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# Fundamental Principles of Transnational Civil Procedure

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# FUNDAMENTAL PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE

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## 1. Jurisdiction

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

## 2. Independence, Neutrality, and Competence of the Court

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

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

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

## 3. Equality of the Parties and Right to Be Heard

3.1 The court should ensure equal opportunity for litigants to assert or defend their rights. This includes the right to

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submit contentions of fact and law and to make presentations of evidence in accordance with applicable procedural law, regardless of the nationality of the litigants, their residence, or the nature of the legal dispute in which they are involved.

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

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

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

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

3.6 The proceeding should be adjudicated in an expedited fashion.

#### **4. Right to Assistance of Counsel**

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

4.2 The professional independence of legal counsel should be respected.

#### **5. Due Notice**

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

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

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

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

5.5 The parties should make known to each other in due course the elements of fact upon which their claims or defenses are based and the elements of law that will be in-

voked, so that each party has the opportunity to organize its case.

## **6. Choice of Law**

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

## **7. Structure of the Proceeding**

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

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

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

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

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

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

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

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

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

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

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

## 10. Judicial Powers of Control; Proportionality

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

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

## 11. Responsibilities of the Parties

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

11.2 Parties should refrain from spurious claims and defenses.

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

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

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

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

## 12. Right of Amendment

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

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

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

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

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

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

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

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

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

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

### **14. Evidentiary Privileges and Immunities**

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

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

## **15. Third Parties**

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

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

## **16. Orality and Written Presentations**

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

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

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

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

## **17. Public Hearings**

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

## **18. Burden and Standard of Proof**

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

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

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

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

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

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

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

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

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

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

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

## **20. Decision and Reasoned Explanation**

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

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

## **21. Settlement**

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

21.2 The parties should cooperate in reasonable settlement endeavors.

## **22. Costs**

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

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

## **23. Finality**

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

## **24. Appeal**

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

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