

**Panel:**  
**Principles of evidence taking in civil procedure -  
common core of civil procedures or not?**



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# Common core of European Law of Evidence

- whether there exists a common core of European Law of Evidence (and taking evidence in particular), and if it does, what are most important points of disaccord among the national legal systems?
- However, the aim is not only to compare the elements in the law of EU Member States, but to explore the actions of national courts in similar circumstances (regarding the application of national law or EU instruments).
- The knowledge of foreign laws is really helpful to a better understanding of the domestic law.

# Concept of Evidence

- Different definitions in national laws
- SLO: 1. taking evidence – actions of parties to convince the judge on their assertions on the relevant facts, 2. piece of evidence (instrumentum) – all that enables the personal perception of a judge, 3. evidence as collected proofs regarding hearings of witnesses, experts, parties and documents, 4. evidence as argument („*argumentum*“).
- 213/1 CCP: Evidence shall be produced in respect of all facts relevant for adjudication of the case in dispute.
- It seems that in particular the fact that the concept of "evidence" is not defined in the **Regulation on Evidence** has created difficulties. This has led to significantly diverging interpretations of what is considered as "evidence" in the sense of the Regulation, in particular with respect to taking DNA and blood samples.

# Direct/indirect evidence

- SLO: Direct evidence immediately addresses the main fact that is upon particular legal norm relevant to be proved in order to rule on the concerned issue (e.g. delivering and transferring the goods to depository).
- Indirect evidence – indication proof – evidence is taking considering facts out of the main facts of the case but from which one can infer the main facts.
- The distinction exists in Italian procedural law too. Indirect evidence (so-called simple presumptions, that is different from presumptions of law) are defined under article 2727 of Italian civil code and regulated under the following article 2729, that says that they can be used only in case they are "**serious, precise and concordant**".

# Hearsay or Circumstantial evidence

- SLO Article 4 CCP
- The court shall decide upon the claim on the basis of an oral, immediate and public consideration of the case.
- In cases specified by the CCP, claims may also be determined on the basis of procedural acts made in writing, and on the basis of **hearsay or circumstantial evidence.**

# „*Prima facie*“ evidence

- In civil law countries, this concept is not developed with the same meaning as in common law countries.
- However, something similar may be found in the distinction between evidence whose evaluation is up to the judge (e.g. witness, unqualified documents, judicial inspection etc.) and evidence whose value is previously fixed by the law (e.g. oath, confession, notarized documents).
- This latter distinction spread across some EU laws from the Napoleonic code.

# Taking evidence –actions of the parties and the court

- Each party shall state the facts and adduce the evidence, upon which their claims are based, and by means of which they contest the facts stated and evidence adduced by the opposing party (212 CCP).
- The court shall decide which evidence will be produced for determination of the ultimate facts (213/2 CCP).

# Parties - witnesses

The methods of hearing parties differ among countries

Case:

The main proceedings are conducted at the Slovenian court. The requested foreign court has heard a party as a witness not differentiating between hearing of parties and hearing of witnesses.

However, in accordance with Slovenian law, a criminal offence of false testimony carries a penalty for parties, as it does for witnesses.

The requesting Dutch court has made a request to take evidence of hearing of a party, who is Slovenian citizen, as a witness, in Slovenia in accordance with Dutch law.

Shall the Slovenian Court grant a request?

Is there really an important difference between hearing the parties and the consequences of their passivity in national systems of MS?



# Witness preparation

- The reform of CCP in SLO introduced the written statements of witnesses which could be required by the court in the preparatory stage. It is not expressly determined that the lawyers prepare the witness but it is obvious that the statements will be arranged by the parties through their lawyers.
- On the contrary lawyers are strongly prohibited to prepare witnesses in Italy. Questioning of witnesses before the trial (but only as an investigation, without preparation) is allowed in criminal cases and it is a disputed issue if the lawyer can even speak to the witness in civil cases.

# Communication with witnesses

- During hearing - in Italian civil trials only the judge can question witnesses. Only in criminal cases cross examination is provided for. The parties and the lawyers cannot speak directly to the witness during the hearing, but they can only ask the judge to ask something to the witness.

# Fair Trial Principle

- Constitutional rights, ECHR
- German doctrine: the right to evidence is directly linked to the access to justice
- **Art. 6 ECHR Fair Trial Principle**
- principle of hearing,
- principle of directness, presence and participation of the parties, direct and indirect type of evidence, written evidence, witness preparation and communication with the witness during the hearing)