Editors: C.H. van Rhee A. Uzelac

# Evidence in Contemporary Civil Procedure

Fundamental Issues in a Comparative Perspective





Ius Commune Europaeum

Editors: C.H. van Rhee A. Uzelac

Evidence in Contemporary Civil Procedure Fundamental Issues in a Comparative Perspective

Intersentia Ltd Sheraton House | Castle Park | Cambridge | CB3 0AX | United Kingdom Tel.: +44 (0)1223 370 170 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-338-6 D/2015/7849/81 NUR 822

© 2015 Intersentia Cambridge - Antwerp - Portland www.intersentia.com | www.intersentia.co.uk

Cover illustration © ingimage

This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the author.

# CONTENTS

List of A	Authorsxiii
Acknov	vledgementsxv
INTRO	DUCTION
C.H. va	n Rhee & A. Uzelac
	CE IN CIVIL PROCEDURE: THE FUNDAMENTALS IN LIGHT OF THE $21^{\text{st}}$ CENTURY $3$
Introdu	ction
1.	Fundamental and other Principles of Evidence in Civil Litigation4
2.	Types of Evidence in Civil Litigation8
3.	Evidence in Arbitration and National Civil Litigation
4.	Evidence in Cross Border Civil Litigation
Bibliog	raphy13
FUNDA LITIGA	AMENTAL AND OTHER PRINCIPLES OF EVIDENCE IN CIVIL ATION
A. Uzel	ac
EVIDEN	CE AND THE PRINCIPLE OF PROPORTIONALITY. HOW TO GET RID OF EXPENSIVE
AND TIM	ME-CONSUMING EVIDENCE?
1.	Introduction
2.	Ideology of 'Material Truth' and its Impact on Evidence-taking

3.	The Seeds of Proportionality and the New Wave of Thinking about	
	Procedure and Evidence-taking	
4.	Reforming Rules on Proof in Croatia: Free Assessment of Evidence	
5.	Conclusion - A Change, but not too Fast	
Bibliog	graphy	31
	Av.	
A. Gal		
	SURE OF DOCUMENTS IN CIVIL PROCEDURE: THE PRIVILEGE AGAINST SELF-	
INCRIM	INATION OR A QUEST FOR PROCEDURAL FAIRNESS AND SUBSTANTIVE JUSTICE	33
1.	Introduction	33
2.	The Limited Scope of Disclosure of Evidence in Slovenian Civil	55
۷.	Procedure	35
2.1.	Documents in the Possession of the Party Adducing Them	
2.1.	Documents in the Possession of the Other Party	
2.3.	Documents in the Possession of Third Parties and Public Authorities	
2.4.	Lack of Access to Information in the Pre-action Stage	
3.	A Short Comparative Overview – Disclosure of Documents in Civil Law	42
<i>J</i> .	Jurisdictions	13
4.	Some Lessons from EU Law	
5.	Evaluation and Conclusion.	
	graphy	
Didiog	тарпу	<i>J</i> ∠
B. Karo	olczyk	
Preclu	JSION OF LATE ALLEGATIONS AND EVIDENCE AS A TOOL TO INCREASE THE	
EFFICIE	NCY OF CIVIL PROCEEDINGS IN POLAND: A SHORT STORY OF THE UGLY PAST	
AND TH	ie Way to a Bright Future	57
1.	Introduction	
2.	The Polish Model of Procedure: A View from Above	
2.1.	Theoretical Classification	
2.2.	A System in Flux	
2.3.	Constitutional Foundation	
2.4.	The Dogma of Truth-seeking	
3.	The Concentration of Procedural Material	
3.1.	Preliminary Remarks	64
3.2.	The Ugly Past (Special Procedure for Commercial Matters until May	
	2012)	
3.3.	The Flexible Future under the New Law?	
4.	Conclusions	
Bibliog	raphy	74

E. Jeu The 'I	lland Right to Proof' and the 'Loyalty Principle': A French Perspective	79
1.	General Picture of Evidence Law in France	79
2.	The Loyalty Principle	
3.	The Right to Proof as a Limitation to Loyalty	
Biblio	graphy	86
V. Rij	avec & T. Keresteš	
RESTR	CICTIONS ON THE ADMISSIBILITY OF EVIDENCE	87
1.	Introduction	87
2.	General Principle of Inadmissibility	89
3.	Balancing of Interests and Restrictions on Evidence	
3.1.	Slovenia	90
3.2.	Austria	91
3.3.	Germany	92
3.4.	Denmark	
3.5.	Estonia	
3.6.	Switzerland	
3.7.	Finland	
3.8.	Poland	
3.9.	Sweden	
3.10.	Romania	
3.11.	Latvia	
3.12.	Hungary	
3.13.	Ireland	
3.14.	France	
4.	Countries with no or Limited Restrictions on Evidence	
5.	Conclusions	
BIBIIO	graphy	101
M. Re	epas ig Leniency Documents as Evidence in Damages Actions in Cases of	
Сомр	ETITION LAW INFRINGEMENT	105
1.	Introduction	105
2.	Public and Private Enforcement of Competition Law Rules	
3.	The Purpose and Aims of the Leniency Programme	
<i>3</i> . 4.	Protection of Business and Other Professional Secrets	
4.1.	The Position of the EU Commission	
4.2.	The Position of National Competition Authorities – The Case of	107
	Slovenia	111

5.	Disclosure of Leniency Documents in Damages Actions	112
5.1.	General	
5.2.	Right to Access under Regulation 1049/2001	
5.2.1.	Right of Access under the Slovenian PIAA	
5.2.2.	Right of Access on the Request of National Courts	115
5.2.3.	Court's Intervention under Slovenian Law	
6.	Directive 2014/104/EU and Disclosure of Leniency Documents	
7.	Conclusion	
Bibliog	graphy	122
E. Silv	restri	
LOST IN	N TRANSLATION? LANGUAGE DIFFERENCES AND THEIR IMPACT ON EVIDENCE-	
TAKING	G IN LITIGATION	125
1.	Introduction	125
2.	The Protection of Language Rights	126
3.	Interpreting and Translating in Italian Civil Courts: Some Evidence-	
	Related Issues	129
4.	Conclusions	132
Bibliog	graphy	134
	r <b>sági</b> nce, Information Technology and Principles of Civil Procedure – Thi arian Perspective	
1.	Role of Principles in Civil Proceedings	137
2.	Development of the Field	
3.	Communication during the Lawsuit: The Principles of Orality and	
	Immediacy	139
4.	The Principle of Free Evaluation of Evidence	
5.	Publicity - Inspection of Documents - Data Protection	145
6.	Principle of Party Control v. Evidence Ex Officio	147
7.	Specialities - Order for Payment Procedure	
8.	Summary	149
Bibliog	graphy	151
·		
T. Iva	<del></del>	
	DTENTIAL IMPACT OF ELECTRONIC PROCEEDINGS ON TRADITIONAL PRINCIPLES	
CIVIL I	Procedure – The Slovenian Experience	155
1.	Introduction	
2.	Relationship between the Law and New Technologies	158

2.1.	The Use of Videoconferencing and the Question of the Oral Character of	
2.2	Procedural Acts	
2.2.	Adversarial System or Equality of Arms	
2.3.	Electronic Service of Documents	
2.4.	Free Evaluation of Evidence	
2.5.	Electronic Form versus Paper or Physical Form	
3.	Conclusion	
Biblic	graphy	168
TYPE	S OF EVIDENCE IN CIVIL LITIGATION	
WITN	ogers, F. Fernhout, H. Jans, R. Mertens & V. Poels ESS TESTIMONY IN DUTCH CIVIL PROCEDURE: FACTS, FIGURES AND STATISTICA	
1.	Introduction	175
2.	Dutch Civil Procedure	176
2.1.	Two Basic Principles of Dutch Civil Procedure	176
2.2.	Post-defence Hearing Model	177
2.3.	Sieve Model	177
2.4.	Witness Evidence	178
3.	Four Indicators to Assess Witness Examination	179
4.	Research Design	180
5.	Results	181
5.1.	Length of Witness Testimony	181
5.2.	The Way in which the Time of a Hearing was Spent	
5.3.	The Way a Witness is being Informed (Rechtsbelehrung)	
5.4.	Participation in a Witness Hearing	
6.	Conclusion	
Biblio	graphy	191
CURB:	Chan & UU. Rehman ING ADVERSARIAL EXCESSES: AN EVALUATION OF THE EXPERT EVIDENCE REGII ONG KONG AFTER THE CIVIL JUSTICE REFORM (WITH A FOCUSED STUDY ON ONAL INJURY LITIGATION)	
LINOC	AND ENJORED ELLIGITION	170
1.	Introduction	193
2.	The Role of the Expert in Civil Litigation	194
3.	The Civil Justice Reform and the Modification of the Expert Evidence	
4		196
4.	The Procedural Rules Governing Expert Evidence and Analysis	200

4.1.	Restrictions on Adducing Expert Evidence and Court's Power to Limit	
	the Number of Expert Witnesses	. 201
4.2.	Expert's Overriding Duty to the Court	. 203
4.3.	Statement of Truth and its Effect on Expert Evidence	. 204
4.4.	Code of Conduct of Expert Witness	
4.5.	Expert Witness's Declaration of Duty to the Court	
4.6.	Procedural Efficacy and Fairness	
4.7.	What is the Exact Realm of an Expert's Expertise?	. 206
5.	Single Joint Expert	
6.	Expert Evidence and Personal Injury Claims	. 209
7.	An Overview of the Process	
8.	Joint Examination and Joint Report	. 211
9.	Single Joint Expert in PI Cases	. 212
10.	Critical Review of the Case Law on Expert Evidence in PI Cases	. 213
11.	Further Reforms and Concluding Remarks	. 218
Bibliog	raphy	. 221
THE NE	oska-Kamilovska ew Rules of Expert Evidence in Macedonian Civil Procedure: Are Failed Effort at Reform?	. 223
1.	Introduction	. 223
2.	A Summary of the Regime of Expert Evidence in Macedonian Civil	
2	Procedure before 2010	
3.	Voices for a More Adversarial Approach, and Some Facts Against This	. 228
4.	The New Concept of Expert Evidence under the Amendments of the	201
_	MCPA of 2010	
5.	Criticism of the New Concept of Expert Evidence	
6.	Conclusion	
Bibliog	raphy	. 238
	NCE IN ARBITRATION AND NATIONAL CIVIL LITIGATION	
	CE: LEARNING FROM ARBITRATION	. 243
1.	General	
2.	Preparation of the Oral Hearing	
3.	Document Production	
4.	Experts	
5.	Witness Examination	
6.	Party Examination and Witness Examination	. 248

7.	Witness and Expert Conferencing	248
8.	Confidentiality	
Biblio	graphy	
	0 1 7	
СН	van Rhee	
	NCE IN CIVIL PROCEDURE IN THE NETHERLANDS: TRADITION AND MODERNITY	257
1.	Dutch Evidence Law in General	262
2.	Types of Evidence	270
2.1.	Documentary Evidence	
2.2.	Witnesses	
2.3.	Experts	
2.4.	Local Inspection	
2.5.	Presumptions	283
3.	Language	283
4.	Costs	
5.	Final Remarks	286
Biblio	graphy	288
TAKIN	as Kramar ng of Evidence in Croatian Appellate Courts: Why No Fact-Finding a' nd Instance?	
1.	Introduction	291
2.	Oral Hearings in Croatian Appellate Courts: From a Theoretical Option	
	to a Legal Impossibility (and Back)	
3.	The Origins of the Reluctance to Hear Evidence at the Appeals Level:	
٥.	An Outline of Arguments	. 292
4.	Fact-Finding at Second Instance: Historical Remarks and Current Law	
5.	Taking of Evidence in Appeal Proceedings in the Law of Other Post-	> c
	Yugoslav Countries	296
6.	Comparative Models - Appeals and Evidence-Taking in the Western	
	Neighbourhood of Croatia	299
6.1.	Austria	
6.2.	Germany	
6.3.	The Netherlands	
7.	Why Croatian Civil Procedure Fears Fact-Finding at Second Instance	
8.	Concluding Remarks	
Riblio	ography	308

D. van	Loggerenberg	
	TION OF THE POWERS OF THE JUDGE AND THE POWERS OF THE PARTIES	
REGAR	DING THE TAKING OF EVIDENCE IN SOUTH AFRICA	311
1.	Introduction	
2.	Civil Procedure in the High Court: A Traditional Perspective	313
2.1.	Commencement of Proceedings and the Determination of Issues: The	
	Pleadings	
2.2.	The Discovery Stage	
2.3.	The Pre-trial Conference	316
2.4.	The Trial	317
3.	The Action Procedure in the High Court: A Developmental Perspective	317
4.	The Power of the Parties in Taking of Evidence	322
5.	Conclusion	325
Bibliog	raphy	326
Annex		327
THE 19	hans & D. Sehnálek 70 Hague Evidence Convention, the European Union and the 2001	
EU EVI	DENCE REGULATION - INTERFACES	337
1.	European Union - Relationships to Third Countries within the Hague	
	Conference	
2.	Relationship between the Hague Convention and the Regulation	
3.	Competence of the European Union to Accede to the Hague Convention	
4.	Content Issues	
5.	Substantive Scope (ratione materiae)	
6.	Re: Civil and Commercial Matters	
7.	Re: Commenced or Contemplated Judicial Proceedings	
8.	Re: Judicial Authority and Competent Authority	353
9.	Re: 'To Obtain Evidence or to Perform some other Judicial Act' and 'To	
	Take Evidence'	
10.	Partial Conclusion	
11.	Specific Aspects of Taking Evidence	
12.	Conclusion	
Bibliog	raphy	361

#### LIST OF AUTHORS

- **S. Aras Kramar**, Assistant Professor of Civil Procedure, Faculty of Law, Zagreb University (Croatia)
- **P.C.H. Chan,** Teaching Fellow, School of Law, City University of Hong Kong (Hong Kong, China); Solicitor (non-practising) England & Wales; Solicitor (non-practising) (Hong Kong)
- **F. Fernhout**, Associate Professor of Civil Procedure, Faculty of Law, University of Maastricht (Netherlands)
- **A. Galič,** Professor of Civil Procedure, Faculty of Law, University of Ljubljana (Slovenia)
- **V. Harsági**, Chair of Civil Procedure, Pázmány Péter Catholic University, Budapest, and lecturer at the Andrássy Gyula German Speaking University in Budapest (Hungary)
- **F. Hoogers**, Bachelor Student of Law, Faculty of Law, University of Maastricht (Netherlands)
- **T. Ivanc**, Assistant Professor at the Department of Civil, Comparative and International Private Law, Faculty of Law, University of Maribor (Slovenia)
- **H. Jans**, Bachelor Student of European Law, Faculty of Law, University of Maastricht (Netherlands)
- **E. Jeuland**, Professor of procedural law and head of the Research Center of Justice and Trial at the Sorbonne Law School, University Paris 1 Panthéon Sorbonne, Legal consultant (France)

- **B. Karolczyk**, Ph.D., LL.M., Attorney at law at Domański Zakrzewski Palinka Law Firm LP in Warsaw (Poland)
- **T. Keresteš**, Associate Professor at the Department of Basic Legal and Other Sciences, Faculty of Law, University of Maribor (Slovenia)
- **D.E. van Loggerenberg**, Extraordinary Professor of Civil Procedure, Faculty of Law, University of Pretoria; Senior Counsel, Pretoria Society of Advocates (South Africa)
- **R. Mertens**, Bachelor Student of Law, Faculty of Law, University of Maastricht (Netherlands)
- **P. Oberhammer**, Professor of Civil Procedure, University of Vienna (Austria); Permanent Visiting Professor of Law, St. Gallen University (Switzerland); Rechtsanwalt, London (UK)
- **V. Poels**, Bachelor Student of Law, Faculty of Law, University of Maastricht (Netherlands)
- **U.U. Rehman**, Visiting Fellow, School of Law, City University of Hong Kong (Hong Kong, China); Barrister-at-Law (Hong Kong)
- **M. Repas**, Associate Professor at the Department of Business Law, Faculty of Law, University of Maribor (Slovenia)
- **C.H. van Rhee**, Professor of European Legal History and Comparative Civil Procedure, Faculty of Law, Maastricht University (Netherlands)
- **V. Rijavec**, Professor at the Department of Civil, Comparative and International Private Law, Faculty of Law, University of Maribor (Slovenia)
- **D. Sehnálek**, Assistant Professor at the Department of International and European Law, Masaryk University (Czech Republic)
- **E. Silvestri**, Associate Professor of Civil Procedure and Comparative Civil Procedure; Scientific Director of the postgraduate program on Mediation and ADR, Department of Law, University of Pavia (Italy)
- **A. Uzelac**, Professor of Civil Procedure, Faculty of Law, University of Zagreb (Croatia)
- **J. Valdhans,** Assistant Professor at the Department of International and European Law, Masaryk University (Czech Republic)
- **T. Zoroska-Kamilovska**, Associate Professor of Civil Procedure, Faculty of Law 'Iustinianus Primus', Ss. Cyril and Methodius University in Skopje (Macedonia)

#### **ACKNOWLEDGEMENTS**

The editors would like to thank Mrs. Marina Jodogne from the Maastricht European Institute for Transnational Legal Research (Maastrichts Europees Instituut voor Transnationaal Rechtswetenschappelijk Onderzoek or METRO) for her help and advice in editing the present volume. They are also grateful to Mr. Randolph Davidson (Pavia) for revising the English of the contributions of the non-native speakers; his language revision often went beyond what may be expected from a language revisor.

Most of the contributions collected in this book were initially presented and discussed at the postgraduate course and conference which took place between 27 and 31 May 2013 at the Inter-University Centre Dubrovnik, as a part of the Public and Private Justice (PPJ) series. The editors would like to thank the Inter-University Centre, led by Secretary General Ms. Nada Bruer, for their continuing kind assistance in providing an inspiring forum for high-quality professional and academic debates. The comprehensive PPJ discussions on fundamental issues and challenges of reforms of the European law of evidence would not have been possible without the help of the Maastricht and Zagreb Universities. In particular, helpful aid in all organisational matters on-site was provided by the team of the Law Clinic of the Faculty of Law in Zagreb, which also financially supported them. Some financial support for participation of individual participants was provided by two Croatian ministries (Ministry of Judiciary and Ministry of Science, Education and Sports), the HESP Programme of the Soros Foundation, and the Judicial Academy of the Republic of Croatia (the latter enabling the participation of judges from two superior Croatian courts, the High Commercial Court of the Republic of Croatia and the Commercial Court in Zagreb). The main source of support and financing, both of this book and the conference that prepared its birth, remains, however, the EU Project Dimensions of Evidence in European Civil Procedure. The results of the research presented in this book will, in the future, be used as the starting point of further research, in particular within the ambit of the scientific project Transformation of Civil Justice under the Influence of Global and Regional Integration Processes. Unity and Diversity (TCJust-UD, IP-11-2013) approved by the Croatian Science Foundation (HRZZ).