Evidence and the principle of proportionality

How to get rid of expensive and time-consuming evidence?

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Outline

EU and fact-finding practices

- Harmonization in regard to taking of evidence?
- TFEU and „cooperation in evidence-taking“
- Compatibility?

Challenges in SEE context

- Mainstream style in evidence-taking procedure
- Three (insumountable?) challenges: concentration, time-management, preclusions

New trends

- Revival of preclusions
- Burden of proof revisited
- Standard of proof/reduction of means of evidence: PROPORTIONALITY!
EU and the taking of evidence

JUDICIAL COOPERATION AS AN IDEOLOGICAL CONCEPT: ILLUSIONS OF AN „APPROXIMATION“ IN THE „COMMON AREA OF JUSTICE“

TFEU & judicial cooperation

JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81
(see Article 83 TFEU)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.
Preconditions for a successful cooperation

- From European Union as a common area of justice to judicial cooperation in the taking of evidence: is a common core of values necessary?
- 2001 Regulation on MS courts cooperation in the taking of evidence in civil and commercial matters

**Simplification**
- National standards for “simple” and “accelerated”?
  - Speed in communication (“swiftest possible means”);
  - Methods of notification of parties/witnesses;
  - Methods of taking of evidence (“teleconferences”);
  - Practice in the use of coercive measures.

**Acceleration**

Direct taking of evidence?

Croatia, Slovenia, South Europe: challenges of evidence-taking

Common Roots, Common Problems?
Main challenges of SEE procedural style (CCP 1976)

**CONCENTRATION**
The missing concept of trial (piece-meal trial, May-rain trial)

**TIME MANAGEMENT**
No planning of procedure. No court instructions on submissions, no procedural calendar.

**PRECLUSIONS**
No deadlines for factual allegations and submission of evidence.

“Non-liberal, paternalistic nature of those who oppose to the system of preclusions that emphasises the responsibility of the parties for the active conduct of the case...” (Restrictions on evidence and the goal of CP)

Civil procedure in the 3rdLT

An anecdotal portrait of the specific features:

- Piece meal trial
- No filtering
- Paternalistic inquisitorial
- Successive remittals
- Unlimited right to appeal
- Concentration
- Efficiency

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Two models of substantive truth

Franz Klein model (Aut)
- The court should actively participate in the taking of evidence
  - The right of a judge to question witnesses and experts.
  - Exceptionally, the right of the court to take evidence ex officio, and to assist the parties in supplying of evidence.
- The right to restrict evidentiary proposals of the parties.
- Right to reject late evidence.
- Right to set time limits for taking of evidence.
- The right of the court to actively manage the case and enforce loyal collaboration of the parties on the joint task (proper adjudication).

Yugoslav CCP
- The court should dominate in evidentiary process (rива: „Socialist paternalistic inquisitorialism“)
  - The duty of the court to take evidence ex officio.
  - Party initiative limited to applications to adduce evidence, no party liability for submitting the evidence.
- Duty to continue the pursuit of evidence until all resources have been exhausted (“no stone should be left unturned”).
  - Virtual impossibility of preclusions.
  - Virtually unlimited options for introducing new evidence.
- The court is solely responsible for accurate fact-finding.

“Material truth” as a result of procedural collaboration.

New trends: fresh winds from the North
WHAT DEVELOPMENTS MAY REDUCE THE CLEFT BETWEEN SOUTHERN AND NORTHERN CIVIL JUSTICE AND ENABLE GENUINE JUDICIAL COOPERATION IN THE EU?
Civil procedure and the principle of proportionality

THREE-DIMENSIONAL CONCEPT OF JUSTICE

"...efficiency and expedition are as important as the correctness of the outcome...", Zuckermann, 2009.

CPR 1.1.1: "...These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost" (Lord Woolf reform, 1999).

What are the (targeted) changes in the evidence-taking process?

• Excluding new evidence on appeal
• Reducing novas during main hearing
• Restricting new evidence

• Default judgments
• Introductory pleadings
• Early presentation of evidence

• Dualism of oral stages
• Limitation on the number of hearings
• Instant delivery of judgments

Achievements?

STILL MISSING:

- Genuine planning; procedural calendar
- Adaptation to the needs of particular case: genuine proportionality
  - Discretionary procedural tracks
  - Latitude in choice of evidence and discretionary threshold of evidence
  - Broad use of decisions based on burden of proof
  - Adaptable standards of proof
New options regarding evaluation of evidence in Croatia

- Broadening of „discretionary“ evaluation of evidence and introduction of proportionality in evaluation
  - Art. 8 CCP: Free evaluation of evidence as the principle:
    - The court should take a fact as proven according to its own conviction, based on a careful and conscious evaluation of every piece of evidence individually and entire evidentiary material as a whole, also considering the results of the entire proceedings.
  - Art. 223: Proof of facts based on „free assessment“ of the court:
    - 223/1: „if the amount or quantity cannot be established, or if it can be established only subject to disproportionate difficulties (nerazmjerne potiskeće).”
    - 223/2: „if decision-making on some of the claims that are insignificant compared to the total value of all claims is subject to disproportionate to the importance of these claims.”
    - 223.a: „For disputes before municipal courts, if the amount in dispute is not higher than 5,000 (10,000) kuna; for disputes before commercial courts, if the amount in dispute is not higher than 10,000,00 (50,000) kuna, if the court deems that the establishment of relevant facts would be connected with disproportionate difficulties and expenses.”

True challenge of discretionary evaluation: the use and filtering of available means of evidence

- Doctrinal challenge: How to explain the „free assessment“ of evidence by courts’ discretion?

  
  | First option | Reducing the standard of proof |
  |             | Instead of the „certainty“ (high probability) standard, introduction of the „balance of probability“ standard. |

  | Second option | Reducing the intensity of pursuit for proof |
  |              | Using the least burdensome way of evidence-taking, the use of „liquid evidence“, rejection of evidentiary proposals that require more efforts, more time and more costs. |

  | Third option | Filtering certain categories of evidence |
  |             | Using only specific categories of evidence (documents, parties’ statements), while excluding certain other categories of evidence (witnesses, experts). |
Justification of changes

- Explanation of legislative proposal, April 2011
  - Cutting on "unnecessary activities"
  - Reducing time and complexity

Triva/Dika:
- True meaning: "Certain reduction of certainty criteria, but short of sheer arbitrariness".
- Case law: "one should come as close to the real facts as possible, if those facts cannot be exactly and precisely established."

Essential hints regarding the selection of means of evidence:
- "[the court may decide] taking into considerations the documents submitted by the parties, and their statements, if the court had the opportunity to hear the parties."

The suggestion for the exclusion:
- Of witness statements
- Of experts
- Of documents procured by the court
  - ("liquid evidence")

It is not over: A Shock Therapy in 11 points

1. Instant dismissal of manifestly ill-founded claims!
2. Setting the date for trial as early as possible!
3. Opening of all channels of communication!
4. No tolerance for vexatious behaviour!
5. Burden of proof should rest on parties!
6. Civil proceedings in two hearings!
7. Procedural calendar for the whole process!
8. Reinforcement of oral hearings!
9. Enforceability of first instance judgments!
10. Limitation of the appeals options!
11. Public trial at appeal courts, a special leave for access to the highest instances!
Questions?
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