

Some Terminology for Volume on Evidence

Robert Turner & Remco van Rhee

The editors of the volume have asked us to think about terminology for our volume on evidence. This is very relevant, especially since we are producing a book with chapters written by different authors who do not necessarily use the same terminology. Additionally it is relevant since the book is written in English by non-native speakers and most of the jurisdictions under discussion do not belong to the common law family. It should be remembered that harmonizing and suggesting the right technical terminology is beyond the tasks of an ordinary language reviser. Therefore, the authors should make an effort to use the right terminology themselves, and the list below is meant to help them in doing this. Obviously, this list is not exhaustive and may be expanded after discussion within the research group. Also, the very terminology itself may be discussed within this group. What follows are only suggestions.

It is suggested that the authors use the terminology indicated at the left hand side of the document. On the right hand side definitions and descriptions are provided.

PRINCIPLES

Adversarial Procedure	Type of procedure in which the parties argue their case in court before an impartial judge who is not involved in the case other than by making sure that the rules of procedure are observed and issuing a judgment. This type of procedure in its pure form does NOT exist in any European jurisdiction since all jurisdictions have introduced judicial case management allowing the judge, at least to some extent, to actively intervene in the conduct of the lawsuit, from the beginning until the end. The terminology 'mildly adversarial' may, however, be used for European legal systems in order to indicate that the judge is as a rule not involved in proving a case; this is left to the relevant parties. 'Accusatorial' is sometimes used instead of 'adversarial'. We would suggest that you avoid using the latter terminology since it is associated with criminal litigation by most English readers. So the French 'accusatoire' should in our opinion be translated as 'adversarial'.
Court Driven Litigation	<i>Offizialmaxime</i> , inquisitorial procedure, absence of party autonomy.
Inquisitorial procedure	Type of procedure in which the judge takes the lead, also as regards evidence. Although common law authors sometimes refer to the civil procedure of continental European jurisdictions as 'inquisitorial', this is obviously wrong given the fact that evidence collection is part of the tasks of the <u>parties</u> in these jurisdictions. Nevertheless, the active role of the judge in the conduct of the lawsuit, including his role in

questioning witnesses, gives rise to this misunderstanding. Maybe common law authors are right when they refer to the questioning of the witnesses by the judge on the European Continent as 'inquisitorial'. Continental civil procedure as a whole is, however, not inquisitorial.

Party Autonomy General terminology indicating that the parties are in charge of taking the necessary procedural steps and decide about the subject-matter of litigation. It also means that the parties decide about the initiation and the end of the lawsuit. It encompasses both the Dispositionsmaxime (party control over the initiation and progress of the action) and the Verhandlungsmaxime (party control over allegations and proof).

Principle of Concentration of the Proceedings Eventualmaxime, i.e. the principle that the various steps in the procedure should be taken only at the time prescribed for them.

Principle of hearing both sides Audiatur and alteram partem

Principle of Immediacy NOT to be described as 'Principle of Directness', although directness indeed indicates what is meant: the judge who decides the case should be in a position to directly observe the witnesses when they testify without the intermediary of a written document summarizing the witnesses statements.

Principle of Oral Proceedings Principle that a civil action should be conducted orally. It also implies that the contents of documents should be discussed orally in court.

Principle of Publicity Principle indicating that both the hearing of a case and the judgment should be public, allowing society to learn about the civil action

Principle of Written Proceedings Principle that proceedings should be conducted in writing and that oral statements should be rendered in writing in order to be relevant in the legal action.

GENERAL

Action 'Action' may be used in the sense of lawsuit, e.g. 'bringing an action' (starting a lawsuit).

Application Request addressed to the court

Astreinte	Money penalties used as a means of enforcing judgments in some civil law jurisdictions. There is not a good English term to describe 'astreinte'.
Cassation Complaint	Second appeal in the Romanic family of civil procedure (in the German family one uses 'Revision' instead)
Civil Imprisonment	Imprisonment of a judgment debtor to force him to satisfy the judgment
Claim / Defense on the Merits	Claim or defense which concerns the actual case at stake and not preliminary (procedural) issues. Opposite of preliminary defenses.
Claimant	Before the Woolf Reforms designated as 'Plaintiff'. We would like to suggest to only use 'claimant'.
Counsel	Generic term for the lawyer assisting a party. We would advise to use this terminology instead of 'advocate', 'procurator', etc.
Default	Not executing the required procedural act.
Defaulter	Party in a civil action who does not execute a procedural act which should have been executed by him.
Enforcement officer	Official involved in enforcing court rulings. Enforcement is part of the tasks of a <i>huissier de justice</i> in France and other jurisdictions belonging to the Romanic family of civil procedure.
Ex officio / Sua Sponte	Both 'ex officio' and 'sua sponte' are used to indicate that the judge may act spontaneously without being asked to do so by the parties. In other words, we are dealing with powers of the judge which he may exercise at his own motion.
Hearing	Time before the court designated for dealing with the case, either fully or in part. For civil law jurisdictions, we would suggest to AVOID using the terminology 'trial' (which in English civil procedure refers to a specific stage in litigation).
Interlocutory Judgment	All judgments which do not decide the merits of the case.
Interlocutory Proceedings	Proceedings which are not aimed at acquiring a final judgment on the merits in the case but aim at an intermediate, non-final decision in a pending lawsuit.
Judicial Case Management	An approach to litigation in which the judge or the court is given powers to influence the progress of litigation, usually in order to increase efficiency and reduce costs.
Main Hearing	In German: Haupttermin

Means of recourse against judgments	General terminology to indicate all possible means to attack judgments, e.g. ordinary appeal, opposition, cassation, Revision etc.
Opposition	Act of disputing a procedural act or result, e.g. a default judgment.
Preclusion	The fact that a party is barred (precluded) from taking specific steps in the procedure since the moment for taking these steps has expired (Reihenfolgeprinzip).
Preliminary defenses	'Exceptions'; (usually) procedural defenses. Opposite of defenses on the merits.
Process server	Official serving the summons on the opponent party. This is part of the tasks of a <i>huissier de justice</i> in France and other jurisdictions belonging to the Romanic family of civil procedure.
Second instance appeal	First appeal, different from a Cassation Complaint or Revision (i.e. 2 nd appeal or 3 rd instance appeal).
Statement of Case	General terminology for the documents containing the claim, defense, reply, rejoinder etc. Before the Woolf reforms these documents were indicated as 'pleadings'. In French: 'conclusions'.
Statement of Claim	Document containing the claim
Statement of Defense	Document containing the defense

EVIDENCE AND FACTS

Agreement on Evidence	Agreement between the parties to a lawsuit concerning the evidence that may be used and the weight to be given to this evidence
Burden of proof	Onus probandi. Terminology to indicate which party has to prove or disprove a certain fact. If the party who has the burden of proof does not succeed in doing so, this will be detrimental to his cause.
Counter Evidence	Evidence serving to undermine the credibility of the evidence submitted by the opponent party.
Cross Examination	In common law jurisdictions, cross examination is the questioning of witnesses by counsel of the opposing party, after the witnesses have been questioned by counsel of the party producing these witnesses. Cross examination does not exist in civil law jurisdictions.
Deed	Signed document that may serve as proof of a contractual arrangement.

Direct evidence	Evidence that provides the relevant information directly, as opposed to presumptions, which allow the judge to conclude from facts that can be proven 'directly' that other facts are also true. The use of this terminology is very debatable since in the end no evidence is direct.
Documentary Evidence	Evidence in writing.
Duty to be Truthful	Wahrheitspflicht
Evidence	Evidence is the means by which the proof of a material fact is sought.
Evidentiary Risk	The evidentiary risk is the risk borne by the litigant having the burden of proof. Although this litigant does not have the duty to prove the facts stated by him as a result of this burden of proof, he will experience the detrimental consequences of not proving or not being able to prove. This is called the evidentiary risk in some jurisdictions.
Expert Report	A report drafted by an expert who has been appointed in a case to provide objective information concerning his area of expertise.
Expert	A person appointed in a case to provide objective information concerning his area of expertise. The terminology 'expert witness' should be avoided for civil law jurisdictions, since the expert is usually appointed by the court in order to provide objective information about his area of expertise and not in order to testify about what he has observed or experienced.
Fishing Expedition	A litigant who initiates a 'fishing expedition' is trying to obtain information in a pending lawsuit from his opponent in order to find out whether additional claims can be brought. In other words, this party is trying to obtain information in the pending lawsuit other than information which is needed to decide the case at hand.
Formal Truth	The truth as established ('fabricated') by the parties. The formal truth may be different from what really happened, i.e. the material (or substantive) truth.
Full Proof	One or more items of evidence positively establishing the truth of the fact(s) that have been stated.
Indirect Evidence	See 'Direct evidence'.
Intimate Conviction	Standard of proof in the Romanic civil law countries, indicating that it is left to the judge to determine whether or not certain facts have been proven. The terminology is not known in the English speaking world, so one has to indicate that this is a standard of proof.

Ius Curia Novit	The court knows the law, i.e. the principle that the litigants do not have to state and prove the contents of the law applicable to their case.
Ius Novorum	The right of the parties to introduce new claims, new defenses and/or new means of proof on appeal.
Legal Fiction	A fact that is assumed by the law or the court without the possibility to prove the opposite.
Legal Presumption	A conclusion that according to the law must be drawn based on a preexisting fact or facts. This conclusion is subject to counter proof.
Local Inspection	A method of proof by which the judge visits a locality in order to inspect the place in the presence of the parties. The results of this inspection may serve as proof in the case. In French known as 'descente sur les lieux'.
Material Truth	The 'real' truth, i.e. what happened in actual practice, as opposed to the formal truth, which may be different from the material truth.
Means of proof	Material method to prove a fact that has been asserted (e.g. a document).
Nemo tenetur	Abbreviation of 'Nemo tenetur edere contra se'. It means that no one has to provide evidence against his own interest.
Numerus clausus of means of proof	The particular means of proof that may be used are enumerated exhaustively in the law. Other means of proof are not allowed
Perjury	Intentionally providing false information when under oath.
Preliminary taking of evidence	Potential litigants may secure evidence before the action is brought in court, i.e. the taking of evidence before actual litigation has started. This should not be described as 'Pre-trial Discovery' since Pre-trial and Discovery do not exist in civil law jurisdictions. Even for England this description is problematic, since the terminology 'discovery' is not used anymore.
Preparation of Witnesses	Preparing witnesses by counsel of the party on whose behalf these witnesses are heard for their day in court. In civil law jurisdictions this is considered to be unethical.
Private deed	A 'private deed' is unknown in English legal terminology. However, we might be tempted to use it in the sense of a document drafted privately to serve as proof; no public official – such as a notary - is involved in drafting. Maybe there is better terminology???

Privilege	The right of certain witnesses not to testify due to their relationship with a party or due to their profession. Such witnesses may claim the privilege not to testify.
Production of Evidence	We suggest not to use this terminology. Instead, the use of submission of evidence is recommended. Only in the case of witnesses, the use of production of witnesses may be justified.
Proof	This word should be used with caution. Better to use evidence. Evidence is the means by which the proof of a material fact is sought.
Shift of the burden of proof	Moving the burden of proof from a party stating certain facts to the opponent party.
Standard of Proof	The standard the judge has to use in order to determine whether certain facts have been proven. In Romanic civil law jurisdictions, this standard is described as the 'intimate conviction' of the judge.
Submit evidence to the court	We prefer this description above 'to produce evidence' or 'to deliver evidence', even though we know that in some jurisdictions the procedure for submitting evidence may be very elaborate.
Witness Evidence	Witness evidence may be provided orally in court, or by way of a document known as a 'witness deposition'