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 (insurmountable?) 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

CHAPTER 3

JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81
(ex Article 65 TEC)

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

„direct taking of evidence"

- 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 **ACCELLERATION**

National standards for „simple" and „accellerated"?
- 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.

90 days?

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

COMMON ROOTS, COMMON PROBLEMS?

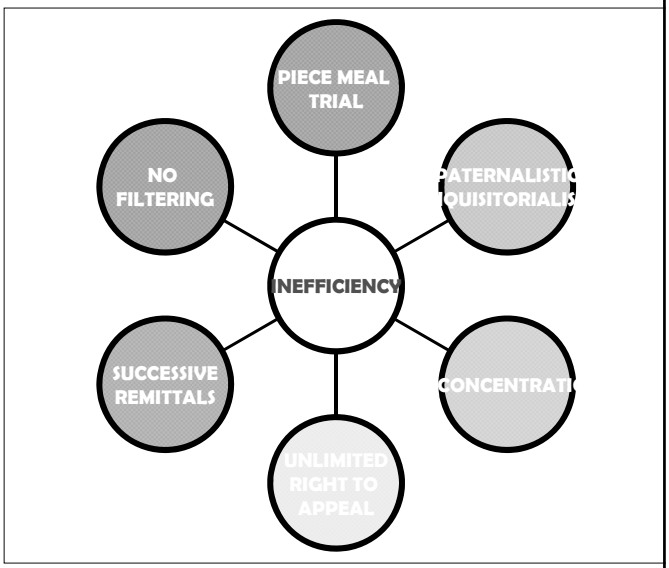
Main challenges of SEE procedural style (CCP 1976)

CONCENTRATION	TIME MANAGEMENT	PRECLUSIONS
The missing concept of trial (piece-meal trial, May-rain trial)	No planning of procedure. No court instructions on submissions, no procedural calendar.	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:



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).

„Material truth" as a result of procedural collaboration.

Yugoslav CCP

- The court should dominate in evidentiary process (Triva: „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.

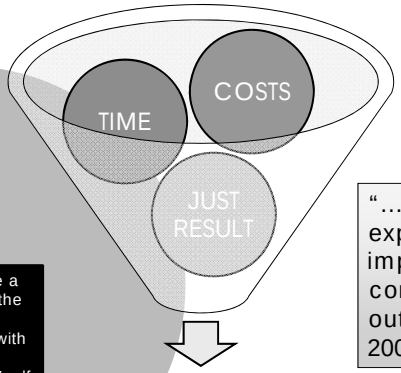
Material truth as a result of ideological imperative of inquisitorial court activity.

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

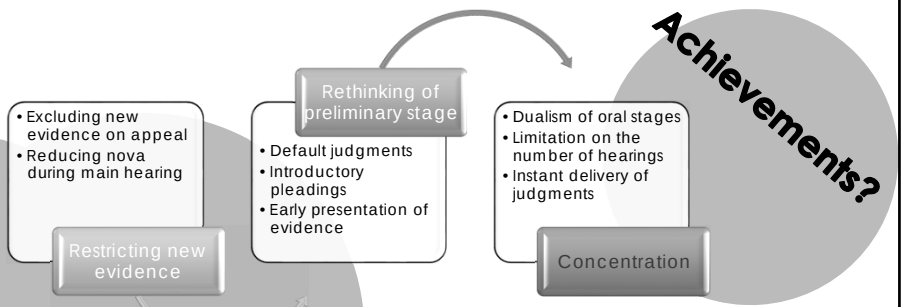
CPR 1.1.1."…These Rules are a new procedural code with the **overriding objective** of enabling the court to deal with cases justly and at proportionate cost" (Lord Woolf reform, 1999).



THREE-DIMENSIONAL CONCEPT OF JUSTICE

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

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



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 poteškoće)***."
      - 223/2: „if decision-making on some of the claims that are insignificant compared to the total value of all claims is subject to **difficulties 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

- Doctrinary 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 pusuit 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

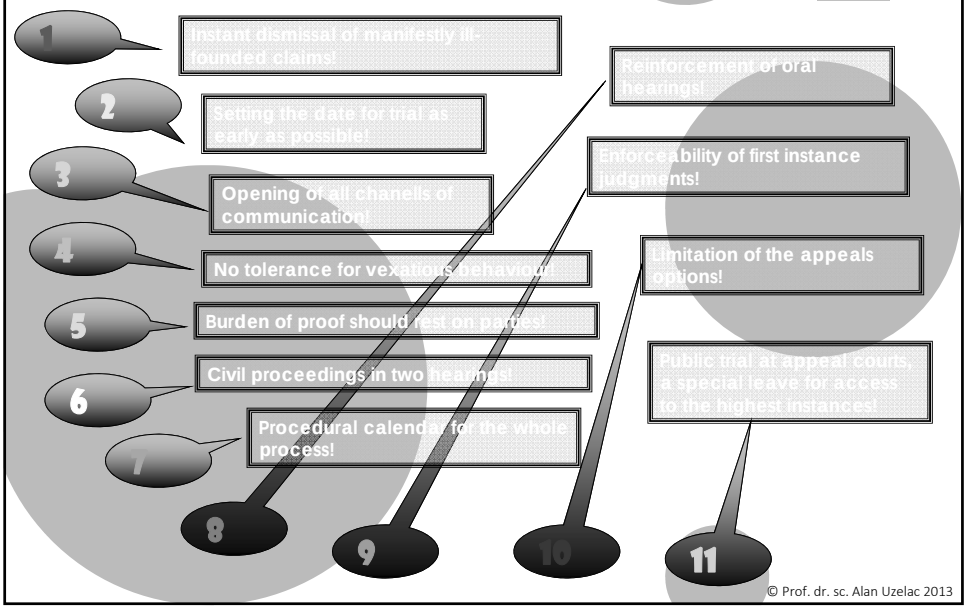
- Explanation of legislative proposal, April 2011
  - Cutting on „unnecessary activities"
  - Reducing time and complexity
- Triva/Dika:
  - *True meaning: "Certain reduction of certainty criteria, but short of sheer arbitrariness".*
  - *Case law: "one should come as close to the real facts as possible, if those facts cannot be exactly and precisely established."*

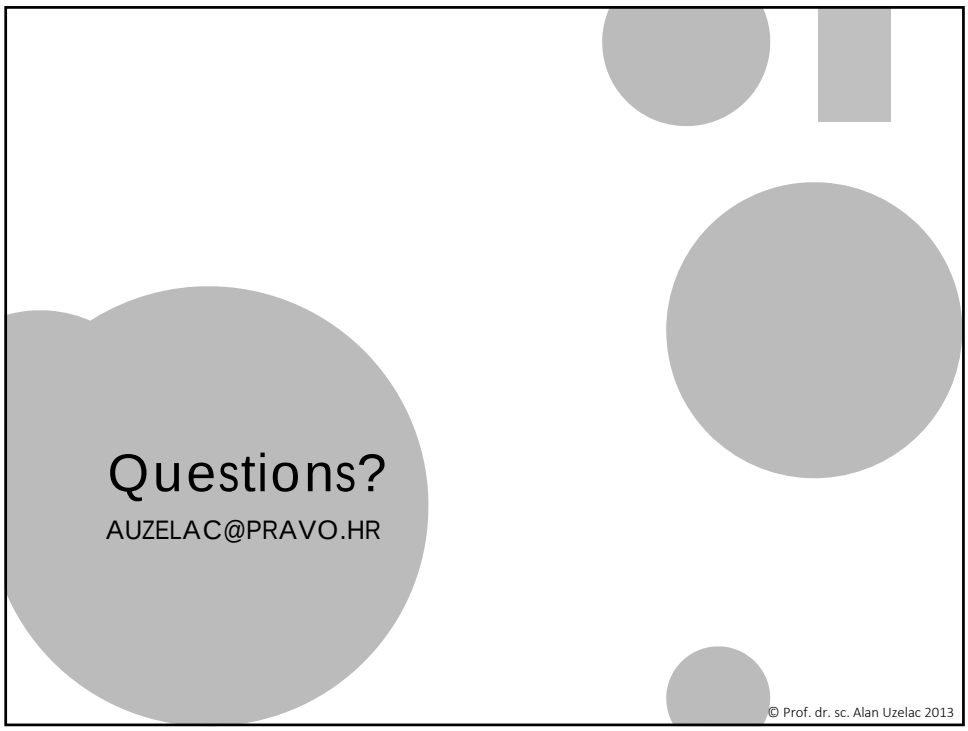
Članak 17.

Donošenje sudske odluke traži od stranaka predlaganje dokaza na kojih sud treba moći steći uvjerenje o istinitosti onoga što stranka predloženim dokazom dokazuje. Međutim, dokazivanje svih istaknutih zahtjeva bitno odugovlači i komplicira postupak, a sud i stranke opterećuje često nepotrebnim poduzimanjem radnji. Zbog toga se ovom odredbom propisuje mogućnost da, u slučajevima kada postoji više istaknutih zahtjeva od kojih su neki beznačajni u odnosu na ukupni iznos svih istaknutih zahtjeva, sud o tim beznačajnim zahtjevima odluči po slobodnoj ocjeni dokaza, a sve na temelju drugih dokaza koje je izveo tijekom postupka.

- 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




Questions?
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