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ON
PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE

Draft Principles of Transnational Civil Procedure
(with Commentary)

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Preamble

These Principles are designed for adjudication of transnational commercial disputes. These Principles may be equally appropriate for most other kinds of civil disputes and may be the basis for future initiatives in reform of civil procedure.

Comment:

A national system seeking to implement these Principles could do so by a suitable legal measure, such as a statute or set of rules, or an international treaty. Forum law may exclude categories of matters from application of these Principles and may extend their application to other civil matters. The procedural law of the forum should be applied in matters not addressed in these Principles.

The adoptive document should include a more specific definition of "commercial" and "transnational." That task will necessarily involve careful reflection on local legal tradition and connotation of legal language. Transnational commercial transactions may include commercial contracts between nationals of different states and commercial transactions in a state by a national of another state. Commercial transactions may include sale, lease, loan, investment, acquisition, banking, security, property (including intellectual property), and other business or financial transactions.

These Principles do not apply to transactions that arise wholly within a state and involve disputing parties who are nationals of the same state. For purposes of these Principles, an individual is considered a national both of a state of the person's citizenship and the state of the person's habitual residence. A corporation, unincorporated association, partnership, or other organizational entity is considered a national both of the state from which it has received its charter of organization and of the state where it maintains its administrative headquarters.

In cases involving multiple parties or multiple claims, these Principles should apply in disputes where the court determines that the principal matters in controversy are within the scope of application of these Principles.

1. Independence, Impartiality, and Competence of the Court

1.1 The court should have judicial independence to decide the dispute according to the facts and the law, including freedom from improper internal or external influence.

1.2 The judges should have reasonable tenure in office. Non-professional members of the court should be designated by a procedure assuring their independence.

1.3 The court should be impartial. There should be a fair and effective procedure for addressing reasonable and substantial contentions of judicial bias.

1.4 Judges should have substantial legal experience and legal knowledge.

1.5 The court should not accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration.

Comment:

P-1A This Principle recognizes that typically judges serve for an extensive period of time, usually their careers. However, in some systems most judges assume the bench only after careers as lawyers and some judicial officials are designated for short periods. The objective of this Principle is to avoid the creation of ad hoc courts.

P-1B Independence can be considered a more objective characteristic and impartiality a more subjective one, but these attributes are closely connected.

P-1C External influences may emanate from the members of the executive, legislators, or prosecutors, or persons with economic interests, etc. Internal influence could emanate from other officials of the judicial system.

P-1D Principle 1.4 only requires that judges for transnational litigation be familiar with the law. It does not require the judge to have special knowledge of commerce or international law as such. However, acquaintance with commercial matters might be helpful.

P-1E A procedure for addressing questions of judicial bias is necessary only in unusual circumstances, but availability of the procedure is a reassurance to litigants, especially nationals of other countries.

P-1F Proceeding without notice (ex parte proceedings) may be proper, for example in initially applying for a provisional remedy. See Principles 5.8 and 9.

2. Jurisdiction Over Parties

2.1 Jurisdiction over a party ordinarily may be exercised only when there is a substantial connection between the forum state and the party or the transaction or occurrence in dispute. A substantial connection exists when a significant part of the transaction or occurrence occurred in the forum state, when a defendant is a habitual resident of the forum or has consented to jurisdiction in the forum, or when property to which the dispute relates is located in the forum.

2.2 Jurisdiction may be exercised, when no other forum is reasonably available, on the basis of presence of the person, or presence of property whether or not the dispute relates to the property.

2.3 Provisional measures may be provided with respect to a person or property in the forum state, even if its court has no jurisdiction over the controversy.

2.4 Exercise of jurisdiction over a party may properly be declined when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.

Comment:

P-2A The standard of "substantial connection" has been generally accepted for international legal disputes. That standard excludes mere physical presence, which within the United States is colloquially called "tag jurisdiction." Mere physical presence as a basis of jurisdiction within the American federation has historical justification that is inapposite in modern international disputes. The concept of "substantial connection" may be specified and elaborated in international conventions and in national laws. The scope of this expression might not be the same in all systems.

P-2B Principle 2.2 covers the concept of "forum necessitatis" – the forum of necessity, when a court may properly exercise jurisdiction when no other forum is available.

P-2C Principle 2.3 recognizes that a state may exercise jurisdiction by sequestration or attachment of locally situated property, even though the property is not the object or subject of the dispute. The procedure is called "quasi in rem jurisdiction" in some legal systems. Principle 2.3 contemplates that, in such a case, the merits of the underlying dispute could be adjudicated in some other forum.

P-2D The concept recognized in Principle 2.4 is comparable to the common-law rule of forum non conveniens. In some civil law systems, the concept is that of preventing abuse of the forum. The existence of a more convenient forum is necessary for the application of this Principle.

3. Procedural Equality of the Parties

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

3.2 The right to equal and reasonable opportunity includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or place of residence.

3.3 A person should not be required to provide security for costs, or for liability for pursuing provisional measures, solely because that person is not a national or resident of the forum state.

3.4 Venue rules should not impose an unreasonable burden of access to court on a person who is not a habitual resident of the forum.

Comment:

P-3A The term "reasonable" is used throughout the Principles and signifies "proportional," "significant," "not excessive" or "fair," according to the context. It can also mean the opposite of arbitrary. The concept of reasonableness also precludes hyper-technical legal argument and leaves a range of discretion to the court to avoid severe, excessive, or unreasonable application of procedural norms.

P-3B Illegitimate discrimination includes discrimination on the basis of gender, race, language, religion, political or other opinion, national or social origin, birth or other status, sexual orientation, or association with a national minority.

P-3C Special protection for a litigant, through a conservatorship or other protective procedure such as a curator or guardian, should be afforded to safeguard the interests of persons

who lack full legal capacity. Such protective measures should not be abusively imposed to disadvantage a foreign litigant.

P-3D Some jurisdictions require a person to provide security for costs, or for liability for provisional measures, in order to guarantee full compensation of possible future damages incurred by an opposing party. Other jurisdictions do not require such security, and some of them have constitutional provisions regarding access to justice or equality of the parties that prohibit such security. Principle 3.3 is a compromise between those two positions and does not modify local law in that respect, but a non national or non resident should be evaluated under the same standards governing nationals and residents of the forum state.

P-3E Venue rules of a national system generally reflect considerations of convenience for litigants within the country. They should be administered in light of the principle of convenience of the forum stated in Principle 3.4. A venue rule that would impose substantial inconvenience within the forum state should not be given effect when there is another more convenient venue.

4. Right to Assistance of Counsel

4.1 A party has the right to assistance of legal counsel of the party's choice, both representation by counsel admitted to practice in the forum and assistance before the court of counsel admitted to practice elsewhere.

4.2 The professional independence of legal counsel should be respected. Counsel should be permitted to fulfill the duty of loyalty to a client and the responsibility to maintain client confidences.

Comment:

P-4A A forum may appropriately require that a party be represented by counsel admitted to practice in the forum. However, a party should also be permitted the assistance of other counsel, particularly its regular counsel, who should be permitted to attend all hearings in the dispute.

P-4B Counsel admitted to practice in the party's home country is not entitled by this Principle to represent his party in foreign courts. That matter should be governed by local law.

P-4C The attorney-client relationship is ordinarily governed by rules of the forum, including the choice of law rules.

P-4D The principles of legal ethics vary somewhat among various countries. However, all countries should recognize that lawyers in independent practice are expected to advocate the interests of their clients and to maintain the secrecy of confidences obtained in the course of representation.

5. Due Notice and Right to Be Heard

5.1 Notice, provided by means that are reasonably likely to be effective, should be directed to parties at the commencement of a proceeding. The notice must be in the language of the forum and either in the language of the person to whom the notice is addressed, if known, or in the language or languages in which the transaction in dispute was conducted.

5.2 The notice should set forth the claims and defenses presented by another party. A defendant should be informed of the possibility of default judgment upon failure to make timely responses.

5.3 After commencement of the proceeding, all parties should be provided prompt notice of important initiatives and determinations.

5.4 The parties have the right to submit contentions of fact and law, evidence, and legal argument.

5.5 A party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party.

5.6 The court should expressly consider each significant contention of fact, evidence, and law relevant to a dispositive issue.

5.7 The parties may, by agreement and with approval of the court, employ expedited means of communications, such as electronic means.

5.8 An order affecting a party's interests may be made and enforced without giving prior notice only upon proof of urgent necessity and preponderance of considerations of fairness. Such an order should be proportionate to the interests that the applicant seeks to protect. As soon as practicable, the affected party should receive notice of the order and of the matters relied upon to support it, and should have the right to apply for a full reconsideration by the court.

Comment:

P-5A The specific procedure for giving notice varies somewhat among legal systems. For example, in some civil-law systems the court is responsible for giving the parties notice, including copies of the pleadings, while in some common-law systems that responsibility is imposed on the parties.

P-5B The possibility of a default judgment is especially important in international litigation.

P-5C According to Principle 5.5, the parties should make known to each other at an early stage the elements of fact upon which their claims or defenses are based and the rules of law that will be invoked, so that each party has timely opportunity to organize its case.

P-5D The standard stated in Principle 5.6 does not require the court to consider contentions reiterated from an earlier stage of the proceeding or contentions that are incidental to the matters in dispute or unnecessary to the decision. See Principle 23, requiring that the written decision be accompanied by a reasoned explanation of its legal, evidentiary, and factual basis.

P-5E The right of a party to be informed of another party's contentions is consistent with the responsibility of the court to consider and determine all substantial issues in the dispute.

P-5F Principle 5.8 recognizes the propriety of "ex parte" proceedings, such as a temporary injunction or an order for sequestration of property (provisional measures), particularly at the initial stage of litigation. Often such orders can be effective only if enforced without prior notice. An opposing party should be given prompt notice of such an order, opportunity to be heard immediately, and a right to full reconsideration of the factual and legal basis of such an order. See Principles 1.5 and 9.

6. Languages

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

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

6.3 Translation should be provided when a party or witness is not fluent in the language in which the proceeding is conducted. Translation of lengthy or voluminous documents may be limited to relevant portions, as selected by the parties or determined by the court.

Comment:

P-6A The court should conduct the proceeding in a language in which it is fluent. Ordinarily this will be the language of the state in which the court is situated. However, if the court and the parties have competence in a foreign language, they may agree upon or the judge may order some other language for all or part of the proceeding, for example the reception of a particular document or the testimony of a witness in the witness's native language.

P-6B Frequently in transnational litigation witnesses and experts are not fluent in the language in which the proceeding is conducted, ordinarily that of the country where the case is tried. In such a case, translation is required for the court and for other parties. The testimony must be taken with the aid of an interpreter, with the party presenting the evidence paying the cost of the translation unless the court decides otherwise. Alternatively, the witness may be examined through deposition, under agreement of the parties or by order of the court. The deposition can then be translated and submitted at the hearing.

7. Default Judgment

7.1 Default judgment must be entered against a plaintiff who abandons prosecution of the proceeding, or against a defendant or other party who, without justification, fails to make an appearance.

7.2 The court, before entering a default:

7.2.1 Against a plaintiff for abandonment, must give reasonable warning to plaintiff that default may be granted;

7.2.2 Against another party, must determine that notice to that party has been properly transmitted and that the party has had sufficient time to respond;

7.2.3 Against a defendant, must determine that the claim is reasonably supported by available facts or evidence and is legally justified concerning liability and remedy, including the amount of damages and any claim for costs.

Comment:

P-7A Default judgment permits termination of a dispute if there is no contest. It is a mechanism for compelling a defendant to acknowledge the court's authority. If the court lacked authority to enter a default judgment, a defendant could avoid liability simply by ignoring the proceeding and later dispute the validity of the judgment.

P-7B A party who appears after the time prescribed, but before judgment, may be permitted to enter a defense upon offering reasonable excuse, but the court may order compensation for costs resulting to the opposing party. In making its determination, it is important for the court to

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

P-7C Reasonable care should be exercised before entering a default judgment because notice sometimes may not have been given to a defendant, or the defendant may have been confused about the need to respond. Forum procedure in many systems requires that, after a defendant has failed to respond, an additional notice be given to the defendant of the court's intention to enter default judgment.

P-7D The decision about whether the claim is reasonably supported by evidence and legally justified under Principle 7.2.3 does not require a full inquiry on the merits of the case. The judge must only determine whether the default judgment is not inconsistent with the available facts or evidence and is not legally unconscionable. For that decision, the judge must analyze critically the facts or evidence supporting the statement of claims. The judge may request production of more evidence or schedule an evidentiary hearing.

P-7E A plaintiff's abandonment of prosecution of the proceeding is, in common-law terminology, usually referred to as "failure to prosecute" and results in "involuntary dismissal." It is the equivalent of a default.

P-7F If the requirements for a default judgment are not complied with, an aggrieved party may appeal or seek to set aside the judgment, according to the law of the forum. Every system has a procedure for invalidating a default judgment obtained without compliance with the rules governing default. In some systems, including most common-law systems, the procedure is pursued in the first-instance court, and in other systems, including some civil-law systems, it is through an appeal. This Principle defers to forum law.

P-7G The party who has defaulted should be permitted to produce evidence to prove that the notice was not proper.

8. Prompt Rendition of Justice

8.1 The courts should resolve the dispute within a reasonable time.

8.2 Regarding that objective, the parties have a duty to cooperate and a right of consultation concerning scheduling. Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their advocates for noncompliance with such orders.

Comment:

P-8A In all legal systems the court has a responsibility to move the adjudication forward. It is a universally recognized axiom that "justice delayed is justice denied."

P-8B Prompt rendition of justice not only is a matter of access to justice, but may also be considered a human right.

9. Provisional Measures

9.1 The court may issue an injunction to restrain or require conduct of a person where necessary to preserve the opportunity to grant effective relief by final judgment.

The extent of the remedy is governed by the principle of proportionality. An injunction may require disclosure of assets wherever located.

9.2 A person against whom the injunction is directed must have opportunity at the earliest practicable time to respond concerning the appropriateness of the injunction.

9.3 An applicant for an injunction should be liable for full indemnification of a person against whom an injunction is issued if the injunction was unjustifiably granted. The court may require the applicant for an injunction to post a bond or formally to assume a duty of indemnification.

Comment:

P-9A The term "injunction" refers to an order requiring or prohibiting the performance of a specified act, for example, preserving property in its present condition. Principle 9.1 authorizes the court to issue an injunction that is either affirmative, in that it requires performance of an act, or negative in that it prohibits a specific act or course of action. The term is used here in a generic sense to include attachment, sequestration, and other directives. Availability of other provisional remedies or interim measures, such as attachment or sequestration, should be determined by forum law, including applicable principles of international law.

P-9B Principle 5.8 authorizes the court to issue an injunction without notice to the person against whom it is directed where doing so is justified by urgent necessity. "Urgent necessity," required as a basis for an ex parte injunction, is a practical concept, as is the concept of preponderance of considerations of fairness. The latter term corresponds to the common-law concept of "balance of equities." Considerations of fairness include the strength of the merits of the applicant's claim, the urgency of the need for a provisional remedy, and the practical burdens that may result from granting the remedy. Such an injunction is usually known as an ex parte injunction. In common-law procedure such an order is usually referred to as a "temporary restraining order." See Principle 1.5.

P-9C The question for the court, in considering an application for an ex parte injunction, is whether the applicant has made a reasonable and specific demonstration that such an order is required to prevent an irreparable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until the opposing party has opportunity to be heard. The burden is on the party requesting an ex parte injunction to justify its issuance. However, opportunity for the opposing party or person to whom the injunction is addressed to be heard should be afforded at the earliest practicable time. The party or person must have the opportunity of a de novo reconsideration of the decision, including opportunity to present new evidence. See Principle 9.2.

P-9D Rules of procedure generally require that a party requesting an ex parte injunction make full disclosure to the court of all aspects of the situation, including those favorable to the opposing party. Failure to make such disclosure is ground to vacate an injunction and may be a basis of liability for damages against the requesting party.

P-9E After hearing those interested, the court may issue, dissolve, renew, or modify an injunction. If the court had declined to issue an injunction ex parte, it may nevertheless issue an injunction upon a hearing. If the court previously issued an injunction ex parte, it may renew or modify its order in light of the matters developed at the hearing. The burden is on the party seeking the injunction to show that the injunction is justified.

P-9F Principle 9.3 authorizes the court to require a bond or other indemnification, as protection against the disturbance and injury that may result from an injunction. The particulars of such indemnification should be determined by the law of the forum.

P-9F An injunction under this Principle is ordinarily subject to immediate appellate review, according to the procedure of the forum. Review by a second-instance tribunal is regulated in different ways in various systems. The guarantee of a review is particularly necessary when the injunction has been issued ex parte. However, it should also be recognized that such a review might entail a loss of time or procedural abuse.

10. Structure of the Proceedings

10.1 A proceeding ordinarily should consist of three phases: the pleading phase, the interim phase, and the final phase.

10.2 In the pleading phase, the parties must present their claims, defenses, and main contentions in writing.

10.3 In the interim phase, the court should, if necessary:

10.3.1 Hold an early conference to establish the schedule for the progress of the proceeding;

10.3.2 Address the matters appropriate for accelerated attention, such as jurisdiction, provisional measures, and statute of limitations;

10.3.3 Address availability, admissibility, disclosure and exchange of evidence;

10.3.4 Identify potentially dispositive issues for priority of determination;

10.3.5 Order the taking of evidence.

10.4 In the final hearing, evidence not already received by the court according to Principle 10.3.5 should be presented in a concentrated sequence and the parties should make their concluding arguments.

Comment:

P-10A The concept of "structure" of a proceeding should be applied flexibly, according to the nature of the particular case. For example, if convenient a judge would have discretion to hold a conference in the pleading phase and to hold multiple conferences as the case progresses.

P-10B An orderly schedule facilitates expeditious conduct of the litigation. Discussion between the court and counsel for the parties facilitates practicable scheduling and orderly hearings. See Principle 12.2 and Comment *P-12A*.

P-10C Traditionally, courts in civil-law systems functioned through a sequence of short hearings, while those in common-law systems organized a proceeding around a final "trial." However, courts in modern practice in both systems provide for preliminary hearings and civil law systems have increasingly come to employ a concentrated final hearing for most evidence concerning the merits.

11. Party Initiative and Scope of the Proceeding

11.1 The proceeding should be initiated by the claim or claims of the plaintiff, not by the court acting on its own motion.

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

11.3 A party, upon showing good reason, has a right to amend its claims or defenses, within reasonable time limits and upon notice to other parties and when doing so does not unreasonably delay the proceeding or otherwise result in injustice.

11.4 The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission in whole or in part, or settlement. Termination or modification of the action other than by agreement of the parties should not be permitted when it would result in prejudice to a party.

Comment:

P-11A All modern legal systems recognize the principle of party initiative concerning the scope and particulars of the dispute. These Principles require the parties to provide details of fact and law in their contentions. See Principle 13.3. It is within the framework of party initiative that the court carries out its responsibility for just adjudication. See Principles 11.2 and 28.3.

P-11B The right to amend a pleading is very restricted in some legal systems. However, particularly in international disputes, the parties should be accorded some flexibility, particularly when new or unexpected evidence is confronted. A right of amendment should be available in appropriate circumstances, so long as its application is not so liberal as to be abused.

P-11C The forum law may permit a claimant to introduce a new claim by amendment even though it is time-barred (statute of limitations or prescription), provided it arises from substantially the same facts as those that underlie the initial claim.

P-11D "Prejudice" is an unfair disadvantage to an opposing party that could not be avoided by an adjournment or continuance, or adequately compensated by an award of costs.

12. Court Responsibility for Direction of the Proceeding

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

12.2 The court's management of the proceeding, to the extent reasonably possible, should be in consultation with the parties.

12.3 The court should determine the order in which issues are to be resolved, and fix a timetable for all stages of the proceeding, including dates and deadlines. The court may revise these arrangements.

Comment:

P-12A The court's management of the proceeding will be fairer and more efficient when conducted in consultation with the parties. See also Comment P-10A.

P-12B Principle 12.3 is particularly important in complex cases. As a practical matter, timetables and the like are less necessary in simple cases, but the court should always address details of scheduling.

13. Obligations of the Parties

13.1 The parties should conduct themselves in good faith in dealing with the court and other parties.

13.2 The parties share with the court the responsibility to promote an efficient, fair and reasonably speedy resolution of the proceeding.

13.3 In the pleading phase, the parties must present detailed facts and contentions of law, and specifically refer to the evidence to be offered in support thereof. When a party shows good cause for inability to provide sufficient specification of facts, or evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.

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

13.5 Advocates for parties have an obligation to assist the parties in observing their procedural obligations.

Comment:

P-13A A party should not make a claim, defense, motion, or other initiative or response that is not reasonably arguable in law and fact. In appropriate circumstances, failure to conform to this requirement may be declared an abuse of the court's process and subject to cost sanctions and fines. The obligation of good faith, however, does not preclude a party from making a reasonable effort to expand a legal concept not yet established or to extend an existing concept based on a change of circumstances. In appropriate circumstances, frivolous or vexatious claims or defenses may be considered an imposition on the court and may be subjected to sanctions beyond that of the dismissal of the case, such as cost sanctions and fines.

P-13B Principle 13.3 requires the parties to make detailed statements of facts in their pleadings, in contrast with "notice pleading" permitted under the Federal Rules of Civil Procedure in the United States.

P-13C It is a universal rule that the advocate has ethical responsibilities for fair dealing with opposing parties and with the court.

14. Access to Information and Evidence

14.1 Generally, the court and each party should have access to relevant, admissible and nonprivileged evidence.

14.2 Admissible evidence includes testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person. The parties should have the right to give statements that are accorded evidentiary effect.

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

14.4 Upon timely request of a party, the court should order disclosure of relevant, nonprivileged, and reasonably identified evidence in the possession or control of another party or a nonparty. It is not a basis of objection to such disclosure that the evidence may be adverse to the party or person making the disclosure.

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

14.6 The court should make free evaluation of the evidence and attach no special significance to evidence according to its type or source.

14.7 The court may draw adverse inferences from a party's failure to produce evidence that reasonably appears to be within that party's control or access, or from a party's failure to cooperate in production of evidence as required by the rules of procedure.

Comment:

P-14A "Relevant" evidence is probative material that supports, contradicts, or weakens a contention at issue in the proceeding.

P-14B In some legal systems the statements of a party are not admissible as evidence or are accorded diminished weight. Principle 14.2 accords a party's testimony the same weight as that of any other witness, but the court in evaluating that evidence may take into account the party's interest in the dispute.

P-14C According to Principle 14.3, eliciting testimony of parties, witnesses, and experts should proceed as customary in the forum, either with the parties conducting the primary examination or with the judge doing so. In any event, a party should have the right to conduct supplemental questioning by directly addressing another party or witness who has first been questioned by the judge or by another party.

P-14D Principle 14.6 signifies that no special legal value, positive or negative, should be attributed to any kind of relevant evidence, for example, testimony of an interested witness. However, this Principle does not interfere with national laws that require a specified formality in a transaction, such as written documentation of a contract involving real property.

P-14E Other sanctions may be imposed against the failure to produce evidence that reasonably appears to be within that party's control or access, or from a party's failure to cooperate in production of evidence as required by the rules of procedure. See Principle 15.

15. Sanctions

15.1 The court should have authority to impose effective sanctions on parties, counsel, and third persons for failure or refusal to comply with obligations concerning the proceeding and other procedural abuse.

15.2 Sanctions should be reasonable and proportional to the importance and seriousness of the matter involved, and take account of the extent of participation and the evident intentions of the persons whose conduct is involved.

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

15.4 The law of the forum may also provide further sanctions including criminal liability for severe or aggravated misconduct by parties and non-parties, such as submitting perjured evidence or threatening or violent behavior.

Comment:

P-15A The sanctions a court is authorized to impose under forum law vary from system to system. These Principles do not confer authority for sanctions not permitted under forum law.

P-15B In all systems the court may draw adverse inferences from a party's failure to advance the proceeding as required or to respond as required and, as a further sanction, to enter a default judgment. Entry of default judgment against a defendant requires specific notice. See Principle 5.2. In common-law systems the court has authority under various circumstances to hold a party or counsel in contempt of court.

16. Evidentiary Privileges and Immunities

16.1 Effect should be given to privileges, immunities, and other objections of a party or non-party concerning production of evidence, including protection from self-incrimination, confidentiality of professional communication, rights of privacy, and privileges of a spouse or family member.

16.2 The court should consider whether these restrictions may justify a party's failure to produce evidence when it decides upon drawing adverse inferences.

16.3 The court should recognize such restrictions in exercising authority to impose direct compulsory sanctions on a party or non-party.

Comment:

P-16A All legal systems recognize various privileges and immunities against being compelled to give evidence. However, the conceptual and technical bases of these protections differ, as do the legal consequences of giving them recognition.

P-16B The weight accorded to various privileges differs from one legal system to another and the significance of the claim of privilege may vary according to the context in specific litigation. These factors are relevant when the court considers drawing adverse inferences from the party's failure to produce evidence.

P-16C Principles 16.2 and 16.3 reflect a distinction between drawing adverse inferences and imposing direct compulsory sanctions.

P-16D In some systems, the court cannot recognize a privilege sua sponte, but must respond to the initiative of the party benefited by the privilege. The court should give effect to any procedural requirement of the forum that an evidentiary privilege or immunity be expressly claimed. According to such requirements, a privilege or immunity not properly claimed in a timely manner may be considered waived.

17. Joinder of Claims and Parties; Intervention

17.1 A party may assert any claim against another party or a third person who is subject to the jurisdiction of the court.

17.2 A person having an interest substantially connected with the subject matter of the proceeding may apply to intervene. Such an intervention should not be permitted when it would result in unreasonable delay of the proceeding.

17.3 When it is necessary and just, the court should grant permission for a person to be substituted for a party in a proceeding.

17.4 The additional party's rights and obligations of participation and cooperation in the proceeding are ordinarily the same as those of the original parties. The extent of these rights and obligations may depend upon the basis, timing and circumstances of the joinder or intervention.

17.5 The court may order separation of claims, issues, or parties, or consolidation with other proceedings, for more efficient management and determination.

Comment:

P-17A Principle 17 recognizes the broad right to assert any claim available against another party, a right which is afforded in many legal systems. In some legal systems joinder is permitted only of claims related to the same transaction or occurrence.

P-17B There are differences in the rules of various countries governing jurisdiction over third parties. In Europe, a valid third party claim is itself a basis of jurisdiction whereas in some common law countries the third party must be independently subject to jurisdiction. Principle 17.1 requires an independent basis of jurisdiction.

P-17C In any event, the court has authority to sever claims and issues, and to consolidate them, according to their subject matter and the affected parties.

18. Amicus Curiae Submission

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

Comment:

P-18A The "amicus curiae brief" is a useful means by which a nonparty may supply the court with information and legal analysis that may be helpful to achieve a just and informed disposition of the case. Therefore, any person may be allowed to file such a brief, notwithstanding a lack of legal interest sufficient for intervention. It is in the court's discretion whether such a brief may be taken into account. A court has authority to refuse an amicus curiae brief when such a brief would not be of material assistance in determining the dispute. The court may invite a third party to present such a submission. An amicus curiae does not become a party to the case but is merely an active commentator. Factual assertions in an amicus brief are not evidence in the case.

P-18B In civil-law countries there is no established practice of allowing third parties without a legal interest in the merits of the dispute to intervene or participate in a proceeding. Neither do most of the civil-law countries have a practice of allowing the submission of amicus curiae briefs. However, the amicus curiae brief is a useful device, particularly in cases of public importance.

P-18C Principle 18 permits the practice of *amicus curiae* briefs, but does not authorize third persons to present written submissions concerning the facts in dispute. It refers only to data, background information, remarks, legal analysis, and other considerations that may be useful for a fair and just decision of the case. For example, a trade organization might give notice of special trade customs to the court.

P-18D The parties must have opportunity to submit written comment addressed to the matters in the submission before it is considered by the court.

19. Oral and Written Presentations

19.1 Pleadings, formal requests (motions), and legal argument ordinarily should be presented initially in writing, but the parties should have the right to present oral argument on important substantive and procedural issues.

19.2 The final hearing should be held before the judicial officers who are to give judgment.

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

19.4 The parties should be allowed direct supplemental oral questioning of witnesses, including another party or an expert.

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

Comment:

P-19A Traditionally, all legal systems received witness testimony in oral form. However, in modern practice, the tendency is to replace the main testimony of a witness by a written statement. Principle 19 allows flexibility in this regard. It contemplates that testimony ordinarily can be presented initially in writing, with orality commencing upon supplemental questioning by the court and opposing parties.

P-19B The right of a party to put questions directly to an adverse party or non-party witness is of first importance and is now recognized in most legal systems.

20. Public Proceedings

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

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

20.3 In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of it secret and if the proceedings are confidential, the judge may order part of it public.

20.4 Judgments, final or otherwise, and their supporting reasons, and ordinarily other orders should be accessible to the public.

Comment:

P-20A There are conflicting approaches concerning publicity of various components of proceedings. In some civil law countries, the court files and records are generally kept in confidence although they are open to disclosure to justifiable cause, whereas in the common law tradition they are generally public.

P-20B In some systems the parties may request, and the court may grant, privacy of all proceedings except the final judgment. The same practice is almost invariably followed in arbitration. Some systems have a constitutional guaranty of publicity in judicial proceedings, but have special exceptions for such matters as trade secrets, matters of national security, etc.

21. Burden and Standard of Proof

21.1 Ordinarily, each party has the burden to prove the facts regarding an issue essential to that party's case.

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

21.3 When it appears that a party has possession or control of relevant evidence that it declines to produce, the court may draw adverse inference with respect to the issue for which the evidence is probative.

Comment:

P-21A The facts that are "essential to that party's case" refer both to the elements of a legally valid claim and the elements of an affirmative defense. The requirement stated in Principle 21.1 is often expressed in terms of the formula "the burden of proof goes with the burden of pleading." The allocation of the burden of pleading is specified by law, ultimately reflecting a sense of fairness. The determination of this allocation is often a matter of substantive law and in any event should be guided by the forum's rules.

P-21B The standard of "reasonably convinced" is in substance that applied in most legal systems. The standard in the United States and some other countries is "preponderance of the evidence" but functionally that is essentially the same.

P-21C Principle 21.3 is based on the principle that both parties have the duty to contribute in good faith to the discharge of the opposing party's burden of proof. See Principle 13. The possibility of drawing adverse inference ordinarily does not preclude introduction of other evidence relevant to the issue in question. Drawing such an inference can be considered a sanction, see Principle 14.7 and 15.3, or a shifting of the burden of proof, see Principle 21.1.

22. Responsibility for Determinations of Law and Fact

22.1 The court is responsible for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law. The court may rely on a legal basis not advanced by the parties only upon giving them opportunity to comment.

22.2 The court may invite the parties to amend their contentions of law or fact and to offer additional legal argument and evidence accordingly.

22.3 The court may rely on an interpretation of the facts or of the evidence that has not been advanced by a party, but only upon giving all parties opportunity to comment.

22.4 The court may on its own motion order the taking of evidence not previously advanced by a party, but only upon giving all parties opportunity to comment.

22.5 The court ordinarily should hear all evidence directly, but when necessary it may delegate the taking of evidence prior to the final hearing to a suitable judicial officer or other person.

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

22.6.1 If the parties agree upon an expert the court ordinarily should appoint that expert.

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

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

Comment:

P-22A Principle 22.1 is universally recognized, even in those systems in which the parties are expected to submit contentions as to the governing law.

P-22B Foreign law is particularly delicate subject in transnational litigation. The judge may not be knowledgeable about foreign law and may need to appoint an expert or request submissions from the parties on issues of foreign law. See Principle 22.6.

P-22C According to Principle 11 the scope of the proceeding is determined by the claims and defenses of the parties in the pleadings. The judge is generally bound by the scope of the proceeding stated by the parties.

P-22D Use of experts is common in complex litigation. Court appointment of a neutral expert is the practice in most civil-law systems and in some common law systems. However, party-appointed experts can provide valuable assistance in the analysis of difficult factual issues. Expert testimony may be received on issues of foreign law.

23. Decision and Reasoned Explanation

23.1 Upon completion of the hearings the court should promptly give judgment by written decision with a specification of the remedy awarded, including a specification of the amount of a monetary award.

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

Comment:

P-23A When a judgment determines less than all the claims and defenses at issue, it should specify the matters that remain open for further proceedings. For example, in a case of joinder of claims, the court may decide one of the claims (damages, for example) and keep the proceedings open for the decision of the other (injunction, for example.) The court should specify the matters that remain open for further proceedings.

P-23B See Principle 5.6, requiring that the court should consider each significant contention of fact, evidence and law relevant to a dispositive issue.

24. Settlement

24.1 The court, while respecting the parties' opportunity to pursue litigation, should encourage settlement and reconciliation of the parties when reasonably possible.

24.2 The court should facilitate party participation in non-binding alternative-dispute-resolution procedure and voluntary settlement at any stage of the proceeding.

24.3 The parties, both before and after commencement of litigation, should cooperate in reasonable settlement endeavors. The court may adjust its cost awards to reflect unreasonable failure to cooperate or bad-faith participation in settlement endeavors.

Comment:

P-24A The proviso "while respecting the parties' opportunity to pursue litigation" makes it clear that the court should not compel or coerce settlement among the parties.

P-24B Principle 24.3 departs from traditions in some countries in which the parties generally do not have an obligation to negotiate or otherwise consider settlement proposals from the opposing party. It can be implemented by a rule about "settlement offers" such as the Ontario (Canada) civil-procedure rules or Part 36 of the new English procedural rules. Those are formal procedures whereby a party may make a definite offer of settlement and thereby oblige the opposing party to accept or refuse it on penalty of additional costs if that party does not eventually obtain a result more advantageous than the proposed settlement offer. See also Principle 25.2.

25. Costs

25.1 The prevailing party ordinarily should be awarded all or a substantial portion of its actual and reasonable costs. "Costs" include court filing fees, fees paid to officials such as referees or court reporters, expenses of presenting evidence, and attorneys' fees.

25.2 Exceptionally, the court may withhold or limit costs to the winning party when there is clear justification for doing so. The court may limit the award to a proportion that reflects expenditures for matters in genuine dispute and award costs against a winning party that has raised unnecessary issues or been otherwise unreasonably disputatious. The court in making cost decisions may take account of any party's procedural misconduct in the proceeding.

Comment:

P-25A Award of costs, including attorneys' fees, is the rule prevailing in most legal systems, although not in China, Japan, and the United States.

P-25B According to Principle 25.2, exceptionally the court may decline to award any costs to a party, or award only part of the costs, or may calculate costs more generously or more severely than it otherwise would. The exceptional character of Principle 25.2 requires the judge to give reasons for the decision. See also Principle 24.3.

26. Enforceability

26.1 Final judgments should be immediately enforceable.

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

26.3 Security such as a suitable bond may be required from the appellant as a condition of granting a stay or from the respondent as a condition of denying a stay.

Comment:

P-26A The Principle of finality is essential to effective adjudication. Any decision, however apparently reasonable, theoretically could be shown to depend on false evidence.

P-26B The fact that a judgment should be immediately enforceable upon becoming final does not prohibit a court from giving the losing party a period of time for compliance of the award. The judgment should be enforced in accordance with its own terms.

P-26C A partial judgment (dealing only with part of the controversy) may also be final and, therefore, immediately enforceable.

27. Appeal

27.1 A party should have opportunity for appellate review on substantially the same terms as other judgments under the law of the forum.

27.2 Appellate review ordinarily should be limited to claims, defenses, counterclaims, evidence, and issues addressed in the first-instance proceeding.

27.3 The appellate court may permit presentation of new facts and evidence when necessary in the interest of justice.

Comment:

P-27A Appellate procedure varies substantially among legal systems. The procedure of the forum therefore should be employed.

P-27B Concerning scope of appellate review, in some civil-law systems a proceeding in the court of second instance can be essentially a new trial. In other systems the decision of the court of first instance can be reversed or amended only for egregious miscarriage. This Principle rejects both of these extremes. However, reception of new evidence at the appellate level should be

permitted only when required by the interest of justice. If a party is permitted such an opportunity, other parties should have a correlative right to respond. See Principles 22.3 and 22.4.

28. Lis Pendens and Res Judicata

28.1 In applying the rules of lis pendens, the scope of the proceeding is determined by the claims in the parties' pleadings, including amendments.

28.2 The time of submission of the claim to the court determines lis pendens.

28.3 In applying the rules of claim preclusion, the scope of the claim or claims decided is determined by reference to the claims and defenses in the parties' pleadings, including amendments, and the court's decision and reasoned explanation.

28.4 The concept of issue preclusion, as to an issue of law or fact, should only be applied to prevent substantial injustice.

Comment:

P-28A This Principle is related to Principle 11.2, which establishes that the scope of the proceeding is determined by the parties in their pleadings.

P-28B Issue preclusion, collateral estoppel or issue estoppel is imposed in some systems on the basis of the judicial determination, with binding effect, of issues in a controversy. Under Principle 28.4, issue preclusion might be applied when, for example, a party has justifiably relied in its conduct on a determination of an issue of law or fact in a previous proceeding. A broader scope of issue preclusion is recognized in many common law systems, but the more limited concept in Principle 28.4 is derived from the principle of good faith.

29. Effective Enforcement

Procedures should be available for prompt, speedy and effective execution of a provisional remedy, a judgment for money, including costs, or a judgment for an injunction.

Comment:

P-29 Many legal systems have archaic and inefficient procedures for enforcement of judgments. From the viewpoint of litigants, particularly the winning party, effective enforcement is an essential element of justice.

30. Recognition

A final judgment or provisional remedy in a proceeding conducted in another forum in substantial compliance with these Principles may be denied recognition and enforcement only on the basis of substantive domestic public policy of the forum.

Comment:

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P-30A Recognition of judgments of another forum, including judgments for provisional remedies, is especially important in international litigation. All legal systems have firm rules of recognition for judgments rendered within the system.

P-20B Principle 30 is essentially a principle of equal treatment. A judgment given in a proceeding conducted under these Principles ordinarily should have the same recognition as judgments given in a proceeding conducted under the laws of the forum.

31. International Judicial Cooperation

The courts of a state that has recognized these Principles should provide assistance to the courts of any other state that is conducting litigation under these Principles, including the grant of protective or provisional relief and assistance in the identification, preservation or production of evidence.

Comment:

P-31A International judicial cooperation and assistance supplements international recognition and, in modern context, is equally important.

P-31B Consistent with rules concerning communication outside the presence of parties or the representatives (ex parte communications), judges should establish communication with judges in other jurisdictions. See Principle 1.5.

P-31C For the significance of the term "evidence," see Principle 14.