PPJ 2013 Course and Conference, IUC Dubrovnik

EVIDENCE IN CIVIL PROCEDURE
Fundamental issues and challenge of reforms
27 May - 31 May 2013

Organized in co-operation with the EU JUST Project
Dimensions of Evidence in European Civil Procedure

Topics to be discussed

The 2013 Public and Private Justice Course and Conference is focusing on trends and developments regarding taking of evidence as one of the core tasks in civil litigation. Both in Europe and globally, reaching balance between the demands of factual accuracy and the need to adjudicate disputes in a swift, cost-effective and efficient way is one of the key challenges. The rise of court backlogs, difficulties of many national civil justice systems in securing reasonable length of trials, as well as an increased influx of new cases and reduced budgets of national judiciaries contributed to the reform trends aimed to streamline, simplify and accelerate the fact-finding procedures.

The contributors to 2013 PPJ conference are invited to reflect how these trends affect the situation in their countries and to present their views regarding further developments, both nationally and in comparison with the developments in other countries and regions. The impact of European and regional integration processes is also an element that may be discussed, in particular when exploring whether some common core elements may be identified in a transnational context, and whether these common core elements have a chance to be further strengthened and developed. In spite of national differences that are still dominant, it may be asked whether the approaches to civil evidence converge, and whether reforms affecting fact-finding have chances to lead to some forms of harmonization.

Here are some examples of particular aspects that might be addressed in presentations and discussions:

1. Fact-finding and evidence-taking in early stages of civil proceedings

- Some countries have been attempting to move the phases of collection and presentation of evidence to pre-action stages of the proceedings, or to ensure that views on factual issues as well as evidence on disputed points are exchanged between the prospective litigants even before the commencement of the lawsuit. Possible issues to be discussed are the relationship of this practice with the discovery/disclosure obligation and pre-action protocols in common law countries; the roots of this development and its outcome; whether the capacity of this trend to prevent litigation, or prepare it more effectively has produced results; the distinction between this trend and the customary procedures of securing evidence.

2. Concentration of evidence-taking and evidentiary preclusions in the pre-trial, trial and appeals proceedings

- Another trend of "frontloading" in civil litigation deals with the developments aimed at concentrating the pleadings and evidentiary proposals in the initial, preliminary stages of civil action. Some countries strengthen the obligation of the parties to submit available evidence and suggest further fact-finding activities already in their initial submissions, or at the preparatory or organizational hearings. In addition, parties are sometimes precluded from introducing new evidentiary material after a certain point in the first-instance proceedings. The admissibility of presentation of new facts and evidence in the appeals process is also being reconsidered, sometimes in the context of the powers of the appellate courts to review the factual findings and take evidence in the appeals stages.

3. Evolution of the powers of the judge and the powers of the parties regarding taking of evidence

- There are two distinct and very different views regarding the capacity of inquisitorial powers to enhance effectiveness and accuracy of the fact-finding process. According to one, for securing fast and accurate process, judges should have an active role and broad powers in the matters of evidence, including the right to take evidence *ex officio.* According to another, excessive judicial activism gives ample opportunity for the parties to exercise delaying tactics and exculpates them from the responsibility for the success of the fact-finding procedures. Consequently, two contrary streams of reforms aimed at acceleration of the civil trials can be identified, one increasing, and the other decreasing the powers of the court to actively search for sources of information on factual background of the civil case.

4. Quality of evidence and the future of the free evaluation of evidence doctrine

- In most European countries, the practice of evidence-taking is based on the so-called doctrine of free evaluation of evidence. This doctrine implies that judicial authorities are free in selecting appropriate evidence, evaluate its probative strength and assess the outcome of the evidentiary process. However, there is a constantly increasing number of exceptions to this rule. The provisions of national law of evidence often prohibit taking of specific evidence, for various reasons – either due to professional privileges, public interests (including privacy concerns and state security reasons), or due to illegality in obtaining a particular piece of evidence. Recently, the principle of proportionality invoked discussions whether certain forms of evidence should be excluded as disproportionately expensive and time-consuming (eg expert assessment in small claims cases); whether oral evidence (eg witness statements) should be reduced or excluded for the sake of efficient, more written procedures etc. Such trends also may have an impact on the changing approach to standard of proof and burden of proof in civil cases.

5. Special evidence in special proceedings?

- The character of the case need not influence selection of evidence only in small claims. It can also have a bearing on the selection of evidence in other forms of special proceedings. Special forms of evidence and special evidentiary rules may be considered in the context of family law cases (regarding scientific evidence, psychological expertise and children testimony) or in the context of various cases regarding insurance or damages (application of mathematical and statistical forms of evidence).

6. Technology of evidence-taking and its impact on the evolution of presentation of evidence

- Modern technical means might have a far-reaching impact on the methods of presentation and evaluation of evidence, affecting both the underlying structures and the efficiency of civil proceedings. The means of distant communication change the meaning of "immediacy" and the concept of trial as a hearing of persons present in court; the availability of audio and video recording blur the demarcation line between the orality and writing. These changes may also affect other aspects, such as evaluation of evidence or the means of control of the trial court findings.

The list of issues noted above is by no means exclusive. These points are only provided with the intention to inspire the contributions and the discussions. Other comparative topics related to the contemporary issues of evidence in civil proceedings are welcome as well.

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