

CONTENTS

List of Authors	xiii
Acknowledgements	xv

INTRODUCTION

C.H. van Rhee & A. Uzelac

EVIDENCE IN CIVIL PROCEDURE: THE FUNDAMENTALS IN LIGHT OF THE 21ST CENTURY 3

Introduction	3
1. Fundamental and other Principles of Evidence in Civil Litigation.....	4
2. Types of Evidence in Civil Litigation	8
3. Evidence in Arbitration and National Civil Litigation	10
4. Evidence in Cross Border Civil Litigation	12
Bibliography	13

FUNDAMENTAL AND OTHER PRINCIPLES OF EVIDENCE IN CIVIL LITIGATION

A. Uzelac

EVIDENCE AND THE PRINCIPLE OF PROPORTIONALITY. HOW TO GET RID OF EXPENSIVE AND TIME-CONSUMING EVIDENCE?

1. Introduction	17
2. Ideology of 'Material Truth' and its Impact on Evidence-taking	18

3.	The Seeds of Proportionality and the New Wave of Thinking about Procedure and Evidence-taking.....	22
4.	Reforming Rules on Proof in Croatia: Free Assessment of Evidence.....	26
5.	Conclusion – A Change, but not too Fast	28
	Bibliography	31

A. Galič

	DISCLOSURE OF DOCUMENTS IN CIVIL PROCEDURE: THE PRIVILEGE AGAINST SELF-INCRIMINATION OR A QUEST FOR PROCEDURAL FAIRNESS AND SUBSTANTIVE JUSTICE.....	33
--	--	----

1.	Introduction	33
2.	The Limited Scope of Disclosure of Evidence in Slovenian Civil Procedure	35
2.1.	Documents in the Possession of the Party Adducing Them	35
2.2.	Documents in the Possession of the Other Party	37
2.3.	Documents in the Possession of Third Parties and Public Authorities.....	42
2.4.	Lack of Access to Information in the Pre-action Stage.....	42
3.	A Short Comparative Overview – Disclosure of Documents in Civil Law Jurisdictions	43
4.	Some Lessons from EU Law	46
5.	Evaluation and Conclusion.....	47
	Bibliography	52

B. Karolczyk

	PRECLUSION OF LATE ALLEGATIONS AND EVIDENCE AS A TOOL TO INCREASE THE EFFICIENCY OF CIVIL PROCEEDINGS IN POLAND: A SHORT STORY OF THE UGLY PAST AND THE WAY TO A BRIGHT FUTURE	57
--	--	----

1.	Introduction	57
2.	The Polish Model of Procedure: A View from Above	57
2.1.	Theoretical Classification	58
2.2.	A System in Flux	59
2.3.	Constitutional Foundation.....	61
2.4.	The Dogma of Truth-seeking.....	61
3.	The Concentration of Procedural Material	64
3.1.	Preliminary Remarks	64
3.2.	The Ugly Past (Special Procedure for Commercial Matters until May 2012).....	66
3.3.	The Flexible Future under the New Law?	69
4.	Conclusions.....	70
	Bibliography	74

E. Jeuland

THE 'RIGHT TO PROOF' AND THE 'LOYALTY PRINCIPLE': A FRENCH PERSPECTIVE	79
--	----

1. General Picture of Evidence Law in France	79
2. The Loyalty Principle	82
3. The Right to Proof as a Limitation to Loyalty	84
Bibliography	86

V. Rijavec & T. Keresteš

RESTRICTIONS ON THE ADMISSIBILITY OF EVIDENCE	87
---	----

1. Introduction	87
2. General Principle of Inadmissibility	89
3. Balancing of Interests and Restrictions on Evidence	90
3.1. Slovenia	90
3.2. Austria	91
3.3. Germany	92
3.4. Denmark	92
3.5. Estonia	93
3.6. Switzerland	93
3.7. Finland	93
3.8. Poland	94
3.9. Sweden	95
3.10. Romania	95
3.11. Latvia	96
3.12. Hungary	96
3.13. Ireland	97
3.14. France	98
4. Countries with no or Limited Restrictions on Evidence	98
5. Conclusions	99
Bibliography	101

M. Repas

TAKING LENIENCY DOCUMENTS AS EVIDENCE IN DAMAGES ACTIONS IN CASES OF COMPETITION LAW INFRINGEMENT	105
--	-----

1. Introduction	105
2. Public and Private Enforcement of Competition Law Rules	106
3. The Purpose and Aims of the Leniency Programme	108
4. Protection of Business and Other Professional Secrets	109
4.1. The Position of the EU Commission	109
4.2. The Position of National Competition Authorities – The Case of Slovenia	111

5.	Disclosure of Leniency Documents in Damages Actions	112
5.1.	General	112
5.2.	Right to Access under Regulation 1049/2001	113
5.2.1.	Right of Access under the Slovenian PIAA	115
5.2.2.	Right of Access on the Request of National Courts.....	115
5.2.3.	Court's Intervention under Slovenian Law	117
6.	Directive 2014/104/EU and Disclosure of Leniency Documents	119
7.	Conclusion	121
	Bibliography	122

E. Silvestri

LOST IN TRANSLATION? LANGUAGE DIFFERENCES AND THEIR IMPACT ON EVIDENCE-TAKING 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
	Bibliography	134

V. Harsági

EVIDENCE, INFORMATION TECHNOLOGY AND PRINCIPLES OF CIVIL PROCEDURE – THE HUNGARIAN PERSPECTIVE	137
--	-----

1.	Role of Principles in Civil Proceedings	137
2.	Development of the Field.....	139
3.	Communication during the Lawsuit: The Principles of Orality and Immediacy	139
4.	The Principle of Free Evaluation of Evidence	141
5.	Publicity – Inspection of Documents – Data Protection	145
6.	Principle of Party Control v. Evidence <i>Ex Officio</i>	147
7.	Specialities – Order for Payment Procedure	149
8.	Summary	149
	Bibliography	151

T. Ivanc

THE POTENTIAL IMPACT OF ELECTRONIC PROCEEDINGS ON TRADITIONAL PRINCIPLES OF CIVIL PROCEDURE – THE SLOVENIAN EXPERIENCE	155
--	-----

1.	Introduction	155
2.	Relationship between the Law and New Technologies.....	158

2.1.	The Use of Videoconferencing and the Question of the Oral Character of Procedural Acts	159
2.2.	Adversarial System or Equality of Arms	161
2.3.	Electronic Service of Documents.....	163
2.4.	Free Evaluation of Evidence	164
2.5.	Electronic Form versus Paper or Physical Form.....	164
3.	Conclusion	166
	Bibliography	168

TYPES OF EVIDENCE IN CIVIL LITIGATION

F. Hoogers, F. Fernhout, H. Jans, R. Mertens & V. Poels

WITNESS TESTIMONY IN DUTCH CIVIL PROCEDURE: FACTS, FIGURES AND STATISTICAL RELATIONS.....	175
---	-----

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.....	183
5.3.	The Way a Witness is being Informed (Rechtsbelehrung)	187
5.4.	Participation in a Witness Hearing.....	189
6.	Conclusion	189
	Bibliography	191

P.C. Chan & U.-U. Rehman

CURBING ADVERSARIAL EXCESSES: AN EVALUATION OF THE EXPERT EVIDENCE REGIME IN HONG KONG AFTER THE CIVIL JUSTICE REFORM (WITH A FOCUSED STUDY ON PERSONAL INJURY LITIGATION)	193
--	-----

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 Regime.....	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	204
4.5.	Expert Witness's Declaration of Duty to the Court	205
4.6.	Procedural Efficacy and Fairness	206
4.7.	What is the Exact Realm of an Expert's Expertise?	206
5.	Single Joint Expert	208
6.	Expert Evidence and Personal Injury Claims	209
7.	An Overview of the Process	209
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
	Bibliography	221

T. Zoroska-Kamilovska

THE NEW RULES OF EXPERT EVIDENCE IN MACEDONIAN CIVIL PROCEDURE: ARE THEY A FAILED EFFORT AT REFORM?	223
---	-----

1.	Introduction	223
2.	A Summary of the Regime of Expert Evidence in Macedonian Civil Procedure before 2010	224
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 MCPA of 2010	231
5.	Criticism of the New Concept of Expert Evidence	234
6.	Conclusion	236
	Bibliography	238

EVIDENCE IN ARBITRATION AND NATIONAL CIVIL LITIGATION

P. Oberhammer

EVIDENCE: LEARNING FROM ARBITRATION	243
---	-----

1.	General	243
2.	Preparation of the Oral Hearing	245
3.	Document Production	246
4.	Experts	246
5.	Witness Examination	247
6.	Party Examination and Witness Examination	248

7.	Witness and Expert Conferencing	248
8.	Confidentiality.....	249
	Bibliography	250

C.H. van Rhee

EVIDENCE 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	270
2.2.	Witnesses.....	274
2.3.	Experts	281
2.4.	Local Inspection	283
2.5.	Presumptions.....	283
3.	Language.....	283
4.	Costs.....	284
5.	Final Remarks	286
	Bibliography	288

S. Aras Kramar

TAKING OF EVIDENCE IN CROATIAN APPELLATE COURTS: WHY NO FACT-FINDING AT SECOND INSTANCE?	291
--	-----

1.	Introduction	291
2.	Oral Hearings in Croatian Appellate Courts: From a Theoretical Option to a Legal Impossibility (and Back)	292
3.	The Origins of the Reluctance to Hear Evidence at the Appeals Level: An Outline of Arguments	292
4.	Fact-Finding at Second Instance: Historical Remarks and Current Law	293
5.	Taking of Evidence in Appeal Proceedings in the Law of Other Post-Yugoslav Countries	296
6.	Comparative Models - Appeals and Evidence-Taking in the Western Neighbourhood of Croatia.....	299
6.1.	Austria	299
6.2.	Germany	300
6.3.	The Netherlands.....	303
7.	Why Croatian Civil Procedure Fears Fact-Finding at Second Instance	304
8.	Concluding Remarks	306
	Bibliography	308

D. van Loggerenberg

EVOLUTION OF THE POWERS OF THE JUDGE AND THE POWERS OF THE PARTIES REGARDING THE TAKING OF EVIDENCE IN SOUTH AFRICA.....	311
1. Introduction.....	311
2. Civil Procedure in the High Court: A Traditional Perspective.....	313
2.1. Commencement of Proceedings and the Determination of Issues: The Pleadings	313
2.2. The Discovery Stage	314
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
Bibliography	326
Annex	327

EVIDENCE IN CROSS BORDER CIVIL LITIGATION

J. Valdhans & D. Sehnálek

THE 1970 HAGUE EVIDENCE CONVENTION, THE EUROPEAN UNION AND THE 2001 EU EVIDENCE REGULATION - INTERFACES	337
1. European Union – Relationships to Third Countries within the Hague Conference	337
2. Relationship between the Hague Convention and the Regulation	341
3. Competence of the European Union to Accede to the Hague Convention	344
4. Content Issues	346
5. Substantive Scope (<i>ratione materiae</i>)	347
6. Re: Civil and Commercial Matters.....	347
7. Re: Commenced or Contemplated Judicial Proceedings	350
8. Re: Judicial Authority and Competent Authority	353
9. Re: 'To Obtain Evidence or to Perform some other Judicial Act' and 'To Take Evidence'	354
10. Partial Conclusion.....	355
11. Specific Aspects of Taking Evidence	355
12. Conclusion	359
Bibliography	361