

# Transnational Rules of Civil Procedure Rules and Commentary

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Introduction by *John J. Barceló III*\*\*\*

The 1996 draft Transnational Rules of Civil Procedure and accompanying Commentary were authored jointly by Professors Geoffrey C. Hazard, Jr., University of Pennsylvania Law School, and Michele Taruffo, University of Pavia (Italy) Law Faculty. In an earlier draft they were the subject of a one-day symposium sponsored by the Cornell-Paris I Summer Institute of International and Comparative Law and the Cornell Berger International Legal Studies Program. The symposium, held July 13, 1996 at the University of Paris I law faculty, brought together scholars and practitioners from the United States and Europe (including France, Italy, Switzerland, and the United Kingdom). Both common law and civil law systems were well represented. On the basis of the discussion and comments at the symposium, the authors revised the earlier draft into the 1996 draft Rules and Commentary published herein. The authors plan further revisions of the draft Rules and Commentary on the basis of continued comment and analysis from scholars, judges, and practitioners.

Hazard and Taruffo, although steeped in their respective common law and civil law traditions, were each receptive to the best features of the opposing system. The Rules are thus a fusion of what the authors think are the most attractive attributes of the two systems in the context of transnational litigation. For example, following the civil law tradition, the Rules dispense with juries, elaborate rules of evidence, and wide-ranging deposition taking before trial. On the other hand, they adopt the common law method of direct and cross-examination of witnesses (although judges may also question witnesses), and they allow some deposition taking before trial (although only upon court order).

The Rules' purpose is primarily to provide an efficient and fair procedure for transnational cases. The authors' intent is for the draft Rules to apply in ordinary national courts, replacing domestic procedural rules whenever the plaintiff and defendant are nationals of different states or whenever property in one state is subject to claims (ownership or security

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interests) asserted by a party from another state. In such transnational cases today, one of the hardships—and hence one of the risks of international commerce—occurs when a party is forced to prosecute or defend its interests under a foreign procedural system containing elements that seem arbitrary or unfair.

International commercial arbitration has become the dispute-settlement mechanism of choice in international transactions, in part for the same reason—to avoid litigation in a foreign system. Even if these draft Rules fulfill the authors' purpose, arbitration is still likely to remain the preferred form of dispute settlement in the transnational arena. However, some cases will always find their way into the courtroom, and the authors' design provides greater procedural fairness in these situations. Moreover, the draft Rules could be useful in arbitration, where the parties are generally free to choose the procedural rules to govern the hearing and fact-finding process (failing the parties' agreement, the arbitrators generally have that freedom). Although the first six Rules—dealing with the Rules' applicability, personal jurisdiction, venue, and composition of the court—would not apply to arbitration, Rules 7 through 25 could be adopted by the parties or the arbitrators, especially if the goal were to find a compromise between common law and civil law procedural systems.

The authors conceive that the draft Rules might come into force through national legislation adopting the Rules for transnational cases. Alternatively, the draft Rules might be incorporated into an international treaty that would obligate adhering parties to apply the Rules directly or to enact implementing legislation. Both the possibilities for adoption and the purpose of the draft Rules are discussed in more detail in the authors' commentary accompanying the Rules.

Even if the draft Rules never become law in any country, they will still serve a useful purpose. They provide, in concrete form, a set of rules prepared by two leading scholars aimed at fusing what is best about civil law and common law procedure in civil cases into a single coherent procedural system. The draft Rules can thus serve, at a minimum, as a reference point against which to analyze existing national procedural systems—an analysis which, by itself, may generate procedural improvements in existing national systems and at least should improve our understanding of procedural justice.

[Editors' Note: The Hazard-Taruffo project has now been adopted as a project of the American Law Institute. Further development will proceed under that sponsorship.]

# Transnational Rules of Civil Procedure

## 1. Subject Matter Competence

(a) Subject to domestic constitutional provisions and statutory provisions not superseded by these Rules, the courts of a state that has recognized these Rules shall apply them in all civil and commercial matters defined in Rule 2, except the following:

(1) Claims for recovery of taxes or a civil penalty, but this limitation does not exclude punitive damages incident to the recovery of compensatory damages;

(2) Claims against an agency or instrumentality of a sovereign or a political subdivision thereof, except with the consent of such a party and except for a counterclaim by way of set-off against such a party, but this limitation does not exclude claims by or against a government corporation or agency based on contract or concerning proprietary activities of the government corporation or agency;

(3) Claims of employees against employers or claims under statutes for protection of consumers or protecting against personal discrimination or civil rights;

(4) Divorce, adoption, filiation and personal status proceedings, but this limitation does not exclude claims to enforce monetary awards made by a court of competent jurisdiction;

(5) Proceedings for settlement or administration of a decedent's estate;

(6) Insolvency proceedings, but this limitation does not exclude claims to be adjudicated between the administrator of the estate and claimants or obligors or among claimants and obligors.

(b) When a plaintiff has initiated litigation according to the procedural law of the forum, any other party may stipulate that the litigation shall proceed according to that law or may demand that these Rules be applied.

## 2. Transnational Legal Disputes Defined

(a) Except as stated in Subsections (a)(3) of this Rule, these Rules apply to a proceeding concerning any dispute, whether or not considered by domestic law to be public or private in nature:

(1) In which a plaintiff and a defendant are nationals of different states, whether or not there are additional parties; or

(2) Concerning property, either fixed or movable, that is located in one state but concerning which a claimant of another state makes a claim of ownership or of a security interest.

(3) These Rules do not apply to a dispute between nationals of different states who are residents of the same state or who renounce application of these Rules to their dispute.

(b) A corporation, *société anonyme*, 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.

### 3. Personal Jurisdiction

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

- (1) Designated by agreement of the parties;
- (2) In which a defendant is subject to the compulsory judicial authority of that state, as determined by that state's law governing personal jurisdiction;
- (3) Where the property is located when competence is based on Rule 2(a)(2).

(b) Jurisdiction may be exercised over another party who should participate in the interest of fair and efficient adjudication if:

- (1) The party in question is subject to the compulsory judicial authority of the state or otherwise may be compelled to participate; and
- (2) The court determines that it is no less convenient a forum than another in which all the defendants could be made parties.

### 4. Venue

Within a state having competence of the matter and jurisdiction over the parties, the proceeding shall be brought in the court of first instance in the locality determined according to the state's rules of venue.

### 5. Constitution of the Court

(a) Unless the parties otherwise agree, the court consists of three judges of the court of first instance in which the proceeding was commenced.

(1) The judges shall be appointed by the presiding judge of that court or by such other judicial administrative authority as may be competent to do so, such as the Chief Justice of the state. The appointing authority shall designate the judge to preside; otherwise, the judge senior in service among members of the court shall do so.

(2) A single judge of the panel may act for the court in preliminary matters, including determination of a preliminary or interlocutory injunction under Rule 8 and discovery and other pretrial matters under Rules 12-16.

(b) Except as prohibited by constitutional limitation, in the trial of the dispute the court shall designate three citizens to participate as nonvoting members.

(1) The procedure for their appointment shall correspond as nearly as practical to that for selection of lay assessors or jurors under the law of

the forum. In a state in which lay jurors ordinarily are used in criminal but not civil proceedings, the tribunal may use the selection procedure for jurors in criminal cases. Otherwise the tribunal shall use a procedure of random selection from a convenient list of residents in the vicinity, for example, voter registration or motor vehicle licensees.

(2) In cases involving substantial issues of commercial practice or scientific evidence, the court may direct that the lay jurors be drawn from lists of people having knowledge of the relevant subject matter. The court shall order the basis on which the list is constituted and the procedure for selection from the list.

(3) Voir dire examination of lay jurors shall be conducted by the court and shall be limited to inquiring into cause for exclusion. Cause for exclusion shall be limited to whether a prospective juror has personal or financial relationship to a party or knowledge of the transaction or occurrence that is the subject of the proceeding. Each party may peremptorily exclude three prospective jurors.

## 6. General Authority of the Court

In addition to authority conferred by these Rules, the court has authority to give direction to the proceedings and to make rulings in furtherance of justice. These Rules shall be interpreted and applied to achieve fair and expeditious substantial justice, having regard for the legal and cultural traditions of the litigants and promotion of an ordered international legal system. Subject to the foregoing, the procedural law of the forum shall be applied in matters not addressed in these Rules, including the time limits imposed on procedural matters.

## 7. Language

The proceedings, including litigation documents, oral proceedings, and evidence, shall be conducted in the language of the court, except to the extent that the court, with the agreement of the parties, otherwise permits. A witness may testify in the witness's own language with the testimony being translated into the language of the court. Documents in a language other than that of the court shall be translated into the language of the court, except to the extent that the court, with the agreement of the parties, otherwise permits. Translation shall be limited to relevant portions of documents that are lengthy or voluminous.

## 8. Preliminary and Interlocutory Orders

(a) The court has authority to issue injunctions to restrain or require conduct on the part of a party, or of a person not a party who is subject to the court's authority, where necessary to preserve the status quo or to prevent irreparable injury pending the litigation.

(1) A court may issue a preliminary injunction upon application of a party, before the opposing party has opportunity to respond, upon proof

showing urgent necessity and a preponderance of considerations of fairness in support of such relief. Such an injunction shall be effective only until the party or person to whom it is directed has reasonable opportunity to respond concerning the appropriateness of the injunction and the court has had opportunity to consider any objections which that party or person may have asserted.

(2) The court may, after hearing those interested, issue or renew a preliminary injunction or extend it into an interlocutory injunction, upon such terms as are justly required to maintain the status quo or prevent irreparable injury.

(3) The court may require the posting of bond or other provision for indemnification of the party against whom a preliminary or interlocutory injunction is entered.

(b) An injunction may restrain transfer of property, wherever located, pending the conclusion of the litigation. An injunction may require a party to make prompt disclosure of the whereabouts of its assets, including assets under its control, and of persons whose identity or location is relevant. This authority does not preclude a party from obtaining an attachment or similar remedy permitted under the law of the forum, but the court may issue an injunction, in accordance with the procedure in subsection (a), to terminate, suspend or limit such an attachment. Whether the court may issue an injunction against prosecution of litigation in another forum is determined by principles of international law, including applicable limitations imposed by international convention.

(c) An order of the court granting, denying, modifying or refusing to modify an injunction as provided in Rule 8(a) is appealable as provided in Rule 27. Unless the appellate court orders otherwise, the injunction remains in effect during the pending of the appeal.

## 9. Commencement of Suit

(a) A proceeding shall be commenced by filing the suit in the court of first instance. The procedure for filing shall conform to the rules of the court in which the suit is commenced. The proceeding shall be designated a Transnational Proceeding.

(b) Concurrently with filing the suit, notice shall be given to the defendant, or defendants if more than one, in accordance with an applicable international convention or, if no such convention is applicable, by transmitting a copy of the statement of claim and a notice that plaintiff elects to proceed under these Rules. The provisions of an applicable international convention, or the rules of the court in which the proceeding is filed as the case may be, shall govern the manner of transmitting such notice.

(c) Defendant shall respond as provided in these Rules or, to the extent not inconsistent with these Rules, according to the procedure applicable in the court in which the suit is brought.

## 10. Statements of Claim

(a) The plaintiff shall state the facts on which his claim is based, the legal rules that he contends support the claim, and the basis upon which the claim is brought under these Rules.

The statement of facts shall be in reasonable detail as to time, place, parties and participants, and events. The plaintiff may subsequently amend the statement of claim upon such terms as the court may permit, and reasonable permission to amend shall be afforded.

(b) The plaintiff shall attach copies of all documents, such as contract documents, on which he intends to rely in supporting the claim. The plaintiff shall also identify all witnesses, including parties and nonparty witnesses, who the plaintiff expects to call in supporting the claim. The list shall identify the witness by name, address, and telephone number and shall state in reasonable detail the testimony expected from the witness.

## 11. Statements of Defense; Counterclaims

(a) The defendant shall within 60 days answer the claim by admissions and denials of the allegations and may assert affirmative defenses. The time for answer may be extended for a reasonable interval by agreement of the parties or by court order. The answer shall:

(1) Deny such parts of the statement of claim as defendant wishes to dispute;

(2) Admit with explanation such statements as defendant does not wish to dispute as thus explained;

(3) State the facts of any affirmative defenses, in the detail required by Rule 10(a), and the legal rules upon which defendant relies for such a defense. Defendant shall have the same right of amendment as stated in Rule 10(a).

(b) Defendant shall attach documents and list witnesses in the same manner as required of a claimant by Rule 10(b).

(c) The defendant may state a counterclaim seeking relief from a claimant and a cross-claim against a co-defendant or third party, in accordance with the procedure of the forum. In accordance with the procedure of the forum, any party may join additional parties, for example in a claim for indemnity or contribution, who are subject to the jurisdiction of the court. The statement of such a claim shall be in accordance with Rule 10.

(d) A counterclaim or cross-claim arising from the same dispute as that in the complaint shall be barred unless it is asserted under these Rules or is made the subject of a suit in a court of law commenced within 90 days after defendant has been notified of the proceeding under these Rules.

## 12. Pretrial Determinations

(a) On motion of a party or upon its own initiative, the court may prior to trial determine:

(1) That the dispute is not governed by these Rules, that the court lacks competence to adjudicate the dispute, or that the court lacks jurisdiction over a party;

(2) That a statement of claim or defense or other procedure employed by a party fails to comply with these Rules or is otherwise irregular;

(3) That a party's statement of claim or defense is invalid as a matter of substantive law or is not supported by evidence sufficient to permit a judgment in favor of that party, but shall have regard for that party's opportunity for discovery under these Rules before making such a determination;

(4) Other matters of substantive law or procedure necessary to advance the proper adjudication of the proceeding.

(b) Upon having made a determination as provided in Subsection (a), the court may allow the party against whom the determination is made a reasonable opportunity to amend when it appears that the deficiency could be remedied by amendment.

(c) When a determination under this Rule is an adjudication of the merits of a claim or defense, the court shall render judgment and publish an opinion with respect to that claim or defense, as stated in Subsections (c) and (d) of Rule 25.

### 13. Pretrial Discovery

(a) A party may demand from another party matter not privileged as follows:

(1) Documents and other things and forms of information, including computerized information, that are relevant to facts in issue in a claim or defense and which are specifically identified by subject matter, date and author or owner in the discovery demand;

(2) The identity and whereabouts of persons having personal knowledge of the facts of the transaction that is the subject of the proceeding;

(3) The identity of any expert witness that a party intends to present, together with a statement of the opinions of the expert.

(b) A party claiming redress for personal injury shall, upon demand of another party, submit to a reasonable medical examination.

(c) The court may order additional discovery of any matter, not privileged, whose production appears necessary in the interest of justice, including the deposition of a party or a witness.

(d) Discovery demands may be made as follows:

(1) Initial demands by plaintiff shall be made in the complaint and by defendant in the answer.

(2) Second demands may be made within 60 days after defendant has answered, but may relate only to evidence that could not reasonably have been anticipated in the initial demand.

(3) Further demands may be authorized by the court.

(e) To enforce discovery the court may:

- (1) Draw adverse inferences concerning facts in issue against a party who has failed to comply with a proper discovery demand;
- (2) Employ the measures authorized by Rule 14;
- (3) Dismiss claims, defenses or allegations to which the discovery is relevant;
- (4) Enter judgment of dismissal against a plaintiff or judgment by default against a defendant.

#### 14. Orders Directed to Third Person

(a) The court may direct persons subject to its authority who are not parties to the proceeding:

- (1) To comply with an injunction issued in accordance with Rule 8(a);
- (2) To retain funds or other property the right to which is in dispute in the proceeding, and to disburse the same only in accordance with an order of the court;
- (3) To give testimony in discovery or at trial;
- (4) To produce documents or other things as evidence in discovery or at trial.

(b) An order directed to a third party may be enforced by imposition of a monetary penalty for noncompliance and by other legal compulsion authorized by the court, such as contempt of court or direct seizure of evidentiary material or other things. See Rule 32.

#### 15. Protective Orders in Discovery

(a) The court, on its own initiative or on motion of a party or third person who is subject to a discovery obligation under Rules 13 or 14, may limit or bar discovery when it appears that the discovery obligation is oppressive or is unlikely to yield admissible evidence or requires production of evidence protected by a privilege.

(b) When the information sought to be discovered is a trade or business secret, or where its disclosure would cause injury or embarrassment that could be avoided or mitigated by a protective order, the court should grant such protection.

(c) When it would assist the court in exercising its authority under this Rule, the evidence sought to be discovered may be examined by the court in camera.

#### 16. Pretrial Conference and Orders

The court may order a conference prior to trial. The advocates for the parties shall attend, and the court may order that the parties attend, or in the case of an organization a responsible officer thereof.

(a) The court may:

(1) Order the addition, elimination or revision of claims defenses and issues, in light of the parties' contentions at that stage;

(2) Order the isolation for separate trial of one or more issues in the case, and order consolidation of the case with another case pending before it, whether such other case is under these Rules or those of the forum;

(3) Make rulings on the admissibility of evidence. Unless the court orders otherwise, documents and other items of demonstrative evidence that are to be introduced at trial shall be identified and their admissibility determined at the pretrial conference;

(4) Identify the witnesses who are to testify, including expert witnesses, and the order of their presentation;

(5) Fix the date for trial;

(6) Enter other orders to expedite the trial.

(b) The court may direct the parties to consider settlement or referral of the dispute to mediation.

## 17. Relevance and Admissibility of Evidence

(a) All relevant evidence is admissible, unless it is excluded according to the following rules. Evidence is relevant when it tends to achieve rationally reliable knowledge of a fact in issue. The court may consider any relevant circumstantial evidence.

(b) Any person having information concerning a relevant fact is a competent witness, including parties and employers and agents of parties.

(c) A party is entitled to call any competent witness whose testimony is relevant and admissible. The court may call any witness on its own motion under the same conditions.

(d) The parties may offer in evidence any relevant document or real or demonstrative evidence. The court may order any party or nonparty to present any relevant document or real or demonstrative evidence in that person's possession.

## 18. Expert Evidence

(a) The court may appoint an expert or panel of experts whenever, in the court's discretion, expert evidence may be helpful in resolving issues in the case. Expert testimony may address the rules of foreign law and international law. The court determines the issues that are to be addressed by the expert and the tests, evaluations or other procedures to be employed by the expert. The court may issue orders necessary to facilitate the inquiry and report by the expert and may specify the form in which the expert shall make its report.

(b) A party may designate its own expert or panel of experts on any issue concerning which the court has appointed an expert. The parties' experts are entitled to participate in or observe the tests, evaluations or other procedures conducted by the court's expert. They may submit their

own opinions to the court, in the same form as the reports made by the court's expert.

(c) The fees and expenses of the court's expert will be provisionally compensated by a party or the parties according to the court's order. The losing party shall pay such expenses at the end of the case, unless the court orders otherwise. Each party pays for an expert whom that party has retained.

## 19. Testimony in Other Languages

The testimony of a witness, including an expert witness, who is not fluent in the language in which the proceeding is conducted, may be presented, at the option of the party presenting that witness as follows:

(a) At trial with the aid of translation. The cost of the translation shall be paid by the party presenting the witness unless the court orders otherwise;

(b) By deposition as provided in Rule 21.

## 20. Evidentiary Privileges

(a) Evidence cannot be admitted of information covered by the following privileges:

(1) Attorney-client. Communications with an attorney who is not in independent practice are not privileged;

(2) Attorney work-product;

(3) Husband-wife;

(4) Priest-penitent;

(5) Doctor-patient. Communications with a psychiatrist or clinical psychologist are covered by this privilege.

(b) Evidence cannot be admitted of information covered by other privileges recognized by the law of the forum, unless the court determines that the need for the evidence to establish truth is of greater significance than the need to maintain confidentiality of the information. If the court permits the evidence to be obtained, it may grant protective measures as provided in Rule 15.

(c) A privilege may be waived by, or on behalf of, the person who is entitled to take advantage of it. A party waives a privilege by omitting to make a timely objection to a question seeking a privileged communication. The court, in the interest of substantial justice, may relieve a party of waiver of a privilege.

(d) The court may order that evidence of privileged communications be given when the evidence is necessary to establish a material fact. Such evidence shall be given in closed session of the court but in the presence of the parties and their lawyers. The court will order protection of the secrecy concerning the privileged material.

## 21. Depositions

(a) A party or a witness may give testimony by deposition in the circumstances stated in subsection (c). The testimony shall be upon affirmation as provided in Rule 22(b)(2) and shall be transcribed verbatim or by audio or video recording, as the parties may agree or as the court orders. The cost of the transcription shall be paid by the party taking the deposition.

(b) The deposition shall be taken at such time and place as the parties may agree or as the court orders. All parties and the court shall be given written notice, at least 30 days in advance, of the time and place of the deposition. The party at whose instance the deposition is taken shall examine the witness first, and other parties thereafter. The examination shall be conducted as provided in Rule 22. Prior to the deposition the court may submit questions to be asked of the witness as supplemental questions to be answered by the witness following the deposition.

(c) Testimony may be presented by deposition when:

- (1) The witness cannot conveniently be present at trial;
- (2) The court has ordered a deposition as provided in Rule 13(c);
- (3) The witness is not fluent in the language of the court, as provided in Rule 19;
- (4) The court so orders in the interests of justice.

## 22. Presentation of Evidence

(a) Receipt of evidence shall be concentrated in a single hearing, or hearings on consecutive judicial days, except when the court orders otherwise for the convenience of the parties or witnesses or the administration of justice.

(b) Evidence at trial will be received according to the following rules:

(1) Any person, including a party, having mental capacity may be heard as a witness.

(2) A witness must affirm to tell the truth. The court will determine the terms of the affirmation.

(3) A witness is directly examined by the lawyer of the party who called the witness. The witness may then be cross-examined by the lawyers of the other parties. Re-direct and re-cross-examination may be permitted by the court. The court will exclude, on objection or on its own motion, matters that are irrelevant or prejudicial and improperly leading questions. The court will prevent embarrassment and harassment of witnesses.

(4) The court may at any time question a witness in order to clarify the witness's testimony. The court may conduct a supplemental examination of a witness after direct and cross-examination.

(5) A witness called by the court is examined by the court first. The witness then may be cross-examined by the lawyers for the parties.

(6) Direct examination by the court or by lawyers may deal with any relevant issue in the case. Cross-examination may deal with any issue

addressed in the direct examination, unless the court permits a more extensive scope.

(7) Statements made by a party outside of the trial against that party's own interest are admissible as evidence.

(8) Opinions of lay witnesses are admissible to clarify the witness's testimony. Opinions of expert witnesses are admissible.

(9) The credibility of a witness, including an expert witness, can be disputed on any relevant factual basis, including cross-examination by a party, consideration of prior inconsistent statements, or other evidence that may affect the credibility of the witness. Any party may impeach any witness. A witness may be examined by the court on its own motion about matters that affect the witness's credibility. Impeachment will be allowed only of testimony concerning material issues and only if it tends to cast serious doubt about the reliability of a testimony. The court may permit similar contest of the authenticity or accuracy of a document or an item of real and demonstrative evidence. The court may similarly provide for controls concerning the reliability of any scientific and technical evidence and may determine the proceedings and the techniques needed for such purposes.

### 23. Powers and Remedies Concerning Evidence

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

(a) Exclude irrelevant, redundant or cumulative evidence, or evidence whose presentation involves excessive cost, burden or delay;

(b) In the interest of substantial justice, relieve a party from a failure to comply with the rules concerning evidence;

(c) Draw adverse inferences from a party's failure to give testimony, or to present a witness whom the party apparently was in a position to present, or to produce a document or other item of evidence that the party was apparently in a position to present;

(d) Impose a fine upon or hold in contempt of court a person, including a party, who fails to attend as a witness upon being lawfully ordered to do so, or fails to answer proper questions, or fails to produce a document or other items of evidence upon being lawfully ordered to produce it, or who otherwise obstructs the administration of justice.

### 24. Record of the Evidence

(a) A summary record of the trial shall be kept by the court's clerk under the court's direction.

(b) A verbatim transcript of the trial on an audio or video recording shall be kept upon the demand of all the parties, who shall pay the expense thereof.

(c) A party may arrange for a verbatim transcript at its own expense.

## 25. Final Discussion and Judgment

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

(b) The court may isolate issues for separate hearing and decision. When the court has isolated an issue for separate hearing and decision, the judgment shall address that issue and its relation to the remainder of the case. The court may consolidate cases pending before itself when they deal with the same or related transactions, and when consolidation may facilitate the trial and the decision. When the court has consolidated cases pending before it, the judgment shall address all the cases.

(c) The court will state its judgment orally at the end of the trial, pronouncing the final rulings. Issues of fact shall be determined according to the preponderance of the evidence and the forum's law governing burden of proof. When necessary the court may retire in chambers to deliberate prior to stating its judgment. When necessary because of the complexity of the case, the court may adjourn and fix a new hearing to state its judgment.

(d) The court will then publish, without undue delay, a written justificatory opinion including the findings of fact based upon the relevant evidence and the supporting inferences, and the main legal propositions supporting the decision.

(e) A judgment may include a conditional penalty or sanction for non-compliance that becomes effective if the judgment is not complied with. See Rule 30.

## 26. Costs

(a) Each party in the first instance pays its own costs and expenses, including court fees, attorneys fees, and incidental expenses.

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

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

## 27. Appellate Review

(a) An appeal may be taken to the court of second instance that has ordinary appellate jurisdiction over the first-instance court under the law of the forum in which the first-instance proceedings were conducted. Except as stated in paragraph (b), an appeal may be taken only from a final judgment of the first-instance court.

(b) An order of a court of first instance granting or denying an injunction sought under Rule 8 is subject to immediate review by a court of the second instance (appellate review) according to the procedure governing such an order by the court under the forum's general law of procedure.

(c) Orders of the court other than a final judgment and an order appealable under Rule 8 are subject to immediate appellate review upon permission of the court of first instance or upon order of the appellate court. Such permission may be granted when an immediate appeal will resolve an issue of general legal importance or of special importance in the immediate proceeding.

(d) No evidence, claims, defenses, or factual issues other than those presented in the court of first instance shall be received or considered in appellate review. If an appellate court determines that a just decision may not be rendered without reception of additional evidence, claims or defenses, or resolution of additional issues, it shall remand the case to the court of first instance for that purpose.

(e) The decision of the court of first instance concerning an issue of fact is conclusive if it is supported by substantial evidence. When an appellate court concludes that a finding of fact is not so supported, it may decide that issue if the record enables it to do so, or remand the case for further proceedings in the first-instance court.

(f) The decision of the court of first instance concerning an issue of law, including foreign law, is subject to redetermination in appellate review. The decision of the court of first instance concerning which the court has discretion, such as a ruling on discovery and evidence, is conclusive unless clearly arbitrary.

## 28. Further Appellate Review

An appeal or other form of review may be taken from the decision of a court of second instance in accordance with the law of the forum in similar cases. For example, if such further review may be obtained by petition for review, that procedure shall govern.

## 29. Subsequent Judgment

A final judgment may be reexamined only through proceedings in the court that rendered the judgment, and then only upon showing that the applicant acted with due diligence and that the judgment was procured:

(a) Without competence over the subject matter or the party seeking relief; or

(b) Through fraud on the court; or

(c) On the basis of evidence, not previously available, that would likely result in a different outcome; or

(d) Through a manifest miscarriage of justice.

### 30. Enforcement of Judgment

(a) A final judgment is immediately enforceable according to the procedure governing enforcement of final judgments under the forum's general law. In particular, a final judgment may be enforced through attachment of property owned by or an obligation owed to the judgment obligor.

(b) A judgment or order requiring performance of a specific act (injunction) may be enforced according to the procedures governing similar orders under the forum's general law. Monetary penalties may also be imposed for delay in compliance as provided in Subsection (c) of this section.

(c) If a person against whom a judgment for money is rendered does not pay the obligation within 90 days after the judgment becomes final, the court may impose monetary penalties on the obligor.

(1) Application for such a penalty may be made by a person entitled to enforce the judgment.

(2) The penalty is to be calculated on the basis of the cost incurred by the party seeking enforcement of the judgment, including attorneys' fees, and a penalty for defiance of the court but not to exceed the amount of the judgment.

(3) If the person against whom the judgment is rendered persists in refusal to pay, the court may impose additional penalties.

(4) No penalty shall be imposed on a person who demonstrates to the court financial inability to comply with the judgment.

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

### 31. Finality

Except as stated in Section 29, a final judgment is not subject to reexamination for procedural regularity or substantive propriety upon expiration of the time for appellate review of such a judgment.

### 32. Judicial Assistance

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

# Commentary

## General Introduction

### 0.1 Adoption of these Rules

The procedure and legal authority for adoption of these Rules is a matter of the internal and international law of nation states. Hence, these rules may be adopted by international convention or by legal authority of a nation state for application in the courts of that state. In countries with a unitary legal system, that legal authority is vested in the national government. In federal systems the allocation of that authority depends upon the terms of the particular federation. It might be, for example, that these Rules could be adopted for the federal courts in a federal system but in the state or provincial courts only as prescribed by the state or province.

Under generally recognized principles of law the parties to a legal dispute may stipulate to the procedure by which their dispute is governed, subject to the authority of a court hearing the dispute to order otherwise.

### 0.2 Purpose of these Rules

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

The Rules herein governing presentation of claims, development and presentation of evidence and legal argument, and the final determination by the tribunal, particularly Rules 7 through 25, may be adopted or referenced in proceedings not otherwise governed by these Rules, particularly arbitration.

It is contemplated that these Rules be expressed in English and French. Both languages are to be "official texts," recognizing that there can be differences in nuance between the languages. These rules are proposed

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

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

### 0.3 Civil Law and Common Law Antecedents

The Rules are designed to express principles of civil procedure recognized in modern societies. They seek to combine the better elements of adversary procedure, particularly that in the common law tradition, with the better elements of judge-centered procedure, particularly that in the civil law tradition. They are expressed in terminology and through concepts that are familiar in all legal traditions. Beyond seeking the best elements in various legal traditions, these Rules seek to be culturally neutral, thus moderating the anxiety of parties and their counsel at the prospect of litigation in an unfamiliar forum. Thus, in whatever forum these Rules are applied, the rules and principles of procedure will be familiar.

### 0.4 Basic Procedural Concepts

The basic concepts expressed in these Rules are as follows:

- Determination of issues of facts and law by professional judges, with lay participants in some instances, but without a common law jury;
- Detailed statements of claim and defense, accompanied by proofs on which the party intends to rely;
- Discovery by production of specified documents, identification of witnesses, and disclosure of expert testimony, but not discovery depositions or discovery of documents unless the court so orders for good cause;
- Free admissibility of evidence, subject to commonly recognized evidentiary privileges;
- Party presentation of evidence by question and answer, in the common law mode;

- Authority of the court to regulate and modify the reception of evidence with a view to obtaining an accurate appreciation of the facts;
- Judgment based on findings of fact and a statement of reasons;
- Appellate review according to the ordinary procedure of the forum.

### Rule-by-Rule Commentary

Rules 1, 2 and 3 define the matters within the competence of the court, and the exercise of personal jurisdiction over parties and others. The concept of competence is equivalent to the concept of subject matter jurisdiction in the common law.

### Rule 1

1.1 Rule 1 provides that the Rules shall govern transnational legal disputes as defined in Rule 2, with exceptions stated in subdivisions (1) through (6) in Subsection (a). These exceptions are stated immediately to make clear that the rules will, by exclusion, apply to other civil and commercial litigation. This includes, among other types of claims, commercial and financial matters, breach of contract, civil wrongs (torts), breach of fiduciary obligations, personal injury and wrongful death actions, and proceedings for enforcement of monetary awards made in connection with dissolution of marriage.

1.2 Subsection (a)(1) excludes suits for taxes and civil penalties. Such proceedings typically are brought by the state or a state agency and are an exercise of general sovereign authority. In many states they are brought in special courts or according to special procedure.

1.3 Subsection (a)(2) excludes litigation by or against a government agency, except with the consent of the agency or by way of a set-off counterclaim or for government, commercial and proprietary activities specified in this subsection. The exclusion applies generally to administrative proceedings, including judicial review of administrative proceedings. Many states retain a concept of sovereign immunity of the state and its agencies from many types of civil claim. In any event, the scope of sovereign submission to the authority of the courts presents a question of important state policy.

When a case is within the definition of competence in Section 2, but a government or government agency should be made a party under a principle of necessary parties, the case may nevertheless proceed unless the court finds that substantial prejudice is likely to result to a party if the government or government agency is not a party.

The qualification that a counterclaim may be asserted against a government or a government agency includes claims unrelated to the transaction that is the basis of the suit. A "set off," i.e., a claim based on the same or an unrelated transaction that offsets the amount of the judgment obtained by the government, is permitted. An affirmative judgment against

the government or a government agency is permitted if it is permissible under the law of the government against which the counterclaim is asserted.

1.4 Subsection (a)(3) excludes disputes concerning claims of employees against employers, claims under consumer protection statutes, and claims under statutes protecting against personal discrimination or to enforce civil rights. These disputes typically are governed by domestic legislation expressing special public policy, and in many countries are governed by special procedures in specialized courts. Subsection (a)(4) excludes disputes concerning divorce, other family relationships and matters of personal status for essentially the same reasons.

1.5 Legal disputes may involve claims asserted on various or multiple substantive legal bases, one of which is within the competence of the court under these Rules but another of which is not. For example, a claim by an employee may concern his right to engage in competition with a former employer and also a claim based on statutory rights as an employee. The court may entertain the claim of which it has competence under these Rules. It may also entertain the other claim or claims if they are within the competence of the court under its domestic law.

1.6 The exclusions stated in this Rule will have clear application in most cases. However, no definition of a court's competence can be stated in unambiguous terms. A plaintiff who invokes the competence of a court under these rules is thereby precluded from thereafter challenging the court's competence, except if the court determines, on its own initiative or at the suggestion of another party, that the lack of competence was manifest. A defendant or other party who does not object to the court's competence until after that party has answered concerning the merits is precluded from thereafter challenging the court's competence, subject to the same exception.

1.7 Subsection (b) permits the parties to waive the application of these Rules.

## Rule 2

2.1 Rule 2 affirmatively defines the matters governed by these rules. The term "transnational legal disputes" includes contract disputes and disputes arising from contractual relations; injuries to person, including wrongful death and injury to personal reputation; injuries to property, including immovable (real), movable (personal), and intangible property such as copyright, trademark or patent rights; and injuries resulting from breach of fiduciary responsibilities. The terms include a series of related events, such as repeated interference with property.

However, the term "dispute" may have different connotation in various legal systems. For example, under Rule 18 of the Federal Rules of Civil Procedure in the United States, it would be interpreted in accordance with the broad concept of "transaction or occurrence." Under the civil law systems the term "dispute" would be interpreted in accordance with the nar-

rower concept of dispute as framed by the plaintiff's claim. The court should determine the scope of the proceeding in accordance with its domestic law but, in ambiguous situations, take into account this difference in approach.

2.2 Subsection (a)(1) establishes competence where a party plaintiff and a party defendant are nationals of different states. If a plaintiff and a defendant are nationals of different states, the competence of the court is not impaired by the fact that another party, plaintiff or defendant or third party, is of the same nationality as one of them or an additional party.

2.3 Subsection (a)(2) establishes competence of a proceeding concerning property located in one state as to which a plaintiff who is a national of another state makes a claim. Competence exists whether the property is immovable (real), movable (personal), or intangible property, such as a copyright, trademark or patent. Whether a legal claim concerns "property" and whether it is a claim of ownership or of a security interest is determined by general principles of private international law. In ambiguous cases the principles stated in Comments 1.5 and 1.6 above should be applied.

2.4 The nationality of an individual is determined by general principles of international law. The definition in Subsection (b) of nationality of a jural entity, such as a *société anonyme*, partnership or unincorporated association, corresponds to generally accepted principles of private international law. The court has competence when an organization is chartered in one state and has its administrative headquarters in another state, if one of those attributed nationalities is different from the nationality of an opposing party.

### Rule 3

3.1 Subsection (a)(1) permits the parties to stipulate that these Rules shall govern a dispute. An agreement to this effect may be incorporated in a contract governing a transaction or may be made after the dispute has arisen. The court's approval is required to proceed on that basis, but the court should accept the parties' stipulation unless required otherwise by limitations imposed by domestic constitutional limitations or limitations imposed by international convention or by important considerations in the administration of justice.

3.2 A plaintiff submits to the court's authority by commencing the proceeding. That submission extends to counterclaims and third-party claims permitted under these Rules.

3.3 Subsection (a)(2) incorporates by reference the domestic law of the forum concerning exercise of personal jurisdiction. That law is interpreted in the light of international law and may be governed by international convention, for example, the Brussels and Lugano Conventions.

3.4 Subsection (a)(3) provides that, when competence is based on Rule 2(a)(2), the court where the property is located has authority over the parties who make claims to the property, whether of ownership or a secur-

ity interest. With respect to immovable property, this expresses a principle that is almost universally recognized. The same principle is also generally recognized with respect to movable tangible property and, with less universality, to intangible property. The location of movable and intangible property in this context is determined by general principles of private international law.

3.5 Subsection (b)(1) confers authority over an additional defendant who is subject to the compulsory authority of the state exercising authority. This provision incorporates laws that confer authority over a defendant who, for example, has committed a legal wrong while temporarily present in the state or conducted a commercial transaction in the state. It applies to organizations, such as corporations, as well as to individuals.

3.6 Subsection (b)(2) provides that the court has authority over other parties who should participate in the interest of fair and efficient adjudication, if there is no other forum that would be more convenient. This provision thus employs the concept of *forum conveniens* to enlarge the authority of the court over other parties, assuming that competence of the court exists as provided in Rule 2. The term "fair and efficient adjudication" contemplates that claims of multiple parties are, when practicable, to be resolved consistently and without repetition of adjudication.

#### Rule 4

This Rule specifies the locality within a state where the proceeding is to be conducted. In common law this concept is called "venue." The locality is to be determined by the domestic procedural law of the state where the proceeding is conducted.

#### Rule 5

5.1 Rule 5 specifies the constitution of the court. The provision for three judges corresponds to the general rule in many civil law systems for adjudication of matters of substantial importance. Common law states ordinarily employ a single judge in courts of the first instance, but three or more judges in courts of second instance and three-judge panels are used in common law states in certain types of special proceedings.

5.2 In some common law states, particularly the United States, disputed factual issues other than preliminary matters are determined by a jury of six to twelve members. Under the U.S. Constitution, jury trial is probably obligatory in federal courts in disputes governed by these Rules, as it is in many states of the United States. The scope of the jury trial right in most other common law countries is far more limited. These Rules yield to constitutional requirements.

Jury trial is alien to civil litigation in civil law systems. However, the value of lay participation in the administration of justice is widely recognized. Subsection (b)(1) directs the court to appoint three lay persons to participate as nonvoting members. A similar practice is recognized in many states. The lay members have equal right to hear and to observe the

evidence, argument by counsel, and discussion between the court and counsel, and to present their interpretations and conclusions to the judicial members of the panel. Subsection (b)(2) permits the court, in cases involving substantial issues of commercial practice or scientific evidence, to require that the lay members be drawn from persons familiar with the relevant subject matter. The common law courts sometimes convened special juries on this basis, although the practice has fallen into disuse in recent times. The participation of specially qualified lay assessors can be an alternative or supplement to presentation of expert testimony in cases involving issues outside the knowledge and experience of the average citizen. Compare Rule 18.

Subsection (b)(3) specifies the procedure for questioning jurors as to their qualifications and whether they are disinterested. It also permits each party to exclude not more than three prospective jurors without establishing cause for exclusion. These are adaptations of procedures for selection of jurors in common law states.

## Rule 6

6.1 This Rule confers general judicial authority on the court in addition to that conferred by the Rules themselves. All judicial systems have a concept of a court's general residual authority. In common law jurisdictions, it is expressed as "inherent authority." In most civil law systems it is drawn from general terms in the constitutive legal codes. In some civil law systems the court's administrative authority is specified in detail. When confronted with a question of its own authority, a court should refer to the concepts of authority in its legal system.

## Rule 7

7.1 The language in which the proceeding is conducted should be that in which the court is fluent. Ordinarily this will be the language of the state in which the court is situated. However, the court and the parties may agree upon some other language for all or part of the proceeding, for example, reception of the testimony of a specific witness in the witness's native language. See also Rules 19 and 21.

## Rule 8

8.1 The term "injunction" refers to an order requiring or prohibiting the performance of a specified act, for example, signing of a document or preserving property in its present condition. Subsection (a) 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.

8.2 Subsection (a)(1) authorizes the court to issue an injunction without notice to the party against whom it is directed where justified by urgent necessity. 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.

“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.” 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 irretrievable deterioration in the situation to be addressed in the litigation, and that it would be imprudent to postpone the order until after the opposing party has opportunity to be heard. However, opportunity for the opposing party or person to whom the injunction is addressed to be heard should be afforded at earliest practicable time.

8.3 As indicated in Subsection (a)(2), if the court had declined to issue an injunction *ex parte*, it may nevertheless issue an injunction upon the hearing. If the court previously issued an injunction, it may renew or modify its order in light of the matters developed at the hearing.

8.4 Subsection (a)(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 reference to the general law of the forum.

8.5 Subsection (b) permits the court to restrain transferring property located outside the forum state and to require disclosure of the party’s assets. In the law of the United Kingdom this is referred to as a *Mareva* injunction. The Brussels Convention requires recognition of such an injunction by its signatories because an injunction is a judgment. This subsection also authorizes an injunction requiring disclosure of the identity and location of persons, for example, of a child in an international custody dispute. Subsection (b) also permits use of the provisional remedy of attachment but authorizes the court to regulate or nullify such a remedy.

8.6 Subsection (c) permits immediate appellate review of an order of the court of first instance that grants or denies a temporary injunction. Normally, appeal should not be permitted from an *ex parte* injunction, because the court of first instance will ordinarily have an opportunity to give further consideration to the appropriateness of the injunction when the opposing party has opportunity to be heard. Allowing an appeal before then could be an unnecessary detour. However, when the effect of an *ex parte* order is severe, an appellate court may entertain an immediate appeal.

When, after a hearing, the court of first instance has issued an injunction that will continue in effect until the proceeding is concluded, the result can be serious injustice if the injunction was inappropriate or improperly granted. It is a generally recognized principle that appellate review should be available to consider this extraordinary kind of remedy.

The procedure for appellate review is that available under the general law of the forum. See Rule 27.

## Rule 9

9.1 The principle recognized in most legal systems is that the proceeding is commenced by filing the suit in the court of first instance. The prevailing rule requires that the complaint must be filed, but in some states other documents must accompany the complaint, for example, a certificate of good cause by the plaintiff's advocate or request for issuance of summons to the defendant. Subsection (a) specifies that the procedures of the forum should govern commencement of the suit. Designation of the suit as a Transnational Proceeding provides notice to the defendant that these Rules will govern the matter.

9.2 Subsection (b) provides for giving notice of the proceeding to the defendant. The Hague Service Convention specifies rules governing notice in proceedings in countries signatory to that Convention. When judicial assistance from the courts of another country is required in order to effect notice, the procedure for obtaining such assistance should be followed. Otherwise the notice should include a copy of the statement of claim and a statement that the proceeding is conducted under these Rules. Beyond these requirements, the rules of the forum govern the mechanisms and formalities for giving notice of the proceeding. In some states it is sufficient to mail the notice; some require that notice, such as a summons, be delivered by an officer of the court.

9.3 Subsection (c) specifies the requirements for defendant's response by referring to these Rules and, where these Rules are silent, to the procedure of the forum. Rule 11 states requirements for the defendant's answer, including the obligation to refer therein to the proofs on which defendant intends to rely. That Rule also specifies the time within which defendant must respond.

## Rule 10

10.1 Subsection (a) requires the plaintiff to state the facts upon which the claim is based. This is a universal requirement, although in some states, notably those employing the U.S. Federal Rules of Civil Procedure, very general allegations are permitted. This Rule calls for more particularity, such as that traditionally required in U.S. "code pleading" and which is required in most other legal systems. In addition, the plaintiff must refer to the legal rules on which he relies to support his claim. Reference to such rules is a common requirement in many legal systems and is especially appropriate where the transaction may involve the law of more than one legal system and problems of choice of law. Rules of procedure in many national systems require a party's pleading to set forth foreign law when the party intends to rely on that law.

10.2 Subsection (b) requires that the plaintiff attach documents on which he relies in support of the claim. This is a common requirement. The plaintiff must also list the witnesses upon whom he intends to rely, together with a summary of their testimony. If the plaintiff later ascertains that there are additional documents or witnesses, he must exercise the

opportunity to submit an amended statement of claim, as provided in Subsection (a).

10.3 The scope of permissible amendment differs among various legal systems, the rule in the United States being very liberal and that in many civil law systems being less so. In many civil law systems amendment is permitted of the legal basis of a claim, as distinct from the factual basis, but amendment of factual allegations is permitted only upon a showing that there is newly discovered probative evidence not previously available and that the amendment is within the scope of the dispute. See Comment 2.1 *supra*.

## Rule 11

11.1 Subsection (a) requires that defendant's response address the factual allegations, denying or denying with explanation those allegations that are to be controverted. Allegations not so controverted are admitted for purposes of the litigation. Whether such an admission has effect in other proceedings is determined by the law governing such other proceedings.

11.2 Subsection (b) imposes on defendant the same requirements concerning his intended proofs as are imposed on the plaintiff.

11.3 Subsection (c) permits defendant to assert a counterclaim in accordance with the procedure of the forum. In most civil law systems, a counterclaim is permitted only for a claim arising from the dispute addressed in plaintiff's complaint. See Comment 2.1 *supra*, for reference to the civil law concept of "dispute." In common law systems a wider scope for counterclaims is generally permitted, including a "set off" based on a different transaction or occurrence. Compare U.S. Federal Rules of Civil Procedure, Rule 13.

This subsection also permits a party to employ procedures of the forum to add additional parties, for example, to obtain indemnity, but it does not authorize class-suit procedure. A counterclaim on a different transaction is not permitted but may be asserted in an action brought under other procedures. If defendant asserts in another forum a claim that could be a counterclaim in the proceeding under these Rules, the other forum may apply its own rules of deference to require the claim to be asserted as a counterclaim in the proceeding under these Rules.

11.4 Subsection (d) requires that a counterclaim arising from the same transaction be asserted in the instant proceeding or promptly be brought in some other available forum. The objective is to require the parties to confront each other with all claims they have from the transaction in suit.

## Rule 12

12.1 It is a universal procedural principle that the court may make determinations of the sufficiency of the pleadings and motions, whether concerning substantive law or procedure, that materially affect the rights

of another party or the capability of the court to render substantial justice. In common law systems, authority to make such determinations ordinarily is exercised only upon initiative of a party made through a motion. In civil law systems, the court has an obligation to scrutinize on its own initiative the substantive and procedural regularity of the proceeding. However, the court in common law systems may exercise that authority on its own initiative and in civil law systems the court may do so in response to a suggestion or motion of a party.

12.2 Subsection (a)(1) expresses a universal principle that the court's authority to proceed, its competence over the dispute, and its jurisdiction over the parties may be questioned. A valid objection of this kind, of course, usually requires termination of the proceeding. Procedural law varies as to whether there are time limitations or other restrictions on delay in making such an objection, and whether participation in the proceeding without making such an objection results in its waiver or forfeiture. Reference should be made to the forum's procedural law concerning such issues.

12.3 Subsection (a)(2) empowers the court to adjudicate procedural irregularities. Ordinarily permission should be given to amend in order to correct such an irregularity, except when such permission would result in substantial injustice. See Subsection (b).

12.4 Subsection (a)(3) empowers the court to adjudicate the merits of a claim or defense prior to the trial stage. Such an adjudication may be based on matters of law or matters of fact or both. Judgment is appropriate when the claim or defense in question is legally insufficient as stated. Judgment is also appropriate when, although the statement of claim or defense as stated is legally sufficient, it is demonstrated that there is insufficient evidence to support the claim or defense. In the latter case, the court should duly consider that the right of discovery may disclose sufficient evidence, but a party may not resist judgment on the ground that discovery might hypothetically yield sufficient evidence.

12.5 In the civil law systems the foregoing powers are exercised by the court as a matter of course. In the common law systems, the power to determine that a statement of claim or defense is substantively insufficient derives from the old common law demurrer and is usually exercised on the basis of a motion by a party. In common law systems the power to determine prior to trial that a claim or defense is not supported by sufficient evidence is usually exercised on the basis of a motion for summary judgment.

Examples of claims that typically may be so adjudicated are claims based on a written contract calling for payment of money, or to ownership of specific property, to which no valid defense is offered. Examples of defenses that typically may be so adjudicated are the defense of elapse of time (statute of limitations or prescription), release, and *res judicata*.

12.6 Subsection (a)(4) confers residual authority on the court to make necessary pretrial rulings. In some civil law systems these powers

are specified in detail. In the common law system they are within the court's inherent powers.

12.7 Subsection (b) expresses a discretionary authority that is universally recognized. When a determination before trial results in a judgment awarding plaintiff a remedy, in whole or in part, or dismissing the plaintiff's claim, in whole or in part, the determination has effect equivalent to a final judgment. As stated in Subsection (c), the determination therefore should be expressed in a judgment and accompanied by a justificatory opinion such as that for a final judgment. Whether a determination of only part of a claim or defense is immediately subject to appellate review should be determined by reference to the forum's procedural law.

### Rule 13

13.1 These rules adopt, as a fundamental model of litigation, a two-stage system, substantially following the common law system. The first stage of the proceedings is a pre-trial phase, the essential core of which is discovery. The main consideration supporting this choice is that a speedy process is required at trial. To achieve this objective, a concentrated-trial-type mode of proceedings should be used so that arguments and the taking of evidence are completed in a single or in few hearings. See Rules 17-24. In order to have a trial that is fair as well as speedy and efficient, machinery of pretrial discovery is necessary.

Rule 13 is the fundamental rule governing discovery. It defines the roles and the rights of the parties, the procedure for discovery demands, the role of the court, and the devices to ensure that the parties comply with discovery demands.

13.2 Subsection (a) provides that every party is entitled to obtain from any other party the disclosure of any relevant evidence in possession of the other party. Ideally, full disclosure of relevant evidence should result through dialogue among the parties, whereby all the parties satisfy the demands of every other party. Subsection (a) lists the evidence and the information the disclosure of which may be demanded, defined as any relevant evidence. A party is not entitled to discover information that "might lead" to further discovery, which is the broad scope of discovery under Rule 26 of the U.S. Federal Rules of Civil Procedure, but only evidence and information that is relevant to the facts in issue. This rule is aimed at preventing abuses in discovery, such as overdiscovery or fishing expeditions.

13.3 Discovery may concern documents and any other things (films, pictures, videotapes, recorded tapes, objects of any kind), including computerized information (disks, data, printings, software systems). The demanding party must satisfy two conditions: first, that the document or thing is relevant to prove or disprove the facts supporting a claim or a defense and, second, that the document or thing to be discovered has been identified. If it is a document, its subject matter, date, author, or owner must be specified. If the discovery demand does not fulfil these condi-

tions, the other party is not obliged to comply with the demand. Disputes concerning whether the conditions of the demand have been satisfied, and whether the demand should be complied with, are resolved by the court on motion by any party. The court may declare the demand invalid or order production of the document or thing, if necessary specifying the time and mode of production.

13.4 Discovery may concern the identity and other relevant information relating to a person whom an opposing party contemplates calling as a witness at the trial. Although the identity of the prospective witness may be discovered, there is no right to discover what the prospective witness knows about the facts in issue. A party is not allowed either to examine orally the witness in discovery or to obtain from the witness any statement by means of written interrogatories, other than a statement required by Rules 10(b) and 11(a)(3). Knowledge about the identity of the prospective witness should be enough to allow the demanding party to infer with reasonable accuracy the statements that the witness will make at the trial. The discovery provided for by this Rule is thus primarily a "discovery of documents," not a discovery of oral evidence.

13.5 Subsection (a)(3) provides broad scope for discovery of expert testimony. Any party is entitled to discover the identity of the prospective expert witnesses of any other party and to obtain a written statement concerning the opinions of the expert. This statement may concern the expert's opinion about the matter in dispute and about the significance of facts of the case. Knowing the expert's opinions is essential for a thorough preparation of the case, because such opinions cannot be inferred simply from the expert's identity.

13.6 Subsection (b) permits a medical examination of a party claiming redress for personal injury, upon demand of the other party. The examination is conducted by a doctor appointed by the discovering party at that party's expense and should be reasonable in that it must respect the individual rights and the privacy of the person involved.

13.7 The general principle governing pretrial discovery is that each party bears the burden of discovering evidence it needs in preparation for trial. However, discovery done by a party on its own motion may be incomplete, resulting in insufficient evidence or surprise to the court or other parties. To deal with such inconvenience, the court may, in its discretion, order additional discovery on its own initiative or on motion of a party. For example, the court may order that a party or a prospective witness submit a written deposition concerning the facts of the case.

The court may not order additional discovery merely because it might reveal relevant evidence. "Necessary in the interest of justice" is a narrower standard than "relevant to prove the facts in issue." Moreover, the court cannot order discovery of privileged matters.

13.8 Generally, discovery demands should be made in the initial pleadings, i.e., in the complaint and in the answer. See Rules 10 and 11. Subsequent demands should not be permitted to prevent the proceeding and tactical maneuvers. However, a party may subsequently learn about

further discoverable relevant evidence after having seen the discovery demands filed by the other party. For instance, the plaintiff may learn the need for further discovery after having read the defendant's answer. A second demand is allowed, within 60 days after the defendant has answered, but only with regard to evidence that the party was not reasonably able to anticipate in the first demand.

13.9 When a discovery demand has not been voluntarily fulfilled by the demanded party, the court may impose sanctions to make discovery effective. The choice among different sanctions, more or less severe, is left to the discretion of the court, taking into account any relevant features of the parties' behavior.

The sanctions are:

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

2) A monetary penalty, fixed by the court in its discretion, or other means of legal compulsion, including contempt of court. The court should graduate the penalty or contempt sanction according to the circumstances of the case. When the discovery demand or order concerns a document or other thing, the court may order a direct seizure of the document or thing. See Rule 14.

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

4) The most severe sanction against noncompliance with discovery demands or orders is entry of adverse judgment. This sanction is equivalent to that discussed in paragraph 3 above when the plaintiff's case includes only one claim, or the defendant's case includes only one defense. The sanction is more severe when, as frequently happens, several claims or defenses are involved. The court will enter a judgment of dismissal against the plaintiff or a judgment by default against the defendant as the case may be.

## Rule 14

14.1 The court has broad authority to order nonparties, as well as parties, to act or refrain from acting during the pendent litigation, to preserve the status quo and to prevent irreparable injury. There are various situations in which a person may be involved in a suit without being a party, but should be subject to orders to do justice in the proceeding between the parties. Rule 14 regulates some of these situations by conferring on the court the power to enter orders directed to nonparties.

14.2 A preliminary injunction issued in accordance with Rule 8(a) may involve nonparties insofar as their cooperation is needed in order to carry the injunction into effect, particularly to maintain the status quo and

to prevent irreparable injury. The court in its discretion determines the kind of cooperation required by nonparties and directs an order accordingly.

14.3 When funds or other property involved in the dispute are in possession of a party or nonparty, the court may require that they be preserved against dissipation until the case is finally decided. The court may order the person in possession of the property to retain it until a further order of the court or the final decision of the dispute determines to whom the money or property shall be delivered.

14.4 When a nonparty's testimony is required at trial, upon a party's motion or upon the court's own motion, the court may direct the witness to give testimony in the manner fixed by the court at trial or through discovery.

14.5 When a document or any other relevant thing is in possession of a nonparty, the court may order its production in discovery or at trial.

14.6 An order directed to a nonparty is enforced by sanctions for non-compliance. These sanctions include a monetary penalty or other legal compulsion, including contempt of court. See Comment 13.9. When it is necessary to obtain evidentiary materials or other things, the court may order a direct seizure of such material or things, defining the manner of doing so.

## Rule 15

15.1 This Rule gives the court broad authority to limit discovery that would be oppressive or unduly intrusive. However, the philosophy expressed in Rules 13 and 14 concerning the right of discovery is essentially that of the common law countries other than the United States. In those countries, the scope of discovery is specified and limited, as in Rule 13, but within those specifications, power to make discovery is generally a matter of right. Discovery under prevailing U.S. procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that "may lead to admissible evidence." Discovery under the civil law systems is generally much more restricted. In particular, a much broader immunity is conferred against disclosure of trade and business secrets. This Rule should be interpreted as seeking to strike a balance between the civil law systems and the system in the United States.

## Rule 16

16.1 This Rule determines the role of the court in preparing the case for trial, when the discovery has come to an end and the parties are in a position to define the terms of the dispute. The court has wide discretion in deciding how to conclude the pretrial phase, and in determining how to provide for the upcoming trial phase of the proceedings.

The court may decide that, in order to clarify the issues and to specify the terms of the dispute in view of the trial, a pretrial conference may be

useful. In such a case the court fixes a date for the conference. The parties' lawyers are required to attend; the court may also order that the parties be personally present at the conference. In the conference the court will discuss with the parties' lawyers, and as appropriate with the parties personally, the issues of the case; which facts, claims or defenses, are no longer disputed; whether new disputed facts emerged from discovery; whether new claims or defenses have been presented; and what evidence will be admitted at trial. The main aim of the conference is to exclude issues that are no longer disputed and to identify precisely the issues of fact and claims and defenses and the evidence concerning those issues that will be the subject matter of the trial. The court may invite the parties to consider settlement of the dispute, if necessary with the mediation of the court itself or referral of the dispute to a mediator or to an arbitrator.

The court may decide that a pretrial conference is unnecessary and that the trial may proceed simply on the basis of entering orders governing the trial stage of the proceedings.

16.2 In the pretrial conference the court may give directives for trial, as provided in Subsections (a)(1)-(6). The court may sum up the terms of claims and defenses ordering corresponding revision of the pleadings. In the light of having defined the issues for trial, the court may rule on issues concerning admissibility of evidence and specifying the items of relevant and admissible evidence, including witnesses and the expert witnesses, and determine the order of their examination. The court will also identify and determine the admissibility of any document or any other item of circumstantial or documentary evidence and resolve disputed claims of privilege. See Rule 17. The court will fix the date for trial and enter other orders to ensure that the trial will be carried on in a fair and expedited way.

16.3 The court may consider the possibility that the party may settle the dispute or refer it to a mediator or to an arbitrator. In such a case the court, before entering the rulings described in subsection (a), may fix a hearing, calling the parties' lawyers and the parties personally, in order to explore the possibility of a settlement or a deferral to mediation or arbitration.

16.4 When a settlement is reached in the pretrial conference or in a special hearing, the proceedings are suspended and the settlement agreement put into the record of the case.

When the parties agree about a deferral to mediation or arbitration, the proceedings will be similarly suspended and such an agreement will be put into the record of the case.

## Rule 17

17.1 This Rule states principles concerning evidence, defining generally the conditions and limits of what may be properly considered as proof at trial. The basic principle is that everything that is rationally useful in reaching judgment on the relevant facts of the case should be admitted as

evidence. This principle is recognized explicitly or implicitly in all procedural systems.

17.2 There are three aspects to application of this principle. First is the usefulness of the evidence. In deciding upon admissibility of the evidence, the court makes a hypothetical evaluation connecting the proposed evidence with the issues in the case, i.e., a hypothesis concerning the possible outcome of the presentation of the evidence. If a probative inference may be drawn from the evidence to the facts, then the evidence is logically relevant. Second, the relevancy of evidence is determined by the "rational reliability" of the knowledge that the evidence tends to support. Third, and consequently, relevant evidence is aimed at achieving a knowledge about the facts of the case, specifically knowledge that should be rationally reliable. Irrational or subjective judgments on the facts are therefore rejected.

17.3 In some legal systems there are rules limiting in various ways the use of circumstantial evidence. These rules, however, seem unjustified and are very difficult to apply in practice. More generally, there is no valid reason to restrict the use of circumstantial evidence when it is useful to establish knowledge of a fact in issue. Therefore, under the general principle, the court may consider any circumstantial evidence, provided it is relevant for the decision on the facts of the case.

17.4 Subsection (b) defines who can be a proper witness. In some legal systems the rules exclude parties or "interested nonparties" as witnesses. However, even in such systems the trend favors admitting all testimony. A general rule of competency also avoids the complex distinctions that such exclusionary rules require. The proper standard for the admission of a person as a witness is the principle of relevancy: if a person has useful information about a relevant fact, this person is a proper witness. This does not mean, however, that subjective or objective connections of the witness with the case must be disregarded, but only that they are not a basis for excluding the testimony. These connections, for example, kinship between the witness and a party, may be meaningful in evaluating credibility.

17.5 Subsection (c) governs the parties' right to proof. This subsection applies to witness testimony, documentary evidence and real or demonstrative evidence. In principle it is open to the parties to offer any item of evidence. However, the court may exercise an active role in the taking of testimony or documentary, real or demonstrative evidence. For example, when the court knows that a relevant document, or an item of real or demonstrative evidence, is in the possession of a party or a nonparty, and it was not spontaneously adduced, the court may on its own motion order the party or the nonparty to produce the item of evidence. The procedural device is substantially an order of subpoena. The court in issuing the order may establish the sanctions to be applied in case of noncompliance.

17.6 The credibility, authenticity and reliability of evidence are a matter of final decision by the trier of fact at the end of the trial, in determining whether a fact in issue has been sufficiently proved.

The credibility of a witness may be tested by means of cross-examination. Each party is entitled to cross-examine any witness in order to elicit circumstances that might affect credibility. Cross-examination should be allowed about any fact (e.g., interest, personal connections, employment or other relationships, physical impossibility to perceive the facts correctly, mental insanity or other psychological problems) that may possibly affect the credibility of the witness, including the witness's capacity to perceive and recollect facts, the witness's neutrality and impartiality towards the facts, and the inherent plausibility of the testimony. Other evidence that may be relevant in order to assess the witness's credibility should also be admitted, such as inconsistent statements by the same witness. Prior statements may have been made in earlier stages of the same proceedings (for instance, during pretrial discovery). Prior statements made out of the judicial context (for instance, before the beginning of the litigation), if duly proved, may also be received.

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

17.8 Scientific and technical evidence may also need to be scrutinized if its reliability is doubtful or disputed. It is impossible to establish generally and *a priori* how this should be done. The court has direction to select the most effective procedures and techniques of control.

## Rule 18

18.1 Concerning expert witnesses, these Rules adopt the basic civil law system, according to which the court appoints an expert or a panel of experts. The court decides on its own motion whether an expert is needed to evaluate or to establish facts that, because of their scientific or technical nature, the court is unable to evaluate or establish by itself. The court appoints the expert or the experts (if possible using the special lists that exist in many countries), on the basis of the expert's competence in the relevant field. If the expert's neutrality is disputed, that issue is for the court to resolve. The court specifies the technical or scientific issues on which the expert's advice is needed, formulating the questions the expert should answer. The court also determines which techniques and procedures the expert will apply, and regulates any other aspect of the tests, inquiries and researches the expert will make, and whether the expert will respond orally or by submitting a written report.

The expert is the court's expert. The role is to be neutral, independent from the parties and from any other influence. The court is expected to rely on the expert's advice when it appears sound and credible; if it does not, the court may appoint another expert in order to achieve reliable advice. However, the court may choose not to follow the expert's advice, deciding by itself the issue in controversy. In such a case the court is

expected to explain specifically the reasons why the expert's advice is rejected, and the reasons supporting the court's different conclusion.

18.2 Subsection (b) the parties are entitled to appoint their own experts, but party experts participate only under supervision by the court. The main role of the parties' experts is to advise the parties about the technical and scientific matters involved and to comment on the activity of the court's expert. The parties' experts are entitled to know everything about the court's expert's activity, and to participate in any test, experiment or inquiry carried on by the court's expert. They may raise problems, ask questions and submit comments, data and information to the court's expert. The court decides whether to hear the parties' experts orally or by written reports. When the court examines orally the court's expert the parties' experts should be similarly heard. When the court's expert submits a written report the parties' experts are allowed to do so also. Although the court's expert is by definition neutral and impartial, while the parties' experts are by definition partisan and partial, the advice of the parties' experts may be taken into account by the court. The court is not expected to give reasons for not following the advice of the parties' experts.

18.3 Subsection (c) provides that the fees concerning a party's expert are paid by that party. The parties also pay the fees of the court experts. Since the court's expert should not wait until the end of the proceedings to be paid, the court provisionally allocates these fees among the parties in the course of the proceedings. The losing party pays the fees of the court's experts at the end of the case.

## Rule 19

19.1 In transnational litigation it happens frequently that witnesses and expert witnesses are not fluent in the language in which the proceeding is conducted, i.e. that of the country where the case is tried. In such a case, translation is required for the court and for other parties. The party who calls the witness should decide how the translation should be provided. The testimony may be taken at trial with the aid of an interpreter, with the calling party paying the cost of the translation, unless the court decides otherwise.

19.2 A second possibility is that of examining the witness by way of deposition, as provided in Rule 21. The deposition can then be translated and submitted at trial. The procedure and cost of the deposition are determined according to Rule 21.

## Rule 20

20.1 Privileges exclude relevant evidence. They are evolving and reflect various social interests. Organized professions (e.g., doctors, psychiatrists, accountants, lawyers) are interested in protecting their members' professional activities through the privilege not to disclose information acquired during such an activity. Statutory law and case law has extended the list of the professional privileges. However, enlarging the protection of

array of privileges has significant cost in the quality of proof in issue at trial, and the tendency to expand the range of privileges cannot be passively accepted. Subsection (a) requires the traditional privileges generally recognized in all legal systems.

The "attorney work-product" privilege, or immunity from discovery, covers evidentiary material obtained by an attorney, or those working under the attorney's direction, in anticipation of or preparation for litigation. The attorney work-product privilege is not known as such in legal systems other than the United States, where it was developed as a limitation on the broad discovery permitted in that country's procedural system. However, the same concept would be applied in all legal systems as a limitation on discovery.

20.2 In addition to the privileges recognized in most legal systems, many states recognize additional privileges, usually in qualified form. Thus, the European Court of Human Rights has recognized various professional privileges (e.g., for banker, accountant and journalist), and so also many countries recognize a privilege for a family member to refuse to give testimony against another family member. Many state jurisdictions in the United States recognize an accountant privilege and some recognize a "self-evaluation privilege" on the part of hospitals and some other organizations. However, these privileges are often only qualified privileges, in that their protection may be denied when the need for the evidence is strong. Subsection (b) adopts this policy regarding these additional privileges.

20.3 A person who is entitled to a privilege may waive it, in which event evidence in the privileged communication is received without limitation. The privilege may be waived by means of an explicit statement or tacitly. A tacit waiver results when the party does not timely claim the privilege. However, the court may disregard the waiver if enforcing the waiver is against substantial justice.

20.4 The information in a privileged communication may be essential to a fair and just solution of the case. When the interest of doing justice should prevail over the privacy interest protected by the privilege, the court may refuse to give effect to the privilege. The court may make such a determination through an *in camera* hearing, in which the participants are limited to the court itself, the parties and the parties' lawyers. The same device may be used concerning non-privileged information when the court finds that publication could impair some important private or public interests, such as a trade secret. The taking of evidence in a secret hearing should be exceptional, having regard for the fundamental principle of the publicity of hearings.

## Rule 21

21.1 The general principle governing presentation of evidence is that evidence will be presented orally at trial, according to Rule 22. However, oral examination of a witness at trial may be impossible, burdensome or impractical. Rule 21 regulates the circumstances under which testimony

can be given at trial by deposition, through a transcript or an audio or video record.

21.2 Subsection (c) specifies when testimony may be provided by deposition. These include cases in which the witness cannot be present at trial (for instance, due to illness or absence); when the court has ordered in discovery a deposition of a party or of a witness (see Rule 13(c)); when a deposition appears to be the best way of obtaining testimony from a witness not fluent in the language of the court, with a proper translation (see Rule 19); and in other cases in which the court determines that a deposition better serves the interests of justice than would an oral examination at trial. Since these cases are exceptions to the general rule of direct presentation of evidence at trial, a party who wants to present testimony by deposition must apply to the court for authorization, stating the reasons why a deposition should be preferred. The court has broad discretion in deciding the request.

21.3 Testimony at a deposition is made upon oath or affirmation as at trial (see Rule 22(b)(2)). It is to be transcribed verbatim or video- or audio-recorded. The parties may agree about the form of transcription or recording, but the court may order which form shall be used. The party who wants to use the deposition will pay the cost of transcription or recording.

21.4 The deposition will follow, as far as possible, the procedure for taking testimony at trial (see Rule 22). Thus the party taking the deposition will examine the witness first, and the other parties will cross-examine the witness thereafter. Before the deposition the court may specify questions that it requires to be asked of the witness (see Rule 22(b)(4)). Time and place of the deposition may be agreed upon by the parties, or may be established by the court. In any case, a written notice of the deposition shall be given to all the parties, at least 30 days in advance to let any party be present and actively participate in the deposition. Notice will also be given to the court.

21.5 The transcript or record of the deposition may be presented at trial as evidence. Any party, except the one presenting the deposition, is entitled to contest the fidelity of the transcription or record to the reality. Such objections are resolved by the court. The court may set aside the deposition and order that the party or the witness be examined directly at trial. Whether the testimony in a deposition is unclear, incomplete, or not useful for the judgment on the facts are matters for the court to determine.

## Rule 22

22.1 Subsection (a) establishes a general principle concerning the structure of the first-instance proceeding. It follows the common law trial model, according to which the taking of evidence should be made in a single hearing. When one day of hearing is insufficient, the trial should continue in consecutive days. In civil law systems a similar structure is reflected in "concentrated" trial procedures. The concentrated trial is by far the best and most effective way for the presentation of evidence,

although several systems still use the old method of separate hearings for taking of evidence. Exception to the rule of the single hearing can be made in the court's discretion when there is good reason, for example, when a party needs an extension of time to obtain evidence. In such a case the delay should be as limited as possible. Dilatory behavior of the parties should be sanctioned by the court.

22.2 Subsection (b)(1), in accord with Rule 17(b), provides that any person having information about a relevant fact is a competent witness. "Any person" includes the parties and any person having mental capacity. Witnesses are under obligation to tell the truth, as required in every procedural system. In many systems, such an obligation is reinforced by an oath by the witness. When a problem arises because of the religious character of the oath, the court has discretion to determine the terms of the oath or to permit the witness to affirm the obligation to tell the truth.

This rule applies to all witnesses, whether parties or nonparty witnesses. This entails a departure from the "free examination" of the parties permitted in some continental systems, whereby parties are not witnesses in the strict sense: they are under no obligation to tell the truth and do not swear.

22.3 According to Rule 18, an expert witness is not a witness in the strict sense, but such a witness may be orally examined as provided in Subsection (b)(6). The court-appointed expert is a professional who provides the court with technical or scientific information and analysis. Such an expert is obliged to perform such a task in good faith and according to the standards of the expert's profession. A party's expert presents commentary rather than evidence and is neither required nor expected to be sworn to tell the truth.

22.4 Subsection (b)(3) governs the presentation of evidence, particularly the examination of witnesses. The traditional distinction between common law systems which are based upon direct and cross-examination, and civil law systems which are based upon examination by the court, is well known and widely discussed in the legal comparative literature. Quite well known are also the limits and defects of both methods. In the common law the chief deficiency is too much partisanship in cross-examination, with the danger of abuses and of distorting the truth; in the civil law the chief deficiency is passivity and lack of interest of the court while examining the witness, with the danger of not reaching relevant information the witness might give. The problem is not necessarily of choosing one of these methods, but of devising a method effective for a presentation of oral evidence aimed at the search of truth. The rules provided here seek such a balanced method.

For a witness called by a party, the common law system of direct and cross-examination is the most suitable for a thorough examination. The witness is first examined by the lawyer of the party who called him, and then cross-examined by the lawyer for the adverse parties. Re-direct and re-cross-examinations may be permitted by the court when useful. To prevent abuses by the lawyers, the court should exclude, on the other party's objec-

tion or *ex officio*, questions that are irrelevant or improper or which subject the witness to embarrassment or harassment. If the court is too passive, it will be ineffective to prevent improper behavior by the lawyers. On the other hand, lawyers not accustomed to the common law system of examination may have difficulty conducting the examination of witnesses.

22.5 The civil law method, in which the court examines the witness, has some advantages in terms of neutral search for the truth and of eliciting facts that the court considers particularly relevant. The court therefore is afforded an active role in the examination of witnesses, an authority that is also recognized in common law systems. The court may play such a role in the course of direct and cross-examinations when a clarification of the witness' testimony seems useful. The court may carry on an independent examination of the witness, after the parties' examinations, when it seems useful to elicit or clarify facts or circumstances that have not emerged sufficiently from such examinations.

22.6 A witness called *ex officio* by the court is examined first by the court. This is the equivalent of a direct examination of a witness called by a party. After that, the parties have the right of cross-examining the witness. The court may conduct a further examination of the witness when it seems necessary to clarify, to control or to deepen the testimony given.

22.7 Since the examination of witnesses is aimed at the fullest search for truth, the scope of direct and cross-examination by the parties' lawyers and by the court should not be limited *a priori*. The governing standard is that of the relevancy of the evidence to the facts in issue. Direct and cross-examinations, therefore, may deal with any relevant issue of fact, event, action or circumstance that may be meaningful in that sense.

When an expert witness is examined orally, the same rules generally apply. However, under Rule 18 the court may require a written report from the expert and examination of the expert after the report has been submitted.

22.8 If a party, as a witness, makes a statement the content of which is contrary to the party's own interest during direct or cross-examination, the statement is to be treated as ordinary evidence. Although such a statement may damage the party because it is adverse, it does not have any special probative weight. That is, such a statement is not to be treated as a "confession" having binding effect. A statement made by a party outside the trial that is contrary to her own interest is admissible as evidence, if duly proved at trial. Such a statement is also to be treated as ordinary evidence and will be freely evaluated by the trier of fact.

22.9 Generally the opinion of a witness should not be admitted as evidence. An exception to this traditional rule is the expert witness, whose role includes also providing the court with technical and scientific evaluations. However, the exclusion of witness "opinions" cannot be interpreted in an absolute manner. The opinion of a witness may be admitted when it will clarify the testimony of the witness. Moreover, in the recollection of the facts, knowledge and memory are often inextricably mixed with judgments, evaluations and opinions, often elaborated unconsciously. Some-

times a "fact" necessarily implies an opinion of the witness, as for instance when he interprets the reasons of another person's behavior. Therefore the rule excluding the opinions of witnesses is properly understood as prohibiting comments that do not aid the reconstruction of the facts in issue.

22.10 The credibility of any witness (including expert witnesses and the parties when examined as witnesses) is essential in the reliability of the testimonial evidence. The best opportunity to cast doubt upon the credibility of a witness is through examination in court. Accordingly, the credibility of any witness can be disputed on any factual basis, including cross-examination, prior inconsistent statements, or any other event, behavior or circumstance that may affect the credibility of the witness. A party is entitled to impeach any witness, as may the court, which may examine a witness on its own motion about any fact or circumstance that may possibly affect credibility.

In the impeachment of a witness by a party, however, the right to impeach an adverse witness can be abused in order to harass the witness or to distort the testimony. The court should prevent such conduct. Impeachment of a witness should be admitted only when there are serious reasons for doing so, concerning testimony dealing with important issues of the case.

## Rule 23

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

Subsection (a) gives the court a power to exclude evidence on various grounds. The first is irrelevancy of the evidence for judgment on the facts in issue or its merely redundant or cumulative character. Redundant or cumulative evidence is theoretically relevant if considered by itself but not when considered in the context of the other evidence adduced. The court may, in the course of trial, admit evidence that was preliminarily excluded because it had appeared irrelevant, redundant or cumulative. The second standard is that of "excessive cost, burden or delay" in the presentation of evidence. Since this standard excludes relevant evidence that is not redundant, the court should apply this standard very cautiously. Because any presentation of evidence involves some cost, burden or delay, these consequences are "excessive" only in comparison with the quantity and quality of information otherwise available. This power should be used by the court mainly when a party adduces evidence with the apparent aim of delaying or confusing the proceedings.

23.2 In most civil law systems, not only are a party's statements regarded as having lower standing than testimony of a nonparty witness, but a party may not be compelled to give testimony if called by another party. The common law rule treats parties as fully competent witnesses and obliges them to testify if called by an opposing party, subject of course to privileges such as that against self-incrimination. This Rule adopts the

common law approach, so that a party has an obligation to testify if called by the opposing party. Noncompliance without explanation or justification may justify the court's holding the party in contempt or imposing other sanctions. However, when a party's failure to comply has some reasonable explanation or justification, it is unjust to impose a sanction. Sanctions may be gradually increased until the party decides to comply, according to the model of the French *astreintes*.

23.3 Subsections (c) and (d) provide for various other sanctions. The court may draw "adverse inference" from behavior of a party such as failing to give testimony, to present a witness the party could present, or to produce a document or other item of evidence the party could present. Drawing adverse inference means that the court will interpret the party's conduct as circumstantial evidence contrary to the party. If there is no other evidence on the same issue, the court may rely upon an adverse inference in deciding that issue.

Drawing adverse inference is obviously a sanction appropriate only against a party. Sanctions applied to nonparties, include contempt of court, and imposing a fine, the measure of which also will be determined by the court in its discretion. The conduct that thus may be sanctioned includes failing to attend as a witness or to answer proper questions, and failing to produce documents or other items of evidence.

23.4 While failure to comply with rules and orders concerning evidence is always subject to sanction, the court has discretion concerning both the importance and the nature of the noncompliance, and the kind and measure of the sanction that will be imposed. The court's authority should be exercised reasonably.

## Rule 24

24.1 With regard to establishing the record of the evidence, two principal methods can be used. One is typical of common law jurisdictions and consists of the verbatim transcript of everything said in the presentation of evidence; the other is typical of civil law systems and consists of a summary of the trial that is written by the court's clerk under the direction of the court, including the statements and the events that in the court's opinion will be relevant for the final decision. In most civil law systems there is no procedure for making a verbatim transcript. The verbatim transcript is complete and provides a good basis both for the final decision and for the appeal, but in many cases it is exceedingly burdensome and expensive. These Rules regard the more desirable practice to be a summary record written by the court's clerk under direction of the court. The court should require the record summary to include all relevant statements made by the parties and the witnesses, and other events that might be useful for the final evaluation concerning the credibility of witnesses and the weight of proofs. The parties are entitled to ask for inclusion of specific statements, and the court has discretion to permit their reception.

24.2 If the parties jointly request a verbatim transcript of the presentation of evidence, the court should so order. The parties themselves pay the expense. Independently of such a joint request, a party may arrange for having a verbatim transcript at the party's own expense. The court should be provided a copy of the transcript. The other parties are entitled to have a copy upon paying their share of the expense. Such a transcript does not take the place of the official record that must be kept according to subsection (a).

## Rule 25

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

25.2 A party may request permission to present a written submission of contentions and the legal rules upon which the contentions are based. The court has discretion to authorize such submissions, and ordinarily should do so when required by the nature and the complexity of the case, provided it does not result in undue delay. The court shall fix a date for written submissions and the date of a further hearing in which the closing statements will be presented and the oral discussion will be done.

25.3 Subsection (b) authorizes the court in its discretion to isolate issues for separate hearing and decision when doing so will promote fair and efficient disposition of the dispute. The court also has discretion to consolidate cases pending before itself when they concern the same or related subject matter and a joint trial and decision seems more advantageous.

25.4 Subsection (c) governs the rendition of judgment. After the closing statements of the parties, the judgment of the court shall be stated orally or in writing. The court may retire in chambers to deliberate the decision, but the decision should be made immediately, except that in complex cases the court may adjourn and fix a new hearing to state its judgment. The judgment should include pronouncement of the final rulings concerning the claims and defenses of the parties and putting them into the record of the case. The effects of the judgment and its enforceability (see Rule 30) depend on the judgment.

25.5 The standard of proof generally applied in civil cases is universally recognized to be that of preponderance of the evidence, in contrast with a higher standard, such as "beyond a reasonable doubt" in criminal cases. Many systems impose a higher standard of proof for certain issues

in civil cases, notably proof of fraud. However, no special exceptions are warranted because the "preponderance" standard as applied to fraud and other morally significant issues inherently requires stronger proof.

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

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

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

25.6 Subsection (d) requires the court to publish a written opinion justifying its decision. The publication is made according to local practice, but a written notice must be sent to the parties. All parties are entitled to obtain a copy of the whole judgment.

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

25.7 A member of the tribunal may give a dissenting or concurring opinion, orally or in writing. Such opinions are published together with the court's opinion.

## Rule 26

The rule governing allocation of costs and expenses of litigation in ordinary civil proceedings, recognized universally except in the United States, is that the prevailing party is entitled to reimbursement from the losing party. That rule is adopted here. In the United States the "Ameri-

can" rule governs, under which each party bears its own costs and expenses except as statutes specifically provide otherwise or in case of exceptional abuse of process. The American rule creates incentives for a party to bring litigation or to persist in defense of litigation that would not be maintained under the generally recognized rule. Attempts in some statutes in the United States to establish an intermediate rule, for example that costs should be recovered when the opposition has lacked substantial merit, have proved to be indeterminate and thus productive of further legal disputes over litigation costs.

## Rule 27

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

27.2 Subsection (a) provides for a right of appeal from a final judgment. The only exceptions are those stated in Subsections (b) and (c). Thus, interlocutory appellate review is not permitted from other orders of the first instance court, even though such review might be available under the law of the forum.

27.3 Subsection (b) permits interlocutory appellate review of orders granting or denying an injunction that is effective *pendente lite*. The reasons for affording an appeal in such circumstances are stated in the Commentary on Rule 8.

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

27.5 Subsection (d) permits appellate review of factual issues on the basis only of evidence previously presented to the court of first instance. This limitation accords with the principle followed in the common law tradition and is also recognized in some civil law systems.

27.6 Within the foregoing limitation the appellate court may determine that evidence should have been received that was excluded by the first-instance court, or require that evidence which was received be disregarded, for example, where the first-instance court made an erroneous ruling about a claim of evidentiary privilege. When the appellate court has determined that evidence was improperly excluded or received, and that

the effect was prejudicial, it may direct judgment where justified or order further proceedings in the court of first instance.

27.7 The appellate court does not have authority to redetermine issues of fact, but only to determine whether the findings of fact by the court of first instance were supported by substantial evidence. For example, the appellate court may not reconsider issues of witness credibility or of inferences to be drawn from circumstantial evidence if the findings of the first-instance court are reasonably plausible. This limited scope of factual review accords with the common law procedure and the procedure in some civil law systems.

27.8 When the appellate court determines that a factual finding by the first-instance court was unsupported under the standard referred to above, it must determine how the matter should thereafter be resolved. If the evidence permits only one reasonable conclusion, the appellate court may draw that conclusion and enter judgment accordingly. If the evidence is otherwise, the appellate court should remand the case for further factual determinations by the first-instance court.

27.9 Subsection (f) recognizes that an appellate court has superior authority to determine issues of law. This is a universally recognized principle. The appellate court also has authority to determine whether a specific issue is an issue of law, as to which its authority is superior, or an issue of fact, which is governed by the rule of deference stated in Subsection (e).

## Rule 28

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

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

## Rule 29

29.1 As a general rule, a final judgment should not be reexamined except in appellate review according to the provisions of Rules 27 and 28. See also Rule 31. Only in exceptional circumstances may it be reconsidered in the court that rendered the judgment.

29.2 Reexamination of a judgment may be requested in the court that rendered the judgment by a party who acted with due diligence in seeking

reexamination and where (a) the court had no competence over the case or over the party asking for reexamination; (b) the judgment was procured by fraud on the court; (c) there is evidence, not previously available, that would result in a different outcome; or (d) there has been a manifest miscarriage of justice.

The court should consider such an application cautiously when Subsection (c) is invoked. The applicant should show that there was no opportunity to present the item of evidence at trial and that the evidence is decisive, i.e., that the final decision should be changed. In interpreting Subsection (d), it should be recognized that the mere violation of a procedural or substantive legal rule, or errors in assessing the weight of the evidence, are not proper grounds for reexamining a final judgment, but are proper grounds for appeal. See Rules 27 and 28. The miscarriage of justice is an extreme situation in which the minimum standards and prerequisites for fair process and a proper judgment have been violated.

## Rule 30

30.1 Subsection (a) recognizes the general rule that a final judgment is immediately enforceable. If the judgment has to be enforced in the country of the court in which the judgment was entered, the enforcement will be based on the forum's law governing the enforcement of final judgments. Otherwise, the international rules including international conventions such as The Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments will apply. When a monetary judgment is to be enforced, attachment of property owned by the judgment obligor, or of obligations owed to him, may be ordered.

30.2 Subsection (b) governs a judgment or order requiring performance of a specific act (i.e., an order for "positive" as well as "negative" or "omissive" behavior). The law of the forum applies if it includes effective means of enforcement remedies. If the law of the forum is ineffective for this purpose, Rule 30 applies directly. Monetary penalties may be imposed by the court for delay in compliance, with discretion concerning the amount of the penalty.

30.3 Subsection (c) authorizes sanctions for failure to comply with a judgment. Subsection (c) authorizes the court, upon request of the judgment holder, to impose monetary penalties upon the judgment obligor for the case of noncompliance with a money judgment. These penalties may become effective if the judgment obligor does not pay the obligation within 90 days after the judgment has become final. The monetary penalties shall be imposed according to the following rules:

1) Application for the enforcement costs may be made by any party entitled to enforce the judgment. A party asking for a monetary relief may apply for penalties, absolute or conditional upon non-compliance with the judgment, while stating final requests to the court. See Rule 25. The court shall afford penalties according to the substantive basis of the judgment.

2) Enforcement costs are to be calculated by taking into account the probable fees required for the enforcement, including the attorney's fees, and including a conditional penalty in case of defiance of the court. A conditional penalty may not exceed the amount of the judgment.

3) Additional penalties may be added, considering the amount of the judgment and the economic situation of the parties, against an obligor who persists in refusal to pay.

4) If the obligation is paid more than 90 days after judgment, the court may determine, on request of the obligor or of the judgment holder, the final amount of the penalties due from the obligor.

5) No penalty may be imposed on a person who satisfactorily demonstrates to the court an inability to comply with the judgment.

30.4 Subsection (d) permits either the trial court or the appellate court to grant a stay of enforcement in exceptional cases. The court may require a bond or other security as a condition.

## Rule 31

31.1 The rule of definite finality is recognized in the common law systems and many civil law systems. Rule 31 rejects the rule, recognized in some civil law systems, that a judgment is open to reexamination even after the time to appeal has expired and even in the absence of the circumstances specified in Rule 29.

## Rule 32

32.1 It is a general principle of private international law that judgments of one state will be recognized and enforced in the courts of other states. The same principle has been recognized with respect to interlocutory orders, such as orders directing testimony from third-party witnesses. The extent of such assistance and the procedures by which it may be provided are governed in many respects by The Brussels and Lugano Conventions.

32.2 Rule 32 provides that, as a matter of the domestic law of the forum, assistance to the courts of another state is to be provided to such extent as may be appropriate. The general governing standard is the measure of assistance that one court within the state would provide to another court in the same state.

