CHAPTER 3D

Assessment of Evidence

Jorg Sladič & Alan Uzelac

§3D.01 INTRODUCTION

The assessment of evidence is probably the most demanding task for a trial court in civil litigation.

A judge is thought to apply the law to facts, as shown by the Latin maxims *ius ex facto oritur* and *da mihi facta, dabo tibi ius* and – at least as regards civil law jurisdictions[1] – *quaestio facti est in arbitrio iudicis*. However, judges are trained in law and not in assessment of facts.[2] Therefore, the assessment of evidence is an operation by which the trial judge either asserts his inner conviction (*l'intime conviction, freie Überzeugung*) on the existence or non-existence of facts suggested by the evidence gathered and administered or declares that under legal rules applicable to evidence, the fact has to be taken as proven (as in the French system of legal proof (*la preuve légale*)).[3]

1. We consider civil law jurisdictions as being composed of four branches (only legal systems examined in this article will be cited): namely, the Latin or Romanic branch (France, Spain, Portugal), the Germanic one (Germany, Austria), Central and East European (Poland, the three Baltic States, Croatia, Slovenia, Slovakia, Hungary, Bulgaria, Romania, i.e., former Socialist States) and Nordic (Denmark, Sweden and Finland). As far as procedural law is concerned, Malta belongs to common law systems.
2. K. Schellhammer, *Zivilprozess*, 14th ed. (Heidelberg: C. F. Müller, 2012), section 550, M. Stein-Wigger, 'Aussagepsychologie im Zivilrecht', *Aktuelle juristische Praxis*, no. 11 (2010), 1409 et seq. The exception seems to be Sweden. See B. Lindell, 'Evidence in Sweden', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (Utrecht: Kluwer Law International, 2004), 429.
3. H. - W. Fasching, *Zivilprozeßrecht*, 2nd ed. (Vienna: Manz, 1990), section 812, O. Pelli, *Beweisverträge im Zivilprozess* (Zurich: Dike, 2012), 155, the term 'legal proof' is used by E. Silvestri, 'The antique shop of Italian civil procedure', in *Truth and Efficiency in Civil Litigation*, ed. C. H. van Rhee & A. Uzelac (Cambridge, Portland, Antwerp: Intersentia, 2012), 48. However,

In general, if there are no specific rules on evidence, the trial court judge shall assess the importance and value of each item of evidence and each fact according to his own personal conviction (*appréciation souveraine*).[4] Examples of specific rules of evidence can be found in the French-inspired system of *la preuve légale* or in the procedural law in common law systems – like the best evidence rule,[5] the parole evidence rule and legal presumptions (*praesumptiones iuris*)[6] – or in rules on public documents (*instrumentum publicum vel authenticum*).

In this article, we will start by examining three options concerning the assessment of evidence in civil procedure in European legal systems. The links between the principle of material truth and the free assessment of evidence will also be examined, as well as two other notions relevant for the assessment of evidence, the notions of standard and burden of proof.

§3D.02 MODERN CIVIL PROCEDURAL LAW AND THE ORIGINS OF RULES OF EVIDENCE

The development of the majority of European legal orders should justify a conclusion that the application of the principle of free assessment of evidence seems to be the standard of proof in modern laws on civil procedure. However, the free assessment of evidence is not a modern invention. Roman law in the later Republican period and in the Principate (in proceedings *apud iudicem*) applied the free assessment of evidence (*apud bonum iudicem argumenta plus quam testes valent*).[7] In principle, the *cognitio extra ordinem* and the *summaria cognitio* of the Roman law and then of the *corpus iuris civilis* – the main sources of the procedure *de civilibus* of *ius commune* that is (at least to some extent) the basis of the majority of modern European procedural laws – continued to apply the free assessment of evidence.[8] It would also appear that the free assessment of evidence remained in force in southern parts of the *Erblanden* in the Habsburg Empire until the *Allgemeine Gerichtsordnung* of 1781.[9]

Italian legal writers hold that there is a difference between the inner conviction (*animus iudici*) and the free assessment of evidence; therefore there is no free inner conviction of the judge if there are rules of evidence that do not follow the principle of free assessment of evidence. See G. Monteleone, *Manuale di diritto processuale civile, Vol. 1*, 5th ed. (Milano: CEDAM, 2009), 414.

4. P. van Ommeslaghe, *Droit des obligations, tome III* (Brussels: Bruylant, 2010), section 1629.
5. Its modern version in Europe since the 1982 case *Kajala v. Noble* seems essentially to adopt the same solution as French law of evidence concerning copies of originals under Article 1335 of the French Civil Code. Though French civil law is much more restrictive as far as copies of written evidence is concerned than English common law; see e.g., Cass Civ. 1re, 29 Mar. 1965, Dalloz 1965, 474.
6. Probably the most well-known presumption being the presumption of the husband's paternity of a child born to a married husband and wife.
7. M. Kaser, *Römisches Recht*, 16th ed. (Munich: C. H. Beck, 1992), 375, M. G. Perband, *Der Grundsatz der freien Beweiswürdigung im Zivilprozeß (§ 286 ZPO) in der Rechtsprechung des Reichsgerichts* (Frankfurt: Peter Lang, 2003), 23, A. Uzelac, *Teret dokazivanja* (Zagreb: Faculty of Law, 2003), 21 and 22.
8. Fasching, *Zivilprozeßrecht*, section 27, Kaser, *Römisches Recht*, 385, Uzelac, *Teret dokazivanja*, 25–28.
9. Fasching, *Zivilprozeßrecht*, section 34.

In continental Europe, the modern free assessment of evidence developed as a reaction to regulated rules of assessment of evidence (legal proof and formal truth) typical for early *ius commune*.[10] As far as procedural law is concerned, it should be mentioned that the medieval Roman Catholic Church applied the principle *ecclesia vivit lege romana*.[11] The system of legal proof seems to be a creation of the procedural law of tribunals of the Roman Catholic Church following the *Decretum Gratiani* and the later papal decrees reforming procedural law.[12]

In other words, the crucial element for the split known in civil law concerning the full free assessment of evidence between the French- and Germanic-inspired systems of assessment of evidence is to be found in the depth of the reception of civil procedure of Roman law. The procedure *de civilibus* typical for the period of *ius commune* is most well known for legal proof with its formal and almost arithmetical rules of evidence.[13] Basically, in order to prove a certain fact a certain amount of evidence (i.e., means of evidence) had to be gathered and administered.[14] The full proof (*probatio plena*) in procedure *de civilibus* could be taken solely by two witnesses (according to the old principle *testis unus, testis nullus*), by a public document (*instrumentum publicum vel authenticum*) and by an irrebuttable presumption. The *probatio semiplena* (half-proof) was to be seen somewhere between the full proof and the *summaria cognitio* of the later Roman law.[15] Two *probationes semiplenae* amounted to a *probatio plena*. The *praesumptio hominis* (factual presumptions) and the oath had only supplementary function. This also meant the application of a very formalised formal evidence and the doctrine of formal truth in civil procedure. France accepted such a procedure to a lesser degree than the Holy Roman Empire (Germany, Austria, the Czech Republic, Slovenia).

Nevertheless, the civil procedure of *ius commune* does not seem to contain a clear concept of assessment of evidence in its modern meaning.[16] However, the rules that seem to have been born in this period are the rules on the conclusive evidentiary force (*plena probatio*) of a public document (*instrumentum publicum vel actum authenticum*) and of oaths (*iuramenti delatio*).[17] A public document (*instrumentum publicum vel actum authenticum*) carried a so-called *plena fides*. The most important public document was a notarial deed. A deed certified by an authentic *sigillum* (seal) was the second type of public document. The third type were minutes (*exemplum, index*) drawn up by a notary and certified by a court. The fourth were the minutes of a trial

10. V. Korošec, *Rimsko pravo, I. del*, 2nd ed. 3rd reprint (Ljubljana: Uradni list, 1994), 39, Perband, *Der Grundsatz der freien Beweiswürdigung im Zivilprozeß*, 23 and 24.
11. J. Kranjc, *Rimsko pravo* (Ljubljana: GV Založba, 2008), 187, E. Spektorsky, *Zgodovina socijalne filozofije* (Ljubljana: Slovenska matica, 1932), 114.
12. K. W. Nörr, *Romanisch-kanonisches Prozessrecht, Erkenntnisverfahren erster Instanz in civilibus* (Heidelberg: Springer, 2012), 1.
13. Nörr, *Romanisch-kanonisches Prozessrecht*, 190, Perband, Der Grundsatz der freien Beweiswürdigung im Zivilprozeß, 27.
14. Perband, *Der Grundsatz der freien Beweiswürdigung im Zivilprozeß*, 27.
15. Nörr, *Romanisch-kanonisches Prozessrecht*, 129.
16. *Ibid.*, 190.
17. *Ibid.*. The latter rule is still important for the French and Italian legal systems, which have maintained the provisions on decisory oath in their law.

established by a court (*instrumentum forense*).[18] This historical origin may explain still existing differences in procedural laws concerning the value of public documents drawn up by notaries and of public documents drawn up by other agencies. A general mistrust of witnesses was latent. This might explain the predominance of written evidence in French-influenced legal systems.[19]

As far as free assessment of evidence is concerned, Germany went the other way. As the precursor of the modern free assessment of evidence that started to be developed in 1806 by the Napoleonic *Code de procédure civile*, the German notion of 'free assessment' was seen as a means against a dominant judge typical in Prussian civil procedure characterised by the *principe inquisitoire (die Instruktionsmaxime)*.[20] Assessing the German ZPO (at the time, very new and modern), the Austrian Franz Klein then started developing the Austrian ZPO, containing the free assessment of evidence, a code that together with the German ZPO became a model for procedural laws of Central,[21] South[22] and North European states.[23]

The common law, however, experienced much less influence from either Roman law or the procedural law of the Roman Catholic Church. In this sense, England indeed still is 'an Island set in a Silver sea'. The English common law had 'developed to a sophisticated degree before reception of the Justinian institutes and the *corpus iuris civilis* with their concepts and principles of Roman law'.[24] Therefore, continental concepts of law of evidence never had any important impact on the British Isles. The impact of continental legal concepts in procedural law in the British Isles is only starting to be seen today through recent developments in the European Union that are leading to a certain 'Europeanization' of English procedural law.[25]

§3D.03 THREE SYSTEMS OF ASSESSMENT OF EVIDENCE: MODERNISED LEGAL PROOF, PREPONDERANCE OF EVIDENCE AND FREE ASSESSMENT OF EVIDENCE

The assessment of evidence is intrinsically linked to the thorny issue of justice and legality of rulings adopted by trial courts. Procedural law is closely linked to the socio-political foundations in any given state, as well as to generally accepted ideas

18. K. W. Nörr, 'Der Urkundenbeweis im romanisch – kanonischen Prozessrecht des Mittelalters', in *Festschrift für Eduard Picker zum 70. Geburtstag*, ed. Th. Lobinger (Tübingen: Mohr Siebeck, 2010), 1304.
19. Traditionally, a contract with monetary consideration exceeding a certain sum fixed by a decree (actually EUR 1,500) can only be proved by a written document according to Article 1341 French Civil Code, and other means of evidence are not admitted. See also Article 1715 French Civil Code prohibiting proving a lease agreement by witnesses in case of negation of its existence.
20. R. Stürner, 'Liberalismus und Zivilprozess', *Österreichische Juristenzeitung,* no. 14–15 (2014), 634.
21. Slovakia, Slovenia, Croatia, Poland, the Baltic States.
22. See e.g., Greece.
23. In particular: Sweden, Finland and Denmark.
24. R. Turner, *Evidence in Civil Law – the United Kingdom*, www.acj.si., 15 Jul. 2015, 3.
25. Comp. so-called *Factortame effect*.

about law, justice and community.[26] However, one should not overemphasise the national differences pertaining to assessment of evidence. The main goal of civil litigation in most legal systems of the world is to resolve disputes, which in most cases involves the application of law to the established facts. While the same general objective is being set, the details may differ, and the technical modalities for achieving the common objective may be more or less different.

It is suggested that, as far as the assessment of evidence is concerned, three broad models may be discerned in Europe. Two models are encountered in continental Europe, and the third in European common law jurisdictions (including Scotland and Malta).[27]

The first model is the system of legal proof. If a strict, formalised and almost mathematical legality in methodical questions of assessment of evidence in civil procedure in order to avoid discretionary and arbitrary decisions shall be the ideal of justice (as for example, in France and in Belgium), then the system of legal proof seems to be the natural way of assessing certain means of proof, such as documents necessary to prove the existence of contracts or the content of legal transactions. Even though the French system in principle acknowledges free assessment of evidence, there are many features that depart from this principle and put French-inspired systems in the camp of the principle of legal proof. The views of scholars are often rather divergent when analysing the law of evidence in France and in other countries of the European South.

The second model of assessment of evidence was developed in the British Isles, in England and Wales and Ireland. To a certain extent, these common law jurisdictions are also exceptions where the principle of free assessment of evidence in civil procedure is concerned, but to a lesser extent compared to legal systems influenced by French procedural law.

The third model puts the emphasis on the finding of 'objective' and 'historical' truth by the use of any available means that the trial court may procure. In this model, the free assessment of evidence goes hand in hand with the pursuit of material truth. However, if the task of the trial judge is viewed exclusively as the resolution of private disputes, with the parties as the driving force in litigation, then the court is limited to the assessment of facts and evidence submitted and administered by the parties.[28] Adjudication as evaluation of the contest of the private parties seems to support a specific standard to be applied by the judge in assessing the evidence, the standard being the balance of probabilities. So, for instance, in European common law jurisdictions the judge shall only decide which party's allegations seem to be more credible. The judge has to refrain from administering the facts, e.g., via orders on taking of

26. Comp. Fasching, *Zivilprozeßrecht*, section 25.
27. Due to the fact that procedural law in both Malta and Scotland clearly belongs to the common law species.
28. Cross-examination being a typical example of such adversarial approach with judges as passive fact-finders. See e.g., in European legal writing U. Böhm, *Amerikanisches Zivilprozessrecht* (Cologne: Otto Schmidt, 2005), 181–238.

evidence.[29] It would seem that modern European civil procedural laws, starting with the 1879 German ZPO and the 1895 Austrian ZPO, opted for the principle of free assessment of evidence with some narrowly defined exceptions (such as the presumption of the veracity of the content of a given public document). The principle of free assessment of evidence is proclaimed and applied in Austria,[30] Bulgaria,[31] Croatia,[32] Denmark,[33] Finland,[34] Germany,[35] Greece,[36] Hungary,[37] Latvia,[38] Lithuania, the Netherlands,[39] Poland,[40] Portugal, Romania,[41] Slovakia, Slovenia[42] and Sweden.[43] Spanish law seems to operate under a system of the 'rules of sound critical approach' (*las reglas de la sana crítica),* a mixed system generally based on free assessment of evidence, but with specific means of evidence governed by legal proof (*la prueba legal o tassada*), in particular regarding the use of documents and testimony of the parties. To non-Spanish lawyers, the 'rules of sound critical approach' may seem to be very close to the standard of free assessment of evidence. However, Spanish doctrine insists that the full, unlimited free assessment of evidence is not subject to laws of logic, rationality and reasonableness, which impose essential limitations on the free assessment of evidence.[44] The remnants of legal proof might be found in all systems applying the free assessment of evidence at least as far as the *praesumptio veritatis* of various public documents (*instrumentum publicum vel authenticum*) is concerned (e.g., certificates issued by land registries, notarial deeds, final judgments or administrative acts).

Individual features of the particular legal systems differ in certain relevant features from country to country, and, therefore, the following systematisation has to be taken with caution. In the sections that follow, we will discuss in more detail all three systems of assessment of evidence.

29. X. Lagarde, 'Preuve', in *Dictionnaire de la justice*, ed. L. Cadiet (Paris: Presses universitaires de France, 2004), 1037, J. Braun, *Lehrbuch des Zivilprozeßrechts* (Tübingen: Mohr Siebeck, 2014), 730.
30. Sections 266 et seq. Austrian ZPO. See B. Nunner-Krautgasser & P. Anzenberger, Evidence in Civil Law – Austria, (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 13.
31. Article 12 Bulgarian CCP.
32. Article 7 Croatian CCP.
33. Article 340(1) Danish Administration of Justice Act.
34. Chapter 17, section 2 Finnish Code of Judicial Procedure Act.
35. Section 286 German ZPO.
36. Articles 304–346 Greek CCP.
37. Section 3(5) Hungarian CCP.
38. Articles 97 and 178 Latvian CPL.
39. Article 152(2) Dutch CCP.
40. Article 233(1) Polish CCP.
41. Article 264 NCPC.
42. Article 8 Slovenian CCP.
43. Chapter 35, section 1 Swedish Code of Judicial Procedure.
44. I. Flores Prada, *La prueba pericial de parte en el proceso civil* (Valencia: Tirant lo Blanch, 2005), 92.

§3D.04 THE MODERNISED LEGAL PROOF DOCTRINE WITH LIMITED FREE ASSESSMENT OF EVIDENCE (FRANCE AND, PARTLY, ITALY)

France and (though only in some regards) Italy still maintain in doctrine the difference between legal proof (*la preuve légale ou réglementée, la prova legale)* and the unlimited free assessment of evidence (*la preuve morale ou libre, la prova libera)*.[45] In civil procedure, both countries in principle acknowledge the principle of free assessment of evidence, yet advocate a mixed system in which legal proof simultaneously comes to expression. The *preuve morale ou libre* – fully applicable in commercial litigation – is actually the French version of the unlimited free assessment of evidence.

The French system of assessment of evidence in civil procedure has different rules for ordinary litigation and commercial litigation. Whereas in commercial litigation free assessment of evidence rules dominate, ordinary civil litigation is to a certain extent based on the system of legal proof.

The system of *la preuve légale ou réglementée* provides for a legal and hierarchical means of valuing, assessing and adducing of evidence of legal transactions like contracts (*l'acte juridique*).[46] Italian doctrine explains that in principle the trial judges apply free assessment of evidence according to the principle of inner conviction under Article 116 of the Italian Code of Civil Procedure (CCP), with the exception of cases where the law provides for legal proof, such as in the case of confession and in the case of decisory oath.[47] One can speak of a system of legal proof if the administration and the assessment of evidence are regulated *ex ante* and not left to the judge's inner conviction, if the value of evidence is regulated in a hierarchical way and if the law sets conditions of admissibility for means of evidence.[48] The essence of such a regulated system of assessment of evidence is the precedence taken by written evidence over testimony by witnesses. This seems to be a reception of legal doctrines born in the *ius commune* procedure *de civilibus*.[49] Such legal proof is defended by legal writers in France and in Belgium as the best way of ensuring legal certainty and also to avoid the risks of evidence produced ad hoc just for a concrete trial. A renown principle of French law states *nul ne peut se constituer la preuve à lui – même*. There is no possibility of a party testifying in his own case. A supposed advantage is also the exclusion of judicial subjectivity and improved certainty in assessing the evidence as well as better forseeability of the results of litigation.[50]

The second supposed virtue of the preponderance of written evidence is the avoidance of the excesses of cross-examination of witnesses and other institutes of the

45. M. Oudin, *Evidence in Civil Law – France*, (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 11 and 12, Silvestri, *The antique shop of Italian civil procedure*, 48 and 49.
46. van Ommeslaghe: *Droit des obligations, tome III*, section 1630.
47. M. de Cristofaro, 'La valutazione delle prove (§ 85)' in *Istituzioni di dritto civile*, 43rd ed., ed. A. Trabucchi, (Milano: CEDAM, 2007), 212.
48. G. de Leval, *Eléments de la procédure civile*, 2nd ed. (Brussels: Larcier, 2005), section 130.
49. Nörr, *Romanisch-kanonisches Prozessrecht*, 191.
50. Fasching, *Zivilprozeßrecht*, section 812.

civil procedure of common law jurisdictions.[51] In a judgment of the Belgian Court of Cassation of 11 December 1969, the Court found that a decision in which the lower court judges did not follow the hierarchical approach in introducing and assessing evidence infringes an essential procedural requirement.[52]

The essence of the French and, partially, the Italian law of evidence in civil procedure is an exaggerated statement that, in order to avoid the risks inherent in 'free judicial conviction', and to ensure simplicity and legal certainty in the evidence-taking process, the law should determine in advance the value of evidence.[53] In other words, based on arguments of legal certainty, free assessment of evidence is rejected as an approach that is too uncertain and too arbitrary.

The traditional doctrine distinguishes, on the one hand, the full proof (*la preuve parfaite*), i.e., written evidence (*l'écrit*), confession (*l'aveu*) and decisory oath (*le serment décisioire*). On the other hand, the notion of half-proof (*la preuve imparfaite*) refers to the testimony by witnesses (*le témoignage*), presumptions and the supplemental oath (*le serment supplétoire*). If, during the taking of evidence the trial judge gathers one of the three means of full proof, he is bound to declare that a certain alleged fact is established, even though the judge's inner conviction might be different. The irrational importance of decisory oath as a part of legal proof in modern legal systems can be demonstrated by the development of German law. The decisory oath was recognised in Germany until 1933, when the provisions on decisory oath were abrogated. German legal scholars consider this to be the final end of legal proof in Germany.[54]

However, as far as the half-proof (witness testimony, presumptions and the supplemental oath) are concerned, the trial judge is authorised to freely assess the evidence. Parties to a case can also conclude an agreement on evidence (e.g., bank documents printed by the ATM when using a credit card are deemed to be proof of the banking operation). It has, nevertheless, to be stressed that the oath and the confession are under attack as 'the two oldest and most outdated items' of civil procedure and that 'nowadays, no reasonable person (whether a lawyer or a layman) would contend that an oath or a confession could advance the cause of an efficient fact-finding in a litigation'.[55]

There seems to be a strict difference between proving a legal transaction (*l'acte juridique*) and proving a legal fact (*le fait juridique, factum probandum*). Legal facts can be proved by any means of evidence (*factum probans*)[56] and are not submitted to the doctrine of legal proof. In other words, there is a free assessment of legal facts. *A contrario,* legal transactions (like various contracts) must be proved by a written

51. van Ommeslaghe: *Droit des obligations, tome III*, section 1631.
52. *Ibid*.
53. Régine Genin-Meric, 'Droit de la preuve: l'exemple français', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (ed.), (Utrecht: Kluwer Law International, 2004), 149–153.
54. Braun, *Lehrbuch des Zivilprozeßrechts*, 731 and 732.
55. Silvestri, *The antique shop of Italian civil procedure*, 47.
56. Article 1348 French NCPC.

document. It is argued that a contract or a legal transaction shall be deemed a *lex inter partes* and shall therefore not be subject to disputes and interpretation. The way to avoid such disputes and litigation is solely by having a written document showing the contents of a legal transaction.[57] Therefore, it would appear that under Article 1341 of the French Civil Code legal proof is reduced to legal transactions (*l'acte juridique*), such as contracts with monetary consideration of more than EUR 1,500 that must be proved by written documents, and as far as legal transactions are concerned there is a prohibition of proof by witnesses or presumptions.

Another type of legal proof is to be found in Article 1325 of the French Civil Code, according to which 'instruments under private signature which contain synallagmatic agreements are valid only insofar as they have been made in as many originals as there are parties having a distinct interest'.[58] This formality is referred to as *la formalité du double* (the requirement of two counterparts). If the said formality is not complied with, the written document does not have a value of *la preuve parfaite*.[59] This rule shall apply in order to determine the value and the force of documents intended to be means of evidence of the transaction as soon as a synallagmatic contract is concluded by the parties.[60] According to Article 1326 of the French Civil Code:

> a legal transaction by which one party alone undertakes towards another to pay a sum of money or deliver him a fungible must be ascertained in an instrument which carries the signature of the person who subscribes that undertaking, as well as the mention, written by himself, of the sum or of the quantity in full and in figures. In case of difference, the instrument under private signature is valid for the sum written in full (*L'acte juridique par lequel une seule partie s'engage envers une autre à lui payer une somme d'argent ou à lui livrer un bien fongible doit être constaté dans un titre qui comporte la signature de celui qui souscrit cet engagement ainsi que la mention, écrite par lui-même, de la somme ou de la quantité en toutes lettres et en chiffres. En cas de différence, l'acte sous seing privé vaut pour la somme écrite en toutes lettres.*).

French legal writers often compare the system of legal proof with the law of evidence in other countries, and they conclude that neither German law nor common law knows such a requirement, as they are grounded on the free assessment of evidence and refuse to put written evidence in the place of *regina probationum*.[61]

Belgian scholars observe that the system of legal proof sometimes makes the quest for truth in a concrete case quite difficult due to its imposing a hierarchy of various means of evidence,[62] thus confirming the old German finding that the administration of justice which imposes binding formal rules of legal proof will necessarily give less satisfactory results than free assessment of evidence.[63] However, one should not forget that the system of legal proof is based on a digest of experience

57. Lagarde, *Preuve*, 1035.
58. Oudin, *Evidence in Civil Law – France*, 18.
59. *Ibid*.
60. Cass. Civ. 1ère 24 Feb. 1987.
61. Lagarde, *Preuve*, 1035.
62. G. de Leval, 'Les techniques d'approche de la vérité judiciaire en matière civile', in *La Preuve et la difficile quête de la vérité judiciaire,* ed. G. de Leval (Liège: Anthémis, 2011), 29.
63. Baumgärtel, *Beweislastpraxis im Privatrecht* (Cologne: Heymanns Verlag, 1995), section 40.

of daily life that is at least indirectly applied also in systems applying the free assessment of evidence. Therefore, on average, legal systems applying legal proof generally do not lead to a flawed finding of facts.[64] The only advantage of free assessment of evidence compared to legal proof is the better acknowledgement of individual and particular factual situations in concrete trials that cannot be compensated by legal proof.[65]

There are also remnants of legal proof in legal systems that generally stick to the free assessment of evidence doctrine. At least in Austrian, Slovenian and Croatian civil procedural law the minutes of the hearing provide full proof of the trial's course and content, although objections to the minutes are treated in a different manner in each of the three laws.[66] In Austrian law, a fact admitted by a party before a trial judge in civil litigation (i.e., a confession) is binding upon the judge, and the court cannot take evidence regarding this ascertained fact.[67] In Croatian law, for example, an agreement on *forum prorogatum* can only be proved by a written document that must mandatorily be annexed to the claim.[68] In Slovenia, a defence of lack of reciprocity as opposition to an *exequatur* can only be proved by a certificate as to the applicable law issued by the minister of justice.[69] In Slovenia and in Croatia, a conviction (finding of criminal liability) of the accused in criminal court proceedings is binding on the civil judge where ruling on the question of contractual liability caused by the criminal act is concerned.[70]

§3D.05 COMMON LAW: BURDEN OF PERSUASION AND BALANCE OF PROBABILITIES

The free assessment of evidence doctrine seems to be absent from the legal theory of common law jurisdictions due to the historical importance of trial by jury, which used to apply also in civil cases.[71] However, a functional equivalent of free assessment of evidence is not unknown in common law. Any piece of evidence is admitted, 'be it oral, documentary or real', provided 'that it must be both relevant and admissible'.[72] Evidence is assessed according to its reliability, weight, demeanour, credibility and the

64. Fasching, *Zivilprozeßrecht*, section 813.
65. *Ibid*.
66. Sections 292 and 215 Austrian CCP, Articles 122–124 and 224 Slovenian CCP, Articles 123–126 and 230 Croatian CCP.
67. Sections 266 and 267 Austrian CCP.
68. Articles 70(3) and (5) Croatian CCP.
69. Article 101(3) Act on Private International Law and Procedure.
70. Article 13 Slovenian CCP, Article 12(3) Croatian CCP.
71. B. Moriarty, *Evidence in Civil Law – Ireland*, (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 25, J. H. Langbein, 'The demise of trial in American civil procedure: how it happened, is it convergent with European civil procedure?', in *Truth and efficiency in civil litigation: fundamental aspects of fact-finding and evidence-taking in a comparative context*, ed. C. H. van Rhee & A. Uzelac (Cambridge, Antwerp, Portland: Intersentia, 2012), 122, 125.
72. D. McGrath, 'Irish Report on Evidence', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (ed.), (Utrecht: Kluwer Law International, 2004), 248.

degree by which the evidence is supported or undermined by other evidence.[73] There is a traditional preference for oral evidence (*viva voce*) with its attendant safeguards of the oath or affirmation, the delivery of testimony directly before the finder of fact and the testing of the witness' credibility and account by cross-examination.[74] However, in common law, in general, 'no particular means of proof are specified. Parties are free to discharge the burden of proof placed upon them by adducing oral, documentary, real evidence'.[75]

Civil procedure in common law legal systems in Europe – including the mixed Maltese legal system – contains some specificities that are largely unknown to civil law lawyers. However, the common law standards applicable to establishment of facts in civil procedure, 'balance of probabilities' and 'clear and convincing proof', are based on a free assessment of evidence known in civil law jurisdictions. 'If the evidence is such that the tribunal can say "we think it more probable than not", the burden is discharged, but if the probabilities are equal, it is not.'[76]

There is another link between the civil law approach and the common law approach to evidence. It has already been stated that the *ius commune* procedure *de civilibus* applied a mathematical way of assessing evidence. This is also sometimes encountered in common law, albeit in a modified 'statistical' version. 'We take the preponderance of the evidence standard as equivalent to 0.5, proof, beyond a reasonable doubt as roughly 0.95, and proof by clear and convincing evidence even more roughly as perhaps 0.75.'[77] Some American legal scholars criticise the civil law's rejection of 'proof by statistical probabilities'. As they claim, nothing is certain, 'all evidence merely gives rise to probabilities regarding the facts at issue, and that the 50 + % probability standard best serves the assumed goal of minimizing errors'.[78] As it seems, mathematical rules like these are not natural and applicable in legal systems applying the free assessment of evidence doctrine. It can even be stated that a mathematical application of the balance of probabilities standard would go very much against the free assessment of evidence.[79] This might justify the conclusion that a strictly and mathematically interpreted balance of probabilities standard would be incompatible with the free assessment of evidence doctrine known in civil law jurisdictions.

However, the fundamental common law standard under which fact-finders in civil courts have to evaluate evidence, known in the US as *preponderance of the*

73. *Ibid.*, 250.
74. Moriarty, *Evidence in Civil Law – Ireland*, p. 13.
75. McGrath, *Irish Report on Evidence*, 248.
76. See *Miller v. Minister of Pensions* [1947] 2 All ER 372) Denning J.
77. F. Schauer & R. Zeckhauser, 'On the degree of confidence for adverse decisions', *Journal of Legal Studies* 25 (1996), 27 (33).
78. R. W. Wright, 'Proving Facts: Belief versus Probability', 79 (2009). Available at: http://scholarship.kentlaw.iit.edu/fac_schol/709, 81.
79. Braun, *Lehrbuch des Zivilprozeßrechts*, 733 and 734 as far as the mathematical value of evidence is concerned.

evidence and in the UK as *balance of probabilities*, is generally not interpreted in a strict mathematical way.[80] According to UK case law:

> [T]he balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.[81]

To that extent, it could be stated that by most legal presumptions in civil law countries the balance of probability standard contains the same idea as evidence. A *praesumptio iuris tantum* (rebuttable presumption) as a way of proving a fact is applied to evidence of facts that normally occur under everyday circumstances, to 'what generally happens' (*praesumptio, ex eo quod plerumque fit)*.[82] The result comes close to the balance of probabilities, even though usually in civil law jurisdictions presumptions are deemed to be special cases of the reversal of the burden of proof.[83,84] In conclusion, it would seem that the methods of assessment of evidence in common law jurisdictions are similar yet not identical to the methods of assessment of evidence in

80. D. Demougin & C. Fluet, *Preponderance of Evidence* (Center for Research on Economic Fluctuations and Employment, Université du Québec à Montreal, Working paper no. 150, April 2002), 1.
81. In re H (Minors) [1996] AC 563 at 586), Lord Nicholls.
82. See e.g., de Cristofaro, *La valutazione delle prove*, 213–214.
83. W. Brehm, 'Beweisrecht in Deutschland', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (ed.), (Utrecht: Kluwer Law International, 2004), 180, Genin-Meric, *Droit de la preuve: l'exemple français*, 147.
84. If we take the most well-known rebuttable presumption known to most civil law countries, namely the presumption of the husband's paternity of children born in wedlock, then it is more likely that the husband is the father of the wife's children born during the marriage as it is more likely that the wife had sexual intercourse with her husband than with other men. The essence of legal presumptions in civil law countries is actually the exclusion of unlimited free assessment. The only element that needs to be proved is the fact that is easy to establish, the basis of the presumption (such as the fact that a child is born while the mother was still married to her spouse), and what is then assessed is – if introduced – the evidence rebutting the presumption. In addition to legal presumptions, the case law developed a number of factual presumptions in many civil law countries, making them even closer to the way of thinking of common law jurisdictions.

civil law jurisdictions. The preponderance of evidence, just as the civil law standard of assessment, attempts to find a reasonable way to deal with factual uncertainty, and to find sufficiently persuasive arguments to take a fact as proven or not. 'Preponderance of evidence' is only a tool for that purpose.[85] The same goes for the civil law standard of conviction. Examining the US, French and German law of evidence, Richard Wright finds that 'the references to the judge's 'conviction' in the French *intime conviction* standard' as well as the adequate German notions 'do provide a minimum standard of persuasion: the judge is required to have a conviction or belief regarding the truth of the fact at issue. This is the core of the civil law approach to proof, which is thought to be absent in the common law's preponderance and balance of probability standards'.[86] However, the requirement of conviction or personal persuasion is also at the core of the common law system of jury trial, but applied to the decision-making of the jury, not of the judge. The very essence of lay participation was, namely, connected to the idea that the representatives of the community (or people in general) be persuaded that one or the other of the factual presentations given by the parties is true or not.

On the other side, some specific features of the law of evidence in several European countries display similar reasoning as the common law approach to assessment of evidence. For example, in German law prima facie evidence (*Anscheinsbeweis*) seems to be founded on the same model of reasoning as the balance of probabilities in common law. In the concept of *Anscheinsbeweis,* their accumulated life experience is used by the fact-finders to conclude that certain events occurred because they are under circumstances so typical and common that they prima facie may be taken as proven, without the further need to prove them to the level of certainty.[87] In case law prima facie evidence is used in cases of extra-contractual liability for proving the fault and the causation of the damage.[88] In such cases, a finding of typical circumstances is sufficient to suppress doubt, and make the judge's 'full conviction' unnecessary.

§3D.06 FREE ASSESSMENT OF EVIDENCE IN GERMANY, AUSTRIA AND IN CENTRAL AND NORTHERN EUROPE

With greater or less divergence, and notable modifications and limitations in particular in France and in Italy (see *supra* section 4), the principle of free assessment of evidence is the fundamental principle of modern law of civil procedure in most jurisdictions of continental Europe. It does not refer to the gathering of evidence; it refers to the

85. 'A jury is often still in doubt as to the true facts of the case. The law solves this problem in a simple way – through imposition of the burden of persuasion. … In most civil cases, the requisite degree of persuasion is "by preponderance of evidence".' N. Orloff & J. Stedinger, 'A Framework for Evaluating the Preponderance-of-the-evidence Standard', *University of Pennsylvania Law Review* 113 (1983), 1158.
86. Wright, *Proving Facts: Belief versus Probability*, 84.
87. Schellhammer, *Zivilprozess*, section 519.
88. Braun, *Lehrbuch des Zivilprozeßrechts*, 741.

production, selection and assessment of evidence by the court.[89] The opinion that the free assessment of evidence refers also to the gathering of evidence is erroneous.[90]

The role of the free assessment of evidence doctrine may be demonstrated by an illuminating example from Slovenian case law.[91] The Slovenian Supreme Court had to decide on a plea whether the value of an object in the probate hearing could be assessed solely by an expert's opinion and not by private documents signed by the claimant. In other words, a plea in law concerned an alleged infringement of essential procedural requirement by the lower courts due to lack of use of a specific means of evidence. The Court's answer was short:

> The rules of civil procedure do not attribute different value to different means of evidence and do not even quantify their specific value. Evidence is namely everything that may be perceived by human senses (by the court and by the interested parties in the case). The trial court should decide on its own which alleged facts are relevant for the ruling and which of the proposed evidence should be used as proof. The presented evidence shall then be assessed by the trial court according to its free conviction.[92]

This ruling displays what may be seen as a European consensus, namely the position that 'the principle of free assessment of evidence comprises in general the abolition of prohibition of use of certain means of evidence'.[93] As rephrased by Swedish scholars, free assessment of evidence 'does not dictate how different pieces of evidence are to be evaluated. This freedom of evaluation constitutes the very essence of the free evaluation of evidence'.[94]

A majority of European jurisdictions adhere to the principle of the free assessment of evidence. While indeed one can consider that the common law balance of probabilities standard has some elements of free assessment, considering these two notions to be equal would mean to ignore the role of the free personal conviction of the trial judge (*animus iudici, die freie Überzeugung, l'intime conviction*). One can speak of free assessment of evidence solely if the trial court does not have any instruction imposed by law, regulations, rules or other legal guidance on how to assess the importance, value and force of certain evidence. There should be no binding formal legal rules on how to assess the evidence.[95] If there is a contradiction between two items of evidence, the trial court shall be free to individually assess the value of each such item.[96]

Under the principle of free assessment of evidence, the sitting judge is 'independent when assessing the evidence and relies only on … [his] experience, ratio and …

89. Fasching, *Zivilprozeßrecht*, section 717.
90. J. Zobec, 'Article 8', in *Pravdni postopek, zakon s komentarjen*, ed. L. Ude (Ljubljana: Uradni list, 2005), 88.
91. Supreme Court of Slovenia, case II Ips 27/2000.
92. *Ibid*.
93. K. Spühler, A. Dolge & M. Gehri, *Schweizerisches Zivilprozessrecht*, 9th ed. (Bern: Stämpfli, 2010), 242.
94. Lindell, *Evidence in Sweden*, 427.
95. Baumgärtel, *Beweislastpraxis im Privatrecht*, section 40.
96. Pelli, *Beweisverträge im Zivilprozess*, 155.

perception of fairness and justice'.[97] However, such a free assessment of evidence relates 'only to the freedom from formal, legal rules of evidence. The judge is bound by general laws of logic, psychology, science and experience in general'.[98] 'The assessment is free because there are no legal rules for the assessment of the evidence taking.'[99] By examining together the laws of various European countries, as divergent as Poland, Spain and Sweden, we encounter common definitions. According to the Polish CCP,[100] the court evaluates the credibility and the force of evidence at its own discretion. In Spanish law, the assessment of evidence shall be performed according to the rules of a sound critical approach.[101] In Sweden, the 'court shall take into account everything that has occurred in accordance with the dictates of its conscience and after that determine what has been proved in the case'.[102] Also in other countries the definitions are quite similar. Due to historical, reasons Slovenia and Croatia have the identical definition of the free assessment of evidence.[103] It reads: 'The court shall decide according to its own conviction which facts it finds proved, based on conscientious and careful assessment of all the evidence, presented individually and as a whole, and taking into consideration the results of the entire proceedings.' In Austrian law 'the court shall freely assess according to conscientious and careful consideration the results of the entire trial and taking of evidence whether a statement of facts is true or not'.[104]

The most surprising issue for common law lawyers is perhaps the lack of guidance for selection of evidence under the 'free assessment' doctrine, other than the vague reference to the laws of logic, psychology, science and experience in general. Under the free assessment doctrine, there is virtually no place for the best evidence rule in the law of evidence.[105] Lawyers trained in civil law jurisdictions applying the free assessment of evidence do not know how to handle the parole evidence rule, as under the principle of the free assessment of evidence the contents and interpretation of a given contract can also be proved by witness testimony.

The most important limitation imposed on a free assessment of evidence is the court's duty to state the reasons for the assessment. The reasoning has to be logical and sound, as indicated by the Spanish 'rules of sound critical approach'. However, the 'sound reasoning' has to be explained in writing and inserted at considerable length into the court judgment. The free assessment is subject to the appellate courts' control,

97. See P. Bonchovski, Bulgarian national report, www.acj.si., 19.
98. S. Aras Kramar, *Evidence in Civil Law – Croatia* (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 16.
99. Nunner-Krautgasser & Anzenberger, *Evidence in Civil Law – Austria*, 8.
100. Article 233 section 1 Polish CCP.
101. N. Mallandrich Miret, *Evidence in Civil Law - Spain* (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 11.
102. E. Bylander, *Evidence in Civil Law – Sweden* (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 8 and 9. See also Swedish CCP, Ch. 35, Article 1.
103. Compare Article 8 of Croatian CCP and Article 8 of Slovenian CCP.
104. Section 272(1) Austrian CCP.
105. 'Best evidence rule requires a party to produce the best attainable evidence to prove a disputed fact or issue.' A. J. Albanese, 'New York Court of Appeals Holds for the First Time That an X-Ray Is a Writing Subject to the Best Evidence Rule, Thereby Admitting Secondary Evidence to Describe the Contents of a Lost X-Ray', *St. John's Law Review* 69 (1995), 651.

and that control is generally performed by examining the challenged statement of reasons. A decision lacking the statement of reasons is generally void or voidable, and the lack is considered to be one of the most serious procedural errors which constitutes an absolute ground for setting the impugned judicial decision aside. While the errors in the assessment of evidence are generally considered to belong to errors in decision-making, as far as the facts are erroneously or incompletely assessed (*error in iudicando)*, the failure to give reasons is considered one of the gravest procedural errors (*errores in procedendo)*. Such an absolute procedural error can in many European laws be raised as a matter of right even in the final appeal before the Supreme Courts (*le pourvoi en cassation*, *il ricorso di cassazione*, *die Revision*, *revizija*).[106]

The need to provide reasons in court judgments corresponds to the highly professional composition of European judiciaries, as the need to motivate judgments is proportionate to the level of technical experience and qualifications of the trial judges.[107] In the context of the rule of law requirements, the obligation to provide reasoned judgments was explained by the European Court of Human Rights, which emphasised that 'the function of a reasoned judgment is to afford the parties the possibility of an effective appeal and to show to the parties that they have been heard'.[108] Such an obligation is more strictly interpreted for trial courts, while the appellate courts are subject to more lenient standards, as they can simply endorse the reasons given by the lower court.[109] The courts of appeal in many European countries decide on appeal without re-hearing and re-assessing the evidence, so the reasoning contained in the text of the judgment (together with the case file which mostly has only summaries of the evidence heard) is virtually the only means to assess the parties' appeals and submissions, and control the soundness and the appropriateness of the factual assessments of the first instance courts.

As far as practical application of the free assessment of evidence is concerned, in the everyday life of civil law courts written evidence dominates, and the use of witnesses (including oral hearing of the parties) appears in a rather restrained form.[110] This might partly resolve some intrinsic difficulties of the free assessment of evidence, namely the lack of clear guidance other than general references to experience, psychology and common sense. It is easier for the trial judge to make a statement of reasons based on written documents than to explain why he chose to trust one witness

106. See e.g., J. Sladič, 'Die Begründung der Rechtsakte des Sekundärrechts der EG in der Rechtsprechung des EuGH und des EuG', *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung*, no. 4 (2005), 123–134, W. H. Rechberger & D. - A. Simotta, *Zivilprozessrecht*, 8th ed. (Vienna: Manz, 2010), sections 1018 and 1047, L. Rosenberg, K. H. Schwab & P. Gottwald, *Zivilprozessrecht*, 17th ed. (München: C. H. Beck, 2010), 832 and 833.
107. A. Uzelac, 'The Need to Provide Reasons in Court Judgments: Some developments in East and West', in *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego*, ed. K. Weitz &, J. Gudowski (Waszawa: LexisNexis, 2011), 1550.
108. See *Suominen v. Finland*, no. 37801/97, section 37, 1 Jul. 2003; *Estate of Nitschke v. Sweden*, no. 6301/05, section 45, 27 Sep. 2007. See also Uzelac, *The Need to Provide Reasons in Court Judgments*, 1551–1553.
109. See, *mutatis mutandis*, *Helle v. Finland*, cit., sections 59 and 60; *García Ruiz v. Spain [GC]*, cit. section 26; *Hirvisaari v. Finland*, no. 49684/99, section 30, 27 Sep. 2001; *Bufferne v. France* (dec.), no. 54367/00, section 1, ECHR 2002-III (extracts).
110. See e.g., Silvestri, *The antique shop of Italian civil procedure*, 49.

rather than another. Civil law courts often limit their explanations in the statement of reasons to narrating and summarising the testimony given by witnesses, instead of thoroughly assessing the value of the testimony (as demanded by legal doctrine). In practice, testimony is seldom assessed in a critical way, and then only when the judge chose to disregard it as unreliable. Following this development, Swiss legal scholarship offers a devastating criticism according to which a longer and more detailed statement of reasons deals only with testimony that was not believed, rather than with the evaluation of the statements that were trusted.[111]

The other avenue of explanation as to why free assessment is losing importance, at least for Southern and Eastern Europe, might be found in the way adjudication is organised. Elisabetta Silvestri has briskly summarised the reality of civil procedure in the European South: 'The presentation of evidence does not take place in a concentrated trial, but rather develops through a sequence of piecemeal hearings, often set months apart.'[112] The testimony given by witnesses tends to be transformed in the protocol of the hearing that is being read and re-read by the judge, and evaluated sometimes many years later, more as a document and less as an integral personal presentation of the individual's perceptions. Common law legal systems adopt a very different approach: '… it is the factual witness evidence which is the main element of any trial at Common Law together with the documents relied on by the parties following the disclosure process.'[113]

Apart from the principles applicable to ordinary civil proceedings, the developments at the European and global level have resulted in the occurrence of special procedural tracks, which partly abandon the fundamentals of the free assessment of evidence principle for some types of proceedings. One of the typical examples here are the small claims proceedings. The pan-European recognition of the proportionality between the intended results of litigation and the procedure used to arrive at these results (in particular the length, costs and vexation of the process)[114] as an overriding objective of civil procedure[115] has had an impact on the doctrine of evidence taking in cases of low social and economic importance. Both in European law and in many national laws in Europe the principle of proportionality is now to some extent recognised in the context of the taking of evidence.[116] Both in developed jurisdictions of the European North and West and in South-Eastern Europe the free assessment of

111. Stein-Wigger, *Aussagepsychologie im Zivilrecht*, 1409.
112. Silvestri, *The antique shop of Italian civil procedure*, 49.
113. Turner, *Evidence in Civil Law – the United Kingdom*, 12.
114. The forerunner of this trend was Lord Woolf in England and his renowned access to justice report; see Lord Woolf, Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales (HM Stationery Office 1996). See also even earlier statements of J. Jacob on 'costs, delay and vexation' being the 'three-headed hydra' of civil procedure. J. Jacob, 'Justice between man and man', in: *Current Legal Problems*, 1985, p. 211.
115. See English CPR, 1.1 (available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01).
116. See more in A. Uzelac, 'Evidence and the Principle of Proportionality. How to get rid of expensive and time-consuming evidence?', in *Evidence in Contemporary Civil Procedure. Fundamental Issues in a Comparative Perspective*, ed. C. H. van Rhee & A. Uzelac (Cambridge, Antwerp, Portland: Intersentia, 2015), 17–31.

evidence in small claims cases is restrained.[117] For example, even though both Slovenia and Croatia adhere to the principle of free assessment of evidence, this assessment is statutorily limited in small claims proceedings. According to Article 450(1) of the Slovenian Code of Civil Procedure, the proceedings in small claims cases are conducted in writing, and therefore witness testimony may be presented only via written witness statements. In other words, there is no orality and no oral pleadings, and therefore no free assessment of live witness testimony. According to the reformed Article 450(2) CCP, 'the court may limit the time and the volume of evidence and perform the taking of evidence according to free assessment in such a way that a proportionality shall be guaranteed between ensuring an appropriate protection of parties' rights and the aims of accelerating proceedings and procedural economy'.[118] Such a derogation for small claims might also be seen in the light of the maxim *lex specialis derogat legi generali*.[119] However, the general spirit of many new reforms of civil procedure encourages the limitation of time-consuming and expensive evidence, like statements of witnesses and experts, in most cases (with the exception of more voluminous commercial and civil cases), and thereby limits the reach of the free assessment of evidence doctrine, which is traditionally focused on the assessment of personal means of proof that are presented orally and assessed for their credibility based on experience and (popular) psychology. Consequently, in the absence of all evidential means, the trend is that the law enables judges to apply probabilistic reasoning and discretionary decision-making, which comes very close to the 'balance of probabilities' standard. So, for instance, German provisions on small claims procedure[120] contain an authorisation for the court to decide according to 'fair assessment' (*billiges Ermessen*).[121] Such derogations of the ordinary procedure are sometimes also justified by the need for a non-bureaucratic and informal approach to dispute resolution in cases of lower importance.[122]

§3D.07 OTHER NOTIONS RELEVANT FOR THE ASSESSMENT OF EVIDENCE: MATERIAL TRUTH VERSUS FORMAL TRUTH, THE CERTAINTY STANDARD AND DIFFERENT PERSPECTIVES ON BURDEN OF PROOF

Assessment of evidence is closely connected with various theories and notions which define the background, purpose and criteria of evidence-taking. In continental Europe, the evolution of the free assessment of evidence doctrine in the eighteenth and nineteenth centuries was accompanied by an ideological debate in which the notions of

117. See e.g., M. Knežević, 'Zur Berufung gegen das Urteil im serbischen Bagatellverfahren', in *Europäische und internationale Dimension des Rechts, Festschrift für Daphne – Ariadne Simotta*, ed. R. Geimer, R. A. Schütze, & Th. Garber (Vienna: LexisNexis (Orac), 2012), 311–323.
118. For Croatian law see Uzelac, *Evidence and the Principle of Proportionality*.
119. Rechberger & Simotta, *Zivilprozessrecht*, section 1114, Braun, *Lehrbuch des Zivilprozeßrechts*, 1108.
120. Section 495a German ZPO.
121. Braun, *Lehrbuch des Zivilprozeßrechts*, 1108–1110.
122. H. Roth, 'Modernisierung des Zivilprozesses', *Juristenzeitung* no. 17 (2014), 806.

'material truth' and 'formal truth' were often used to describe the potentially different outcomes of the system of free assessment of evidence and the system of legal proof. The proponents of the free assessment of evidence doctrine argued that a less formal system of free assessment arrives at the 'real' and not merely the formal truth, to the extent that it can better correspond to modern life, and also to the personal and moral convictions and perceptions of the fact-finders.

The notions of 'material truth' and 'formal truth' have lost much of their importance today, but they are still used in contemporary debates and doctrines. In typical textbook presentation of the system of free assessment of evidence, it is argued that civil proceedings cannot become the pursuit of an absolute truth, and instead the maximum that can be achieved is the judicial truth.[123] However, one should strive to bring the judicial truth as close as possible to the real, material truth, i.e., to historical truth about past events that gave rise to litigation. This is best achieved if the judges inquire into what really happened, unbound by formal rules (which lead to only formal, legal truth). To that extent, the free assessment of evidence is interpreted as the method that arrives at the material truth.[124] The material truth has always been linked to the *principe inquisitoire* typical of criminal procedure on the European continent.

However, in civil proceedings such a principle is not formally acknowledged in the majority of contemporary European legal orders (a notable exception is Bulgaria), though a comparative analysis may show that civil proceedings of former Socialist countries still share some distinct features which are much closer to inquisitorial models of state interventionism and state paternalism.[125] The insistence on precision of fact-finding and factual accuracy at any cost is closely connected with the general perception of the goals of civil procedure, and with the general views on its importance from the public policy angle. On average, civil procedure is nowadays regarded as a discipline that secures a default forum for the resolution of private disputes, where public interests play only a minor, secondary role.[126] The implication of this perception is that ordinary civil procedure regulates something that is of lesser interest to society at large, and therefore the establishment of the truth in the proceedings is not as important as it is in criminal cases.

Thus, the notion of (material) truth in Continental law has been based on a merger of two notions, the notion of free assessment of evidence ('material truth' as the result of the assessment that is unbound by formal legal rules) and the notion of inquisitorial, ex officio powers of the court regarding evidence ('material' or 'real' truth as the result of the official inquiry of the court that transcends 'partisan' truth). The

123. Monteleone, Manuale di diritto processuale civile, Vol. 1, 411.
124. A. Uzelac, *Istina u sudskom postupku* (Zagreb: Pravni fakultet, 1997), 142.
125. More in Uzelac, *Evidence and the Principle of Proportionality. How to get rid of expensive and time-consuming evidence?*, Ch. 2. See also A. Uzelac, 'Survival of the Third Legal Tradition?' in *Common Law, Civil Law and the Future of Categories*, ed. J. Walker, & O. Chase (Markham: LexisNexis, 2010), 377–396; and R. Manko, 'Survival of the Socialist Legal Tradition? A Polish Perspective', *Comparative Law Review* (2013), available at SSRN: http://ssrn.com/abstract = 2332219.
126. An exception is special procedures in matters with higher involvement of public interest, such as civil procedure in family cases. In these special procedures, the urge to find the 'true' facts of the case is also stronger.

perspective on truth-finding in the Common Law tradition is, however, rather different. It is rooted in the fair contest of the litigants who present their views in an adversarial trial. The equal position of the parties and the fairness of their contest before an impartial adjudicator (the 'sporting theory of justice') is thereby traditionally conceived as the guarantor of accurate results, which is best encapsulated in the often-cited statement by Wigmore that 'cross-examination … is the most powerful instrument known to the law in eliciting truth'.[127]

The differences in the approach to the pursuit of truth between civil law and common law jurisdictions is largely motivated by the differences in procedural organisation and structures. In common law trials, the case with all the factual issues is presented by the parties' witnesses. The statements of the witnesses of the other party is open to rebuttal by cross-examination.[128] In continental Europe, evidence in civil procedure is usually examined by the court (be it the trial judge or *le juge de la mise en état*) after the presentation of written submissions concerning all alleged facts of the case. In other words, witnesses and parties are examined by the judge and not by the lawyers. From the perspective of common law lawyers and scholars, judicial activism of that kind seems to be an important infringement of party autonomy and incompatible with natural justice and due process of law, just as the European observers find common law practices to be theatrical and odd.[129]

The two opposing approaches, however, seem to converge. Both sides of the divide have long ago realised the shortcomings of the extremes of the systems.[130] Some elements of civil law litigation are evolving in the direction of common law practices. The emerging use of expert witnesses engaged by the parties, the increasing use of written witness statements as well as more concentrated trials make up the essence of many procedural reforms in continental Europe. On the other side, the judicial management of fact-gathering, 'managerial judging' and a more proactive role of the court in regulating (and conducting) the fact-gathering process may be a signal that common law jurisdictions also are converging with their civil law counterparts. To that extent, the preconditions for approximation in the way the pursuit of the truth in civil

127. *Wigmore on Evidence*, section 1362, at 4 n.1. (Chadbourn rev. 1970).
128. Stürner, *Liberalismus und Zivilprozess*, 635.
129. European feelings about the theatrical nature of American trials are best summarised by an American: as John Langbein stated back in 1985, 'The contest between opposing counsel; the potential for surprise witnesses who cannot be rebutted in time; the tricks of adversary examination and cross-examination; the concentration of proof-taking and verdict into a single, continuous proceeding; the unpredictability of juries and the mysterious opacity of their conclusionary verdicts – these attributes of the Anglo-American trial make for good theatre'. J. H. Langbein, 'The German Advantage in Civil Procedure', *University of Chicago Law Review*, 62 (1985), 831.
130. For a very old and famous criticism of the 'sporting theory of justice' see R. Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice', *American Law Review* 40 (1906), 729, 742. For a more recent account see R. H. Underwood, 'The Limits of Cross-Examination', *American Journal of Trial Advocacy*, 21 (1997), 113, E. F. Sherman, 'Dean Pound's Dissatisfaction with the ''Sporting Theory of Justice'': Where Are We a Hundred Years Later?', *South Texas Law Review*, 48 (2007) and Tulane Public Law Research Paper Series No. 07-21. Available at SSRN: http://ssrn.com/abstract = 1439897.

procedure is conceived are almost achieved, and the doctrinal divisions are not as sharp as they used to be.[131]

Similar convergence can also be diagnosed with respect to two other notions closely connected to the assessment of evidence – the notions of *standard of proof* and *burden of proof*. From a very general perspective, it could seem that the systems of evidence in common law and civil law jurisdictions have rather divergent starting points as to the quantum of evidence that needs to be reached in order to take certain fact as proven. In the civil procedure of civil law countries, the standard that needs to be achieved after the presentation of evidence is *certainty*,[132] sometimes also interpreted as *high* (or *very high*) *probability*;[133] on the other side, the common law standard of evidence is, as already stated, *preponderance of the evidence* (in the US) or *balance of probabilities* (in the UK). The quantum of evidence that is necessary for the civil procedure of continental Europe, which can also be rephrased as *beyond reasonable doubt,* is in common law jurisdictions characteristic only of criminal law and procedure.

The apparently great difference is ultimately not so great at all. Although some writers have tried to quantify the standards of 'probability', 'high probability' and 'certainty', it seems that almost all legal practitioners, from all legal systems, share a distrust for 'mathematical evidence' and 'trial by statistics'.[134] Both standards are also closely linked to the division of roles in civil procedure. *Preponderance of probabilities* is a natural standard for the 'sporting theory of law' in which the fact-finder (traditionally: the jury), after passive observation of the evidence presented by the parties, has to decide in favour of one or the other version of the presented facts. In a system based on an active judicial role in the collection, presentation and assessment of facts, the emphasis is put on the subjective assessment that should result in the full conviction of the judge (sometimes referred to as 'moral certainty') that the presented evidence was sufficient to take a certain fact as proven. As such certainty needs to exist in both directions (certainty that a fact exists, and certainty that a fact does not exist), an apparently large gap between the two 'certainties' is bridged by the burden of proof notion. In standard continental European doctrine on the burden of proof, developed in 1900 in Germany by Leo Rosenberg, the prominent role is played by the 'objective' burden of proof, which comes into play only in *non liquet* situations, i.e., where the free assessment of evidence by the trial judge could not reach the required standard of certainty. In such an event, the judge will have to decide based on the burden of proof rules, basically interpreting the substantive law in a way that distinguishes facts that

131. See more in C. H. van Rhee & A. Uzelac, *Truth and Efficiency in Civil Litigation* (Cambridge, Portland, Antwerp: Intersentia, 2012).
132. Croatian law requires 'certainty' (*sigurnost*); see Article 221a Croatian CCP. In Germany, the renown Anastasia case of the BGH has defined the civil standard of proof as *an Sicherheit grenzenden Wahrscheinlichkeit* (on certainty bordering probability); see H. Nagel & E. - M., Bajons, *Beweis – Preuve – Evidence* (Baden-Baden: Nomos, 2003), 108-109.
133. See e.g., the case law of the Austrian Supreme Court, OGH 2 Ob 185/98i; OGH 2 Ob 97/11w Zak 2011/631 (cited in Nunner-Krautgasser & Anzenberger, *Evidence in Civil Law – Austria*, 12).
134. See e.g., N. M. Katiforis, *Evidence in Civil Law – Greece* (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 10. For common law criticism see L. Tribe, 'Trial by Mathematics', *Harvard Law Review*, 84 (1971), 1329-1393.

were supposed to be proven by the claimant, and facts that were supposed to be proven by the defendant.[135] For many practical purposes, the result of such a cognitive process comes very close to the result that would be achieved by the use of an alternative strategy of argument, namely by the application of the *preponderance of probability* standard of proof. In the end, the balance standard – 'more-likely-yes-than-not' – again finds root in the somewhat subjective assessment of the outcome of the evidentiary process, where personal convictions and moral judgments also play an important role.

In such a way, by using different methods to cope with uncertainties arising from the fact-finding process, different systems have developed avenues that enable them to arrive at the same results. What matters in the end are the guarantees that the assessment of evidence will not be conducted in an arbitrary fashion and that it will not arrive at irrational conclusions. A lesson that can be drawn from the comparison of different alternative strategies of motivation of factual judgments in different legal systems points, however, to the close interconnection between the way in which civil procedure is organised and the way in which a particular system of civil procedure explains its approach to evidence. To that extent, anybody who might, at the European or regional level, consider difficult projects on harmonising rules and standards in the field of the assessment of evidence should take into account the need to commence such projects by harmonising the procedural structures that apply the rules and standards.

BIBLIOGRAPHY

Aras Kramar, S. *Evidence in Civil Law – Croatia.* Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Albanese, A. J., 'New York Court of Appeals Holds for the First Time That an X-Ray Is a Writing Subject to the Best Evidence Rule, Thereby Admitting Secondary Evidence to Describe the Contents of a Lost X-Ray', *St. John's Law Review 69* (1995): 651 - 662.

Bylander, E., *Evidence in Civil Law – Sweden.* Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Baumgärtel, G., *Beweislastpraxis im Privatrecht.* Cologne: Heymanns Verlag, 1995.

Böhm, U. *Amerikanisches Zivilprozessrecht*. Cologne: Otto Schmidt, 2005.

Bonchovski, P., *Evidence in Civil Law – Bulgaria*, www.acj.si, 15 July 2015.

Braun, J., *Lehrbuch des Zivilprozeßrechts*. Tübingen: Mohr Siebeck, 2014.

Brehm, W., 'Beweisrecht in Deutschland', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans*

135. See L. Rosenberg, *Die Beweislast* (1st ed. 1900). This book was very influential in civil law jurisdictions, and his 'theory of norm' (*Normentheorie*) was adopted in a number of jurisdictions in Europe and Latin America. However, the definition and the concrete rules on the burden of proof have continually triggered lively academic debates, in particular in Germany. See for an overview of twentieth-century debates H. Prütting, *Gegenwartsprobleme der Beweislast* (München: C. H. Beck, 1983); see also Uzelac, *Teret dokazivanja*, and also F. Waage & M. Herborn, *Evidence in Civil Law – Denmark* (Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015), 14.

l'Union Européenne, ed. J. M. Lebre de Freitas (ed.). Utrecht: Kluwer Law International, 2004: 179–210.

de Cristofaro, M., 'La valutazione delle prove (§ 85)' in *Istituzioni di dritto civile*, 43rd ed., ed. A. Trabucchi. Milano: CEDAM, 2007: 211–214.

de Leval, G., *Eléments de la procédure civile*, 2nd ed. Brussels: Larcier, 2005.

de Leval, G., 'Les techniques d'approche de la vérité judiciaire en matière civile', in *La preuve et la difficile quête de la vérité judiciaire*, ed. G. de Leval. Liège: Anthémis, 2011, 25–43.

Demougin, D. & Fluet, C., *Preponderance of Evidence.* Center for Research on Economic Fluctuations and Employment, Université du Québec à Montreal, Working paper no. 150, April 2002.

Fasching, H. - W., *Zivilprozeßrecht*, 2nd ed. Vienna: Manz, 1990.

Flores Prada, I., *La prueba pericial de parte en el proceso civil*. Valencia: Tirant lo Blanch, 2005.

Genin-Meric R., 'Droit de la preuve: l'exemple français', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (ed.). Utrecht: Kluwer Law International, 2004, 137–178.

Jacob, J., 'Justice between man and man', *Current legal problems*, 38 (1985): 211–238.

Kaser, M., *Römisches Recht*, 16th ed. C.H. Beck: Munich, 1992.

Katiforis, N. M., *Evidence in Civil Law – Greece.* Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Knežević, M., 'Zur Berufung gegen das Urteil im serbischen Bagatellverfahren', in *Europäische und internationale Dimension des Rechts,* Festschrift für Daphne – Ariadne Simotta, ed. R. Geimer, R. A. Schütze, & Th. Garber. Vienna: LexisNexis (Orac), 2012, 311–323.

Korošec, V., *Rimsko pravo*, I. del, 2nd ed. 3rd reprint. Ljubljana: Uradni list, 1994.

Kranjc, J., *Rimsko pravo*. Ljubljana: GV Založba, 2008.

Lagarde, X., 'Preuve', in *Dictionnaire de la justice*, ed. L. Cadiet. Paris: Presses universitaires de France, 2004, 1033–1038.

Langbein, J. H., 'The demise of trial in American civil procedure: how it happened, is it convergent with European civil procedure?', in *Truth and efficiency in civil litigation: fundamental aspects of fact-finding and evidence-taking in a comparative context*, ed. C.H. van Rhee & A. Uzelac. Cambridge, Antwerp, Portland: Intersentia, 2012, 119–164.

Langbein, J. H., 'The German Advantage in Civil Procedure', *University of Chicago Law Review*, 62 (1985): 823–866.

Lindell, B., 'Evidence in Sweden', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas. Utrecht: Kluwer Law International, 2004, 407–436.

Mallandrich Miret, N., *Evidence in Civil Law – Spain*. Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Manko, R., 'Survival of the Socialist Legal Tradition? A Polish Perspective', *Comparative Law Review* (2013), available at SSRN: http://ssrn.com/abstract = 2332219.

McGrath, D., 'Irish Report on Evidence', in *The Law of Evidence in the European Union, Das Beweisrecht in der Europäischen Union, Le Droit de la Preuve dans l'Union Européenne*, ed. J. M. Lebre de Freitas (ed.). Utrecht: Kluwer Law International, 2004, 245–268.

Moriarty, B., *Evidence in Civil Law – Ireland*, Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Monteleone, G., *Manuale di diritto processuale civile*, Vol. 1, 5th ed. Milano: CEDAM, 2009.

Nörr, K. W., *Romanisch-kanonisches Prozessrecht, Erkenntnisverfahren erster Instanz in civilibus.* Heidelberg: Springer, 2012.

Nörr, K. W., 'Der Urkundenbeweis im romanisch – kanonischen Prozessrecht des Mittelalters', in *Festschrift für Eduard Picker zum 70. Geburtstag*, ed. Th. Lobinger. Tübingen: Mohr Siebeck, 2010, 1303–1312.

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

Nunner-Krautgasser, B., & Anzenberger, P., *Evidence in Civil Law – Austria*. Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

van Ommeslaghe, P., *Droit des obligations*, tome III.Brussels: Bruylant, 2010.

Orloff, N. & Stedinger, J., 'A Framework for Evaluating the Preponderance-of-the-evidence Standard', *University of Pennsylvania Law Review* 113 (1983): 1159–1174.

Oudin, M., *Evidence in Civil Law – France*, Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.

Pelli, O., *Beweisverträge im Zivilprozess*. Zurich: Dike, 2012.

Pound, R., 'The Causes of Popular Dissatisfaction with the Administration of Justice', *American Law Review* 40 (1906), Available on http://www.encyclopedia.com/doc/1G2-3437704909.html.

Perband, M. G., *Der Grundsatz der freien Beweiswürdigung im Zivilprozeß (§ 286 ZPO) in der Rechtsprechung des Reichsgerichts*. Frankfurt: Peter Lang, 2003.

Prütting, H., Gegenwartsprobleme der Beweislast. München: C. H. Beck, 1983.

Rechberger, W. H., & Simotta, D.-A., *Zivilprozessrecht*, 8th ed. Vienna: Manz, 2010.

Rosenberg, L., Schwab, K. H. & Gottwald, P., *Zivilprozessrecht*, 17th ed. Munich: C.H. Beck, 2010.

Schauer F. & Zeckhauser, R. 'On the degree of confidence for adverse decisions', *Journal of Legal Studies* 25 (1996): 27–52.

Schellhammer, K., *Zivilprozess*, 14th ed. Heidelberg: C. F. Müller, 2012, § 550.

Sherman, E. F., 'Dean Pound's Dissatisfaction with the 'Sporting Theory of Justice': Where Are We a Hundred Years Later?', South Texas Law Review, 48 (2007) and Tulane Public Law Research Paper Series No. 07-21. Available at SSRN: http://ssrn.com/abstract = 1439897.

Silvestri, E., 'The antique shop of Italian civil procedure', in *Truth and Efficiency in Civil Litigation*, ed. R. van Rhee & A. Uzelac. Cambridge, Portland, Antwerp: Intersentia, 2012, 47–58.

Sladič, J., 'Die Begründung der Rechtsakte des Sekundärrechts der EG in der Rechtsprechung des EuGH und des EuG', *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung*, no 4 (2005): 123–134.

Spektorsky, E., *Zgodovina socijalne filozofije*. Ljubljana: Slovenska matica, 1932.
Spühler, K., Dolge, A. & Gehri, M., *Schweizerisches Zivilprozessrecht*, 9th ed. Bern: Stämpfli, 2010.
Stein-Wigger, M., 'Aussagepsychologie im Zivilrecht', *Aktuelle juristische Praxis*, no. 11 (2010): 1409–1415.
Stürner, R., 'Liberalismus und Zivilprozess', *Österreichische Juristenzeitung*, no 14-15 (2014), 629–639.
Tribe, L., 'Trial by Mathematics', *Harvard Law Review*, 84 (1971): 1329–1393.
Turner, R., *Evidence in Civil Law – the United Kingdom*, www.acj.si., 15 July 2015
Underwood, R. H., 'The Limits of Cross-Examination', *American Journal of Trial Advocacy*, 21 (1997): 113.
Uzelac, A., 'Evidence and the Principle of Proportionality. How to get rid of expensive and time-consuming evidence?', in *Evidence in Contemporary Civil Procedure. Fundamental Issues in a Comparative Perspective*, ed. C.H. van Rhee & A. Uzelac. Cambridge, Antwerp, Portland: Intersentia, 2015, 17–31.
Uzelac, A., *Istina u sudskom postupku.* Zagreb: Pravni fakultet, 1997.
Uzelac, A., 'Survival of the Third Legal Tradition?' in *Common Law, Civil Law and the Future of Categories*, ed. J. Walker, & O. Chase. Markham: Lexis Nexis, 2010, 377–396.
Uzelac, A., *Teret dokazivanja*. Zagreb: Faculty of Law, 2003.
Uzelac, A., 'The Need to Provide Reasons in Court Judgments: Some developments in East and West', in *Aurea praxis, aurea theoria. Księga pamiątkowa ku czci profesora Tadeusza Erecińskiego*, ed. K. Weitz &, J. Gudowski. Waszawa: Lexis-Nexis, 2011, 1547–1566.
Waage, F. & Herborn, M., *Evidence in Civil Law – Denmark.* Maribor: Institute for Local Self-Government and Public Procurement in Maribor, 2015.
Wright, R. W., 'Proving Facts: Belief versus Probability', 79 (2009). Available at: http://scholarship.kentlaw.iit.edu/fac_schol/709.
Zobec, J., 'Art. 8', in *Pravdni postopek, zakon s komentarjen*, Vol. 1, ed. L. Ude. Ljubljana: Uradni list, 2005: 84–96.

Dimensions of Evidence in European Civil Procedure

Edited by
Vesna Rijavec
Tomaž Keresteš
Tjaša Ivanc

Wolters Kluwer

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-6662-3

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.