

EVIDENCE IN CIVIL PROCEDURE: THE FUNDAMENTALS IN LIGHT OF THE 21ST CENTURY

Introduction

If civil procedure lies at the heart of every legal system, the taking of evidence lies at the heart of every civil procedure. Yet, there are very few comparative works that attempt to present the topical issues of evidentiary proceedings in civil litigation.¹ The harmonization of procedural law in the European Union has not changed this situation, irrespective of the fact that mutual cooperation of European judicial systems as regards the taking of evidence in civil and commercial matters forms part of the European *acquis*.² Nevertheless, comparative research of the trends and developments in the national practices of evidence-taking in civil litigation has a lot to offer. Since the start of the new millennium, many contemporary jurisdictions are revisiting the fundamental principles of their civil procedures. The core areas of the civil process are not left untouched, including the way in which evidence is being introduced, collected and presented in court. One generator of the reforms in the field of evidence-taking in the past decades has been the challenge of slow and inefficient litigation. While the taking of evidence is not the only reason for the endemic deficiencies that have put into jeopardy the human right to a trial within reasonable time, in many national justice systems it has been contributing a fair share to it. Difficult access to information, inaccessibility of witnesses, and time-consuming processes of producing expert testimony have been the cause of frustration for many court-goers across the European continent and elsewhere. Both in Europe and globally, reaching a balance between the demands of factual accuracy and the need to adjudicate disputes in a swift, cost-effective and efficient way is still one of the key challenges. The rise in court backlogs, the difficulties of many national civil justice systems in securing a reasonable length of the central stages of their civil proceedings as well as an increased influx of new cases and reduced

¹ See as one of the rare exceptions the work of Heinrich Nagel, revitalized and reconceptualized in collaboration with Ena-Marlis Bajons (Nagel 1967; Nagel & Bajons 2003).

² Compare EU Regulation No 1206/2001 of 28 May 2001.

budgets of national judiciaries contribute to the reform trends aimed to streamline, simplify and accelerate fact-finding procedures.

The second reason why many countries are reforming their law of evidence is related to cultural and technological changes in modern societies. As the balance between, on the one side, traditional human rights such as the right to privacy and due process is shifting to, on the other side, the modern need for security, efficiency and quick access to justice, the perception of what is admissible or not in the context of evidence-taking is changing as well. In the same sense, the fast pace of modern life commands different practices of fact-finding, accompanied by new methods of selection of evidence that are appropriate for this purpose. Last but not least, the overwhelming penetration of new technologies into all spheres of public and private life has the capacity of dramatically changing the methods of the collection and presentation of evidence. The ubiquitous migration to paperless, online-based information systems is greatly changing the conventional landscape of civil courts, which were during many ages graphically presented as venues submerged in a sea of paper documents – and the biggest part thereof were the documents used as means of proof and those recording the results of evidence-taking. ‘Digitalization’ of civil procedure³ challenges the conventional principles and routines, and may in the future bring much more than a mere conversion of dusty paper documents from court archives into electronic cyber-documents on court servers or cloud-based services.

Exploring these issues, the editors of this book invited the contributors to reflect on 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 was also an element that could be discussed, in particular when exploring whether some common core elements may be identified in a cross-border or transnational context, and whether these common core elements have a chance to be further strengthened and developed. Our further goal was to inquire whether, in spite of national differences that are still dominant, the approaches to civil evidence converge, and whether reforms affecting fact-finding have a chance of leading to some forms of harmonization.

The contributions in this volume have been brought together under four different headings: 1) Fundamental and other Principles of Evidence in Civil Litigation; 2) Types of Evidence in Civil Litigation; 3) Evidence in Arbitration and National Civil Litigation; and 4) Evidence in Cross Border Litigation.

1. Fundamental and other Principles of Evidence in Civil Litigation

In this section, a series of fundamental and other important principles of evidence in civil litigation are discussed, amongst others: (1) proportionality in the taking of evidence, (2) access to information and evidence, (3) concentration in the administration of evidence, (4) the principle of loyalty and the taking of evidence,

³ On current debates in this context see Kengyel & Nemessányi 2012.

(5) the right to proof, (6) the admissibility of evidence, (7) equality of arms and language in the taking of evidence, and (8) immediacy and publicity as regards evidence.

The first contribution in this section by Alan Uzelac starts with the observation that some harmonization in the approach to the taking of evidence in civil matters is indispensable if the common European area of justice is taken seriously. The author advocates the role of the proportionality principle in this area. In order to show how matters should *not* be organized he discusses the way the ideas of the Austrian law reformer Franz Klein have been wrongly interpreted in Socialist legal systems to advocate the idea that it is the task of the judge to leave no stone unturned in the effort to establish the 'real truth' in the case, i.e. the so-called material truth. According to the author, after the demise of Communism the quest for the material truth is still pursued in former Socialist systems, leaving out of consideration whether the efforts invested in proof proceedings are justifiable in relation to the features of the specific case at hand. The modern trend is different if one takes into consideration various other civil procedural systems in Europe (the author specifically mentions the Woolf reforms in England & Wales) and recent EU legislation (e.g. the Small Claims Regulation). This trend suggests that the simplest and least burdensome method of taking evidence should be opted for in civil cases, and that the specific features of individual cases should give guidance in answering the question as to what evidentiary efforts should be made to establish the factual basis of the legal action.

In the second contribution to this section, Aleš Galič discusses access to information in the hands of the opponent party which could adversely affect the opponent party's case. In many Continental jurisdictions such access is problematic in civil litigation, amongst other things given the observance of the *nemo tenetur* principle and the fact that access to information is only available if the information can be identified adequately by the party in need of it and if the judge so orders. On the basis of a comparative overview of the approaches in different legal systems, the author claims that the traditional Continental approach to matters needs to be re-examined and that alternatives, for example the system of disclosure in England & Wales, should be considered. In the author's home country (Slovenia), the introduction of a new system of access to information in the hands of the opponent is especially urgent, since the existing system has abolished the far-reaching *ex officio* powers which the judge could exercise in Socialist times as regards evidence. The author states that the traditional *nemo tenetur* principle should be re-evaluated if it extends beyond the risk of exposure to criminal prosecution of the party holding the information, and that Slovenia should fully profit from the convergence in this area of civil procedure between England & Wales and some civil law systems such as Germany, Austria, Switzerland, the Netherlands and France, a convergence that can also be witnessed at the EU level (e.g. in the area of intellectual property rights legislation and competition law).

Next, Bartosz Karolczyk discusses the attempts of the Polish Legislature to concentrate allegations and evidence in civil procedure. He starts his contribution, however, with the remark that in modern Polish civil procedure the old Socialist maxim that the judge has the duty to search for the truth *ex officio* still applies. Nevertheless, modern Polish legislation seems to sacrifice the search for the truth to other important values. Attempts at concentration resulted in, for example, special procedural rules, introduced in 2000 and abolished in 2012, for commercial cases, providing for what the Polish Supreme Court called an *Eventualmaxime*. This meant that allegations, objections or defences as well as motions for evidence, when omitted from the statements of case, could not be introduced later unless the omission could be excused (for which only two bases existed). There was no judicial discretion in these cases and therefore no flexibility. The ordinary procedure, however, continued to follow the French 19th-century model, a model that did not advocate any concentration at all. In 2012, together with the abolition of the special procedure for commercial cases, the ordinary procedure was amended, aiming to introduce some concentration while avoiding the introduction of an *Eventualmaxime*. According to the Polish Legislature, the amendments allow for judicial discretion and the new rules are considered to be both flexible but at the same time rigorous. According to Bartosz Karolczyk, however, it is hard to see why the new system should be better than the former procedure in commercial cases. First, the new rules state that all the procedural acts by the parties should comply with the established standards of good behaviour. Second, they state that parties and participants in the proceedings are under a duty to submit allegations and evidence without delay, and third, that the court may ignore untimely allegations and evidence unless the moving party can show that there is a good excuse for the late submission of allegations and evidence. The author provides various reasons why the new system is flawed and suggests that far-reaching reforms are needed in order to achieve the required balance between efficiency and fairness in Polish civil procedure.

The principle of loyalty in French civil evidence is the central topic of the contribution by Emmanuel Jeuland. The author states that evidence is not studied as a separate subject in France (neither is it in many other civil law countries), and as a result the topic is often neglected although it seems that currently the situation is subject to change. According to the author, written evidence is central in French private law. By way of an example, he remarks that a document is needed to prove a legal act if the value of the act exceeds the relatively small sum of 1,500 euros. Witnesses rarely appear in court to give oral evidence, but their statements are submitted to the court by way of witness depositions. The judge has extended case management powers in the French civil process, also as regards the administration of evidence, and the cooperation principle implies that the parties must assist the judge in arriving at a decision in the case in an efficient manner. A central element in the contribution by Emmanuel Jeuland is the so-called loyalty principle in relation to the right to proof. This loyalty principle, which is not generally

recognized in France, is said to apply in the area of the administration of evidence in civil matters and means that the parties must exercise good faith when obtaining evidence. This principle is, however, in competition with a right that is firmly recognized under French law, i.e. the right to proof. This right facilitates the parties in proving their case in civil litigation and is opposed to limiting the use of evidence. The right to proof is widespread in France and according to the author it 'fits within the new procedural interactions, based on human rights interests and the principle of proportionality'.

The theme of the contribution by Vesna Rijavec and Thomas Keresteš is restrictions on the admissibility of evidence. The authors provide a comparative overview, focusing on differences in how illegal and illegally obtained evidence are treated within the various jurisdictions discussed by them. These differences are especially problematic where cross-border cases are involved, and where evidence is taken in a state that is different from the state where the evidence needs to be used in court proceedings. The authors distinguish three groups of jurisdictions in Europe. In the first group the use of the relevant evidence is forbidden without much further ado, and this is, according to the authors, most likely the case in Croatia (if the constitutional provision that contains a blanket prohibition of illegally obtained evidence is interpreted literally). The second group contains jurisdictions where a balancing test is used, i.e. where the interests of the litigant who wants to use the evidence is weighed against the interests of the litigant whose rights have been infringed by the use of or the methods used for obtaining the evidence. In a third group of countries, there are no restrictions on the use of the relevant evidence in a civil action, although the litigant producing this evidence may be subject to an action in tort.

Martina Repas discusses evidence in civil claims for damages in relation to competition cases and leniency programmes. Within the context of leniency programmes, companies provide information to the authorities about the cartel in which they have participated in return for immunity from fines. However, these companies will not be exempt from civil liability for the consequences of competition law infringement. The problem that arises in civil actions for damages before national courts is that the claimant may not have access to relevant evidence, especially to information provided by the defendant company to the authorities within the context of the leniency programme. The author discusses various possible venues for obtaining the relevant information and to what extent these venues offer any relief to the claimant. Of special interest here are the CJEU *Pfleiderer* and *Donau Chemie* cases, in which it was decided that the national authorities may not exclude the disclosure of the relevant documents (including the leniency documents themselves) completely and categorically, but have to take the merits of the individual case into consideration when deciding about the matter (i.e. there is a balancing test between public and private interests). The future implementation of Directive 2014/104/EU may, however, mean that the balancing test would be short-lived where it concerns the leniency documents themselves (the Directive only knows such a test for pre-existing documents).

The contribution by Elisabetta Silvestri is devoted to language and evidence. A fair trial may require the translation of documents (including documents used as evidence) and the availability of language interpretation (also for witnesses). The author was, however, only able to find one case at the European Court of Human Rights 'hinting at the problem of language in adjudication as a potential obstacle interfering with the principle of "equality of arms"' (an element of the right to a fair trial), and in this case the claim of an alleged violation of Article 6(1) ECHR was rejected. Nevertheless, the author holds that a dialogue on language and translation in civil litigation is necessary since these are closely related to the right to be heard. It is not justified that legal translation is underestimated in legal practice and that the profession of interpreter is not regulated in some jurisdictions such as Italy.

Finally, Viktória Harsági and Tjaša Ivanc address the questions whether the 'virtualization of court procedure' (litigation with the help of IT) is compatible with the traditional principles of procedural law, to what extent these principles prevent the use of IT, and whether the traditional principles are in need of reform given technological developments. In order to answer these questions, the authors discuss several examples of the use of IT in the court room, especially those in relation to the administration of evidence. One example is the hearing of witnesses by way of video link. In this case the principle of immediacy is at stake since communication by video link replaces the personal and direct contact between the court and the witnesses. A second example concerns public documents such as those produced by a Latin notary or other competent authority which have a special evidentiary status in various legal systems. Traditionally, these documents are paper-based and therefore the requirements these documents need to meet are related to this format. These requirements, which allow the courts to establish the integrity and authenticity of such documents, have to be re-evaluated and may be subject to change where such documents can be submitted in electronic format. The third example concerns the principle of the publicity of court hearings (where evidence is administered) and judgments (where evidence is evaluated). Obviously, this principle dates from a period in which the publicity of court hearings meant that access to the court room was granted to the public at large and making hearings available to a larger audience by television broadcasting or through the Internet was not possible since these modern communication technologies did not exist. The same holds true for the publication of court judgments. These were published in professional law journals or series which were mainly accessible to professional lawyers and getting access to these judgments for laypersons was nearly impossible. How different the situation is in the modern Internet age, where searching judgments, e.g. by 'googling' the names of the parties involved (e.g. the name of a neighbour) would certainly give rise to the necessary 'hits'. These and other examples demonstrate, according to the authors, that it is time to reconsider the traditional principles of civil procedure and to evaluate them in the light of developments in modern technology in order to provide for procedural principles that would stand the technological test of the 21st century.

2. Types of Evidence in Civil Litigation

The second section of this volume discusses two types of evidence: witness evidence in the Netherlands, and expert evidence in Hong Kong and the Former Yugoslav Republic of Macedonia.

In the first contribution in the section, Fokke Fernhout and his students report on an empirical study performed by them to assess the efficiency and the quality of witness examinations in Dutch commercial cases. As in most Continental legal systems, the hearing of witnesses is performed by the judge with only the limited participation of the parties. In their research, the authors have taken into consideration (1) the length of the examination of witnesses, (2) the way the available time is spent, (3) the way the witness is informed about his position by the judge (his or her rights and obligations), and (4) the extent to which the parties participate in witness examinations. From their research it appears that the average length of time used for hearing an individual witness in Dutch commercial cases is 36 minutes, of which 51 per cent is used for the actual interrogation of the witness. The remaining time is needed for making a written record of the witness statements, which in the Netherlands, just as in many other jurisdictions, is done by way of a summary dictated by the judge to the court clerk. On average 37 per cent of the time appears to be needed for drafting the summary, whereas an additional average of 12 per cent of the time is used for reading the summary to the witness, allowing him or her to make objections against the text where he or she considers this necessary. The authors come to the conclusion that the procedure followed in the Netherlands is of good quality, whereas they also consider that the time used for compiling an accessible and clear written record of the hearing (i.e. a summary, which in their opinion is far superior to an audio or video recording since it provides a clear report of the relevant issues in the witness statement which is authorized by the witness instead of an at times unclear, lengthy and not easily accessible audio or video recording of the proceedings in court) is well spent. Problems are noted as regards the quality of the information provided by the judge to the witnesses about their rights and obligations. Additionally, it seemed that at various courts staff had forgotten about the fact that civil court proceedings are public, since the researchers were sometimes initially denied access to the court room to observe the hearing of witnesses.

Peter Chan and Ubaid-Ur Rehman address expert evidence in Hong Kong within the context of recent changes that have been introduced in that jurisdiction. The aim of the changes was to curb the adversarial excesses in the administration of expert evidence. The Hong Kong changes have not gone as far as in England & Wales, where the judge has been given considerable powers to exclude expert evidence altogether. In Hong Kong, the general feeling is that there are already sufficient procedural tools for the court to manage the use of expert evidence. The Hong Kong reforms limit themselves to stating that the expert witness owes a duty to the court which overrides any obligation to those instructing or paying the expert, a set of declarations the expert needs to make in order to have his report

received by the court, and the introduction of a code of conduct for experts. Chan and Rehman describe in detail how the system of expert evidence works in Hong Kong, including the use of the joint examination and joint report of experts that have been appointed on each side, respectively, and the Single Joint Expert. When discussing an area of litigation where the use of expert evidence is prevalent, i.e. personal injury litigation, they note that especially the use of the single joint expert, a measure that in England & Wales was thought to result in more efficiency, is not very frequent in Hong Kong. Although the authors explain that many personal injury cases are too complicated for a single joint expert to be used and therefore single joint experts are not frequently used, the limited use of such experts may also be proof of the fact that in Hong Kong the judge has not been given sufficient powers to manage the administration of expert evidence due to the successful opposition of the legal profession and 'the majority of stakeholders'.

Tatiana Zoroska discusses recent changes in the area of expert evidence in the Former Yugoslav Republic of Macedonia (FYROM). There, a shift has occurred from a Continental civil law approach to matters to a more adversarial, Anglo-American approach to expert evidence. Surprisingly, Macedonia has abolished court-appointed experts and adopted party-appointed experts even though in European common law jurisdictions the adversarial character of expert evidence has recently been reduced. Under the new rules, the Macedonian court may not order expert evidence at its own motion anymore. Another rule is that the parties must introduce expert evidence at the same time they submit their statements of claim and defence, respectively. The court cannot restrict expert evidence under the new rules. Only when the party-appointed experts provide vague, incomplete or contradictory reports, and re-examination of the experts does not eliminate the problems, may the court appoint an additional expert by way of random selection from the register of experts, and this is known as 'super-expertise'. Obviously, this system has many drawbacks, one of them being that the expert reports must be submitted prematurely, i.e. together with the statements of case. This may result in double work being done by the party-appointed experts, and in the event of problems super-expertise will be expensive. Also, under this system the defendant is disadvantaged, since the limited time period available to submit a statement of defence which must be accompanied by an expert report may mean that the defendant will not be able to find an expert who is willing to draft an expert report. The results are not favourable from the perspective of, amongst other things, complexity and costs.

3. Evidence in Arbitration and National Civil Litigation

The initial contribution to the section on Evidence in Arbitration and National Civil litigation is written by Paul Oberhammer. The author holds that in the area of evidence in civil matters (especially outside the area of small claims), one might learn from experiences in arbitration practice, especially where larger and more complex cases are concerned. The practice in arbitration is qualified by the author as user-friendly and efficient, and may serve as an example for court proceedings. The

author states that the oral hearing in arbitration is very well prepared by way of written preliminary proceedings and this is done to such an extent that no new facts and evidence are admitted at the hearing stage. New facts and evidence are even precluded at the hearing stage. Experts are party-appointed, and court-appointed experts only appear in the case when this is really needed. Court-appointed experts may be avoided by way of a confrontation of party-appointed experts, as this confrontation usually leads to very reliable results. Witnesses are examined by the parties since they know their own case best, but the arbitration tribunal may ask additional questions. Another feature is that no distinction is made between party-witnesses and ordinary witnesses since there is no evidence that ordinary witnesses are more reliable than party-witnesses. The author also advocates witness conferencing and especially expert conferencing (i.e. bringing witnesses and experts together in order to discuss the evidence given by them), which is common in arbitration practice. In his final section, Paul Oberhammer advocates a method that is used in arbitration practice to deal with materials that are claimed to be privileged, i.e. the use of the so-called 'confidentiality advisor'. This advisor consults the materials that are claimed to be privileged and reports on the issue to the tribunal. In the event privileged materials are at stake, the advisor will not disclose the content of the materials to the tribunal or to the parties.

In another contribution, Remco van Rhee discusses the current system of civil evidence in the Netherlands. This system underwent major reforms in 1988, but has remained loyal (at least in part) to its 19th-century French origins. Since 1988 partial reforms have been introduced in the Dutch system of civil evidence, including some designed to deal with the latest developments in law and technology. Furthermore, the system has profited from a recasting of the civil procedural rules in 2002. Especially the introduction of the so-called 'post-defence hearing model' has led to concentration of the hearing and to the parties having an incentive to be as complete as possible as regards the facts of the case and the available means of evidence at an early stage. Concentration and efficiency are further advanced by the various discretionary powers of the judge in the conduct of the civil action, which are also the result of these reforms. Current reform plans may again bring some additional beneficial changes (although the planned abolition of the cause-list and the introduction of a digital 'My Case Environment' which is only accessible to a limited group of people may not be a good idea). The Dutch model may certainly be a source of inspiration for civil law jurisdictions which are aiming at a gradual reform of their civil procedural system and which are unwilling to embrace the extremes of more adversarial systems of civil procedure.

Sladana Aras addresses the scope of appeal in civil cases in Croatia, comparing it with other jurisdictions. One of her central questions concerns the possibility of introducing new evidence before the appellate courts. In Croatia, oral hearings for the introduction of new evidence are allowed on appeal, amongst other reasons to remove the need for remittals to the court below. In practice, however, Croatian appellate courts still prefer remittals of cases to the lower courts instead of re-examining the evidence themselves. This is problematic since the European Court of Human Rights has identified successive remittals as a systemic problem in Croatian civil procedure. Croatian appellate courts are, nevertheless, of the opinion that they

are unable to organize oral hearings on appeal. The author concludes that recent law reforms may not be able to solve the present problematic situation.

Danie van Loggerenberg describes the powers of the judge and the parties in the taking of evidence in South Africa. On the basis of his contribution, it may be concluded that the South African legal system is conservative in its approach to limiting the adversarial system by increasing the case management powers of the judge in taking evidence. The author describes a traditional common law approach to matters, where the trial judge is rather passive. The judge may, for example, only ask witnesses questions if this is needed to clarify obscure points. In addition, the parties themselves do not have much duty to enhance the efficiency of the trial itself either where evidence is concerned. As a rule, they do not have to inform their opponent of the evidence they are going to present at trial. According to the author, in South Africa '[t]he result is that the surprise element plays a major role in the context of the presentation of oral evidence at the trial'. It seems that the present situation is not going to change quickly and the judge is unlikely to be given more case management powers in the taking of evidence in the near future. Van Loggerenberg concludes his contribution with the following, telling remark: In South Africa '[t]he parties remain in control of the taking of evidence, and distinctly so.'

4. Evidence in Cross Border Civil Litigation

The central theme of the contribution by Jiří Valdhans is the relationship between the 1970 Hague Evidence Convention and the 2001 EU Evidence Regulation. Where it concerns the Hague Convention, the author especially studies the relationships and roles of the European Union and its Member States as regards the Hague Convention's implementation. Furthermore, the author compares the mechanisms of evidence taking of both instruments. Valdhans states that it is clear that the Hague Convention addresses the same issues of evidence taking as the EU Regulation, and he comes to the conclusion that despite differences in wording, the substantive scope of both instruments is also the same. The Hague Convention remains relevant where it concerns the relations between EU Member States and non-member states, whereas among the Member States the EU Regulation has to be applied. This is an advantage within an EU context, since the Regulation offers measures for the taking of evidence that reach further than those of the Convention. These far-reaching measures are not a surprise given the fact that issues of national sovereignty are less emphasized in an EU context than in a wider international context. Especially the possibility of the taking of evidence abroad directly by the requesting court is a revolutionary aspect of the Regulation which is absent in the Convention. The Convention puts greater emphasis on measures protecting against interference in the national sovereignty of the requested state than the Regulation. The editors of the present volume are convinced that the contributions provide valuable information on recent trends in the area of civil evidence in Europe and beyond. The various contributions form in their opinion valuable materials that may be used in identifying areas of the law of civil evidence that are problematic

within legal systems that operate in a justice area where national frontiers have become less relevant and where modern technology exercises an ever greater influence on the manner in which the civil process unfolds. And hopefully, the suggestions of the various authors to solve problems that have been identified will provide useful information in the hands of law reformers, both at the national level and in an international context.

C.H. van Rhee & A. Uzelac
Maastricht/Zagreb, July 2015

Bibliography:

Kengyel & Nemessányi 2012

Kengyel, M. & Nemessányi, Z. (eds.), *Electronic Technology and Civil Procedure. New Paths to Justice from Around the World*, Dordrecht: Springer, 2012.

Nagel 1967

Nagel, H., *Die Grundzüge des Beweisrechts im europäischen Zivilprozeß - Eine rechtsvergleichende Studie*, Baden-Baden: Nomos, 1967.

Nagel & Bajons 2003

Nagel, H. & Bajons, E-M., *Beweis - Preuve - Evidence*, Baden-Baden: Nomos, 2003.