

ALI / UNIDROIT Principles of Transnational Civil Procedure*

Scope and Implementation

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

1. Independence, Impartiality, and Qualifications of the Court and Its Judges

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

1.2 Judges should have reasonable tenure in office. Nonprofessional members of the court should be designated by a procedure assuring their independence from the parties, the dispute, and other persons interested in the resolution.

1.3 The court should be impartial. A judge or other person having decisional authority must not participate if there is reasonable ground to doubt such person's impartiality. There should be a fair and effective procedure for addressing contentions of judicial bias.

1.4 Neither the court nor the judge should accept communications about the case from a party in the absence of other parties, except for communications concerning proceedings without notice and for routine procedural administration. When communication between the court and a party occurs in the absence of another party, that party should be promptly advised of the content of the communication.

1.5 The court should have substantial legal knowledge and experience.

2. Jurisdiction Over Parties

2.1 Jurisdiction over a party may be exercised:

2.1.1 By consent of the parties to submit the dispute to the tribunal;

2.1.2 When there is a substantial connection between the forum state and the party or the transaction or occurrence in dispute. A substantial connection exists when a significant part of the transaction or occurrence occurred in the forum state, when an individual defendant is a habitual resident of the forum state or a jural entity has

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received its charter of organization or has its principal place of business therein, or when property to which the dispute relates is located in the forum state.

2.2 Jurisdiction may also be exercised, when no other forum is reasonably available, on the basis of:

2.2.1 Presence or nationality of the defendant in the forum state; or

2.2.2 Presence in the forum state of the defendant's property, whether or not the dispute relates to the property, but the court's authority should be limited to the property or its value.

2.3 A court may grant provisional measures with respect to a person or to property in the territory of the forum state, even if the court does not have jurisdiction over the controversy.

2.4 Exercise of jurisdiction must ordinarily be declined when the parties have previously agreed that some other tribunal has exclusive jurisdiction.

2.5 Jurisdiction may be declined or the proceeding suspended when the court is manifestly inappropriate relative to another more appropriate court that could exercise jurisdiction.

2.6 The court should decline jurisdiction or suspend the proceeding, when the dispute is previously pending in another court competent to exercise jurisdiction, unless it appears that the dispute will not be fairly, effectively, and expeditiously resolved in that forum.

3. Procedural Equality of the Parties

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

3.2 The right to equal treatment includes avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence. The court should take into account difficulties that might be encountered by a foreign party in participating in litigation.

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

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

4. Right to Engage a Lawyer

4.1 A party has the right to engage a lawyer of the party's choice, including both representation by a lawyer admitted to practice in the forum and active assistance before the court of a lawyer admitted to practice elsewhere.

4.2 The lawyer's professional independence should be respected. A lawyer should be permitted to fulfill the duty of loyalty to a client and the responsibility to maintain client confidences.

5. Due Notice and Right to Be Heard

5.1 At the commencement of a proceeding, notice, provided by means that are reasonably likely to be effective, should be directed to parties other than the plaintiff. The notice should be accompanied by a copy of the complaint or otherwise include the allegations of the complaint and specification of the relief sought by plaintiff. A party against whom relief is sought should be informed of the procedure for response and the possibility of default judgment for failure to make timely response.

5.2 The documents referred to in Principle 5.1 must be in a language of the forum, and also a language of the state of an individual's habitual residence or a jural entity's principal place of business, or the language of the principal documents in the transaction. Defendant and other parties should give notice of their defenses and other contentions and requests for relief in a language of the proceeding, as provided in Principle 6.

5.3 After commencement of the proceeding, all parties should be provided prompt notice of motions and applications of other parties and determinations by the court.

5.4 The parties have the right to submit relevant contentions of fact and law and to offer supporting evidence.

5.5 A party should have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court.

5.6 The court should consider all contentions of the parties and address those concerning substantial issues.

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

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

6. Languages

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

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

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

7. Prompt Rendition of Justice

7.1 The court should resolve the dispute within a reasonable time.

7.2 The parties have a duty to cooperate and a right of reasonable consultation concerning scheduling. Procedural rules and court orders may prescribe reasonable time schedules and deadlines and impose sanctions on the parties or their lawyers for noncompliance with such rules and orders that is not excused by good reason.

8. Provisional and Protective Measures

8.1 The court may grant provisional relief when necessary to preserve the ability to grant effective relief by final judgment or to maintain or otherwise regulate the status quo. Provisional measures are governed by the principle of proportionality.

8.2 A court may order provisional relief without notice only upon urgent necessity and preponderance of considerations of fairness. The applicant must fully disclose facts and legal issues of which the court properly should be aware. A person against whom ex parte relief is directed must have the opportunity at the earliest practicable time to respond concerning the appropriateness of the relief.

8.3 An applicant for provisional relief should ordinarily be liable for compensation of a person against whom the relief is issued if the court thereafter determines that the relief should not have been granted. In appropriate circumstances, the court must require the applicant for provisional relief to post a bond or formally to assume a duty of compensation.

9. Structure of the Proceedings

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

9.2 In the pleading phase the parties must present their claims, defenses, and other contentions in writing, and identify their principal evidence.

9.3 In the interim phase the court should if necessary:

9.3.1 Hold conferences to organize the proceeding;

9.3.2 Establish the schedule outlining the progress of the proceeding;

9.3.3 Address the matters appropriate for early attention, such as questions of jurisdiction, provisional measures, and statute of limitations (prescription);

9.3.4 Address availability, admission, disclosure, and exchange of evidence;

9.3.5 Identify potentially dispositive issues for early determination of all or part of the dispute; and

9.3.6 Order the taking of evidence.

9.4 In the final phase evidence not already received by the court according to Principle 9.3.6 ordinarily should be presented in a concentrated final hearing at which the parties should also make their concluding arguments.

10. Party Initiative and Scope of the Proceeding

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

10.2 The time of lodging the complaint with the court determines compliance with statutes of limitation, lis pendens, and other requirements of timeliness.

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

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

10.5 The parties should have a right to voluntary termination or modification of the proceeding or any part of it, by withdrawal, admission, or settlement. A party should not be permitted unilaterally to terminate or modify the action when prejudice to another party would result.

11. Obligations of the Parties and Lawyers

11.1 The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties.

11.2 The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence.

11.3 In the pleading phase, the parties must present in reasonable detail the relevant facts, their contentions of law, and the relief requested, and describe with sufficient specification the available evidence to be offered in support of their allegations. When a party shows good cause for inability to provide reasonable details of relevant facts or sufficient specification of evidence, the court should give due regard to the possibility that necessary facts and evidence will develop later in the course of the proceeding.

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

11.5 Lawyers for parties have a professional obligation to assist the parties in observing their procedural obligations.

12. Multiple Claims and Parties; Intervention

12.1 A party may assert any claim substantially connected to the subject matter of the proceeding against another party or against a third person subject to the jurisdiction of the court.

12.2 A person having an interest substantially connected with the subject matter of the proceeding may apply to intervene. The court itself, or on motion of a party, may require notice to a person having such an interest, inviting intervention. Intervention may be permitted unless it would result in unreasonable delay or confusion of the proceeding or otherwise unfairly prejudice a party. Forum law may permit intervention in second-instance proceedings.

12.3 When appropriate, the court should grant permission for a person to be substituted for, or to be admitted in succession to, a party.

12.4 The rights and obligations of participation and cooperation of a party added to the proceeding are ordinarily the same as those of the original parties. The extent of these rights and obligations may depend upon the basis, timing, and circumstances of the joinder or intervention.

12.5 The court may order separation of claims, issues, or parties, or consolidation with other proceedings, for fair or more efficient management and determination or in the interest of justice. The authority should extend to parties or claims that are not within the scope of these Principles.

13. Amicus Curiae Submission

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The

parties must have the opportunity to submit written comment addressed to the matters contained in such a submission before it is considered by the court.

14. Court Responsibility for Direction of the Proceeding

14.1 Commencing as early as practicable, the court should actively manage the proceeding, exercising discretion to achieve disposition of the dispute fairly, efficiently, and with reasonable speed. Consideration should be given to the transnational character of the dispute.

14.2 To the extent reasonably practicable, the court should manage the proceeding in consultation with the parties.

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

15. Dismissal and Default Judgment

15.1 Dismissal of the proceeding ordinarily must be entered against a plaintiff who, without justification, fails to prosecute the proceeding. Before entering such a dismissal, the court must give plaintiff a reasonable warning thereof.

15.2 Default judgment ordinarily must be entered against a defendant or other party who, without justification, fails to appear or respond within the prescribed time.

15.3 The court in entering a default judgment must determine that:

15.3.1 There is jurisdiction over the party against whom judgment is to be entered;

15.3.2 There has been compliance with notice provisions and that the party has had sufficient time to respond; and

15.3.3 The claim is reasonably supported by available facts and evidence and is legally sufficient, including the claim for damages and any claim for costs.

15.4 A default judgment may be no greater in monetary amount or in severity of other remedy than was demanded in the complaint.

15.5 A dismissal or a default judgment is subject to appeal or rescission.

15.6 A party who otherwise fails to comply with obligations to participate in the proceeding is subject to sanctions in accordance with Principle 17.

16. Access to Information and Evidence

16.1 Generally, the court and each party should have access to relevant and nonprivileged evidence, including testimony of parties and witnesses, expert testimony, documents, and evidence derived from inspection of things, entry upon land, or, under appropriate circumstances, from physical or mental examination of a person. The parties should have the right to submit statements that are accorded evidentiary effect.

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

16.3 To facilitate access to information, a lawyer for a party may conduct a voluntary interview with a potential nonparty witness.

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

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

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

17. Sanctions

17.1 The court may impose sanctions on parties, lawyers, and third persons for failure or refusal to comply with obligations concerning the proceeding.

17.2 Sanctions should be reasonable and proportionate to the seriousness of the matter involved and the harm caused, and reflect the extent of participation and the degree to which the conduct was deliberate.

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

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

18. Evidentiary Privileges and Immunities

18.1 Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information.

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

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

19. Oral and Written Presentations

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

19.2 The final hearing must be held before the judges who are to give judgment.

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

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

20. Public Proceedings

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

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

20.3 In the interest of justice, public safety, or privacy, if the proceedings are public, the judge may order part of them to be conducted in private.

20.4 Judgments, including supporting reasons, and ordinarily other orders, should be accessible to the public.

21. Burden and Standard of Proof

21.1 Ordinarily, each party has the burden to prove all the material facts that are the basis of that party's case.

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

21.3 When it appears that a party has possession or control of relevant evidence that it declines without justification to produce, the court may draw adverse inferences with respect to the issue for which the evidence is probative.

22. Responsibility for Determinations of Fact and Law

22.1 The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.

22.2 The court may, while affording the parties opportunity to respond:

22.2.1 Permit or invite a party to amend its contentions of law or fact and to offer additional legal argument and evidence accordingly;

22.2.2 Order the taking of evidence not previously suggested by a party; or

22.2.3 Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.

22.3 The court ordinarily should hear all evidence directly, but when necessary may assign to a suitable delegate the taking and preserving of evidence for consideration by the court at the final hearing.

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

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

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

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

23. Decision and Reasoned Explanation

23.1 Upon completion of the parties' presentations, the court should promptly give judgment set forth or recorded in writing. The judgment should specify the remedy awarded and, in a monetary award, its amount.

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

24. Settlement

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

24.2 The court should facilitate parties' participation in alternative-dispute-resolution processes at any stage of the proceeding.

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

25. Costs

25.1 The winning party ordinarily should be awarded all or a substantial portion of its reasonable costs. "Costs" include court filing fees, fees paid to officials such as court stenographers, expenses such as expert-witness fees, and lawyers' fees.

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

26. Immediate Enforceability of Judgments

26.1 The final judgment of the first-instance court ordinarily should be immediately enforceable.

26.2 The first-instance court or the appellate court, on its own motion or motion of a party, may in the interest of justice stay enforcement of the judgment pending appeal.

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

27. Appeal

27.1 Appellate review should be available on substantially the same terms as other judgments under the law of the forum. Appellate review should be concluded expeditiously.

27.2 The scope of appellate review should ordinarily be limited to claims and defenses addressed in the first-instance proceeding.

27.3 The appellate court may in the interest of justice consider new facts and evidence.

28. Lis Pendens and Res Judicata

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

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

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

29. Effective Enforcement

Procedures should be available for speedy and effective enforcement of judgments, including money awards, costs, injunctions, and provisional measures.

30. Recognition

A final judgment awarded in another forum in a proceeding substantially compatible with these Principles must be recognized and enforced unless substantive public policy requires otherwise. A provisional remedy must be recognized in the same terms.

31. International Judicial Cooperation

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