile that with judicial intervention and the process in complex litigation, such as consolidating related claims, which is an accepted feature of case management. Can Principle 8.2 be used to avoid consolidation of related claims, especially when different people are involved in the cases? In the comment at least, we must mention that the parties cannot invoke this principle with the objective of perpetrating some fraud. For example, in cases of illegal transactions, the court must have an active role in uncovering the illegal nature of a claim that on its face is legal, but there might be collusion between the parties. We do not have to disfigure the text. These things can be explained in the comments.

It was answered that Principle 8.2 cannot be used to veto the consolidation of related claims nor to preclude the court from detecting illegal transactions. It was recognized that common lawyers will have problems to understand the scope of this principle.

There are two ideas here that are linked. One is that parties should have authority to define the scope of the dispute. The second is that the way they do that is by their statement of claims. The assertions of fact and their legal implications define the dispute.

We might clarify that relation better than we did here. We could bring Principles 11.3 and 11.4 to this Principle.

There is an ambiguity in the draft of Principle 8.3. Is withdrawal unilateral, or joint? It was accepted that there is an ambiguity, but this might be the only way to formulate a principle, because it will depend on the local procedure. Sometimes unilateral withdraw is possible, some times opposing parties have to agree.

There must be exceptions to Principle 8.3. For example, if the litigation involves the interest of mentally incapable, minors, etc. These persons are not sui juris and must receive paternalistic protection from the court in settlement. It is standard feature. We could mention this in the comments.

## **Principle 9**

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

This is a very important principle.

The term “judicious discretion” recognizes that direction can be excessive. Maybe “judicious” is not the most elegant way of qualifying discretion. Given that the discretion is going to be exercised by a court, the word judicious might be redundant. It is either superfluous or it should be improved upon.

We could consider to change the order and to put the remaining part of Principle 11 behind Principle 8. It would be appropriate to have the substance of Principle 11.3 and 11.4 transferred to Principle 8 because those define the controversy. Once the controversy is defined, the court’s authority commences within that framework and the parties then have the responsibilities mentioned in Principle 11.1 to interact with the court in its management. That allocation of the components would also be satisfactory. There are many different ways of doing it, but this would also be reasonably logical.

Principle 9.1 expresses the function of the court to actively manage litigation “to achieve resolution of the case within a reasonable time.” We have seen something rather similar already, which is the new principle Justice Within a Reasonable Time. This might be a repetition, but 9.1 is concerned not just with expedition, but also with emphasizing that the process of management should be conducted in order to achieve disposition of the dispute fairly. This is an attractive way of putting it. The term “fairly” in England is followed by an enumeration of subsidiary facets of fairness, such as speediness, proportionality, efficiency, cost-effectiveness. This is not to suggest that we should copy the English rule. However, concepts of fairness might differ around the world and we might want to specify.

Principle 9.2 is a bit vague. Are we saying that generally speaking, in all stages of the litigation, the court has ultimate responsibility to determine the relevance of evidence and the validity of legal contentions? If we are saying that, it is redundant, because it is part of the process of adjudication. Are we saying that as a part of active management the court should make preliminary determinations of these matters? If that is the case, this Principle creates a mechanism for the early disposal or abbreviation of cases, on the basis of evidence and law. 9.2 in that sense, is creating the means to get rid of bad, frivolous factually unsustainable, legally incorrect claims.

From a civil law point of view, there is a strict control of relevance by the court from the very beginning, with two effects. The first is the possibility of summary judgment and better court management. The court decides which evidence is necessary, how to manage the time of the case and so on. On the other hand, in a system in which the court is not fully responsible to find the law and it is the responsibility of the party to present the law, it would not be possible for the court to manage a case well if the court has no certain idea of the applicable law or the relevancy of the facts and evidence.

In some civil law systems, the judge at a preliminary hearing will determine the controverted issues of the case and which evidence is relevant. The judge should know the case from the beginning, and not only when the judge has to decide and only necessary evidence should be produced. There is more control.

The second part of Principle 9.2 (“the court should determine the validity of legal contentions”) goes beyond the title of this Principle. It is similar or maybe identical with the subject of Principle 19.1 (“the court is responsible for determining the correct legal basis for its decisions”).

Principle 9.3 is the best way to do it, but most of the times judges cannot consult with lawyers about the schedule of the hearings because the court’s schedule is overburdened. The judge fixes the schedule and if a lawyer has a problem, the lawyer will have to complain and request changes.

The sequence in this Principle could be improved. Principle 9.1 should come first and then 9.3 and then 9.2.

There must be a linking between scheduling and assessment of relevance and validity because those issues may be highly determinative of an appropriate schedule of, for example, preliminary questions that should be resolved in an early stage.

## **Principle 10**

### **Judicial Powers of Control; Proportionality**

This Principle is not controversial. In the civil law, the judge does not have authority to impose contempt of court. Therefore, the judge must use other kinds of sanctions. Common law judges very rarely use contempt of court and much more often simply exercise their authority to schedule or penalizing a party for failure to adhere to a schedule and authority to make substantive decisions. If a judge use those powers wisely, the judge does not need to hold anybody in contempt. Contempt of court is a power that has much more reputation than practical significance in common law systems.

The title could be improved to “Sanctions with Respect to Default.”

As it presently stand, Principle 10.1 refers only to a party and this is very retractive. We should make clear that the sanctions are available not just against a party, but also, when appropriate, against a party’s lawyer. If this is going to be a general provision, sanctions are also available against nonparties.

A member disagreed that we should make any reference to third parties. How can a third party who are not concerned, by definition, with the proceedings be under the jurisdiction of the court? In response, it was given the example of the freezing injunction to a non-party bank. It was said, however, that is an exceptional situation and there is no

reason to have a general principle that non parties are governed by the instructions of the judge.

In disagreement to the opposition, it was said that in Argentina, the law permits the judge to impose *astreintes* in a third party, for example, if the judge requests a document and the third party refuses. Another member considered it important to include a reference to sanctions to third parties. It is recognized that sanctions against non parties are very different in civil and common law countries. Civil law authority in this respect is much narrower than common law system.

Another point of disagreement was sanctions against the lawyers. In France only the parties are sanctioned. There can also be a claim of liability from the party against the lawyer. The idea of sanctioning an attorney is not understandable from a French perspective. It was observed that lawyers in England have to be careful not to commit procedural abuse and not offer statements that they know are not true, obligations of disclosure, etc. In England, a lawyer could find herself in contempt of court, or liable for a “wasted costs order”, when the lawyer conducted proceedings or some aspect of proceedings in a way that a court subsequently decides was not justified. This is especially important when the client is impoverished so that an important way of supporting the costs disciplinary system is actually to have an exceptional rise of recourse against the lawyer, whether it was a barrister or a solicitor, who has conducted the case in an improper fashion. That is regarded not as a compensatory matter, purely, but as a sanction.

Sanctioning lawyers by the court is very narrow in civil law countries and a broad principle would not be accepted in several legal cultures. It is problematic to give the judge, who might be angry at the lawyer, the power to sanction his or her conduct. In civil law, the only possibility is to make lawyers liable to the sanctions imposed against the party. We should consider sanctions against non parties, but we should be cautious regarding sanctions against lawyers.

In agreement, it was added that sanctions against lawyers are a matter for the internal organization of the legal profession and the courts. This has nothing to do with the relationship between the parties and the judge. It is a different matter, of a different nature. In addition, there is a danger to allow the judge to be a judge in his or her own cause, when he or she has a quarrel with the lawyer. Therefore, sanctions against lawyers should be left outside of this draft.

Even in common law system, this is an exceptional matter. The basis and scope of judicial authority is a matter for local law and tradition. In Argentina, judges can impose sanctions and costs on the lawyers, but only exceptionally do judges do so.

The reference to proportionality in Principle 10.2 is extremely important. This is a feature of art. 6 of the European Convention as interpreted by courts. It is also a prominent feature of the English Rules. English courts are responding to art. 6 of the European Convention. The formulation says that sanctions should reflect the intentions of the persons. Perhaps, instead of “intentions” we should say “conduct.” The adjustment of sanctions is concern with the conduct of the parties in default. Conduct includes intentions, but it includes so many other things. We want to keep this as broad as possible.

A member disagreed with this distinction between “conduct” and “intentions.” The text as it is makes sense. There are different types of conduct and there may be

situations in which it is legitimate for the party to resist the direction from the judge. It makes sense to make reference to “intention.”

Another member considered that the word “intention” is too “psychological.” We should speak of conduct or behavior.

Would it not be helpful if we gave some indication of the sort of sanctions we have in mind? Not to state them exhaustively, nor to put in language that strongly suggest civilian or common law sanctions, but just to have a tentative non exhaustive list of sanctions. Otherwise, this will be very much up in the air and it does not communicate very much to developing system. We could include: default judgment, cost awards, dismissal of the claim or case whether in whole or in part, fines, criminal liability for perjury, related offenses of interference with the course of justice, astreinte, contempt of court. When one juxtaposes Principle 10 with the Rules, we see that the Rules contain a lot of specific sanctions (See Rules 20.9, 22, 28.3.1, 29.4, 30.3, 38, etc). We should have references to sanctions in Principle 10.

### **Principle 11** **Responsibilities of the Parties**

We have extensively discussed this topic, but there remain several aspects to be debated. We already considered the possibility of removing 11.3 and 11.4 to another Principle.

The propositions are worth keeping, but they should be reorganized to be better understood. Principles 11.5 and 11.6 are very important. Principle 11.6 could be moved, to follow 11.1.

Principle 11.2 is extraordinarily brief and it does not properly communicate a structure. One cannot disagree with its proposition, but there is more to it than that. We should give some form of indication to the sanctions for violating this rule. Does the court dismiss the claim or defense that is spurious? In addition, other than claims and defenses, there are other opportunities for parties to engage in spurious activities in the course of litigation, such as applications for injunctions or other applications and appeals. Perhaps, this is covered by the word “claims.” We could say “claims, defenses, applications, or appeals.” People can make spurious defenses or responses. We should be more precise.

What is implicit in Principle 11.2 and should be made explicit is the distinction between something that is legitimately arguable and something that is baseless or lacks any substantial basis. Every legal system must make this differentiation. The idea is clear in theory and sometimes even in practice, but sometimes it is not that clear in practice. A party, has a right to state any reasonably arguable proposition but also a duty not to assert any that is not reasonable. The pursuit of a baseless contention is a basis for imposition of sanctions. We need to sharpen this distinction, assuming that this is acceptable to the group.

Principle 11.6 is an important proposition and an aspect of modern English civil procedure. We could say “In the interest of fairness, speediness and efficiency” or something of this sort, in order to make clear the reason why we require parties to cooperate. The overriding purpose is to have a procedure that is fair, speedy and efficient.

This would give some guidance to the parties and their lawyers. This will also give guidance to the court. This principle would be easier to apply and understand. This suggestion was agreed by another member.

We should also link this principle with Principle 9 about the court's responsibility. The idea is that the parties have a responsibility to facilitate achievement of the court's responsibility.

Principle 11.5. A similar case was presented to the French Court of Cassation and the court decided that even if the party does not deny a fact, this might not be considered as automatically admitted. This is an important principle, but maybe much detailed. The member was not sure at this stage, about which direction to take. Another member suggested that the principle could read: "the judge *may* consider that the statement is admitted," leaving this to the discretion of the judge. Still another member, in agreement, said that the principle could read "*may be* a proper basis." In complement, it was said that we could improve this Principle and say "a party's *unjustified* failure." There are sometimes reasons justifying the failure. As a fundamental rule, with exception, this is a good and necessary principle.

The important principle is that the court may, assuming that there is no justification of the failure, treat acquiescence as establishing the fact. Some systems require that every proposition on which a court proceeds must be established by evidence. There are cases involving children that the generalization does not hold, but this is a generalization.

## **Principle 12**

### **Right of Amendment**

We could differentiate three systems regarding amendments. The first system is the American Federal Rules, in which, given the absence of a requirement of pleadings and the breadth of discovery, amendment is practically a necessity. There will be an amendment of the pleading as part of a pre trial conference, and the amended pleading will look like the kind of pleading that most other legal systems require at the outset, stating what the contentions are and specifying the issues for trial.

At the other extreme, the rules in some civil law countries are very restrictive to the point of that amendment is not permitted. A party who made a mistake, for example, is required to commence a new action. Apart from costs, this creates problems like statutes of limitations and other kinds of difficulties. That is a pretty severe sanction.

The reasonable accommodation would be a right of amendment so far as it does not have a practical adverse effect on the opposing party's ability to respond. This is what we tried to state in Principle 12.2. The concept is that there is a right of amendment, but it is conditioned by a requirement that it does not result in prejudice on the opposing party. This middle ground solution is the rule in all common law systems other than the United States and several civil law systems. Particularly in international litigation, the possibility that, as the case moves forward, it will take a different appearance, is certainly greater than in a domestic case involving an automobile accident.

A member was in doubt whether this right of amendment was a principle or not. However, the member is convinced that we should keep it because it involves the

question of achievement of justice in the process. It renders a better and more efficient justice. The member agreed with this principle. The problem is the link between a more precise, modern, and efficient justice and the reasonable time to end the proceeding. The proposal that, if we keep this Principle of amendment to prevent injustice, maybe we should delete the item 3 of the new Principle of Justice Within a Reasonable Time, proposed by Mr. Stürner. This is only a repetition.

One member considered that this principle should be included in the new principle of justice within a reasonable time. Another member disagreed.

Another member was convinced that something should be said about amendment and that this is a Principle, but the member is not convinced of the substance of the text in this Principle. If we have the possibility of making time schedules in the instruction phase, and we have the right of amendment for a party, with disrupt the order of the judge, the time schedule will be of no effect. Therefore, the right of amendment in this principle is far too broad. It is a more fundamental conflict in systems with strong adversary character, when the parties govern the proceeding, it is necessary to have abstract rules leading the parties and their conduct. If the court manages the proceeding, the judge makes the time schedules and the parties should be precluded if that party do not comply with the time schedule. The right of amendment should be the exception. It is a necessary right, but should be the exception. Therefore, we should have a more strict text. Therefore, it is necessary to allege a good reason and that the amendment be necessary in the interest of justice. To say that in the instruction phase one can amend its contentions is too much. If a judge say that in four weeks the response is due, and the response does not come, the parties should be precluded, sanctioned, and there should be no fundamental right to amendment.

Another member agreed with the previous statement, but cautioned that the right of amendment is more justified in transnational situations. In several cases, a foreign party was taken by total surprise in having arbitration in one jurisdiction in which you have to put all your arguments in the first pleadings and after that you are foreclosed.

We should also mention explicitly in this Principle about overcoming surprise.

A member was unhappy with the attempt in Principle 12 to create a virtually unqualified right to amendment at the early stage and then to impose a rather stricter approach at the main hearing. It would be better to have a unified approach as stated in Mr. Stürner item 3 of the new principle of Justice within a reasonable time. This strikes a right balance. There should be an element of discipline whenever possible, so that the pleadings are not some casual formulation. The discipline is sufficiently imposed in this formulation because the court retains an ultimate power to refuse amendment, balancing all the interests and the interest of justice, when it feels that there is no good reason to do so. Although it should be the exception for the court to refuse amendment, ultimately, the court should retain that power.

The importance of maintaining the discipline increases the closer you are from judgment and, obviously, application will be made at the final hearing. In the instruction phase, the parties are not yet in their final submission. Amendment at the final hearing has a greater risk to the opposing party. This distinction between instruction phase and main hearing might not be easy in complex cases, in which we cannot sharply distinguish between the phases. For example the main hearing may be bifurcated with different issues. Another way to deal with this problem of timing and consequence is to refer to

avoidance of significant delay and requiring good reason and eliminate a duality between the different phases. This might be a little more realistic.

Applications England have been granted even after judgment, which would take us back to *lis alibi pendens*, and the attempts to formulate the scope of litigation.

This notion of amendment is an attractive principle, with opposite arguments going in two directions, one in favor of flexibility and equity and avoiding surprise and the other is the element of procedural discipline and problem will arise when a party would be financially prejudiced by a shift in the scope of the litigation, when whole new issues would be opened up, perhaps at a late stage. We should consider this process of amendment as resting on a still deeper principle, which is “procedural equity.” In general, we would like to have the power so far as it is consistent with the wider interest of justice, to relieve parties in the course of litigation if they have genuinely committed some form of procedural error or mistake. Amendment should be perceived in that context. We need a balance of the interests of the parties and the wider interest of justice.

We can also look at the question of the formulation of pleadings and amendments not just from the perspective of the parties, but also taking into account the role of the court. Under the new English system, it is said that the courts have the power and the responsibility to clarify the issues. This is the power the court has to look at the pleadings, preferable at an early stage but at any stage of the proceeding, and check if the statements are sufficiently clear. There is an element of amendment potentially as a initiative from the court, and this is an aspect of amendment because amendment could be ordered by the court.

A member considered the expression “when it would not prejudice an opposing party’s ability to respond” in Principle 12.2 as redundant because the right to be heard would necessarily imply the possibility after an amendment to be heard and to defend oneself. This does not mean, however, that the expression should be suppressed.

### **Principle 13**

#### **Right to Proof and Duties to Disclose Evidence**

This is a set of specific provisions, each one of which, separately, could be regarded as not being a principle, but taken in aggregate, they convey a sense of procedural right and confer substantial party autonomy in the presentation. It is consistent with some civil law systems, but inconsistent with civil law systems in which the authority of the judge is supreme. However, civil law systems recognize the importance of party initiative at the evidentiary stage and that is what this principle is about.

Perhaps the most controversial provisions are 13.5 and 13.6.

A preferable title for this principle could be “Access and Right to Evidence.” Another member did not agree with the expression “and right” and suggested that we should add “information.” This is important when one reads 13.1, and we should put information before evidence. Some things might qualify as information, but not as evidence.

In any event, we do not want to allow “fishing expeditions.”

There are two possibilities for the initiation of the taking of evidence: the party may present their evidence (Principle 11.3) or the court may take or order evidence on its own motion (Principle 19.4).

An enumeration of the admissible means of evidence is an exemplary list, not restrictive list. Another member considered this a problem, because in some countries there is a closed number of forms of evidence and in other countries there is full freedom. Normally, this is not a great problem in practice, but some times there may be evidence, such as information by authorities. Is information from authorities considered a means of evidence or is it necessary to summon the office to come and give testimony in open court? In the enumeration, there is a list of means of evidence known in all legal cultures. It is dangerous to give the judge the power to decide what is a means of evidence.

There is also another problem with Stürner proposal for Principle 13.1. What is the relation between the words “generally” and “unrestricted”? There is a potential conflict in those two ideas. The word “unrestricted” is restricted by the word “generally.” A member is unsure about the idea of unrestricted access. The answer is that there are exceptions to the rule of unrestricted access. For example, if a document is a private document, such a love letter, one should not give full discovery of this document. A member would prefer to say “in principle.” Unrestricted would seem to go too far.

Principle 13.1 has a very compressed language. In 13.1, we use the word “relevant” and in 13.5 we say “directly relevant.” In Stürne’s Principle 13.6, we say “strictly relevant.” These are shades of meaning that might be understood by us at this moment, but they may be difficult when applied. Can we improve upon this? Can we not specify what notions of relevance we want to use in this context? We could also leave this to the comments, to give more concrete explanations. Another member, in defense of the language, considered that this differentiation is not without sense. In 13.1 the general principle is the right to unrestricted access to all relevant evidence. Principle 13.5 is a special rule for the instruction phase. In proposed Principle 13.6 the restriction is even greater because we are dealing with third persons. In the comments, we might want to clarify that.

In the Introduction, we refer to the English Peruvian Guano test of relevance and the horrific expansion of discovery, which occurred because of that notoriously nebulous and open-ended statement from the court of appeals. This is a real problem because someone in a far country will be faced with a three-level hierarchical structure of “relevance,” with three different filters (relevant, directly relevant, and strictly relevant.) Is this the end of the story, or could not we in the next year think whether we could clarify what we mean? This should not be a capricious, subject decision by the court, and there must be guidelines. We should avoid reinventing the wheel. We could give examples in the comments. As perceived by another member, the important is that we should keep consistency whenever we need to refer to one of those three levels of relevancy in other parts of the project.

In Principle 13.2, the access to evidence includes all kinds of evidence, and we should not make special remarks on party statements. We could say that the parties have the right the relevant evidence by all means of evidence and right to adequate presentation of evidence. Party statements and expert evidence are not special forms of evidence and there is no reason to mention them in that special provision.

In defense of Principle 13.2, it was said that in some civil law systems, even today, the statement by the party is insufficient to establish a fact. It may be admissible, but it does not have sufficient weight unless corroborated by other evidence. They do not have equal weight as a witness statement. That is why this principle is necessary, establishing that party statement is sufficient ground as a basis of a finding. Even if one does not call it evidence, it is the equivalent of evidence.

In any event, an enumeration, according to a member, would be better. We could then add the specificity of the party's statements.

What should we understand about this? In France, for example, the parties can give three kinds of evidence: a "personal comparison", the "oath", and "confession." The personal comparison does not bind the judge, but the oath and the confession do. There are two different concepts: one is the right of the parties to give statement and the other is the freedom of the court to evaluate those statements. It was answered that the statements referred to in Principle 13.2 do not bind the court. Those statements should be given "evidentiary effect" by the court, whatever these effects might be. The party has the right to give statement, but the court has authority to believe in it or not. The principle that applies is the free evaluation of the evidence by the court and the court can disregard the evidence because it thinks that it is not credible.

In general, at least in international uniform law instruments one should refrain from referring not only to specific domestic law, but also to families of law. Therefore, the reference to common law systems and civil law systems, as it appears in parenthesis in Principle 13.3, should be transferred to the comments.

Principle 13.5 is very important, because it allows one party to demand that another party produce relevant evidence, which includes documents and also testimony. Thus, one could demand that some corporate employee give testimony even though the corporate party does not want the testimony to be presented. That is functionally a form of the dreaded discovery. A member shared the view that this is an important procedural principle. This principle is acceptable applied to directly relevant evidence.

We should not say that a party has access. You can only have access if you know that the information exist. If you say that a party has a right to information, this is worse, because it would imply a duty of disclosure from opposing party. Should we approach this as a right for information or as an obligation to disclose?

Principle 13.5 speaks in terms of right. One interpretation is that the party should list the document. Another is that the party could require the other party to reveal all documents fitting a certain definition or within certain dates or in a certain class of matter. If that is the interpretation, there is a duty to disclose. There is a difference in practice between requiring a party to exercise a right to specific information and enabling a party to require another party to reveal the set of documents which would be useful to opposing party. The title of this principle uses both right to proof and a duty to disclose.

This principle has a very difficult proposition. One of the reasons why 13.5 is written the way it is, is to require the party to go through the court in seeking the information. A party has the right to demand but the court may consider the demand unjustified or excessively burdensome. In the United States, when the broad concept of discovery was first adopted, in 1938, it was linked to procedural requirements of a motion to the court to obtain that information. By 1960, this was regarded as a useless gesture because the courts usually granted the demand and that the request to the court should be

eliminated. This opened the gates to comprehensive discovery, because a party could demand discovery from another party without any risk of incurring rejection by the court. A requirement that the party request the court is functionally different from a party requesting from another party.

Almost all would agree that a party should be able to require the court to give access to a specifically identified document that is admissible and relevant. This is not the problem today. The problem is when a litigant has reason to believe that there are documents of a certain character or category in the possession of the opposing party that the demanding party cannot specifically identify. For example, the engineering specifications that were transmitted by the defendant to some supplier of subordinate equipment. In today's world, there are technical specifications, financial specifications, correspondence concerning delivery of products, and so on. There should be a right of a party to demand production of documents that are described in a defined category, not a fishing expedition, or at least an expedition in which you have to describe the fish. Several people in European systems are afraid that if you allow this at all, one is inviting the American wide-open discovery. There is strong resistance and fear to allow any kind of discovery. Principle 13.5 permits demand for discovery in categorical terms and not simply identification of an specific dated document. It does also admit the possibility of abuse. The other side is that if you do not permit discovery, you foreclose the best evidence. This group should consider this issue carefully.

According to a civil lawyer, Principle 13.5 is a good compromise between the continental practice and the broad discovery in common law countries. We restrict it to directly relevant evidence. On the one hand, it does not permit a "fishing expedition" but, on the other hand, sometimes it is impossible to identify a specific document. We may not be able to make a better text on this issue.

It was noted that the French translation is wrong because it says that one party can demand from another party. The English text is ambiguous, but it should mean a demand that the court order the party to disclose evidence.

A problem with the text is that it restricts discovery to the instruction phase. This principle can be better understood in connection with Principle 7.3. What if there is a need for information before or after this phase? This is too restrictive.

Principle 13.6 has a very broad text. It is too broad to say "reasonable discovery" because in some legal cultures in the pretrial phase, the access to means of evidence from third parties is very restrictive. That is not without importance because third persons are not directly interested in the controversy and should be protected from burdensome discovery. There is a difference between documents in the power of the parties and document in the power of third persons. We must stress this difference because sometimes the evidence in the possession of third parties involves different considerations, such as privacy. The scope of discovery should be narrower in regards with third parties than an opposing party.

The court should be able to require evidence from third parties on its own motion or on motion from the parties. This is addressed in Principle 19.4. In the instruction phase, the judge could order the taking of evidence on its own motion. Another question is whether the facts on which evidence is taken could be only alleged or presented by the parties, but the court could be allowed to take evidence on its own motion even from third parties.

We should avoid the expression “discovery from third parties.” We would invite a general rejection from civil law countries. Some systems are reluctant to compel any discovery from third parties.

Do we want this provision to be available only after the commencement of the proceedings, or could it be available pre-action, in anticipation of suit?

Is Principle 13.7 considered a limit on Principle 18 about burden and standard of proof? This is a good principle, because Principle 18 can be accepted only if 13.7 is a limitation of 18, that appears as an absolute rule. In several countries, the rule of the burden of proof is not absolute. A relaxation of the burden of proof is that the court may draw adverse inference from a party’s failure to produce evidence that reasonably appears to be within that party’s control. As an answer, it was said that the inference is more powerful than shifting the burden of proof. The judge should draw no adverse inference when the party has a good argument and the inference could be wrong.

#### **Principle 14** **Evidentiary Privileges and Immunities**

We should enumerate only self-incrimination, professional communications and inter-spousal communication because those are virtually universally recognized. This provision is to be read along with the authority of the court to draw adverse inferences from failure to produce evidence, as stated in Principle 13.7. It is a standard doctrine in the United States that a party in a civil case may invoke the privilege but the court may take into account that the party has thereby refused to produce evidence that could be produced and draw inferences accordingly. If we understand that, then, we could come close to agreement.

Stürne’s proposal may not be adequately definite. Is a party definitely entitled to refuse to give evidence about communication with counsel? If it is, then it is to be recognized that the party cannot be forced to produce the evidence but, in accordance with Principle 13.7, the court could take into account whether in the circumstances it would be proper to infer that the facts would be adverse if they were to be revealed.

For continental legal culture, a witness cannot be forced to testify. There are some countries that allow coercive measures, but this is very rare. Adverse inference is a common sanction. It is possible even when there is a danger of self-incrimination or when professional communication is protected.

Most continental codes of civil procedure have no specific rules on party privileges. There is the “cause legitime” in French law, but it is always possible to draw adverse inferences. The point of view of common law countries is a little bit different, because they have the possibility of forcing the parties by contempt sanctions to give evidence. Given this possibility of forcing compliance through contempt powers, there is a need for a real privilege in common law countries. In civil law countries, the privilege is not as important because a party normally cannot be compelled to give evidence. A party can do nothing and the court’s only sanction is to draw inferences. The effect of a possible privilege therefore would be misleading in civil law countries. A privilege to a party is to give that party a right of passivity. We should be aware of this difference. In civil law, a party has no obligation to give testimony at all, and the party has an absolute

right to refuse to answer questions, not because it is privileged, but because the party has a right to refuse to give any answer. There is no need to refer to grounds of refusal. In common law systems a party has an obligation to answer questions unless the testimony would reflect a privileged matter. The court has the possibility to respect the reason of refusal. This is a very complex debate and there need to be awareness of broader principles to understand the practical implications.

In the civil law system, the protection for non-disclosure is viewed as a substantive matter, governed by the civil code, rather than a procedural matter.

Should we make a difference between the scope of privilege of parties and third persons? In most continental systems, the scope of privilege for third persons, such as witnesses, is broader and clearer and the scope of privilege of parties is narrower and less clear.

From a common law perspective, there is no need to distinguish between the positions of parties and non-parties. In common law, the definition of the right to refuse is in concept the same for a party and third person, but consequences are different. With regard to the party, the court can draw adverse inferences, with regard to a third party this is not possible. If a party seeks to have testimony from an independent witness, and that person refuses because the subject is covered by a privilege, an American court would not be permitted to draw an adverse inference. However, if the person refusing to give testimony were a party, it would not be unjust if the court could draw adverse inferences. The party may have a right to refuse, but should pay the price, which is adverse inference.

If we are to allow the taking of adverse inferences, we are weakening the strength of the privilege. This question has a supra national constitutional perspective now, especially because of art. 6 of the European Convention. It expresses some sort of fundamental right. The question of privilege in England is not purely a question of evidence or procedure, but a question of substantive law. The example is the confidential relationship between client and lawyer, which gives right to an equitable obligation to protect the confidentiality. Here we are invading the territory of substantive law to a certain extent.

## **Principle 15**

### **Third Parties**

In commenting Stürner's proposed Principle 15.1, it was said that there is merit in allowing the parties to join claims in one action. The question is whether we should adopt some limitation on the scope of joinder of claims, such as "same subject matter" or "same underlying transaction." Or should we say that there is no prescribed limitation and let the parties and the court decide what would be logical to assert in the same action.

The court has broad discretion to order the joinder or the separation of claims. If the court is convinced that a joinder is not helpful, the court can separate the claims. The power of the court is important because the freedom of the parties without the corresponding power of the court would be inappropriate.

Principle 15.1 allows a party to bring counterclaims, third party claims, etc.

An important practical problem especially in international arbitration and litigation, is the relationship between joinder and Rule 6 regarding intervention. The distinction is not very clear. There may be intervention that will not result in joinder. We should explore a little more on the relationship between those two ideas. The answer was that there is harmony between Principle 15 and Rule 6.

There are three categories. The first one is when there is an intimacy of relationship that would lead the court on its own motion or on motion of one of the parties to require participation of a third person. This is a rule concerning a “necessary” party. The second is intervention, which is voluntary, when the person seeks participation, but the court has some measure of discretion in allowing it or not. The third category is a person who intervenes, but not as a joint party.

In international cases, third persons ordinarily do not want to intervene in an action because they want to have another opportunity to consider their interests after the pending proceeding has been concluded. Joinder ordered by the court raises several questions, especially in international cases. There often are issues of jurisdiction involved because a third party may not be subject to jurisdiction in the same way as the parties are. There are some civil law countries in which the court could require the parties to bring a third person into the proceedings.

An aspect of the principle of voluntary commencement of litigation is that no one can be compelled to be a co-plaintiff. You can compel the person to be part of the litigation, but if joinder is against her will, she should be joined, technically, as a defendant.

Can a third person with interest in the subject matter join the proceeding even against the will of the parties? Or consent between the existing parties is necessary?

We should clearly distinguish between joinder of parties and joinder of claims. One is referring to what the parties may do (join claims) and the other refers to what third persons might do (join the proceeding).

A member considered that a rule or principle of joinder or separation of claims would be unimportant. Other members considered it very important.

We should not write a principle on intervention of third persons without writing a principle about the right of the parties to compel intervention from third persons. This right is implicit in proposed principle 15.1.

The proposed principle 15.2 should be limited by proposed principle 15.3. Third parties who want to enter existing litigation should not necessarily have the opportunity to do so. There should be a control mechanism at two stages, one when the person makes the application and the second if the court needs to take charge and reconstitute the dispute. The formulation in 15.3 is extremely brief and the emphasis is not quite right. First, we should add that the court may order the joinder or separation of parties (and not only claims.) Second, the criterion refers only to efficient, which is important, but not the only consideration. We should have a more general reference to the interest of justice.

Proposed Principle 15.3 means that the court could order the joinder of claims in *existing* proceedings. This is called “consolidation of related claims” in common law. This might involve the addition of new parties. However, the court cannot force the parties to add claims in the proceeding.

We might also distinguish an intervention to help one party and an intervention as an independent party. A member considered that the text covers both kinds of interventions and we should not try to differentiate those two aspects.

This might be the right place to discuss about class or group actions. This is an aspect of compelled joinder. It was decided that we should not be involved with class litigation in this project. There are important considerations that would take us very far afield from the original project. This is not to say that a country cannot employ class suits in international area, but only that these rules do not authorize them.

Several members of the working group suggested a more detailed provision. This is a very difficult and burdensome field of procedural law.

## **Principle 16**

### **Orality and Written Presentations**

Stürner's suggestions for Principle 16 are substantially the same, but present a better sequence than the Hazard-Taruffo draft. We cannot describe oral and written presentation without first considering the order of the proceeding, which begins with written pleadings and legal arguments.

We need to give special attention to possible written testimony.

This is a remarkably important provision. We should find an acceptable balance between written and oral forms of presentation. There is a lot of local history in both common and civil law traditions. Historically, the common law courts employed trial by jury, in which there was oral presentation of everything. As a result, the principle of oral proceedings became a predominant feature of English civil procedure. With the virtual disappearance of jury trial in civil matters in England, it was possible for the English system to become more flexible in achieving a balance between written and oral proceedings. The hand of history is still visible. The rule still proclaims that the starting point is that matters of evidence shall be received orally. This is, however, very much misleading. The reality is that in a sophisticated commercial matter in London these days, most of the information (presentations of law, evidence, expert testimony) is primarily received in written form prior to the full hearing (trial). Opportunity exist for supplemental oral questioning of the content of these written forms. There is the great advantage that everyone receives notice well before the final hearing about what the experts intend to say, or the witness statements. Each side receives notice of the details of the legal argument and so at trial the court can simply ask counsel to engage in cross examination of the other side's witnesses or experts and to make supplemental comments on issues of law. That balance is, on the whole, an attractive one in commercial litigation and satisfies the requirements of due notice. There is no opportunity to surprise and this is a great procedural advance.

There are, of course, disadvantages. One obvious well-known disadvantage is the opportunity for the lawyer to manipulate the content of the witness statement and to influence the content of the expert report. Another disadvantage is that in England lawyers are paid by the hour and the tendency is for the witness statement to be exceedingly long. The third disadvantage is that the witness at trial has no opportunity psychologically to warm up with gentle friendly questioning from the lawyer. This is a

real psychological difficulty now that the witness is immediately exposed to hostile questioning from the other side.

There are several instances in which judges do not accept, do not pay attention, or discourage oral legal arguments by counsel or by the parties. Under art. 6 of the European Convention, oral argument may be a right.

In some civil law countries, there is a long tradition of orality in criminal cases, but not in civil cases. Many judges do not like to listen to witnesses or to oral arguments. However, reform of civil procedure is going into that direction, because it is better to see and witness demeanor.

German procedure is more oral than French or Italian procedure. In France, sometimes the procedure is completely written, with rare oral testimony of witness. The possibility is for the lawyer or the parties to speak to the court, but questioning of witness is not possible at this time and there is no inclination to change.

Is there a right of the party to oral argument? Art. 6 of the European Convention of Human Rights implies that there is. If the parties are satisfied with written proceedings and do not apply for oral argument, the proceeding may be written. But if the parties wish to have oral argument or present testimony orally, there should be a right to do so. In several cases, if the judge is open to hear the parties, the judge might change the view on the case and the opinion about the best decision. We should strike a good balance between written and oral proceedings. There is a tendency towards written procedure, but orality is a right of the parties. The principle should be that the proceeding is written if the parties agree, but if they want, the proceeding may be oral.

We could mention in the comment that the right of oral presentation can be waived. The parties will have to make estimates on the advantages in each case, and decide what presentation would be best.

There is no antithesis between oral and written. The issue is a question of balance. Speaking in terms of right of orality seems to be too simplistic. What is fundamental is the opportunity for oral supplementation and for oral challenge. Only a very rigid system would try to curb that opportunity. Our debate indicate that the opportunity for oral challenge for the avoidance of exclusivity of written procedure is perceived an important and fundamental advance in procedural systems. The way in which are presented here are too antithetical and it may just be a question of the restructuring of the sequence of sentence. We need the opportunity to present the matters initially in written form, but for that be an opportunity of cross examination (supplemental question). The notion of supplemental questioning is a valuable right, or a valuable opportunity.

A member considered this principle to be a set of abstract propositions, not sufficiently tied up with the sequence or the structure of the procedure. A suggestion would be to include a subparagraph to say that the court, as part of its active management of the case, should at an early stage discuss with the parties and, if necessary, give directions, whether the testimony of the parties, including the experts testimony, would be presented initially in written form and specify the dates by which these matters are to be disclosed both to the court and to the other side. In that way, we can tie this process of written and oral presentation with the process of case management. It would avoid the potential for chaos, if a party demands oral presentation and resist any attempt to require the parties to present in written form. There must be a power for the court to regulate this process.

Another member disagreed, and considered that this principle is very good, and it would be too pessimistic to consider it merely a set of abstract propositions not linked to the structure of the procedure. There is no problem in giving the parties a right to present its case orally. There is no chaos.

A problem with proposed principle 16.2 is that it says that all testimony should be received orally, except as the parties, with the consent of the court, may agree. This decision should be in control of the judge. In response, it was said that proposed principle 16.3 is a limitation and say that oral testimony may be limited to supplemental questioning. We should be aware of the fact that in some countries the oral testimony is the rule and written testimony is an exception. It is doubtful that the tendency towards oral testimony would be the last word. The French solution to have no opportunity for the party for oral examination could be challenged by the European Court of Human Rights, if the party is not allowed to have an oral examination of the witness. This principle is a compromise, it is not satisfying, but it is the best compromise.

We could lose flexibility if we say too much. An early oral hearing could be a good instrument to prepare or organize a proceeding. An order of the court to have a time schedule could be enough, according to the case. We should not lose flexibility.

In international arbitration there is a tendency to have proceedings much more in writing than orally. However, as far as witness is concerned, most arbitrators hardly believe written testimonies until they have the opportunity to hear the witness.

A question was raised about the brief *amicus curiae*. On the one hand, our discussion last year recognized that some times there are legal issues that have wide implications that the court may not be fully aware of. In some cases, it might be important that the court understand the ramifications of the matters at issue. However, the brief *amicus* can become a vehicle for attempted improper influence by trade associations, the government, or the like. There are conflicting purposes involved.

We could also take the provision on the brief *amicus curiae* out from the black letter and make a reference to that idea in the comments. The balance between the benefits of information and the detriment of improper influence may be better in some countries than in others. Judges in the United States, for example know that a brief often is commissioned by an interest group and they look at it with skepticism. Should we leave it in, recognizing that it can be improperly employed, or should we take it out and perhaps refer to it in the comments?

The *amicus curiae* technique has been in use for several years in France. At the beginning, there were no procedural guarantee, such as the principle of contradiction, whereby a party could respond. The party would be powerless against what the *amicus* had to say and the court would be influenced by well known persons, such as a reputable doctor or the president of the bar association. The tendency now is to give the parties the right of contradiction or to have another *amicus curiae* to shed a different light in the matter. It may not be necessary to give too many details on this rule. We should include a right of a party to respond to any assertions made in an *amicus* brief. However, a member reminded the group that Rule 6.3 already provides for a right to contradiction.

Several members agreed that *Amicus* is a very interesting practice and should be included in this project. Moreover, it should not be swallowed in this principle, but have a more detailed and independent provision. It deserves a better fate.

In different legal cultures, however, there might be misunderstandings about how this practice works.

We should think about the possible relationship between a third party claim or an intervention of third parties and *amicus curiae*. In civil law countries, organizations, such as trade unions often employ a practice similar to *amicus*. If there is a right to file an *amicus*, it reduces the interests for organizations to try to intervene. This is a safety valve to discourage intervention, when they could submit a brief.

We should proceed cautiously. We should not be seen to be encouraging the proliferation of such techniques because this is a potentially dangerous technique. We should phrase it to make sure that the emphasis is upon the court. We should avoid the language of non-party semi governmental organizations, which they tend to be having some right to enter the forum in this way. This would be profoundly dangerous. In England there is wide experience with this, although this is not in the written English Rules. The tendency is for this device to be used by reputable organizations, such as the Law Society, in matters related to professional ethics and professional conduct. This is a healthy use. There is always another side. For example, in the Pinochet case, Amnesty International was allowed to intervene concerning the matter of international human rights. A problem arose because Lord Hoffman had connections with Amnesty International.

### **Principle 17**

#### **Public Hearings**

The difficult part in this principle is how to state the authority of the court to restrict public hearing. So far as possible, all proceeding should be public. What should be the scope of authority? What words properly capture the balance?

The title should remain publicity, rather than public hearings.

Instead of “right of confidentiality” we should adopt a broader criterion, such as “interest of justice.” We do not also need the word “necessary” which is too strong.

Another member considered that the exception to the principle in Stürner’s proposal (“the court may order that a part or all of a hearing may be closed when the protection of confidentiality is necessary in the interest of justice”) is not satisfactory. The protection of confidentiality is not always linked with the interest of justice. Art. 6 incorporates many more exceptions, such as morality, public order, national security, young people, privacy, and interest of justice. This is a very short language, and we should have more exception to this principle. This is not the correct expression.

In defense of the proposition, it was said that confidentiality would include most of the aspects included in art. 6, for example state secrets are a form of confidentiality. The idea was that it should be enough that something was confidential. We need a balance, and the protection of the confidentiality should be in the interest of justice.

We should find guidance in the European Court of Human Rights. There are several books and decisions about this debate. Art. 6 is not as broad as we might think. Cases from the European Court indicate that the principle of publicity refers to the main hearing, the judgment. The court is very liberal in allowing parties to waive their right of publicity for business secrets, etc. We should not go too far in that direction.

The emphasis in Stürner's proposal is half right. 50% of the question is wrongly excluded. Subject to very narrow exceptions oral hearings should be open to the public. However, the expansion of recent aspects of procedure, a matter, properly addressed in the original version, cannot be ignored. If one confines the right of publicity to hearings, one is almost cynically suppressing public access to civil proceedings because it is the tip of the iceberg. The substance of proceedings is contained in documents. Journalists and other members of the public sitting in the court would not have access to that material, it would be out of view. Therefore, the court of appeals recently emphasized and the English rules now reflect that all members of the public in principle have a right to inspect pleadings and also judgments and supporting reasoning. Of course, it is not just a right of inspection; they have a further right of taking copies. This is an important supplement.

There are four types of documents included in a case record: pleadings, documents received, written texts of witness testimony and expert reports, and judgement and supporting reasons. We might need to address them separately. There is a very strong argument for extending the principle of publicity to judgments, which would be consistent to English arbitration practice. This would extend also to the supporting reasons, even if those reasons include reference to matters that people would prefer out of public view. If the court, in open chamber, has articulated its reasons, and it has reading from a draft, can one not say that the judgment has entered the public domain? Yes. Common law pleadings do not contain all the details of the case. Pleadings indicate the scope of the litigation and are different from testimony. It is axiomatic that publicity should extend to pleadings. Just because one put in documentary form this should not trigger some right of confidentiality. This is circular reasoning. There is ground for sensitivity and precaution about publicity of witness statements if the matters relate to children or diplomatic conflicts. Otherwise, all should be governed by the right of publicity and the members of the group should have the right to inspect it. This should be qualified because the right of publicity only exists once the relevant material has been received as evidence in the case. At that moment, the document has crossed a line. There are very circumscribed exceptions. A member did not favor a vague principle of confidentiality. It is preferred to have specific grounds for exception, such as national security, the welfare of children and perhaps trade secrets.

The most important aspect of this discussion is that it may indicate a fundamental conflict of cultures. In England, for example, there is a morbid interest in details about the particulars of divorce litigation, which in other cultures is considered a terrible violation of family law and the right of privacy. In England, this is totally natural to discuss the details of the married life of personalities (and non-personalities.) A member recognized that commercial cases should be open to the public, and maybe public opinion in many European countries would be prepared to accept the publicity of the records. The general reaction might be that there is absolutely no reason to offer that opportunity to nosy people. Another member agreed that this would be very difficult to accept in several countries.

In most continental countries, the judgment is partially public, but it is exceptional that third persons can look the records of the case. In some systems, authorization from the presiding judge of the court is required. In common law systems, the rule is that anyone can look at the records and the parties have to obtain a protective order sealing

the record. It is not possible to have a right of publicity of record in legal cultures of continental tradition. This is a deep gap between these two cultures. We could have a compromise and say that the publicity of the record would depend on court order. This would balance the different legal cultures. We should not say anything about rules and exceptions. What is the rule in common law is the exception in civil law. Common law countries are a bit reluctant with the right of privacy. It is not possible to agree on a principle for the publicity of the records.

One important aspect of this principle is that it allows the public to scrutinize whether the judge is impartial.

In practice, in commercial disputes, there are often problems of business secrets, intellectual property, and competition. So that simply the parties of commercial transactions would never accept that kind of publicity. The trend toward publicity means that arbitration will remain the favorite means of solving disputes.

There are two fundamental ideas in conflict: doing justice is a public matter and people should be protected against revealing their intimate and personal affairs. A business or government should not be compelled to pay the price of publicity in order to be able to get justice. The law in the United States reflects great difficulty in articulating a good balance among those conflicting values. Some states, at the initiative of the media, have adopted statutes that prohibit or restrict the judge from imposing secrecy on any materials received in the case. In the United States, the interest in public visibility is strongly voiced by the media.

Some pleadings and some motions are bound to have material that is a candidate for secrecy. One approach is that the parties may agree, with consent of the court, to withhold information to be kept in confidence. This is a protective order.

We could say that "matters are open to public inspection in accordance with the rules of the forum." This would recognize the different approach in several systems. Subject to that approach, the parties, with the approval of the court, could specify that all or part of the materials shall be maintained in confidence. This would give more weight to confidentiality than the media in the United States would approve of, but it recognizes the fundamental differences between civil and common law. A member considered that leaving to the local law would not be a very encouraging solution to this problem.

Another aspect is that in continental legal systems, the oral hearing is the general rule and in common law systems most cases are settled without a final hearing before the judge. The publicity of the record is not important in continental legal systems because journalists could come to the final hearing.

The publicity of the hearings and reasoned judgment without the names of the parties was accepted by all members. There is a possibility of an agreement, especially, if there is some discretion to the judge. There is an area of consensus.

The Supreme Court of Argentina, decided to put all decisions in the Internet and invited the judges to do the same. The judges did not like this innovation because there was not an explicit rule in the code. The problem with arbitration is that there is no case law available to the public. It is unknown by the large public. If one is not in the little group, would not be able to know the practice.

In some Swiss cantons, tax files are open to the public. Without a need to show interest, anyone can know how much a neighbor is paying or declaring. Other files, a person should prove interest.

## **Principle 18**

### **Burden and Standard of Proof**

There is a problem with Stürner's suggestion about "without reasonable doubts." In many common law countries this would be read as the criminal law standard of proof "beyond a reasonable doubt." "Reasonable doubt" is a word of art in common law and should not be used. It would be ill advised to include this language in this principle.

That is why the original draft refers to the standard adopted in the forum. In civil cases, the standard of proof in common law and in civil law may in practice be the same. The phrase "preponderance of the evidence" may be interpreted to mean 50% plus one. However, in practice, juries and judges in the United States apply a more stringent standard. They have to feel pretty confident before deciding.

According to a member, we should have only one standard of proof. We should not refer to local law, because it would be useless. This standard should not be the preponderance of evidence. This formula is a consequence of the adversarial system, without a judge who could initiate additional evidence on the court's own motion. We should adopt an intermediate standard, because this project changes the adversary principle, in allowing the court to take evidence on its own motion. The proposed text is not enough to express that there is a connection of the possibility of the court to take evidence on its own motion, but we should say something about this.

We could use a formula like "reasonably convinced" or "convinced." We could also use the "clear and convincing evidence."

Another member added that practical experience in arbitration shows that when one have to decide between two parties, none of which tells you the full truth, one just cannot wait to decide until one is fully convinced of the truth beyond a reasonable doubt. The judge task is not to discover the truth in civil matters, which would be an impossible task in most cases. The judge has to rely on presumptions, on relative evidence, etc. Therefore, reasonably convinced would seem the best possible formula.

Given the difficulty in capturing the differences and the tendency of lawyers to seize at even the minute changes of formulation, do we need a Principle about burden and standard of proof? Is this of the essence of transnational litigation? Can we make more good or more harm in messing up with these concepts? It is self-evident that a party has the burden of proving the claim, if a plaintiff, or a defense, if a defendant. The question of the standard of proof is a linguistic quagmire and we should not be sucked into it. It can cause much difficulty.

This is an important remark. If we can do more harm than good, we should not address the issue. A member, however, was not sure one way or the other. In civil law systems, there is an important distinction between the burden of allegation and the burden of proof. The burden of proof is not self-evident because for many years since 1911 in Swiss law, it has been decided by courts that the principle of good faith can have effects in the burden of proof, in the sense that the defendant has to contribute with good faith to the discharge of the burden of proof in particular when proof is negative. If we cannot bring something concrete and clear, it is better to say nothing.

This Principle should be understood in connection with Principle 13.7. In some countries, burden of proof is an important issue nowadays. Good faith and fairness in proceeding oblige a party to offer proof even if that person does not have the burden of proof. It is a duty to cooperate.

The distribution of the burden of proof is an old standard of the *codex justinianus*. In most code there is this fundamental rule. The original version of Principle 18 is too short. This is a fundamental problem, because the activities of the parties depend on this responsibility. It would be wrong to silent on this. The rules of burden of proof are much more complicated than that. There are several aspects, including the shifting of the burden of proof. We should be general and develop in the comments.

The problem of specification of this allocation is troublesome in several legal systems. In the typical 1900 litigation, one merchant was suing a supplier. Nowadays, much of the information is in the hands of a bureaucracy of some sort, either a private corporation or the government. That is when good faith and presumption, or failure of a party to come forward with proof that they must have. There are several ways of responding to the modern phenomenon of repository of information. There is a slow evolution on this matter. We could recognize the problem without trying to solve it. We could in the comment recognize that in modern procedure the court often has occasion to indicate its dissatisfaction with the level of proof and endeavor to obtain a fuller development of the proof. A common law court without a jury may give signals that there is a need for better evidence. In a jury trial the parties sometimes try to put in everything that they consider convincing subject only to avoid the risk of confusing or boring the jury. One never knows how a jury will react to each kind of evidence.

This should be the standard of decision for final judgment, but there are other decisions in which there is no need for this level of conviction. For example, an interim injunction and several awards, other than final judgment are often regulated by a different standard of proof. This principle is not in collision with that practice. In those cases there is not even necessary to give evidence, there is only a balance of interests. This principle should not apply to interim orders and provisional measures. This Principle refers only to the final judgment. To make sure that this will not be misleading, and that we are referring to the basis of judgment, we could add “regarding the merits”.

A general comment was made that in several occasions the project use expressions such as “in principle”, “generally”, etc. Should we need those specifications? Or should we include them in all provisions? For example, this principle is an example in which there are exceptions. Should we include “in principle” here also? Or should we delete from all other principles?

A better composition would be “each party bears the burden of proving facts necessary to the success of his or her case.”

A member considered that we do not need the word “asserted” before the word “facts”. We could say “questions (or issues) or fact are proved when the court is reasonably convinced.” We could also say “contentions of fact,” recognizing the different between a fact and a version of a fact. In defense of the word “asserted”, it was said that the facts should be delivered by the parties, and it is not the job of the court to bring new facts to the dispute. We could say “contentions of fact”. “Facts” alone may mean that there is a possibility for the court to broaden the facts of the case on the basis of the evidence. The court is not able to bring new facts to the case without the consent of the

parties. A judge cannot decide a case by what the judge read in the newspaper. A member considered that to say “contentions of fact” is not right. One would have to say “contested facts” or “issues of facts”.

### **Principle 19**

#### **Judicial Responsibility for Determinations of Law and Fact**

How far can a judge or an arbitrator go in assisting the weaker party, or the weaker attorney. How can one reconcile the duty of impartiality with the recognition that a case is insufficiently presented in facts, evidence or legal arguments? The more a judge helps one party the more the judge is against the opposing party.

All legal systems have two ideas: the judge has a responsibility of doing justice and should take account of gross deficiencies in the presentation of legal argument, evidence or facts. On the other hand, the judge should not become partial or an advocate for one of the parties. It is not possible to be very specific about how these duties could be accommodated. We could mention in the comments that these duties exist and should be accommodated. They are in tension, but we should not try to solve them in this project.

Judge Robert Keeton once said that, except when it is a case of extreme and obvious incompetence, the judge should not intervene because the lawyer’s behavior may be an strategic approach because the other side may be very weak. How far should a judge go in the intervention? Nobody knows. In several cases, competent, intelligent, and experienced judges will consider that the presentation is not perfect, and there is always deficient. The cases are in fact never as well presented as the judge think it should be. The judge should restrain him or herself to try to improve the parties’ presentation. Not so intelligent judges could destroy a party’s presentation.

The principle of *iura novit curiae* is important in civil law systems. The judge can help weak parties with this principle. This is the importance of Principle 19.1. Usually the judge does not consult with the parties to apply the law. Under Principle 19.1, the judge will have the duty to hear what the parties have to say. A member considered this as a restriction to the principle that the judge knows the law. Another member considered that it was a healthy restriction. Several constitutional courts are going in that direction, in order to avoid surprising decisions, which would conflict with the principles of fair proceedings and the right to be heard.

There is also another aspect of the principle of *iura novit curiae*, which arises if the applicable law is foreign law. Must the judge ask for cooperation of the parties absent which the judge can resort to local law, or has the judge the duty to find the content of the applicable law *sua sponte*? Different countries solve this problem in different ways. In some countries, foreign law is considered a fact and in others it is considered law, or an inferior kind of law. We should not try to solve this problem in this project one way or the other.

Another member considered that Principle 19.1 solve this problem because it imposes on the judge the duty to decide the correct legal basis for the decision, including foreign law. In disagreement, it was said that this Principle does not solve this problem

because it does not explain in which way is the judge to find the correct legal basis for the decision. The judge will do it according with local practice.

A member reminded the group that this problem of foreign law as fact or law was discussed last year in connection with the discussion of Principle 6.

Principle 19.1 is a departure from common law practice. What does “the court” mean? Is that the court of first instance? Or does it include second instance court? This is ambiguous.

Principle 19.2, as it is written, is too broad, even for continental practice. The court should not be able to rely on facts not advanced by the parties. The parties have to allege the facts. That is their duty. The judge may not give a decision upon facts which have not been brought by the parties, but can only invite the parties to bring new facts or particularities of the case. However, the judge may rely on facts mentioned by the parties, but about which the parties have not given much importance. It is difficult to find a global solution for this problem. There is no problem about legal principles or evidence. The problem is the question of fact.

Could we say “amend contentions of law and fact?”

These rules are intended to be applied to international litigation. What does “in consultation with the parties” mean in this context? It does not mean that the parties shall agree in advance, but that the parties have an opportunity to comment before the judge decides. We may need to find a better expression, such as “after receiving parties contentions.”

A member considered that the expression “upon consultation” in Principle 19.1 was not important because the same idea was already included in Principle 19.2. The right for consultation is already in 19.2.

In defense of the language “upon consultation”, a member considered that in practice a judge is not able to decide the applicable law without having discussed it with the parties. Normally, the judge makes a proposal and the parties have the chance to give the opinion and the court will have to decide which law to apply. The choice of law should be done in cooperation. Several discussions on the applicable law could be resolved in a fair manner without dispute when each party has a possibility to be heard and the judge discusses the question with the parties.

The proposed Principle 19.2 says that the judge may “invite” the parties. There is a close connection with Principle 8. The scope of the proceedings must be determined by the claims of the parties. Parties decide the facts that they want to bring to the court. If a fact is necessary, the court may invite the party, but the party has full control. This means “suggest” not “order”.

Another member argued that the choice of law is not different from any other legal issue. Choice of law is a legal issue. It is not necessary to distinguish them.

Why should a court ask a party to amend their legal contentions, if the court is responsible to find the law? Principle 19.1 dominates on this matter. The party should just be heard. Legal basis for a decision is in 19.1 and facts and evidence are in 19.2.

Principle 19.3 may be too broad. We should not mention the power of the judge to delegate the decision about issues of fact and law.

There are several important principles together in Principle 19. Principle 19.3 is not a principle, but a rule. The rule is good, but it is a rule. In defense of this principle, it was said that it is a fundamental principle that evidence should be given before the court

and not before a third person. The court is responsible to take the evidence. When we say that the taking of evidence may be made by a delegate, this is an exception. There is a connection as a principle. Otherwise, it could be considered as an abandonment of judicial responsibility.

In transnational litigation, it would be advisable to have a delegation of taking evidence abroad, including questions of foreign law. In this respect, this might be an important principle for transnational civil procedure, although it is only a detail in domestic litigation. From a pedagogical point of view, this is very important. In general, judges and lawyers are not accustomed to this principle.

Principle 19.5 is redundant and should be deleted.

Principle 19.6 of free evaluation is also contained indirectly in Stürner's proposed Principle 18.2. What is the connection between those two principles? How can we organize better those two provisions? Principle 19.6 is not a rule of evidence and Principle 18.2 is about evidence. Principle 19.6 is a rough rule for many countries because in several countries like Spain, France, Italy, etc. This principle is the abandonment of the rules of evidence in international disputes. There are connections with substantive laws in several countries, especially rules regarding documentation in the civil codes. This rule could be far too broad, because of the rules of evidentiary effects of documents in the civil code.

The expression "free evaluation" means nothing to common lawyers. We should explain it in the commentary and it will give rise to anxiety and dispute in common law countries. Does this principle override rules of substantive law? There is a rule of contract law in England which says that a contract of surety needs to be evidenced in writing. In the absence of writing, the alleged guaranty is invalid.

This is a very old problem. The difference about the form of the taking of evidence. It was discussed in the Rome Convention on Private International Law, when the European Convention was drafted. Question of the parole evidence rule, etc. They decided to be silent on this, because they had difficulty. In that convention, there is a rule that the means of evidence are governed by local law. When we say "free evaluation of proof", it may mean that the English parole evidence rule or the French rule of proof by document or written proof could be interpreted as abandoned.

What is the significance of "free evaluation of proof"? What does it direct the court to do that it would not do if she were simply deciding the case without such an instruction? It means that there is no fast and strict rules of evidence. The traditional rules of evidence are only an argument. For example, an old rule is that the wife cannot be a witness for the husband. One can use the argument that the wife is no good witness. If a party have a written contract and has additional conditions and terms, an English lawyer could say that according to the parole evidence rule could say that one cannot add new rules to this contract by the testimony of witness.

It is doubtful that this principle will destroy substantive laws related to evidence, but it is possible. This is a very broad provision and we should delete it. It has different significance in different contexts and it leaves open to argument in the court. This only leads to complex inquiries that we cannot resolve.

In Vienna sales convention, this issue was addressed from the substantive law angle. Once it has been agreed that no formal requirement was necessary for the conclusion or amendment of a sales contract (and this is a well settled principle) the

reporter considered important to add “and can be proved by any means,” just to cope with this mix of substantive and procedural law. If we cannot take into account the applicable substantive law, it would be problematic to have this rule in a project of procedural law.

According to a member, it is not wise to delete it fully. We should seek for a compromise. There are several countries with very primitive rules of evidence. We should be in search of a more soft formulation. We should say that the Principle is the free evaluation but there are exceptions. For example, testimonial evidence should be evaluated without discrimination concerning the character or the relationship of the witness. This differentiation among witness according to their status is contrary to modern conceptions. On the other hand, differentiation of proof according to whether it is in writing or not is reflected in the law of several countries. Writing is essential in certain types of proof in several countries and we do not wish to invade upon rules that require documentation. On the other hand, rules that make discrimination among witnesses are something else. If this analysis makes any sense, we could make a provision that evaluation of testimony should be without reference to personal characteristics of the witness.

We could also look for a compromise in a different direction. There is a different distinction that could be useful, between domestic situations and transnational situations. The experience in arbitration is that these transactions involve in most cases professionals and experienced people who do not need the same kind of protection about formal rules of evidence as in the domestic sphere. In most cases, they are experienced people and they should know what they are doing. Therefore, we could find a compromise, making it clear that the principle is restricted to international litigation.

We have to understand the concept of “free evaluation” in an historical perspective. It is in opposition to a “legal” evaluation of evidence, in which the law (the procedural law, not the substantive law) would consider written evidence more convincing than oral evidence or that one would need four women to overcome the deposition of one man. This is in opposition to free evaluation, in which a judge may give more credibility to an oral deposition than a written document. We could compromise by adding the following phrase at the end of this principle: “unless substantive law makes a certain form essential to the validity of the document.” It seems to be a good idea, but there are several forms of written evidence and the relationship between form and evidence is very difficult (and sometimes there is no difference.) And what about the “binding oath” in French and Italian procedure?

We say something about written evidence. Rules on written evidence should be excluded from the meaning of this principle. However, there are other rules. We could say “but the procedural or substantive rules requiring a matter to have been documented shall be observed.” We should avoid characterizing the problem as substantive or procedural because different systems might classify it differently. The point that a writing is required in certain types of transactions is an important public policy in many countries. Another member was in disagreement with distinguishing between writing and not writing because this is old fashioned in present international transactions because electronic mail, especially among professionals. Perhaps more useful line would be to accept the principle of free evaluation, unless, not necessarily the forum law, unless there exists an imperative rule of evidence to the contrary somewhere, such as in a country having close connection to the case. Loi de police or public policy requirement

concerning evidence. In disagreement, it was said that this suggestion does not solve the problem, because it was decided that this group does not want to cancel local rules regarding evidence, even if they do not amount to a “loi de police.” In defense, it was said that if we keep relying in local rules in transnational transactions the only way is to discard as much as we can domestic procedural rules and keep only what is loi de police, or imperative, or public policy.

In support of the previous proposal, another member said that sometimes it is a problem of evidence and sometimes it is a matter of validity of the document. In French law there are old fashioned rules about written evidence, if the contracts concerns more than 5,000 francs, etc. This is ridiculous, and one hope that his will not be kept much longer. Most of the evidence rules in France can be modified by contract between the parties: it is therefore droit dispositif. Only a few evidence rule belong to the loi de police.

There is a difference between domestic public policy and international public policy. In international litigation, less formal evidence is required. This is normal in transnational relationship. We are touching on the essential of this exercise. What are we discussing about? Are we envisaging a sort of model law for transnational civil procedure, along the lines of a model law of international commercial arbitration? In a number of occasions like this one, of discussions of model international law, the participants found themselves in disagreement because of the existing national legislations, but at the end of the day, they came to the conclusion that, because the project is an international venture, one should look ahead and adopt a more liberal approach. What should be kept in mind is the functional approach, the better law approach for a particular kind of litigation, where there might be good reasons to forget about domestic peculiarities.

We could adopt the principle of free evaluation, except as to matters concerning which public policy applicable to an international transaction require otherwise. What does that mean? We can recite examples in the comments. We can mention that in several countries there is a requirement of written contracts in certain situations. We just have to indicate the general character of what we are talking about and move on. Sometimes we have agreement in the extremes, but we cannot imagine the full range of circumstances or we cannot find words to express it. We indicate the framework and assume that it is up to the court to decide accordingly. A member agreed with this focus on international public order, meaning only those formal requirement should preserved which according to the applicable law claim application even at the international level. This is more advanced than the Rome Convention, which sends us back to the status quo, meaning every single national law applies irrespective of whether the litigation is national or international.

We could also take the same approach taken in the Rome convention on international contract law. According to this convention, the rules for the form of contract govern the applicability of the means of evidence. So, we could say that the rules of international law, such as the Rome convention have rules on the conflict of laws for the form of the contract. We could take the same rules for the applicability of the means of evidence. That is a solution for contract cases, which is the main problem. Rules on witness testimony are not so important in this aspect. What is important is documents and contracts. Therefore, we could adopt the same rules that govern the form of contract in international law. That will be a reasonable solution because questions of form and

questions of evidence sometimes are very similar. This is a good suggestion, and should be studied.

We cannot change the international law for the forms of contracts. And it is not intelligent to create established rules on the applicability of means of evidence and not to respect the rules for contracts in international law. We will have different rules for form and means of evidence, and sometimes discuss whether this is a form or a means of evidence. Therefore, we should have the same rules and we cannot change the rules of form, they are governed by substantive international law. We should adapt our rules on the applicability of the means of evidence in contract cases to the rules for the form of the contracts. We could say the applicability of means of evidence in contract cases is decided according to the rules of international law regarding the form of contract. That could be a possible solution.

A member did not agree with this proposition. There is no compromise at all in saying that the rules of evidence are modeled on the rules of form of contract. What we should be doing is try not to apply the rules on the form of contracts in international law when they in fact diminish the principle of free evaluation of evidence unnecessarily. It is necessary only when these rules on the form of contract and the form of evidence are really imperative and apply to a transnational situation, not in other cases. If we model our rules of evidence on the rules of form of contract, we may be destroying our own work. There is a better approach a better method in trying to limit the principle of free evaluation to those cases in which, in certain countries closely connected to the case, there are formal rules, which insisted to be applied because considered public policy as imperative. We should not go beyond that. The problem with the proposition is that the author has no formula to propose at this moment.

Free evaluation should be subject to applicable international convention or other legal sources specifying form or matter involving public policy. We should try to capture those alternatives and present another draft next year.

Principle 19.7 was considered unnecessary and could be deleted. It is also very general and vague and is not necessary.

Is Principle 19.8 a principle? Is the formulation satisfactory? Where should it go? Should it go to Principle 13? In any event, the issue of expert witnesses is so important and the general approach in civil and common law is quite different. This principle recognizes both traditions. The court may appoint an expert and the parties may nominate experts whose testimony will be received. This is important in international commercial litigation, in which experts are so important. We should not omit the subject.

It is important to say something on the relationship of parties' experts and the court's expert.

In several civil law countries, the institutions and culture of science are fairly well established, so that the court could immediately recognize the identity of an appropriate expert, for example, referring to the relevant academic department in the university. There are several systems, however, in which there is no such generally accepted hierarchy and the court may appoint some sub optimal expert and the party might hire a more convincing expert.

A member considered that the first sentence in Principle 19.8 was not important because in 19.4 the principle is that the court may order the take of evidence on its own motion. The second sentence is important.

The rule of expert is so important in court proceedings and in arbitration that the word expert is swallowed in a provision about other issues. We should have an independent Principle about expert witness, whether the parties' expert or the court expert. There is a good book published about twenty years ago in France of a comparative study of expert witness. In that book there are approximately 15 national reports and a general report. There is also another more recent book by the International Chamber of Commerce Institute of International Business Law, which was a seminar with lawyers and experts. In several cases, the judges decide following blindly what the expert said. This issue is of so great practical importance that an independent provision is necessary. We could do it in the Rules. We have Rule 26.

The joint expert is one of the most controversial aspects of the recent English reforms. The court of appeals interpretation is very agnostic, and Lord Woolf is in the court of appeals. In cases of 5,000 pounds or less, it would be disproportionate to have a two tiered system of party-appointed experts and a court-appointed expert. However, in complex cases, a two-tiered system is useful. That model works very well.

One of the most important issue is who pays the additional party expert.

A member was in disagreement with Stürner's proposal to delete Principle 19.8.

## **Principle 20**

### **Decision and Reasoned Explanation**

In Principle 20.1, we should say "public" judgment because this is a part of the principle of publicity.

Principle 20.2 may be too broad. In several countries, default judgments are not reasoned or the reasons are only given orally and the parties can have a transcript. In international cases, the problem is the recognition and enforcement of judgments.

A reasonable explanation is standard in the European Convention of Human Rights and should be an absolutely fundamental requirement everywhere. The fact that the decision is given orally is not objectionable if followed by a reasoned explanation. In a case, the written decision was different from the decision given orally. However, in one European case, it was said that what was written later is not valid if it contradicted what was said orally in public before.

Do we want reasoning in every case? This might be a good decision, but this is not the rule in all countries. If there is a settlement or a consent judgment, the judge does not have to give reasons. We should distinguish cases such as settlement and concentrate on real judgments.

We can distinguish several things. Do we want to require the court to give a written judgment, or is it sufficient that the decision be oral? Do we want to require the court to supply reasons to support its judgment? Other problem is the question of publicity and the other is the problem of speed and the need for the giving of judgment to take place within a reasonable period after the conclusion of the relevant stage of the litigation. The next question is whether the requirement imposed in this principle should be applicable only to final judgment or whether we wish to extend this set of obligation to all decisions. A final question is whether we want to indicate the level of specificity that we are requiring. There is a danger in encouraging already prolix courts, especially some

of the commercial decisions in England, which occupy hundreds of pages at times. There is a real danger that the duty to give reasons will be taken too seriously. Whereas in other parts of the world, there is a danger that the duty to give reasons is not taken sufficiently seriously and the so-called reasons are cryptic.

Giving reasons is a constitutional issue in several countries.

We could say in the comment that the extent of the explanation should depend on circumstances such as whether it was a contested case as distinct from a default judgment, as well as the relative complexities of the issues involved. This is an important principle, which is not universally observed in several countries, such as the United States. Jury trial and default judgment are examples. Also in appeal, if the appeal will support the first instance decision the appeal court will not feel obliged to supply a reasoned decision. Some appellate courts are so heavily burdened that they have resort to formulary convictions. There are also decisions that cannot be cited because they want to decide cases without explaining it very well and judges do not want that a poor explanation come back to hunt the justice. This is not proper, but this is necessary. In default judgment, one can find findings on the amount of damages involved, but not liability. This is a sharp reform in some countries. We should not be too detailed, otherwise, there will be difficulty to compliance.

A further dimension is that we assume that who write the reasoning is really the judge. In some countries, the judge delegate to clerks the task of writing the decision and the judge just gives consent. Should we take notice of that? It was answered that in multilingual countries, judges do not write themselves the opinions because although they can understand three languages, but they cannot write in three languages. The judgment of the Swiss Supreme Court is written by the registrar under the guidance of the reporter. We should not enter in that difficulty.

This draft is an admirable compromise and should be maintained as it is.

## **Principle 21**

### **Settlement**

By comparing the Principles with the Rules, we will notice that there are Rules that are more elaborate, with mechanical procedure for settlement, patterned on rules in Ontario, Canada. This Principle is written only in general terms. It is a universally recognized responsibility to encourage settlement. Obviously a court can be coercive in that respect, putting great pressure on the parties to settle, but this is simply an abuse of the concept. This Principle should be kept at a high level of generality.

Maybe the word “responsibility” is too strong. What happen if the judge does not do this? Maybe we could use another word. A member added that in France, it is said as “mission” of the judge (duty). This is a problem of the ambiguity of the language. The word responsibility in English does not mean “responsabilité” in French, which is much more defined. Mission or duty is more acceptable. We should also reconcile this with Principle 8.3, which the parties should control the voluntary termination of the action by settlement.

A possibility if to say “the court should consider the possibility of achieving a settlement by the parties whenever this appears to be reasonable possible.” This suggests

to the court that it should be sensitive, but not “dirigist.” The reality is that the judges do not feel compelled to force settlement upon the parties. This will come up naturally in the case management. See, for example Rule 23.4 about case management, under which the court may suggest that the parties consider settlement. One of the consequences for not cooperating with settlement endeavors is in Rule 16 about settlement offers.

A member expressed skepticism of a present trend coming from the United States for reasons partly peculiar to the United States, which is fashionable in England and Europe about ADR. The idea is sound, it has been encouraged by busy judges, but may be a terrible waste of time for the parties, and a way to escape the duties of the judges. We should not encourage the parties’ participation in prelitigation procedures and ADR. This is to encourage the parties to be in the hands of lawyers looking for work and wasting their time in pseudo-reconciliation procedures.

Principle 21.1, sentence 2 does refer to prelitigation procedure and a member was not sure what it means. This is the only stage in these Principles that there is any reference to a prelitigation stage. As a matter of logic, what does it mean to say that the court should encourage parties to participate in prelitigation procedure? Once there is a judge to encourage, there is no way to coming back to a prelitigation stage. In England, there are preaction protocols, but in other jurisdictions this might not make sense. Another practical problem is when a party intends do commence a legal proceeding to interrupt the statute of limitations and is told by the court to postpone the commencement in order to begin prelitigation proceedings to reach settlement. Is this an order or a suggestion?

Principle 21.2 is an admirable provision. The question is if there are any sanctions if the party fails to engage in reasonable settlement endeavors. A member answered that in some countries there are cost sanctions. The violation of this principle can have sanctions. In some other countries, payment into court would mean consequences if a party does not cooperate in reasonable settlement endeavors. This Principle is a good formulation.

Should we mention the forms of possible settlement procedures, such as prelitigation procedures, ADR, etc? We could consider providing greater detail but we should postpone discussing about this until we have taken a look at the Rules, which include a number of specifications, some of which may strike as very attractive. From that, we could inform ourselves about specifications that could be added here. The range of possibilities is great here, from simple encouragement to strong coercion, such as the Ontario procedure.

The question of settlement in several jurisdictions includes some evidentiary issues, such as the privilege that attaches to bona fide settlement negotiations. This is a privilege enjoyed by both parties, and is called “without prejudice negotiations.” This is a vital means of facilitating and encouraging settlement. Is it universally recognized? If so, should we mention it? If not, should we adopt it? Should we include this in the Principles? The CCPE code recognize the importance of lawyers being free to discuss frankly the possibility of settlement and that the conventions in the European Community are not uniform. Lawyers should be informed that lack of uniformity could be an embarrassment to a lawyer who for example is operating under the English conventions but communicates under the Italian convention. It probably would be better not to try to address it because it is universal that lawyers talk about settlement, but the conventions

are sufficiently different that we would create problems rather than solve it. Perhaps the comments might say that rules and conventions concerning communication between counsel concerning settlement vary from jurisdiction to jurisdiction. A member, however, referred to Rule 27.1.2, in which we say that communications between counsel about settlement negotiations are privileged.

In some legal cultures, especially in Asian countries, there is already a strong tendency towards settlement and to avoid litigation. One has to consider the text very carefully. If this is a responsibility for the court, there may be a misunderstanding for Asian judges. In cultures that have a very strong preference for settlement, we should mention here that “the court, while respecting the parties rights to participate in litigation, etc etc.” We should not overemphasize settlement.

## **Principle 22**

### **Costs**

This principle is a compromise between the American and the Continental rule, which governs much of the rest of the world. The prevailing rule is that the winning party should be awarded reasonable expenditures and costs. There is now one limitation in Principle 22.1. Every country has some exceptions, for example, that the winner cannot have reimbursement of all costs in cases of abuse of process, etc.

Principle 22.1 should state a general principle and 22.2 be an exception. We should insert in 22.1 the word “normally” or “generally” or we could insert the word “exceptionally” in 22.2. With exception of the United States, the prevailing approach is that contained in 22.1 and we should state it as being the almost universally accepted position. Another member considered it unnecessary to state in Principle 22.2 that it is the exception, because it is implied.

In the first sentence of 22.1, the words “awarded it’s actual and reasonable expenditures.” What is the force of the word “actual” in this context? One can understand the word “reasonable.” It can be argued that it is unnecessary because cost rules can only be applied to expenses actually incurred or, at any rate, liability incurred. Therefore, the word “actual” is superfluous. What is not actual cannot be reasonable. In response, it was said that the costs incurred by the party to prepare a dispute, such as several experts, they must not always be reimbursed. In response, it is said that this is not reasonable. A member considered it important to include both actual and reasonable in the text.

In defense of the word “actual”, it was added that in some countries that adopt the Continental rule on costs, do not award the actual expenses incurred by the winning party. For example, in Canada there are several different amounts, according to each situation. Some countries award around 50% of the actual expense incurred. That is why this word “actual” is very important, if we want full compensation. In some systems, the court gives only a contribution to the costs.

In addition, the Principle goes on to say that the court has the power to determine what is “fair and appropriate.”

Is it necessary to use, in Principle 21.1, the adjective “substantial”?

In England, the cost-shifting rule applies not only to lawyer costs, but also the conditional fee situation (which is different from the contingent fee). In England the law

allows the retainer of a lawyer on a conditional basis. Only if the case is won will the lawyer receive his or her fee, called a success fee, which is a percentage of the lawyer normal fee. That differs from the American contingency fee where the speculative element is normally expressed as being a percentage of the damages actually recovered or awarded. In England, the success fee is a percentage of the lawyer's normal fee. The maximum percentage is 100% of this amount. In England, that success fee is also subject to the cost-shifting rule. Therefore, according to the literal wording of 22.1, the prevailing party should be awarded its reasonable expenses incurred in the proceeding. The success fee is included.

It may be true that Principle 22.2 would be a door for American courts to adopt an American rule approach. We should decide whether this exception is too broad. If we are not prepared to have a compromise, the chance that cost principle, which is clear contrary to the American rule, would be accepted is slim. Therefore, we need a compromise.

In American procedure, a victorious party does not recover attorney's fees, but only certain specified expenses, which vary from state to state. For example, it is a common provision that a party demanding a jury trial must make a deposit for the costs of the jury per diem (a juror is paid a small allowance every day.) This amount, which could be \$200.00 a day for a three-day trial, then becomes a cost that is recoverable. This is very small, in comparison to attorney's fees. This is the rule in state and federal courts. However, there are several exceptions for that. First, it is common practice to include a provision in contracts that the prevailing party in any dispute will be entitled to attorney's fees. This is common in promissory notes, for example. There are also many statutory provisions both at the federal and state levels that make provision for the recovery of attorney's fees to a victorious party. Almost always, this is an asymmetrical rule, provided for the benefit of the plaintiff, not a defendant. The court may in unusual circumstances award attorney's fees and other expenses against a party who has persisted in vexatious litigation. Americans think that the European rule is better. The American cost rule means that a prospective plaintiff has very little risk in commencing litigation. This is often linked to the use of contingent fees, because a plaintiff can engage a lawyer who will prosecute a case without any money and the lawyer would be compensated out of recovery. In addition, the plaintiff has no exposure to liability for attorney's fees. This loads up the advantage very strongly in favor of plaintiffs. There is justification for this rule in consumer legislation, in employment litigation. However, in most commercial contracts, particularly with an arbitration provision, there will be a stipulation that in the event of litigation or arbitration the victorious party will be entitled to attorney's fees.

This provision may be controversial in the United States. Not because there would be much opposition for such a provision in commercial cases, but fear that the concept might be borrowed and transmitted to other types of litigation, such as personal injury litigation. There is support for this proposition in the United States, even though it is exceptional in American law.

French law makes a distinction between court costs and attorney's fees. According to art. 700 of the French Code of Civil Procedure, the prevailing party has not to pay court costs, but has to pay attorney's fees under a sort of free evaluation of the court. The court has discretion to determine a fair amount and the parties do not have to prove how much was paid to the lawyer. The award normally would be a substantial portion of the attorney's fee. The French law authorizes the judge to withhold cost to the

winning party for reasons of equity or for the financial situation of the losing party. A suggestion was made that we should explain what “clear justification” mean in the context of Principle 21.2.

What a “clear justification” can be? Is it a question of equity, of justice? Or is it a question of *lex fori*, meaning that Americans would have a different rule? A clear justification could be a change in the law, of case law, for example. This is a good illustration of a relationship between the Principles and the Rules. The Rules will say that there is a clear justification for doing so.

We have to keep in mind that, in some aspects, Principle 22.2 is more narrow than the cost provision in Rule 33.5. The Principle is softer and could be well accepted by Europeans and the rest of the world. Rule 33.5 is broader and its content should be discussed. The discretion available to the court in Principle 22.2 to deny complete operation of the cost-shifting rule is very important.

Principle 22.2 intensifies the qualifications upon the cost rule in Principle 22.1. There are three opportunities to reduce the recovery of the successful party: reasonable, substantial proportion, and “clear justification”. Could we write this exception to the general principle in a single sentence? We can give the court authority to, when it feels just and equitable, considering all circumstances, but especially the conduct of the successful party, to reduce or deny the award of costs in favor of the prevailing party. Another member disagreed because the exception in the second part of Principle 22.1 is different from the exception in Principle 22.2. Principle 22.2 is a more fundamental exception. If we made it in one sentence, we would change the content of the Principle.

The position is more complicated in England, because very exceptionally, a successful party would not only be denied recovery of its costs from the other side, but will be required to pay the other side’s costs. This is an extremely draconian proposition and only applies in extraordinary circumstances, but it is not something contemplated by this Principle. Do we want to deny this possibility? This is a real possibility in common law systems when the case was conducted in an entirely improper fashion by the winner.

In big cases costs are enormous and there are cases in which costs are much greater than the amount in issue. In the real world of litigation, it is one of the most important facets of litigation. The power that the court has to control the operation of the cost-shifting rule is actually a sanction. The reality is that this is a sanction, a powerful weapon that the court has to indicate disapproval of the way that the victorious party conducted its case. We need to bear in mind the link between this discretion to deny the award of costs and the principle concerning sanctions. This link might be obvious to some courts. Therefore, the court would do well to attend the wording of the Principle regarding sanctions. We need not necessarily be express about this link in the text, but this relationship could be developed in the comments. In Principle 10.2 there is language describing questions of reasonableness and proportionality, and reference to the conduct of a party. This will be useful when the court has to exercise this most important and difficult discretion.

A member asked what the word “withhold” mean. Is this word appropriate, or the word “limit” is more appropriate?

If we assume that the case is one hundred percent, that means that the winning party suffered certain damage from the attitude of the other party, which is against general principles of tort law. Any damage should be fully compensated. That is the basis

of this principle. The distinction between court costs and attorney's fees is important. Court costs are clear and indisputable while in attorney's fees there is a wide margin and it may be unfair to make the losing party pay attorney's fees in full. These are not the same kind of damages.

This is an important and difficult problem.

### **Principle 23**

#### **Finality**

All legal systems recognize that a judgment's very purpose is to be a final resolution of a dispute. However, in some legal systems there are rights of reconsideration that are pretty substantial. It is not highly exceptional to seek reconsideration, but fairly common. All systems have some procedure for re-examination, such as, for example, fraud in service of process, or the use of false documents. All systems have also limitations, particularly, that the victim must act promptly after the discovery of the relevant facts. It may not be necessary to recognize those qualifications, but it is appropriate to state that opportunity for examination is not a right and should be very exceptional.

Judgment should be final. However, the provision that judgments should be immediately enforceable after being rendered is not satisfying from a civil law perspective. If there is an opportunity for appeal, the judgment is, in principle, not enforceable, but the court may order the provisional enforcement of the judgment. Especially in international disputes, we should say something about a security for the obligor. We should say that in case of appeal an order for stay of execution or security deposit might protect the obligor from unjustified loss. In international cases, it is too much to say that the decision is immediately enforceable. In most countries there are provisions to protect the obligor if appellate review is possible.

This principle is fundamental. There are some countries where there are no rules of finality of judgments, and in those countries there are several opportunities for reexamine the case.

Another member asked how this Principle relates with the new principle about res judicata. To say that a judgment is final means that the same parties cannot reopen that question in subsequent litigation. If they want to have a further opportunity to discuss the merits of the case, their only recourse is appeal. There is a second connotation, which is that once the judgment is final the court of its own initiative should not start on amending, or reopening the questions. Another member answered that finality and res judicata are not the same thing. The judgment can be final without establishing res judicata. Finality means that the court is not allowed to change the judgment or that there is no opportunity for changing the judgment, with the exception of appeal. The proper translation of "final" may be "jugement définitif."

Instead of entering into possible difficulties with vocabulary like "finality" or similar terms, we should be explicit in the language and express in plain language exactly what has been said. Once judgment is rendered it can no longer be changed by the court. The problem is that when we say "final" it means that there are several exceptions. If we use a plain language, saying that it is fully binding, this could be misunderstood. There

are special reasons for re-hearing or revision. If we describe finality, we should also describe possible exceptions.

We could say “in general” because this would mean that there are exceptions and qualifications that are not addressed in the text. The idea here is that the normal consequence should be the end of inquiry, but we must recognize that there have to be exceptions. This is one of the most sensitive aspects of adjudication because it is a point at which the process of reasoned inquiry comes to a halt and the process of authoritative rejection comes into play. This is a profound shift from an outlook that is receptive and impartial to one that rejects the possibility that the judgment may be erroneous. That is a very heavy attitude for a court to take, but it must. That is why any rule, verb, or set of words will have difficulty encompassing all qualifications. We should consider using the expression “final, not subject to modification or reconsideration.”

What about the French “jugement mixte”? In this decision, the judge determines part of the case and it is subjected to the right of appeal. Is this a final judgment?

There are three different stages in England, in relation to finality. English law distinguishes between the giving of judgment, which can be oral, the giving of written reasons, which can take place weeks or months later, and then the perfecting of the order. Those are three different stages in the final resolution of the case. It is overelaborate. The crunch comes only when the court has drawn up its order, the technical language being when it is perfected as an order. At that moment, it is too late for the court to try and take it back and rectify in any form. This means that in England, even after having expressed its decision orally, the court is still in a position to revise its reasons and the scope of what was decided. This is a discretionary power of the court. The court loses control only when it draws up its final order. After that, the only recourse is appeal.

A member asked whether in England the court might, until it has actually given the order, change its decision as to what was said in open court? The answer is yes, as an extreme and exceptional possibility.

After a judgment is published, this is the last time to change the judgment. Should we mention that a published order cannot be changed?

We could say that the forum law should have a rule defining finality with reasonable clarity.

We could also adopt the same approach as in Principle 24, where again, obviously, we had to rely on the law of the forum. Because of the importance of this topic, we should have a principle, but refer the precise moment to the law of the forum. We should draw the attention to this problem, but acknowledge that it cannot be universally solved by a principle because of the diversity of domestic law. Should we say “the judgment should be final, subject to the right of appeal, as defined in the law of the forum.” Another member added that only the exact time of finality could be referred to the law of the forum. The reference to the law of the forum should not be too broad, but limited to the exact time of finality.

The American Federal Rules Committee was recently invited to revise the rule on finality.

## **Principle 24**

### **Appeal**

A member strongly supported Principle 24.1. The language changed was excellent. If that was the only statement in this principle, it would be entirely unproblematic.

Another member did not understand what is meant by “similar litigation under the law of the forum”? This language is ambiguous.

A member had serious doubt about Principle 24.2, which seems to go against the rule in several countries. In many countries, there is a full right to bring new arguments in appeal. This text seems to prohibit that. The text should be revised. There is no great disruption in introducing new legal arguments in appeal. A much more serious problem is introducing new evidence and an even greater problem is introducing a new claim.

In countries where there is a right of full appeal of fact and law, in practice the appellate court will only repeat the taking of evidence if there is some mistake or it was not well done. Appellate courts do not have the time to take evidence. There is a tendency of some countries to limit the scope of appellate review, such as Austria. Another member considered that there are different kinds of philosophy relating to appeal. Perhaps a better compromise could be to say only “claims and counterclaims”. We should not preclude new “legal arguments.” It would be more difficult to find a compromise about new facts and new evidence.

In Argentina, the rule is similar to Principle 24.2. However, Stürner’s proposal is according to the new trend. New evidence, when it is necessary in the interest of justice.

The substance of Principle 24.2 is acceptable to most or all common-law lawyers. We should consider deleting the first three words (“the right to”) because in some countries this is not accurate and there is no “right” of appellate review. That is the case in England, for example, where one must have permission either from the court of first instance or the court of appeal in order to pursue an appeal. There is no right to appeal; appeals are controlled by the court.

The words “claims, defenses, counterclaims, and evidence” are slightly cumbersome. We could use a generic word, such as “issues”. Another member disagreed with the word “issues”.

The word “adduced” in the first instance is not the best way to present the matter. Adduced, to most common lawyers strongly suggest matters of evidence (we say “adducing evidence”).

The ambiguity here is: do we want to limit it to matters discussed at the relevant hearing? Or do we wish to include matters contained in the pleadings but which were not addresses in oral form in a debate at the hearing. The member suggested keeping it broad. Appellate review should be limited to issues pleaded or considered at first instance.

The French code of civil procedure allows the parties to bring new arguments, facts, evidence, but not new claims or defenses. It must be possible, for reasons of efficiency of justice, to permit the assertion of new facts or the presentation of new evidence. The contradiction will be with the principle of justice within a reasonable time.

In disagreement, it was said that countries that permit a full review of the decision of first instance are now a small minority. The development is to limit the scope of the second instance.

A member stated that allowing the assertion of new facts or the presentation of new evidence should not be left to the discretion of the court. We should find a clear provision with some criteria. This will be in the direction of a better compromise.

An outside reader of Principle 24.2 will be confused because 24.1 states that an appeal is to be substantially in the same terms as provided under the law of the forum. In Principle 24.2 we introduce an autonomous rule. A part from the merits, from a methodological point of view, should we adopt an autonomous rule about this for international litigation? There are a number of points in favor of this. Then we might have to reconsider Principle 24.1. Another member saw no contradiction between 24.1 and 24.2. The first one deals mostly with admissibility of appeals and 24.2 describes the scope. We should make it clearer.

We have to take into account that the practice in some countries is that appeal is considered the only way to obtain justice because the judges of first instance make so many mistakes that the practitioners simply have lost their trust in first instance justice. We might say that the right to appellate review should in principle be limited in some way.

A member reminded the group that we are not trying to change the system of appeals in all domestic cases. Rather, this project is limited to transnational cases, presumably more complicated issues than the average case submitted to a first instance judge. Perhaps, the view of appeal should be different from the view of appeal in domestic affairs. The average judge is simply not able enough to deal with complex international issues. Even Swiss judges, which are more exposed to this sort of litigation than its counterpart in a large country, are not able enough. There is a consensus that only in appeal one can get proper justice. We have to take all this complexity and reality into consideration. Another member considered that this proposition would mean a broader right to amend contentions of fact. We cannot allow this.

Another member pointed to the importance of having a specialized court in which these Rules will be applied. See Rule 3. Litigants will have specialized counsel. It will be difficult for specialized attorneys to work with judges that are not so specialized in the Principles and Rules of Transnational Civil Procedure. The existence of a specialized tribunal for international litigation may lead to the opposite problem and the first instance might be more sophisticated and efficient than the second instance. A suggestion is that the parties could agree that the transnational court of first instance should not be subject to appeal.

This is the Western-style structure of appeal. Some Asian countries have a different concept of appeal, not necessarily at the motion of the parties.

One member considered that Principle 24.2 should be deleted because it is a very complicated issue. We should limit ourselves to Principle 24.1. Other members disagreed.

The parties should not be able to broaden the issues in the second instance or change the scope of the litigation. It is particularly not good to begin a new dispute in international cases in the second instance. That is a form of abuse of process. There are countries in which the parties can bring new claims and counterclaims in the second instance, such as Germany. This rule is a good compromise. We could add that the court might permit amendment in claims and counterclaims in the interest of justice, but

normally the parties should limit the second instance to what was disputed in the first instance.

One of the reasons why American law is pretty strict in limiting what can be discussed in appeal is the extreme liberality of what can be addressed in the trial court, from notice pleading and discovery. What else does a party need?

What is appeal and what are its purposes? This is an important philosophical question.

## ADDITIONAL PRINCIPLES

At an informal conversation, some members have suggested the addition of two other Principles: reasonable means of enforcement and preclusion. The Reporters welcomed suggestions about the content of these new proposed Principles. The following morning, Professor Hazard came up with a draft for three additional principles: one about *lis pendens* and preclusion, one about effective enforcement, and one about recognition. They were discussed in that afternoon after the end of the discussion about the Principles and before the beginning of the discussion about the Rules. This proposal is attached as an appendix to this Report.

### **Lis Pendens and Res Judicata**

This principle is related to the definition of the scope of the proceeding. The definition of the scope of the proceeding has implications for conduct of the case in the court of first instance, the scope of appellate review, and in essence, this is the next stage, where the question of scope as it affects present litigation (*lis pendens*) and subsequent litigation between the parties (*res judicata*).

This proposal is a fair compromise between the common law and the Continental concepts.

In the first sentence, the text that says “should be determined by the contentions of the pleadings, including amendments” would be difficult to understand for an European lawyer, because contentions could also be “contentions of fact.” A common law lawyer could argue that the text imposes claim preclusion for claims not brought into the court, if a party forgot a special claim based of facts, which were asserted in the proceedings. This would preclude the claim. We should say “by the claims of formal relief in the parties pleadings.” This language would correspond to our Principle 8.

We should also include defenses. There are some situations in which the defense might be significant not only against the present claim but also against some other claim, such as a defense of illegality to avoid a contract obligation reflected in one of a series of promissory notes. The defense would be effective not only against one claim but also in others. As an answer, it was said that if one includes defenses, this is a question of issue preclusion, which we do not want to have.

In the first sentence we mention the rules of “lis alibi pendens.” It is rare in this text that we use latin phrases. The concept of lis alibi pendens is sophisticated and works in different ways in different systems. Is it universally recognized? We should have a clarification in the comments. For a common lawyer, this proposed rule on lis alibi pendens would be a change. In international litigation, lis alibi pendens is a very important issue.

In the second sentence “except to prevent substantial injustice, for example when a party has justified relied on such determination in its contract.” This sentence is a very good compromise between the Continental system, where there is always the possibility of a declaratory judgment to have res judicata for the legal basis of a claim, and the common law concept. This is a very safe form of issue estoppel. The problem in mind is exactly issue estoppel, in which the party assumes that the termination is effective and then guides its conduct accordingly. This is a kind of estoppel, but not strictly issue preclusion.

A member failed to see the structure of the principle being discussed and relationship between this debate and Principle 8.

The second sentence should precede the first sentence. The second sentence is making a positive proposition and the first sentence is trying to explain how the second sentence applies. This is a logical point. The first should be “res judicata means x” and the second should be determining the scope of res judicata. A member considered it a mistake. The two sentences speak of two different things. The first one deals with claim preclusion and the second deals with issue preclusion.

The second sentence is very intriguing. This is a question of substance. A member did not like it because considered it the wrong proposition. The approach is from the wrong direction. Suppose that the litigation has cost x amount of money and has taken three years. At the end of this elaborate procedure there is a final judgment. Here the question is to what extent this decision is binding on the parties, and the Principle says that it is not immediately binding on the parties. It only has preclusive effect and ceases to the party the opportunity for reopening the question where this is necessary to prevent substantial injustice. What does substantial injustice mean? When the party has relied on such determination in its conduct. We should positively accord real res judicata effect between the parties. There might be opportunities in which one might want to have exceptions to that rule. We should say something stronger and more powerful, such as the decision will be binding between the parties as a matter of law and as a matter of the facts actually decided, and that one might then specify circumstances in which there would be qualifications or exceptions to that general rule. Why it is that the second sentence states that there is no preclusive effect unless something special happens. In addition, the reference to substantial injustice is too vague.

Another member pointed out that the previous member had not understood the proposal at all. It is obvious that the proposal is not to have preclusive effect only to prevent substantial injustice. Who would propose such a rule? In order to solve this misunderstanding, it was suggested that we should label these two sentences. The first one deals with claim preclusion and the second one deals with issue preclusion. We should be more explicit. It is a universal principle of claim preclusion that once claims are determined there is no opportunity to relitigate the claims. The issue being addressed in this Principle is how do we decide what the claims were. We have focused on the

parties pleadings, in contradistinction to “the transaction” which is the American common law scope of claim preclusion. What if the second litigation involves a different claim? We should add in the text of the second sentence “a subsequent proceeding addressing a different claim” to make it clear that what we are talking about is the consequence of the first determination in a second case involving a different claim.

There are two problems here. The first is how to distinguish between a different claim and the same claim. We cannot say much that would be useful on this matter. The other problem is whether we want to adopt the civil law approach as to issue preclusion, which is that an adjudication is determinative so far as it affects the claims of the case, but it is not carried over into some other litigation involving a different claim.

The member who had said that the proposition was wrong withdrew his opposition after the explanation of the content of the text. It was decided that the text would be rewritten to avoid misunderstandings and wrong interpretations.

A member asked whether we should exclude “issues of law” in the text about issue preclusion. The key problem is the determination of “issues of fact.” Is the intention that determination of law should be governed only by claim preclusion? The question of legal determination is adequately covered by the part of the principle dealing with claim preclusion. This might create complications when operating the system of precedent. Read literally, the second sentence could be interpreted to say that “a decision of the high court in a common law country has no binding effect in a subsequent case except if there is substantial injustice”. As an answer, it was said that there is a difficulty in differentiating issues of law and issues of fact. If we are making a negative proposition, there is no cost involved in making that statement. Obviously, if the law hasn’t changed, and the tribunal is still sane, it will presumably reach the same decision of law in the second case as it did in the first case. The interpretation that there is no precedential effect is completely wrong, because this Principle deals with preclusion, not with precedent. Those are two different issues that should not be confused.

What do we mean by “determination”? Do we want to include default judgment? This is more troublesome. In several legal systems, default judgment has some *res judicata* effect, but apparently it is a less strong effect than a final judgment on the merits. A member said that issue preclusion in the United States is never determined in default judgment. The formula for issue preclusion is “actually litigated.”

Another member questioned the word “determination.” Does this refer to something contained in the dispositive part of the decision or is it one of the reasoning (*ratio decidendi*)? This is an important problem.

The scope of issue preclusion is not very clear under the common law tradition. It is not very clear in the civil law tradition either. The civil law tradition, under German law, there is no issue preclusion. The only exception is when the party applies for formal relief to the court to decide on issues of law, and the court gives a declaratory judgment on the legal basis, for example. This is an example of issue preclusion. Under French law, there is some variation of this strict rule. In French law there is the “*jugement implicite*” for example, “*motif decisoire*”. Those are perhaps examples of issue preclusion. If it is clear for both parties and the court that the issue is in dispute and should be decided, for example in the French “*jugement mixte*”, when the court says that it will have first evidence but the basis is that the contract is not void. That could be a case of issue preclusion under French law.

Hazard's proposal is a compromise between these concepts and the common law concept, when it restrict preclusive effect to cases of substantial injustice, when it was clear for the parties and the court that these issues should be decided. This compromise is acceptable for common law and civil law traditions, but it is a troublesome compromise.

It is entirely possible that we conclude in the future that we should not address issue preclusion at all in this project. Issue preclusion may be just too complicated to be addressed in a uniform principle. There are unavoidable ambiguities in the concepts of "claim", "issue" and "preclusion". We need to have a principle that is clear and understandable.

Here we could adopt a modified civil law approach to the problem, the incidental declaratory judgment. We could say "a determination of an issue of fact in such a proceeding should not have a preclusive effect in a subsequent proceeding unless one of the parties requests such a determination at the moment the issue is raised in the proceeding." The party may request this in an informal way. It should not be necessary to comply with any formality. The party will never be at a surprise because the parties and the court will be always in alert. This means that the party will say, "since this issue is important, I want a preclusive determination of this matter." This proposal was agreed by another member, but there are other examples of issue preclusion in some systems, for example, bad faith in Japanese law. There is no real judgment, but an implied consent of all parties and the court that a certain question was fully decided and should not be disputed in a second lawsuit. Either we say nothing or we must have a compromise. Having a compromise is much better. Questions of issue preclusion are very important in international litigation. When a foreign judgment is recognized in the United States, will this judgment have the effect recognized in the country where the decision was rendered or the effect that United States law confers to domestic judgment? For the parties, it is important to know what is and what is not decided in a case. This is an important aspect in the consideration of appeal.

In international disputes, we need clear and simple solutions for *lis alibi pendens* and *res judicata*. The simple and clear solution is a formal rule. We can read the formal relief in the pleadings and it is clear the amount requested. This would be the *lis alibi pendens* and describe the scope of the proceedings for the question of claim preclusion. If we were to make no principle, or refer to local law, that would be confusing. Several conventions avoid giving solutions to problems. We should not avoid these important problems.

A member added that we might have principles about matters that are not addressed in the Rules. This might be one of them precisely because some guidance to the international community on this complicated set of issues might be very helpful, even if it is only in general terms.

Should we not make clear that the phrase "should not have preclusive effect" should have preclusive effect only between the parties to the earlier litigation. In the United States there are forms of issue preclusion that are not recognized outside the United States.

### **Effective Enforcement**

We should be very general about enforcement and should not have any details. The mechanics in every system is different.

Is there a repetition in saying “effective and efficient”? A member answered that there is no repetition. Effective means to have effect, to be effective. Efficient is related to economy, a relationship between the result achieved and the effort and cost in achieving it. There can be a very effective result but too expensive.

The process of enforcement should be governed by the principle of proportionality. The judgment creditor cannot harass the debtor and employ a disproportionate and draconian form of enforcement. There is also an element of protection to the judgment debtor in assuring that the procedure is not only cost-effective, but that it is also a fair and reasonable response to the judgment.

In answer, it was said that we should not give too much room for those arguments of proportionality because the debtor has always the possibility of enforce the judgment in the most agreeable way, and if the debtor does not choose this way, it is his own burden that the creditor will choose a more burdensome way to get his or her money. This discussion exists also in Germany, but may not be very helpful because the debtor has always the possibility of free choice. It was answered that not always this possibility exists. It was added that in the French reform a decade ago, the principle of proportionality was adopted. The prevailing party has the right to choose the best means to enforce the judgment but, with regard to the interest of the other party, this freedom is not unlimited. If there are measures that could be more acceptable to the losing party, this option must be chosen. There is a possibility for a sort of appeal to the enforcement judge.

Is there a repetition in saying “prompt and speedy”? It is a notorious fact that people speedily commence the process of enforcement, but the process can be very prolonged. We want to ensure that people have swift access to it and the process is conducted as speedily and efficiently as possible. Therefore, prompt might not be the correct word. We should say speedy as well.

What about injunctions? Are we in agreement that the process of enforcing an injunction be left to local rules? Or are we going to say that this is a court order supported by court sanctions of fines? There is a real issue to be addressed.

It is an issue under the Brussels Convention whether to have a fine in a forum enforced as a money judgment in another country.

This text covers both injunctions and money damages. An injunction can be enforced with the devices of the enforcing country. An injunction can create an order for fine enforced in another state.

Why is this proposal explicit about judgments for money and for costs? Is it necessary? This is just to recognize the difference on the cost rules between the American rule and the Continental rule. If we said simply “judgments for money,” the question that would occur in the mind of some American observers is whether this is applicable also to the judgment for costs, because the costs can be very substantial. It is probably redundant, but is there for clarification.

There are only two types of judgments that are referred to in the proposal. This is very elegant and concise. However, there is a risk. There is a difference between money judgments and everything else, and “everything else” has to be embraced by “injunction”.

There is also the distinction between an injunction which has a negative effect (“you shall not do something”) and a court order with a positive content (“you shall do something”). In some jurisdictions that is an important distinction, also a terminological distinction because of the distinction between injunctions and orders of specific performance. Lots of history and terminological difficulties here. We should acknowledge that there are terminological problems in describing “everything else” as being just an injunction.

In response, it was said that the text covers all judgments. It just say “including judgments for money, for an injunction, and for costs.” We could discuss if we need a more detailed enumeration, but injunctions and costs are decisions with the most problems. In several countries, injunctions cannot be enforced because there is no system of fines. There are also problems of enforcement of judgment for costs enacted in France.

If the title of this principle were “effectiveness,” which is better than “enforcement,” would it not be a suitable title under which to make reference to provisional relief? The process of insuring that the civil procedure operates effectively is not confined to enforcement of the final judgment. This suggestion was accepted and provisional measures will be included in the enumeration.

It was noted that there is a great asymmetry between this Principle and the Principle about recognition. In the light of the following question, one might consider include additional language in this provision. First of all, there is no reference in this Principle stating that we are talking about judgments rendered according to these Principles. Second, there is no equivalence between judgments rendered under these Principles and other judgments of the forum. Should it be understood that for judgments rendered under these Principles the country must provide special procedures for enforcement? One may infer that. A third point is why the rule under recognition there is an express reference to the recognition in the forum and elsewhere, meaning abroad? No such hint about the enforcement abroad is given in this Principle.

In answer, it was said that we could add in this Principle that “the judgment is conducted according to these Principles.” In general, all legal systems take the view that enforcement involves enforcement of coercion beyond what the judiciary is responsible for, even in common law contempt of court, any physical implementation is done not by the judge, but by the police. Therefore, one should distinguish between enforcement and recognition. It may be that we could usefully delete the reference to the forum in the Principle about Recognition. However, the procedure under these Principles will in some countries be significantly different from the procedure in the ordinary courts. This could raise the question of appropriateness of recognition.

Another member added that the Principle about Recognition should address the question both of recognition and mutual reciprocal enforcement abroad, outside of the forum.

### **Recognition**

This Principle was also discussed in connection with the previous Principle.

Most legal systems have rules of recognition. Would it be appropriate to include this matter in the scope of the project?

When forum B has an obligation to recognize a judgment rendered in forum A, that legal obligation is carried out by forum B doing some official judicial act that says “the judgment of forum A is hereby recognized.” That transforms what had been a judgment of A into a judgment of B, or its legal equivalent. In the United States, traditionally, one had to bring a suit and get a judgment on the judgment, but now there is a bureaucratic mechanism to transform a judgment of A into a judgment of B. However, this step is necessary. The sheriff or marshal in B will not respond to display of the judgment of country A; he will respond only if that judgment is properly registered and becomes a legal obligation through the intervention of the judiciary of country B. It is appropriate to differentiate between recognition and enforcement.

The relationship between the previous principle and the present principle is that this one addresses solely the question of recognition under attention is that the relevant foreign forum, having recognized the judgment, it is then obliged to make available its internal system of enforcement and this should happen on the back of the previous provision. We should spell that out.

In response, it was said that there are some serious problems about injunctions. It is one thing to have enforcement of a money judgment and quite something else to talk about enforcement of an injunction. It is an extremely complex subject and we should not try to delve into it. This level of generality is enough. We will find insuperable difficulties in trying to get much below the surface. For example, there are problems with injunctions about employment relations, intellectual property, environment injunctions.

There are difficulties in requiring a foreign jurisdiction to give effect to an injunction, positive or negative. Within the West European countries, this difficulty is overcome by the provisions of the Brussels and Lugano conventions. Our formulation should not derogate from that. To say that there are difficulties in the enforcement of a foreign injunction does not provide an answer to the real problem of enforcement of a money judgment. This silence on the question of the enforcement of a money judgment abroad is disturbing. Either we do not say anything, or we say that there should be a process of reciprocal recognition and enforcement of all judgments. We cannot just say that the process of reciprocal notice is confined to recognition.

The New York convention concerning arbitral awards talks about recognition, not about how a country enforces a judgment. It says that the country should recognize it. The procedures that follow recognition are highly idiosyncratic to each legal system. There are important differences. One important difference is the existence of a Federal System. Enforcement is deeply affected by long historic origins, we must recognize the existence of a problem, but should not try to solve it.

We should be more ambitious. The Brussels and Lugano Conventions are a remarkable set of conventions because it captures the reality of international litigation by providing a mechanism of mutual recognition or enforcement of final judgments and other forms of order. There is no point going all the way to judgment if the relevant assets have already sent away to an impenetrable part of the globe. We should think about the possibility of being bold here and offer a lead to the international community. We are not going to change regimes, but we can make enlightened messages to the world. There are practical differences, but we could declare in a principle that there should be mutual recognition and enforcement of provisional measures this would be most important.

We could take a look at the debate on the Hague Conference on Jurisdiction and Judgments and take from there some good ideas. The conflicts in The Hague are not related to the recognition proceedings, but were in jurisdiction. If the Hague negotiations fail, we could still have a fundamental principle on recognition, not only in enforcement in the technical sense, but on recognition.

What kind of effectiveness are we giving if we do not say anything about enforcement in another country. Otherwise, this is just a declaration.

Enforcement is a difficult problem. Several defendants, more powerful defendants, can conceal the property.

We can say something about the proceeding for recognition, to formulate two or three principles for the recognition procedure, which is very burdensome in several countries. Our Principles could make proposals to simplify recognition procedures. We could consider whether our Principles should be the measure of possible public policy discussions in the recognition proceeding. An infringement of the national public policy referring to procedural infringement should not be possible when the provisions of these Principles were satisfied; when the forum procedure was no infringement to these Principles. That could be a possibility to say something more on recognition. The recognition procedure is in some aspects the end of the procedure and perhaps better recognition in international disputes is the real purpose of our Principles. From that point of view, it would be wrong to be succinct about this. We could have a more detailed provision.

The New York convention deals about recognition but goes a little further. It tries to limit the possibility of refusing recognition in art. 5, specifying the permissible grounds for refusing recognition. Do we contemplate the possibility of having a restrictive list of admitted grounds, one of course would be public policy in a certain sense. One might say that an error about applicable law is not a ground to refusing recognition. There should be no *exequatur* proceedings.

The use of the term enforcement is not necessarily the same, and has been used in different meanings during this debate. Some understand the word enforcement as the actual procedure to enforce the judgment once it has been declared enforceable. This is outside the scope of the principle. Others refer to enforcement as the procedure to be followed to have a foreign judgment declared enforceable. This is why there is some disagreement.

An interesting approach is followed by the model law on international commercial arbitration, with striking parallelism with this exercise (rules and principles intended to be adopted by states with respect to international arbitration on their territory). There, the enforcement of awards rendered is dealt under the title "enforcement" pretty much along the lines of the New York Convention. "Enforcement meaning the conditions in order to have the award capable of being then enforced according and with the effect of local law." An striking characteristic of this law is that the reasons which may prevent the enforceability of an award rendered under this law are exactly the same as those which may prevent its recognition in the forum state, so as to have a perfect parallelism and avoid unpleasant surprises meaning that one is safe in the forum state and when one goes abroad one does not find additional problems.

## **TRANSNATIONAL RULES**

After discussing all the Principles and the new proposed Principles at length, the Group realized that there would not be enough time to go over each individual Rule carefully. There were far too many Rules to analyze them all in the remained one and a half days of meeting. Moreover, the discussion of the Principles had largely anticipated the subject of discussion.

The Working Group decided that the discussion of the Rules should begin with Part G, Subsequent Proceedings, because we did not have the time to discuss these Rules last year. It might prove wise to begin discussion with these Rules. There is undone work from last year. If we begin from the beginning again, we might never get to the end. The comments could relate to either the black letter or to the comments.

The group decided that after discussing Part G, the group would discuss several rules at random. The proposed technique was that each member would select a few Rules that he or she considers difficult, incomprehensible, important, or otherwise useful to be addressed by the group.

It was agreed that the group should not limit the discussion to the difficult rules, but should also discuss other complex issues such as the relationship between Principles and Rules and the important aspect of how to proceed from now on.

### **Rule 34**

#### **Appellate Review**

The title of Section G could be “Appellate Proceedings,” instead of “Subsequent Proceedings.” Section G addresses things other than appeal, but this name is better. We could also call it “Appellate and Subsequent Proceedings.”

If we agree with Principle 24, should we put it in both the Principles and the Rules? If they both have the same meaning, we may not have to repeat the same thing twice. This is an appropriate opportunity to discuss about a broader issue, which is the relationship between the Principles and the Rules. The Rules are described as “an implementation of the Principles.” One of the consequences that would follow would be responsive to the fact that the provision about Appeal should be in here because these Rules are sufficient within themselves.

Rule 34.2 makes a reference to Rule 17 about provisional measures. Provisional measures are so important in transnational litigation that we should give priority to discussion of Rule 17.

Rule 34.2 should be moved to Rule 17. The reason is that a freezing injunction, which is granted without notice (*ex parte*) can always be reviewed and should be reviewed speedily. The word here is “reviewed,” and this is different from “appeal.” There can be an appeal from the review, which is a different matter, but the process of review of the injunction once it is granted is not an appeal in the strict sense. It is conducted by the court of first instance. Its proper home is Rule 17.

In Rule 17, we have to differentiate the reconsideration by the court of first instance when the order has been issued *ex parte*. This is taken care by Rule 17.1.1 and 17.1.2. However, Rule 34.2.2 provides that the injunction is subject to immediate appellate review, even though it is bilateral (as distinct from *ex parte*).

The second sentence of Rule 34.3 says that “when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.” One would expect, instead of the word “may”, it should be “shall”. There should be a review in those situations. In response, it was said that it changes somewhat the implication of the term “general importance.” Its meaning will have to be “very important,” sufficiently important to justify immediate appeal.

This is the common law solution. This is very broad for a civil law lawyer. In civil law countries, normally there is no appeal against normal orders of a court, only in very special cases. The possibility for appeal is very limited in civil law countries. It is a very broad scope of appeals, which could be very burdensome. Another civil law member considered this rule to be healthy. We could say that the appellate court should have to give leave or permission for appeal. We should not give this competence to the lower court too.

There are a wide variety of possibilities. The trial judge may grant the permission or he can grant leave to seek permission, which would give the appellate court the final say, or we can say that the discretion is only the appellate court. The appellate court might have authority to refuse to review something when the litigant has been a nuisance.

For many years, the American Federal Courts attempted to maintain the policy of a final judgment approach. It proved unsatisfactory. For example, the Federal Rules have been just changed to allow immediate review of class suit certification because of its importance. Most states have long since recognized liberal interlocutory appeal.

### **Rule 35** **Further Appellate Review**

This Rule says “appeal or other form of review” in order to take account of different terminology in different legal systems. However, the main idea is clear.

This Rule extends and is not a consequence of Principle 24. It is appropriate not to have this in the Principles. In France, for example, there is no fundamental right to appeal as a second instance, but there is constitutional right to a further appellate review in the court of cassation.

We do not wish to rewrite national systems of appeal. They rest upon national characteristics and perhaps deeply felt constitutional views. However, it is worth noting that in many jurisdictions the principle is emerging that one’s opportunity of appeal is confined to one level of appeal. There are competing principles in certain parts of the world.

“In accordance with the law of the forum” is a short hand reference to all local rules. However, is it necessary? Does it add anything? Why only in this Rule? It was decided that it was not necessary and that this could be said in the comments.

This Rule might be included in Rule 34, which is the general discussion on appeals.

There are wide differences in national rules concerning the period within which to file the notice of appeal. It is understandable that we do not specify a period. However, this is a situation in which we should not be too timid. The transnational procedure should be speedy and efficient. Correspondingly, there should be a short period for appeal. For example, we could say four or six weeks from judgment.

We have to take account of the fact that in international transaction there are problems of communication. We could mention in the comment that the time should be such as to impose an obligation of prompt action, but should not be so short as to create unfair risk of prejudice. Another member disagreed with 30 days for appeal in transnational litigation. The local lawyer might need to consult the other lawyer, there may be language problems, etc. A reasonable time limit would be 60 days.

We should have a special rule about time limits, and provide that the judge might extend time limits in special cases. Rule 13.1 has a special rule for statement of claims, but we might want to have a general rule about this. This might be an example of “restitution of time limits” or “excusable neglect.”

### **Rule 36**

#### **Expiration of Time to Appeal**

What is the solution for the problem of a party who did not get notice of the original proceeding (service of process)? Should the remedy be appeal or a procedure for nullification of judgment? There may need to be a hearing to prove that there was no notice. After all, the judge had to verify that the notice was given before rendering a default judgment. If evidence is required, the procedure should be the nullification of the first judgment.

What if the party does not receive notice of the judgment? In that case, the time for appeal has not run. There should be another chance for appellate review.

A new principle or rule could be stated as follows: “All time limits commence from the date of notice.” This provision should be stated in an independent rule or principle. However, should it refer to actual notice, or only formal, fictitious notice? This is a serious problem.

### **Rule 37**

#### **Nullification of Judgment**

Rule 37.1.1 mentions jurisdiction over the party. However, the lack of jurisdiction may be related to other deficiencies, such as lack of “material jurisdiction,” lack of notice, etc.

We should add lack of service of process as a ground for nullification of the judgment. The judgment is not void because of lack of notice. The party is forced to bring an action of nullification. This is necessary.

Rule 31.1.4 is acceptable, but is very broad for civil law countries. Several grounds are far too broad. In the United States, the lack of jurisdiction is ground for

review of a case, but not in other legal cultures. What does “jurisdiction” mean here? Does it mean personal jurisdiction? Subject matter jurisdiction? We should narrow this ground.

What happens in the United States if a court decides, over objection from the defendant, that it has jurisdiction?

We could also make the time shorter, say, 60 days, and make it begin from the date of discovery of the event that is the basis for nullification.

### **Rule 38**

#### **Enforcement of Judgment**

Should we have this penalty for noncompliance on a broad scope? Should we narrow it? Should we delete it?

The idea of a penalty will create anxiety among many people both in common and civil law countries. The reference to contempt of court would create anxiety in civil lawyers. We could say that by way of enforcement, the court may employ means or mechanisms in accordance with the law and traditions of the forum. This would allow legal systems in which these penalties are acceptable to make use of them. We may not need to be specific. In the comment, we might say that common law courts have the power to impose contempt, but generally are very restrained in exercising it. Some legal systems permit penalties under various circumstances. In the United States, the courts have authority to impose penalties but is rarely used.

We could use the precedent of Rule 30.3 (about order to non-parties) in which there is specification of various types of sanctions.

### **Rule 39**

#### **Judicial Assistance**

If we decide to say more on the Principle about recognition, we might want to do so also in the Rules.

The Rule refers to the court of a state that has recognized these Rules. What is meant by recognition? A governmental ratification? If this is wider than that, could we not indicate that Rule 39 applies when the courts of a state have recognized, adopted, or regularly used the Rules.

The normal formula in case of model law is “adopted” because “recognized” can mean a number of things. Is it our intention to impose on a court of a state who has adopted these Rules to give effect to any order coming from any country whatsoever, in any form and with any content? We should introduce some caution. “Must” is too strong. In the second part we say “may”. Everyone is free to do what that person wants. Is this appropriate to address the behavior of courts who have not adopted the Rules?

We should use, instead, “may” and “ordinarily should.” This allows for some flexibility.

Recognition of the responsibility to assist other courts, and to coordinate proceedings is a major problem of international justice. In every dimension, many efforts are moving in that direction. A major field of developing coordination is insolvency and bankruptcy. The way in which it initially develops is by informal consultation among the judges. We should refer to that. The Canadian, American, and English judges have greatly facilitated transnational bankruptcy simply by being on the telephone and coordinating the schedules, the hearings, and so on. Once they discovered that this is proper, it has become standard practice and it is very effective. Judges should understand that such informal cooperation is permissible and lawyers should understand that this is something acceptable to invite the court to do. The question is how strong we want to put in the Rules. Should we say “may do it”?

This provision enjoys full support of one member. It contains a mandate for courts of states operating these rules to employ a system of mutual recognition and enforcement, not just final judgments, but in particular provisional measures.

What is the scope of this Rule? In the comment, the Reporters speak about interlocutory orders. Does this provision apply to provisional measures in the broader sense? Because there is no regard to the jurisdiction of the court of the state which decided about the order. Is not there a contradiction between art. 24 of the Brussels convention and this provision? According to the European Court of Justice, there must be a real connection between the court that orders a provisional measure and the matter of the dispute.

In response, it was said that a person who considers that the forum that entered the order did not have proper authority could resist enforcement or recognition in another jurisdiction. We may need to be clear about that. It is a principle that a party against whom enforcement is sought has a right to contest the jurisdictional basis upon which the order was entered. Do we need to be explicit about that or this is taken care by the local law?

A further question is: are there recognized principles as to the forum in which disputation over a provisional measure is to be carried forward? Conceptually, one could be required to return to the forum that issued the order to make the objection there, or it could properly be made in the forum in which the assistance is pursued. In the international setting, it should be permissible for the person to whom the order is directed to resist enforcement in the state in which enforcement is sought.

Under the Brussels Convention, it is not possible for the enforcing court to change the interlocutory order of the other court, except when there are circumstances that happened after the order was given. This is a possibility, but it is very unclear. The safer way would be to return to the first court to have the order changed. This, too, is a very unclear situation under the Brussels Convention. It would be better to concentrate the competence to the place where the order was given.

What about the countries not a party to the Brussels Convention? This convention extends only to European countries, which are geographically convenient to each other. A different matter is an order in Indonesia concerning a bank in Toronto. We should not foreclose or disparage the right to resist in the forum in which enforcement is sought.

We should say that, at least, the party may object in the forum that rendered. The forum that rendered should appreciate that a party could object to the order there, at least

if the party did not previously object to this issue. However, we could say that this right would be superseded by conventions that the countries are parties.

Another member disagreed with this solution because interlocutory measures involve a form of *res judicata*, and normally it is a principle of international civil procedure that the enforcing court cannot vary or change the decisions of the court who gave the order or judgment. The solution is not to enforce interlocutory orders. A German court would not enforce an interlocutory order, a preliminary attachment of... However, if the court decides that the order should be enforced, the court should choose the same principle governing judgments and final orders. It would be very dangerous because it could be that the court which gave the order varies the order, and the enforcing court decides to vary it too and there will be contradictory orders and decisions.

Some countries are hesitant to accept orders from foreign countries. This Rule might improve this behavior.

Without a treaty, normally a foreign state will not recognize and enforce orders on provisional measures. That is the most accepted international rule. If we decide that under these Rules provisional measures should be recognized, we must first specify which court would have the right to vary the provisional measure. We should not have two courts with the same attribution.

A practical aspect is that, normally, it makes no sense to have a provisional measure recognized because it requires the same work to have a new provisional measure in the foreign state. The party has a free choice to ask for a new provisional measure or to have a foreign provisional measure recognized. We should have a rule that provisional measures could be recognized and enforced, giving the choice to the party. However, the other problem is that it is too much to say that all interlocutory orders should be recognized and enforced. We should say only provisional measures.

Comment C-39.1 says that “the same principle has been recognized with respect to interlocutory orders, such as orders directing testimony from third-party witnesses.” This sentence is wrong because testimony is taken under the Hague Convention. Under this convention, it is not possible for the forum state to give an order for a witness to come and that this order is recognized and enforced by the other state. The correct way is to request judicial assistance in the state where the witness is located. We should narrow the scope of a possible recognition of interlocutory order, and limit it to orders for provisional measures. This is the best solution.

We could also decide that there is no recognition of foreign provisional measures and the parties should request them in the place where the measure should be enforced.

Rule 39 is very good. We need some clarification and some expansion of the text.

Two important problems are the reciprocal recognition and supplementary grant of relief in respect to provisional measures and the question of recognition and enforcement of final judgments. Rule 39 has a large job. It deals with complex issues of international comity.

There is some ambiguity in Rule 39. The court of state y has an obligation to support and facilitate litigation that is taking place in the court of state x, which is the court which seized the substance of the matter. We want to create the maximum degree of possible support. There should be some obligation that the courts of state y give effect to provisional orders emanating from the courts of x. There will be situations in which for technical reasons the court which seized the substance does not have power, under its

arsenal of provisions, to issue a particular order and yet state y does have this power. For example, the court of appeal in England considered whether it should issue a freezing injunction (or an order for disclosure of assets) in London when the primary case was in Switzerland. The Swiss court declared that it did not have jurisdiction to issue this particular supportive remedy and denied the relief. But the English court did have that jurisdiction. Can the secondary forum grant provisional relief for a proceeding taking place in the primary forum? Admirably the English court said that it was a joint endeavor against international fraud and, if there is a lacuna in Switzerland, the court should be bold and intervene.

A member of the group was surprised by this information. Another member said that most jurisdiction do not know freezing orders with the broad scope developed in English courts. Even the United States refuse to exercise such broad authority. The enforcement of freezing orders needs a special provision in the enforcing country. When the English High Court orders that all assets have to be frozen, this order cannot be enforced in most countries of the world because there is no possibility of in personam effect against third persons. Without this, enforcement is not effective. It is necessary to transfer the content of the freezing order into the standards of national law. For example, the Continental systems transfer a freezing order by preliminary attachment of individual assets. Therefore, it is easier for the party to go directly to Switzerland and to apply for a preliminary attachment of a banking account. Switzerland would oppose the enforcement of a foreign freezing order because it is against public policy to give effect to this broad order. We should provide for the enforcement of foreign orders dealing with provisional measures, even English freezing orders, but we should be aware that in practice the effect is unattractive. Provisional measures have always narrow connection to the substantive law of the country. Therefore, it is complicated to transfer provisional measures to other countries.

Freezing order relief is now accepted in England, Australia, New Zealand, Hong Kong, Australia, Canada, Singapore, Ireland, etc. An important aspect is that the plaintiff is not only concerned with freeze assets, but for the practical reason of obtain an order that says that it may not be possible to freeze the assets but the person is compelled to say what the assets are and where they are located. This direct order, addressed to a person, is very important. Once one has this information, one can go to the countries where the properties are located and start applying for local relief. This is the practical importance.

It was noted that the English law is enthusiastic about orders for disclosure of assets, but not orders for disclosure of evidence.

The phrase “in aid of proceedings in another state” is slightly ambiguous because it could be read as “proceedings which are still pending.” What do we mean by litigation? How many stages does it have? What about the pre litigation stage? Supplementary remedies in aid of litigation are often important after the judgment is obtained. We should clarify in the comments.

Most countries, however, do not permit preliminary discovery of assets in their own systems. A provision allowing such discovery might be considered as an infringement of public policy. Without a judgment, it may not be fair to require disclosure of the assets of the defendant all over the world. This might be too rough a measure and would not be acceptable to every country.

We have to differentiate between final and non-final judgment, interlocutory and provisional measures, assistance through a new proceeding and assistance by way of extension of the original proceeding.

The members selected for discussion: the relationship between Principles and Rules (summarized above), and Rules 1, 2, 9, 16, 17, 18, 19, 20, 21, 23, and 30.

### **Rule 1**

#### **Principles of Interpretation**

We need standards of interpretation. Given that we also have a document called Principles, we should call them something else, to avoid confusion. We should reserve discussion of those for a later moment in the project. They are more abstract and the detailed rules might be more pressing at the moment.

A member said that we should call this principle “Interpretation”, keep only Rule 1.1 and send the others to the Principles. Also, we might consider other issues concerning interpretation, such as the question whether the court should have regard to jurisprudence available about the Rules in other jurisdictions, and other issues of interpretation. We should also delete the sentence “as stated in the preamble.”

Another member disagreed.

### **Rule 2**

#### **Disputes to Which These Rules Apply**

A member considered that the project needs a more general approach. We should say only “transnational business and commercial litigation.” The list is too narrow.

Another member considered that we should look for a shorter and less technical way to describe the scope. We should go in the direction of simplification.

There is a very interesting strategic question. The acceptability of this project in the United States will be much greater if we remain relatively indefinite on the question of scope. If there is any suggestion that these Rules would be applied in cases of product liability, it will immediately be attacked.

Gerhard Walter said in an article that if this project is not applied to products liability Europeans are not interested in it. The answer is that products liability would kill the project in the United States now. This is just a first step, if we apply this to a limited list of commercial cases, with time, some of these principles might be acceptable in other kinds of litigation, for example, products liability. However, we cannot do this now. We should postpone this discussion for the future.

## **Rule 9**

### **General Authority of the Court**

We could abandon this Rule and transfer its content to the Principle about case management.

Another member considered that there is a place for a statement to the effect that the court has general authority to give effect to proceedings governed by these Rules. This concept is recognized in all common law jurisdictions. It expresses the idea that the court has got ultimate control and responsibility for the effectiveness of its procedure and it is a deep well of residual power. It is useful for a court to have the power to say that something is not provided by the rules, but this does not stop the judge from inventing something new to fill a gap or do something unusual. It is useful to have a rule, which can relax the other rules and supplement them.

The fundamental approach of common law courts is based under the supposition that they have authority to do whatever seems necessary in the interest of justice, even if it is not specifically conferred by rule or statute. There is some ambiguity about that in the case of the United States Federal Courts, but State Courts – which predated Federal Courts – have that attitude. On the other hand, some civil law systems might regard this unconstitutional and antidemocratic, because residual authority resides into parliament. A way to deal with this would be to draw upon the Principle of administration, which is broader than case management, but use the concept of judicial administration as the verbal concept to express this idea. This approach will be adequate to the purpose and will create less sensitivity on the part of some civil law systems.

A civil law lawyer disagreed that the line should be drawn along civil law and common law systems. There are countries in which there would be a constitutional objection to a procedural obligation of a third person or even a party to be subjected to medical examination. A constitutional question is whether this is permissible without a clear and exact legal rule.

In the United States, the problem of physical examination provoked anxious response by the justices, but physical examinations became very common during World War II.

In any event, this Rule should be a Principle, not a Rule.

This touches on the problem of the relationship between the Principles and the Rules.

The language of Rule 9 is shorter and more to the point than Principle 9, which describes the responsibility of the court, but we also mention the cooperation with the parties. The way it is written, it is a small dictatorship. We should adapt the Rule to the Principle.

## **Rule 16**

### **Transnational Dispute Settlement Offer**

In a provision for settlement offers, the rule could require the defendant not only to make an offer of a sum of money, but actually to make a payment into court. England law is quite strict about that. The premise is that if the party wants to take advantage of

the costs rule, the party should put the money into court. Therefore, payment into court is the primary means to get the advantage of the cost protection if the party cannot do better than the payment into court. Therefore, settlement offers not accompanied by payment into court are regarded as exceptions, applicable when the nature of the claim is not for debt or damages, like injunctions, for example. It was urged that the reporters consider if there is merit to require defendants in pecuniary claims to make payment into court.

In response it was suggested that in international litigation, the amount in controversy might be very high. It would not be fair or even efficient to force a party to sell some of its property to make and “offer” and later this offer be rejected. Moreover, the offer might be for a payment differed in time. In any event, Rule 16.7 allows the plaintiff to either enforce or continue with the proceedings in case of an offer that is not complied with. Another opposition is that this provision is available both to plaintiffs and defendants. A plaintiff cannot make a payment into court.

The proponent could be required to provide a security that he or she will pay the amount offered. This could be a bank security.

The defendant who wishes to make a deposit into court could without selling property can make a side agreement with a lender, whereby he or she puts the property as security for the loan, gets the money, puts the money into court. If the offer is rejected the defendant suffers the costs of the transaction, which might be very high. Psychologically, the fact that the money is available makes the offer more compelling.

More than one civil law member said that this method is novel in civil law systems, but considered it very helpful. However, it is very strong threat against plaintiffs.

It was announced that although this is not a very common rule in civil law countries, a similar Rule was introduced in the project for a Code of Civil Procedure of the Province of Mendoza in Argentina, by suggestion of Mrs. Aída Carlucci. The Argentineans thought that this mechanism would encourage the settlement.

Another member, however, was confused by the need to follow specific guidelines and a legalized procedure for settlement. Settlement is something to be conducted informally, said the member. In response, it was said that it is very common that people understand this rule as if it were the only possible way to get settlement. It is not. It is just one among several ways, including, of course, informal discussions.

Some members considered the Rule too detailed. Some of those details may not be adaptable to national systems. For example, Rule 16.6 says that the sanction shall be “...reasonable costs incurred by the offeror from the date of delivery of the offer.” This is not compatible with systems, which adopt a “lump sum” system of attorney’s fees. We could simplify the rule and put the details in the comments.

Another member argued that this rule is only the bare bones of the idea of settlement offers. The rules in Canada and England are much more detailed, involving several subdivisions. Part 36 of the English procedure is extremely detailed. Not one of those subdivisions can be deleted without compromising the main rule. In the case of a “lump sum” system of attorney’s fees, the court may arbitrate the reasonable amount in proportion with the total duration of litigation taking into account the date of the offer. In any event, what is the point of writing a rule in the comments?

Some detail in this Rule is very important. Without the detailed protocol, the Rule will have not the same impact.

Some attorneys do not want to pursue settlement to make sure that they receive more fee in the end of the litigation. We could say something about this in the comments. However, this is a problem of ethics, not of procedure.

Rule 16.1 says that “a party may deliver to another party a written offer to settle.” This means that either plaintiffs or defendants can make offers. This is the new trend in England and the rule in Canada.

There are a number of provisions in the Rule that are related to contract law. Some of them are not accurate and may even be misleading. See, for example, 16.1, which says that the offer can be withdrawn by a writing. In general, the withdrawal can only be made before the offer reaches the offeror. See also Rule 16.2, second sentence. Also, according to general principles of contract law, the delivery of a counter offer is a rejection of the original offer. We can make a reference to the Unidroit Principles on International Commercial Contracts.

Suppose a plaintiff makes an offer of 10,000 but the defendant does not accept this offer and judgment is awarded to plaintiff in the amount of 12,000. Therefore, the defendant erred in not accepting the offer and therefore should be sanctioned. And what is the sanction? The sanction shall be loss of the right to be reimbursed for costs. But, because the defendant has lost the case, there is no right to be reimbursed. Accordingly, there is no possibility of applying any sanction to this defendant because he has no right to be reimbursed. Therefore, we could only say that the court may impose sanctions, either as costs or some pecuniary sanction. We could delete 16.6 and say that the judge may take this situation in consideration, when he or she makes the cost decision.

In response, it was said that this interpretation is wrong. The last sentence of Rule 16.6 says that the sanction “shall be in addition to the costs determined in accordance with Rule 33.” This means that the loser will have to pay double the costs.

It was also said that Rule 16.5 says that “the court must impose an appropriate sanction, considering all the relevant circumstances of the case.” According to Rule 16.6, the cost sanction should be given only “unless the court finds that special circumstances justify a different sanction.”

This project makes no reference to consent decrees in general. We should discuss about this, because it such a decree can be a basis for enforcement.

## **Rule 17**

### **Provisional Measures**

Rule 17.1 says that “In accordance with forum law and subject to applicable international conventions...” This is redundant, because if the international conventions are applicable, it is because they are part of the law of the forum.

We should eliminate these references in all cases, because it is a general principle of this project that forum law applies, except as these rules otherwise apply.

Rule 17.1.1 addresses provisional measures awarded without notice. Rule 17.1 instead, is not confined to ex parte injunction. This Rule is the source of authority to grant any kind of injunction, of an interlocutory nature, prior to the final hearing. It might be better to make a clearer distinction, or revise the title. “Provisional measures” have a

certain connotation these days, at least in Europe. The substance should be wide, but two types of injunction, inter parte and ex parte, should be sharply differentiated.

Rule 17.3 is unclear. We should say that those injunction should be recognized and enforced, but should an injunction be enforced and recognized only after the defendant has been heard? In many cases, English courts give a freezing order ex parte. The creditor applies for recognition and enforcement before the defendant has the possibility of be heard. Then, several months later, there is a first hearing for the defendant give his arguments to the court. We should say something about the possibility of recognition and enforcement and the right to be heard in court. The rule should be that provisional measures that are not given ex parte, should be recognized and enforced not only under the rules of the country where the enforcement takes places.

We should deal with the problem of recognition, assistance and enforcement in another jurisdiction in a separate rule. We could eliminate 17.3 and address the problems in a separate rule. We could put in the comment to this rule a reference to this matter.

It is one thing to say that the forum may exercise this kind of authority (Rule 17.2.) It is something else to address the question if another forum is required to do so. We should separate this problem.

The last sentence of 17.1 (“The extent of such a remedy shall be governed by the principle of proportionality”) should be further discussed. Proportionality is a principle that we have addressed in the context of sanctions. What is the link between interim injunctions and proportionality? This is a novel juxtaposition.

In response, it was said that the idea of a freezing order is acceptable only when there is proportionality. Some English freezing orders are not proportional. When they are enforced in foreign countries, they are reduced to a more proportional measure. When a debtor has several valuable properties, an English freezing order might cover all assets. However, the enforcing state will reduce it to a few properties, if more proportional. This clause is very important to civil law jurisdiction. Civil lawyers would not accept the English freezing order practice.

This Rule directs the issuing court to consider the problem of proportionality but does not limit the direction to courts called upon to give recognition.

What does it mean to say that an injunction was “wrongly granted”? (Rule 17.1.3) In some countries, there is liability only in cases of abuse of asking for a provisional measure, not just that it was wrongly granted. There is no strict liability in a few countries, but there is in several others. The answer is that the person obtaining the injunction bears the risk of having to indemnify the other party if, upon completion of the procedure, there is a determination that it was too broad, or otherwise erroneously granted. It is not necessary to assert a higher degree of fault, such as abuse. Abuse means clearly erroneous. That is not a fair allocation of risk. This is a serious intervention in another’s affairs. If it is granted without objective legal basis, one should pay for it.

This is a complex issue. It could be that the claimant is the winner of the main procedure, but that the application for a freezing order was wrong because there were enough assets for possible enforcement. Would this rule cover this situation? The answer is that the duty of proportionality applies and if a disproportionate freezing order is obtained, the party who obtained should make compensation to the opposing party.

## **Rule 18**

### **Preliminary Determinations at the Preparatory Stage**

We should reconsider the title for this Rule. We could say something more precise than “preliminary determinations.” Perhaps we could list the contents of Rule 18. We could say “Determinations at the Preliminary Stage,” but this does not change much.

This Rule is a combination of the instruction stage under civil law systems and dispositive motions in common law (which includes motions to dismiss and for summary judgment.) The point is that it precedes the main hearing. We could strike the word “preliminary.”

In Rule 18.1, we could say that the court “at any stage before the final hearing”?

How does Rule 18.1.2 work? To say that a statement of claims fails to comply with these Rules is difficult and takes us in a circle. In some systems there are elaborate rule fixing the contents of pleading, prescribing exactly what they might contain, etc. In response, it was said that the way to be more specific would be to refer back to the requirements of Rules 12 and 13, for example.

Rule 18.2. Is there preclusion when a party wants to amend its pleadings after the time schedule. This Rule confers a broad permission to the parties to amend their pleadings. When the judge has prepared a timetable and the party then did nothing, and the judge wants to give summary judgment, the party should not be able to amend the pleadings. We discussed this when we discussed the principles. We should adapt to the more severe Principle. In response, it was said that there is no need to change the Rule because it will be interpreted in light of the Principles. We could tighten it to say that not only can the deficiency be remedied by amendment but also that the extension of time thereby required will not result in material prejudice to the other party.

One of the “preliminary determinations” that we might consider is the provision in many legal systems for a court, prior to final hearing, to make a order for interim payment, either of the debt or some proportion of it or of damages. This is important when the plaintiff is an ordinary person and needs speedy proportion of the claim in question. Several jurists are comfortable with the desirability, if not necessity, for having a provision for interim payment. Do we have in this provision or elsewhere in the Rules, adequate provision for the award of an interim payment? In Rule 17 we addressed the question of interim injunctions. It could be argued that 18.1.5 is sufficiently broad to allow the court to do this, but it would better if this would be explicit in the Rules.

We should make clear the difference between final judgment on a part of a claim and “interim payments.” There are several types of interim payments. We could say that interim payments are a provisional measure or a final decision on a part of the claim that is not in dispute.

It was asked if the idea above refers to a judgment, a partial award, when it is clear that some amount is clear and could be decided immediately. If so, Rule 18.1.4 may cover this situation.

There is difference between a final judgment on part of a claim and the interim payment. There are various forms of interim payments. We could say that interim payments could be a provisional measure or a final decision on part of a claim which is in dispute.

## **Rule 19**

### **Disclosure**

In some civil law systems one party may interrogate the other party. That party may require that party to give answers to questions. In some systems, a party may refuse to give evidence beyond the refusal based on privilege: the party can simply refuse to give evidence and answer to questioning and incur the risk that the court would draw adverse inference. The sanction is not a direct compulsion. A witness can be forced to testify in court, but a party refusal will have the consequence of adverse inferences. Some systems have a form of “astreinte” but they are not used for these purposes, unless the person is under the obligation to produce a document. In common law systems, a party may not refuse to respond to interrogation by opposing party, except on the basis of privilege.

In common law jurisdictions, a litigant can demand that an opposing party appear for a deposition and interrogate on any matter related to the case. If the matters are not protected by privacy or privilege, the party has to answer. In extreme cases, the court may issue a default judgment for failure to cooperate. This is an extreme way of drawing adverse inference and is not very common. Usually, a party realizes the consequences and will give the answers. The coercive powers are very strong and in the United States, ordinarily, they would happen at the discovery stage, rather than at trial. In other common law countries that do not have depositions, one may not know the attitude of the deposing party until trial.

We have to reconstruct these provisions to take into effect the practice in civil law countries.

There are civil law countries in which the parties have the obligation to produce a document, but when the party does not produce the document, the sanction is that the contents of the document will be established as asserted by the opposing party. To the minds of civil law lawyers, it is not only unnecessary but also disproportional for a party to be forced to produce the documents. Why should this be done? The party has the choice. If the party acknowledges the claim, for example, why force the party with contempt fines or imprisoning? Even in common law countries, if the party admits the fact, the document becomes irrelevant and the court cannot compel its production any longer.

Some civil lawyers do not understand such a level of punishment and enforcement. Drawing adverse inference is sufficient, because will lead to adverse judgment. However, some other civil lawyers are dissatisfied with only drawing adverse inferences. Drawing adverse inferences may not be sufficient. It is not the same thing to presume the contents of a document and to know it. Moreover, the document may contain other important information.

The problem is that it leaves the judge with a huge amount of discretion. If there are several documents, and several of them are revealed and some are not, how can one say whether one of them is relevant. There may be several reasons why the party does not want to produce the document. Drawing adverse inference is an imprecise technique to deal with the problem of non-disclosure. On the issue of proportionality, a member

considered that drawing adverse inference may be even more drastic than forcing production. It will all depend on the specifics of each case.

In a professional judiciary, experienced in litigation, with no jury, and prepared to enter judgment without really knowing the facts, responding to a party refusal to produce documents at its possession, then this system works because the party understands the risk of non production of document or evidence. This is more difficult when in very complicated transactions, like medical malpractice, or a complex commercial case. One cannot draw an obvious inference just by the refusal of production of a document. *Res ipsa loquitur* is valid only if the circumstances allow a clear inference. In several kinds of cases, the court would be in serious doubt. On the other hand, if the court specifies what a party has to produce, the court has more specifically given warning about the risk of not giving an answer.

Production of document should only be ordered by the court on motion of the party, not on its own motion. It is an important principle.

What if the court decides not to order the production of the evidence? Is it at the discretion of the court? In France, this is at the discretion of the court, the court does not have to justify and there is no review of this decision.

Considering Rule 29, 29.3, and 29.4. Rule 29.4 seems timid in light of our discussion. Should we preserve the status quo and say “authorized by local law”? Or should we delete those words and allow courts all over the world to be more adventurous and move towards the common law position?

This approach is very interesting. It seems that even the English judges would not have difficulty with the idea of drawing adverse inference instead of putting a party in jail. Some American judges would also be timid about doing that. Part of this problem has to do with how judges are selected.

In many ways, this is the most important part of this project: the problem of moving from contention to determination and there are fundamentally two ways to do it. The first is to try to get information and the other is to exercise judgment based on failure of a party to produce contradictory evidence.

## **Rule 20**

### **Exchange of Evidence**

If one accept that the approach of drawing inferences is superior to forcing production of evidence, such as discussed above (Rule 19), this should be accepted here as well. This is valid for obligations of parties.

We had the idea of having two stages, but now we are evolving to a kind of connected interaction.

There is a connection between the Principle on privileges and this Rule, especially for third persons. There are only poor privileges in this text, such as self-incrimination. The specified privileges are too few for some countries.

We should have a different approach in regards to obligation from third parties. There are several types of third parties. One of them is a person for whom the party is responsible, such as an employee in a corporation. There is also an independent third party, who would have a right to refuse on the basis of privilege. Does a third party have

a right similar to the party to refuse to give testimony or produce document that would be very important for the court to understand what the situation is? For example, a nurse, which is a percipient witness in a malpractice case. In some civil law countries, such as France, the third party is not obliged to testify, but in others, like Argentina, Brazil, and Germany, there is a strict obligation to testify and the nurse could be punished by fine or maybe even prison in some countries. Some countries have only small sanctions and no enforcement, and others have severe sanctions, but the underline principle is that there is an obligation. In the case of production of document, a few countries have sanctions. In other countries one has to begin a new suit against the third person to force that person to present the document, but this action is of doubtful efficiency.

It is odd from the common law perspective that a witness can be fined or go to jail and a party will only suffer adverse inferences.

It was said that in civil cases in France, it is not common that a witness is questioned in person by the judge or the lawyer. Usually they present an *attestation*, a written affidavit. Moreover, there is no obligation for a party to be a witness in civil cases, as there is in criminal cases. However, non-parties can suffer a fine or *astreinte* if she refuses to produce a document. If that person does not produce the document, there is no further sanction.

This Rule is related to Principle 15.2, which provides that third parties should cooperate in the court's management of the litigation. What does this mean?

There is always confusion between third persons and third parties. Third parties are parties to the litigation. Third persons are not party at the litigation. In English legal language, these two expressions are not always very precise.

## **Rule 23**

### **Case Management**

This Rule was applauded. It is an excellent and very useful rule.

It corresponds to Principle 9. Principle 9 may not seem necessary anymore. However, when civil law lawyers read Rule 23, and compare 23 with 9, they think of many additional powers of a court, and they could be afraid of abuse. Is it really necessary to have Principle 9 in light of Rule 23?

For a conscientious civil law court, most of Rule 23 is redundant. It is only reciting what the court should be doing. There are, of course, some civil law judges that exercise no more control over the proceeding than a classic common law judge, which is nothing. These powers may be new in England, but most United States courts already accept this. In any event, we should keep this Rule.

Another member did not consider it redundant, but a very useful rule.

In Rule 23.2, in the part providing "The advocates for the parties shall attend such conferences," this is the English position. We should, however, say "lawyers" instead of "advocates." How strong a statement is that any way? What happen if they do not turn up?

We should make clear that the court's responsibility for the active management of the proceedings is an obligation which the court should carry out at all stages of litigation.

In Rule 23.3.4, would case management rulings, concerning admissibility and exclusion of evidence and other procedural matters, be binding upon the court at the final stage?

Rule 23.3.6 is a good provision, but perhaps too rigid. “Dates” suggests a precise day. We should talk in terms of periods.

Rule 23.3.2 (“order the isolation for separate hearing...”) should read “order the isolation for preliminary or separate hearing.” The word “separate” is a language for “split trials” between liability and damages. We should be more flexible than that.

Rule 23.3 should also reflect what was discussed about Principle 21 about settlement.

In Rule 23.4, maybe we should not keep the second sentence because it could be an argument not to go to national court because if the court may stay the proceeding, the parties will think about arbitration. We should delete this sentence. The possibility may exist for the national courts (In France, for example, since 5 years ago, the court can stay the proceeding and compel the parties to go to mediation), but we should not write it here. Another member agreed that this would be an excuse for lazy judges to avoid working on complex transnational cases.

The second sentence is important because allows the judge to stay the proceeding. If this is not made explicit, some judges may not do it.

## **Rule 30**

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

For some countries, the Rule gives more power to the court for sanctions against third persons than the national law. This Rule is good and correct because there are countries that sanctions are too weak.

Rule 30.1.2 says “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.” Would not it be better to say, instead of “disburse”, “to deal”? Disburse is too narrow.

Rule 30.1.4 says “To produce documents or other things as evidence.” We might strike out “as evidence” because it is a bit restrictive but we might insert “or allow the court of a party to inspect.” The thing to be examined might be too big to be produced.

Another member disagreed. The duty of cooperation of non parties should be limited. In Rule 20.1, we say that there should be direct relevance. It could be that third persons should not be compelled to cooperate for a preparing discovery, like the parties. Perhaps, the wording means too much, but there should be a limitation. Non-parties should be compelled only to give evidence. Otherwise, this would be a burden that may not be acceptable.

Another member suggested that we could say “directly relevant,” as in Rule 20.1, but there was no agreement on this point.

In Rule 30.2, we should qualify the word compensation with the word “reasonable.”

In Rule 30.3 before the phrase “contempt of court” one might refer to astreintes.

The structure of Rule 30.1.1 is that the court may issue an injunction and then notify a non-party or third person to comply with that injunction. In England, and in most

common law jurisdiction, that happens automatically because the principle is that if an injunction is binding upon the defendant, a non-party is automatically required, once it has notice of the injunction, to desist from conduct that will have the effect of undermining the injunction. In this Rule, there is an explicit enunciation by the court of that obligation, which is then applied to the non-party. This Rule might be troublesome in those countries that already have this equitable concept of automatic application. It could be argued that, absent an specific order directed to the non-party, the non-party can ignore an injunction that has already been applied to the defendant. In the comment, we should say that this does not purport to derogate from common law principles relating to injunctions and their effect upon third parties.

We could say something in the comment, but American law is to the contrary. A third person has no obligation in the absence of an order directed to that person.

The Reporters will present a revised version of the Principles at an ALI Advisory meeting in early October. The Rules may not be revised by then. This revision will be also presented to the ALI Council in December for further consultation. In May 2002, this project, with fully revised Principles and Rules, will be presented to the ALI members at the annual meeting for extensive discussion. In April 2003, the Principles might be presented to the UNIDROIT Council. It will be presented also to the ALI Council in December 2002 and to the ALI members again in May 2003. In the meantime, we will have meetings in Japan and China in October 2001, and in Mexico in February 2002. We are discussing with friends the possibility of other meetings in Lyon, Argentina, Germany, and Brazil.

We want to facilitate worldwide discussions about this project, as a matter of dissemination and education. There will be better reception if the participants of these meetings can make suggestions that will be considered in the drafting. We should aim to have final approval of the Principles around 2003, but not approval of the Rules until perhaps the following year, when we will have had opportunity for more observers and participants to criticize the project. UNIDROIT or ALI will not necessarily approve the Rules, but rather the idea of such set of Rules. There will be some official action, but we still do not know of what kind. It could be adoption, ratification or simply acceptance that this is a reasonable implementation of the Principles. The official product, so far, is the Principles. The Rules are an exemplification but not a text to which there is the same commitment. A similar problem was faced by UNIDROIT concerning the Principles of Contract Law. There was no procedure for dealing with it and the UNIDROIT Council simply authorized publication.

A member remembered that, a couple of years ago, the Governing Council of UNIDROIT discussed the possibility of a Model Law. Another member considered it as more prudent to see the Rules only as a reasonable implementation, an illustration of Rules that implements the Principles. That approach will considerably reduce the anxiety felt in the United States by the lack of comprehensive compulsory discovery. We should not be more specific than that and leave to various countries the decision of what to do with this work. This is an acceptable and promising formula.

The Uniform Law Review wants to have a special issue on this project and would invite all members of the group and a number of experts around the world to participate. Authors should work on the text that comes out of this meeting.

Who will prepare the French version? Traditionally, the French version were prepared by either a francophone native speakers in the Working Group or the Secretariat. However, there is no proceduralist in the secretariat. The Rule is that the burden has to be taken over by those involved in the exercise, because they are the experts and only they can assure proper knowledge and competence. Particularly in a subject like this, it has to be done by direct supervision of the Francophone members of this group.

The Reporters asked from the members of the Working Group to write the Reporters, sending their comments in written form. The Reporters welcome complaints, and criticisms, but they much prefer proposed solutions. Specific proposed solutions could include the specific wording suggested for a specific Principle or Rule. An excellent format is for example: “please change Rule 12.3 to read as follows ... because...” Usually the Reporters can understand why changes are necessary, but they might need help to figure out what are the solutions available. It was suggested that the members prepare this document shortly after the meeting, while their minds were fresh. It was suggested that they present this document no later than 60 days.

It was decided that the several versions of this project can be made public via web sites or publication, as long as it is said that it is not the final version. If possible, the comments should also be published because they enhance the understanding of the project.

The Working Group thanked the Chairman, Mr. Ronald Nhlapo for the excellent and fruitful way in which the discussions were conducted.

The Working Group decided to meet again from 27 to 31 of May 2002, subject to confirmation.

The Chairman declared the meeting officially closed.

## APPENDIX

### Additional Principles (Proposed by Prof. Geoffrey C. Hazard, Jr. and discussed in the meeting)

#### #. **Lis Pendens and Res Judicata**

When the rules of lis alibi pendens or res judicata are applied with respect to a proceeding conducted according to these principles, the scope of the proceeding should be determined by the parties' pleadings, including amendments.

A determination of an issue of law or fact in such a proceeding should not have preclusive effect in a subsequent proceeding, except to prevent substantial injustice, for example when a party has justifiably relied on such a determination in its conduct.

#### #. **Effective Enforcement**

Procedures should be available for speedy, effective and efficient execution of a judgment, including judgments for money, for an injunction, and for costs.

#### #. **Recognition**

A judgment in a proceeding conducted according to these principles should be accorded the same recognition in another forum as other judgments of the latter forum.

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[Return to "UNIDROIT Proceedings and Papers 2002: Contents"](#)