

PART VII

ACCESS TO INFORMATION AND EVIDENCE

CHAPTER 4

TYPES OF EVIDENCE

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1 INTRODUCTION

- 1 Throughout all ages and all around the world, there is a wide variety of evidence, both tangible and intangible, used in litigation. Such various kinds of evidence could be classified into several categories, according to certain perspectives and criteria. However, the general methods of classification differ greatly between common law countries and civil law countries, and are not even uniform among the same legal families. After all, there seem to be no universal criteria that are unquestionably accepted for categorizing types of evidence.
- 2 Considering the above, it might be better to adopt the following simple classification described below that seems relatively easy to accept for the majority of readers of different legal cultures, in the light of conventional comparative legal studies. To follow that line, as a first step, we should start by classifying all kinds of evidence into 'testimonial evidence' and 'physical evidence'.
- 3 Testimonial evidence is a type of evidence provided by a person by means of oral statement in court. Note that when a person's body is used as evidence rather than a person's statement, it is undoubtedly to be considered physical evidence. In common law countries, the term 'person' in the above definition can be simply replaced with the legal concept of 'witness'. However, in continental law countries, the term 'witness' means only a third party other than the plaintiff or defendant who states the facts based on the memory of experience of that person. The parties and the experts are then classified as different categories and are subject to different rules from witnesses. In other words, the concept of 'witness' in continental law countries has a narrower meaning than in common law countries. In this chapter, when simply referring to 'witness' without any reservation, the term 'witness' shall mean a witness as a third party which is in the definition of the continental law countries.
- 4 Physical evidence is a type of evidence that is in the form of a tangible object. Physical evidence can be further subclassified into 'documentary evidence' and other tangible objects. Physical evidence other than documentary evidence is often referred to as 'material evidence' or 'real evidence'. Hereinafter, it shall be referred to as 'material evidence' to distinguish it from documentary evidence. The reason for subdividing physical evidence is that the functions as evidence are significantly different between documentary evidence and material evidence.
- 5 Documentary evidence is a record of the perception of a person on a medium such as a paper. It is not the medium itself that functions as evidence, but the information recorded on it. In other words, the medium as a physical object is not evidence in this context. Therefore, for example, when a document is produced as evidence for the purpose of proving the antiquity of it based on the state of the aged deterioration of the paper, the document should be classified as material evidence, not documentary evidence. Due to the nature of documentary evidence, the court is not in a position to

directly recognize the information on the evidence, but in a position to obtain the information secondarily through the primary recognition of the person who created the document.

- 6 Material evidence is, in contrast to a document, a type of evidence that functions as an object itself. While documentary evidence once passed through the perception of someone other than the court, material evidence is directly perceived by the court. Material evidence is often the primary means of proof in criminal cases, and less so in civil cases. However, in some cases, material evidence also plays important roles even in civil cases. For example, the plaintiff was injured when a tire exploded while he was mounting it on a car, and he filed a tort suit against the tire manufacturer for damages. In this case, the exploded tire is the key piece of evidence.

2 TESTIMONIAL EVIDENCE VS. DOCUMENTARY EVIDENCE

2.1 General Remarks

- 7 The question as to whether testimonial or documentary evidence is superior evidence in court has been repeatedly discussed among lawyers throughout the ages and throughout nations. Needless to say, there is no single absolute answer to this, as the circumstances dictate which evidence is superior in an individual case. Nevertheless, it is also true that a broad perspective of a certain legal culture in a certain time could sometimes find some tendency as to whether to attach weight to either testimonial or documentary evidence.

2.2 Historical Background

- 8 In the past, there have been observations that testimonial evidence tends to be given relatively more weight in common law countries, and that documentary evidence is relatively more important in continental law countries.
- 9 Speaking of common law countries two centuries ago, for example, the famous words of Jeremy Bentham, 'witnesses are the eyes and ears of justice,' symbolically represents this inclination.¹ Such predominance of testimonial evidence may be relevant to the fact that civil juries were used in some common law countries. Marcus states his view as follows:

In olden days, the reliance on oral testimony fit in well with the jury trial method, and also the related emphasis on a single continuous and public trial of a case. Particularly with witnesses and jurors who were often illiterate, or at least not very

¹ J Bentham, *Introductory View of the Rationale of Judicial Evidence* (1828-53), as cited in J Hunter and K Cronin, *Evidence, Advocacy and Ethical Practice* (Butterworth 1995).

literate, this method enabled both jury comprehension and audience comprehension.²

- 10 The situation is somewhat different in civil law countries, especially those in East Asia and South America that have adopted continental European legal systems after the late nineteenth century. Japan, for example, adopted the German Code of Civil Procedure (GCCC) at the time, with the Japanese Code of Civil Procedure (JCCC) enacted in 1890, and established a judicial system influenced by German law with the Court Constitution Act in 1889, the previous year. The German system adopted by Japan did not have a system of civil juries. And, even in the late nineteenth century, the literacy rate in Japan, at least in urban areas, was well over 80 percent. In addition, the cultural sphere of East Asia including Japan has historically been called the 'the Lands of Letters', and politics and rituals had been conducted mainly through documents. The remnants of this historical and cultural background seem to remain as the undercurrent even in modern days. Judges and lawyers in Japan tend to place more importance on documentary evidence than testimonial evidence. This is because the contents of the document are fixed and there can be no change afterwards, but the testimony of witnesses or parties may always be inaccurate based on false memories or deliberately distorted. In addition, in reality, perjury in civil proceedings is rarely prosecuted in Japan. Similar circumstances can be seen in Argentina.
- 11 In Argentina, the general criterion of comparative evidence evaluation favours documentary evidence over testimonial evidence, because one thinks that the documents do not lose their memory over time nor are they affected by biases and character defects that people have when they store information. Argentine lawyers are aware of this tacit criterion, and in general, use witnesses as subsidiary evidence, only when there are no documents in which an event has been recorded.

2.3 Present Days

- 12 As time goes by, those stereotype recognitions need to be corrected. First of all, the increasing reliance in common law systems on written materials as a basis for decision may reflect a shift toward what has been conceived as the continental law approach. In addition, the importance of written materials is increasing, not only in civil law countries, but also in common law countries, backed by the advancement of social and economic complexity and diversification, as well as the accelerated development of technologies.
- 13 In today's complex and diversified society, all activities of companies and individuals are inevitably supported by huge amounts of documents. Furthermore, many of these activities have been shifting from real three-dimensional spaces to online virtual spaces. Most of such activities online are automatically stored as electronic records, which can later be used as documentary evidence in the event of a dispute. Furthermore, advances

² R Marcus' written response to the author's written interview.

in recording tools, from conventional film and tape to electronical cloud storage, have greatly expanded the definition of a document and have increased the total amount of documentation.

- 14 However, this does not entail a reduction in the weight of testimonial evidence. With the rise of orality in modern litigation, testimonial evidence has now attained a place similar to that in common law countries in the continental law countries. After all, while the weight of testimonial evidence has not diminished in any way, the importance of documentary evidence has been increasing in all countries, regardless of continental or common law countries.

2.4 Conversion of Testimony into Document

- 15 The practice of converting evidence which was previously presented to court in the form of testimony into a document form has been developed in many of countries.
- 16 In Japan, for example, since the mid-1990s, the practice of producing documents called 'letter of statement' to the court as partially in lieu of the testimony of the party or potential witness has become established nationwide. The 'letter of statement' is a documentation of statements corresponding to the answers to the direct-examination (this also may be called 'examination in chief' or 'principal examination'; hereinafter, referred to simply as 'direct-examination'), which omit oral direct-examination and allow immediate cross-examination. There is no legal provision for a 'letter of statement'. It is a custom of practice that arose in the reform movement that aims to expedite civil litigation procedures by means of omitting the direct-examination which is mostly carried out under the preestablished harmony, and focusing on cross examination.
- 17 As another example, the great majority of witness testimony obtained in US civil cases occurs in deposition rather than in court. In the United States, trials in civil cases are rare events. But depositions are commonplace events. And it is likely true that for every witness who testifies live in a trial literally hundreds more testify in depositions. Deposition testimony recorded in a documentary form is admissible at trial when the witness is unavailable.³ Most deposition testimony is not used at trials. Instead, it is employed in relation to motions for summary judgment, which have become the predominant method of judicial resolution of the merits of civil cases in the United States.⁴
- 18 In Israel, for decades, courts have ordered parties to submit testimony in the form of an affidavit, in lieu of direct-examination. The 2021 Israeli Civil Procedure Rules (ICPR) opted to revert to oral direct-examination. Rule 67(a) ICPR provides that the court shall

³ Rule 32(a)(4) USFRCP.

⁴ See Markus R, 'Reflections from an Outlier: An American Reaction to the EU Rules on Evidence' (2021) 11 International Journal of Procedural Law 106, 112-115.

decide if the direct-examination of the witnesses will be heard orally or in writings, taking account of the scope of written and oral evidence, the complexity of the claims and the nature of the dispute between the parties, showing preference to an oral examination, if it can contribute to discovering the truth and to the efficient conduct of the hearing. However, according to Rule 67(b) ICPR, preference shall be given to direct-examination in writing in the case of money claims exceeding 2.5 million NIS, claims for physical injury and claims based on the Compensation of Victims of Traffic Accidents Act, brought in the District Court.

3 TESTIMONIAL EVIDENCE

3.1 Types of Testimonial Evidence

- 19 In common law countries such as the United States and England, the legal concept of 'witness' includes not only third parties who state their own experiences of the case, but also experts and parties. In other words, anyone who provides testimonial evidence is a witness. In contrast, in many continental law countries such as Germany and Japan, experts and parties are in different categories from witnesses. According to this distinction, testimonial evidence is classified into three types. This is not only a conceptual classification, but, as to be detailed later, the legal treatment is different.
- 20 The reason why many continental law countries categorize those who provide testimonial evidence in court into three categories is that third parties, experts, and parties have different functions in civil procedure. A witness as a third party is a person who shall report her own perception of her past experience relevant for deciding a case. Since personal experiences are only vested in the person herself, witness can't be substituted by others. In contrast, the expert is a person who shall provide the court with professional opinions necessary for deciding a case in order to supplement the knowledge of the court. Since professional opinions can be provided by other experts of comparable competence, experts can be substituted by others.⁵ Therefore, if an expert refuses to appear in court, it is not permissible to take coercive measures as is permitted for a witness. In addition, an expert is appointed by court and is subject to the same independence as a judge. Parties to a case as providers of testimonial evidence are treated as a separate category from witnesses and experts. The reason for the special treatment of parties to a case is that parties are not independent, in the sense that they are by definition biased, and their testimony is in general less trustworthy by nature. Consequently, it is necessary to design a system based on this premise.

⁵ See J Friedenthal, 'Discovery and Use of an Adverse Party's Expert Information' (1962) 14 Stanford Law Review 455, 482: '[T]he expert, unlike an ordinary witness, has no unique knowledge. That is, the other side, at least in theory, can obtain the same information merely by engaging an expert of its own.'

- 21 Why, then, did such a difference arise between the Common Law system and the Continental Law system? Gottwald states his view as follows:

In common law, evidence is presented by the parties. An expert witness is also presented by the party and there may be a battle of expert witnesses. Within such system a distinction between witness, expert and parties are unnecessary. All statements are subject to the free assessment of evidence by the judge or the jury.⁶

- 22 To further understand the implication of Gottwald's words, in the common law system, the responsibility for discovering the truth is entrusted to the adversarial activities of the parties. Therefore, differences in the functions of third parties, experts, and parties as evidence should be dealt with in their strategies as the parties' own responsibility. If so, it follows that there is no need to categorize third parties, experts, and parties by blackletter rules. In contrast, under the continental law system, the court is responsible for discovering the truth, and it is necessary to establish detailed procedural rules as blackletter in accordance with the function of evidence in order to control the proving activities of the parties.

3.2 Witnesses

- 23 A witness is a third party who shall report facts that she has experienced in the past. In Germany and Japan, the concept of 'witness' requires clarity to enable distinction with expert and the party. This is because which provision of the law applies depends on whether or not a person falls under the category of a witness. While the distinction between witness and party is relatively easy, the distinction between witness and expert can sometimes be confusing. For example, suppose a patient died during a surgical operation, and the bereaved family filed a suit for damages against the doctor who performed the operation. In this case, if another doctor who was present as an assistant in this operation is required to state in the court whether the defendant's operation was appropriate based on her professional knowledge, is this assistant doctor a witness or an expert? The answer is that she is a witness. Because, although she states based on her professional knowledge, she is a person who reports the facts of her own experience, and no other person who did not present at the surgery can substitute for her. Therefore, the provisions of a witness shall apply when questioning her.⁷ In this way, witnesses who can testify more appropriately and accurately than ordinary people because of their expert knowledge are called 'expert witnesses' in Germany and Japan. In order to avoid misunderstanding, we should confirm again as follows. In the continental law countries, witnesses and experts are different categories, and so-called 'expert witnesses' are classified as witnesses. On the other hand, in the common law countries, there is only one category of human evidence. So, witnesses and experts in the continental law countries are always classified as witnesses in any case in the

⁶ P Gottwald's written response to the author's written interview.

⁷ Art 414 GCCP, Art 217 JCCP.

common law countries. Rather, the type of witnesses called 'expert witness' in the continental law countries is sometimes called 'hybrid witnesses' in the United States.

- 24 The way in which witnesses are examined also differs between countries. In common law countries and continental law countries with adversarial natures such as Japan, questions are conducted in the following order. First, direct-examination is conducted by the party who applied for the witness. Then, it is followed by cross-examination by the other party and redirect-examination by the applying party. Finally, the judges may also conduct their own questioning as a supplement, at least in Japan. In Germany, by contrast, witnesses (and also experts and parties) are examined by the court. Firstly, any witness is questioned by the presiding judge. If the court consists of more than one judge, the other judges may ask additional questions.⁸ The parties also may be allowed to put questions to the witness. With permission of the presiding judge, parties and their lawyers conduct direct questions.⁹ In Germany there is no system of cross-examination. In countries where the examination of witnesses is initiated by the parties, such as the United States, examination of witnesses is mainly conducted in a question-and-answer manner, while in countries where it is initiated by the judge, such as Germany, it is more likely that it is done in a narrative way by the witnesses.
- 25 In countries that adopt the question-and-answer manner initiated by the parties, courts need to control undue examination. For example, rule 611 (a) of the Federal Rules of Evidence in the US provides that:

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.¹⁰

- 26 As another example, Article 115 of the Supreme Court Rules of Civil Procedure in Japan have the following provisions. Paragraph 1 provides that 'Questions shall be as specific and particular as possible.' Paragraph 2 provides that:

The parties shall not ask the questions listed in items (1) through (6). However, this does not apply to the questions listed in items (2) through (6) if there are justifiable grounds for doing so. (1) questions that insult or embarrass a witness; (2) leading questions; (3) questions that duplicate questions already asked; (4) questions that are not relevant to the issue; (5) questions asking for an opinion; (6) questions asking witnesses to state facts they have not directly experienced.¹¹

⁸ Art 396 GCCP.

⁹ Art 397 GCCP.

¹⁰ Rule 611 (a) USFRE.

¹¹ Art 115 (1)(2) Supreme Court Rules (Japan).

- 27 Of particular comparative concern with regard to the examination of witnesses is the issue of whether or not it is permissible to rehearse potential witnesses in advance. On this issue, some countries are fairly lenient on rehearsing potential witnesses in order to properly address the questioning of witnesses, while others considerably restrict prior contact with potential witnesses.
- 28 For example, in the United States, rehearsals for potential witnesses are not only permitted but rather expected. One of a lawyer's obligations is to try to learn about what the witnesses will say. This fits under the heading investigation. Failure to do investigation means that the lawyer is not properly doing her job.¹² The reality is the rehearsals are necessary because the opposing lawyer will try to get the witness to say without realizing how the testimony will be used to create a misleading impression. Particularly nowadays with heavy reliance on electronic communication rather than face-to-face talk or talk over the phone, the lawyer may know that the other side has a lot of detailed information that is familiar to the lawyer due to work on the case but which the witness does not remember in any detail. Hence it is the professional obligation of the lawyer to refresh the witness's recollection. Another and related reason why the lawyer must prepare the witness is that most people have little experience with being witnesses. The lawyer must therefore educate them about what is expected and the possible pitfalls of giving testimony. Japan and Argentina are roughly the same. In Israel, it is even the duty of parties and their lawyers to rehearse potential witnesses, because there is a rule that a party shall not bring a witness to court unless she knows what the witness is going to say. Therefore, lawyers prepare their witnesses and also cross-examine them during preparation, to ensure that they do not become confused when they are cross-examined by the other party. Also, lawyers may indicate the points that they expect the witness to emphasize in his testimony in court. However, of course, lawyers must not change the content of the testimony in such a way that the witness commits perjury.
- 29 By contrast, in some countries rehearsals for potential witnesses are basically not allowed. Whether or not to adopt such a policy has nothing to do with whether it belongs to continental law countries or to common law countries. Let us look at Germany as a typical example of a continental law country, and the UK as a typical example of a common law country. In Germany, for a long time, the behaviour of lawyers was not regulated by statute or formal regulations. Until 1987, when the German Federal Bar Association issued informal Professional Law Guidelines. According to these guidelines,

¹² The customary term in the US for witness preparation is 'woodshedding' the witness. The witness's lawyer tries to alert the witness to the pitfalls she will confront and may school the witness in revealing as little as possible. Whether or not witnesses would testify more accurately and honestly without preparation, woodshedding is ingrained in the US adversary system to the extent that the lawyer who does not prepare a witness may be charged with falling to satisfy his professional obligations. See R Marcus, M Redish, E Sherman and J Pfander, *Civil Procedure: A Modern Approach* (7th edn, West Academic Publishing 2018) 365.

the lawyer was forbidden ‘any appearance to influence a witness’.¹³ By decision of 14 July 1987, the German Constitutional Court decided that such informal rules are insufficient to create professional duties.¹⁴ According to the authorization by the Law Regulating the Profession of Lawyers,¹⁵ the German Federal Bar Association issued the Professional Regulation for Lawyers on 22 March 1999.¹⁶ This regulation is however silent with regard to witness rehearsals. The prevailing opinion holds that the previous old informal guideline has survived in this regard. The reason why rehearsals for witnesses are prohibited in Germany is closely related to the German system in which the examination of witnesses is led by the court. The examination of witnesses by the court is based on the idea that this is the best way to ascertain the truth, and the lawyer helps to find the truth. To some extent, the mere contact and telling to the witness why his testimony is needed can influence the later testimony, but this is unavoidable. The lawyer may, however, not dictate or recommend the content of the testimony. If the judge becomes suspicious that the witness may be coached, he may in detail ask the witness why she has such concrete knowledge.¹⁷ If the suspicion remains, the judge can order the witness to swear an oath or finally will not believe the testimony as a free assessment of means of evidence.¹⁸ In addition, the judge or the lawyer of the opponent can report a violation of professional duties to the Bar Association which can impose professional sanctions. Similarly, in England, rehearsals for potential witnesses are prohibited. Lawyers are not allowed to prepare witnesses on what they should say. This has been underlined for criminal proceedings by the UK Court of Appeal.¹⁹ There is no similar judgment for civil proceedings, so the law is somewhat unclear. However, there appears to be one authority in which *Momodou* has been cited with apparent approval.²⁰ Therefore, the Bar Council in their Guidance advises that, until further authority emerges, it would be prudent to proceed on the basis that the general principles set out in *Momodou* also apply to civil proceedings.²¹ However, as an exception, witness familiarization is allowed both in criminal and in civil cases, ie, arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. As the Bar Council puts it in their guidance:

¹³ Promulgated according to Sec. 177 (2) Bundesrechtsanwaltsordnung (Law Regulating the Profession of Lawyers); reprinted in Lingenberg and Hummel, *Kommentar zu den Grundsätzen des anwaltlichen Standesrechts*, 1981, 66.

¹⁴ Case 1 BvR 537/81, 1 BvR 195/87 (Constitutional Court, Germany), Order 14 July 1987 [Neue Juristische Wochenschrift 1988, 191].

¹⁵ Art 59b Bundesrechtsanwaltsordnung 1959 (Law Regulating the Profession of Lawyers) (Germany).

¹⁶ Berufsordnung of 22 March 1999 (Professional Regulation for Lawyers) [BRAB-Mitteilungen (1999) (3) 123] (Germany).

¹⁷ Art 396(2) GCCP.

¹⁸ Art 286 GCCP.

¹⁹ *Momodou v In R* (Court of Appeal, UK) [2005] EWCA Crim 177 para 61-65.

²⁰ *Ultraframe (UK) Ltd v Fielding* (Court of Appeal, UK) [2006] EWHC 1638 (Ch).

²¹ The Bar Council Ethics Committee, ‘Witness Preparation’ (2019) para 27 <<https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Witness-preparation-guidance-2019.pdf>> accessed 29 June 2023.

such arrangements prevent witnesses from being disadvantaged by ignorance of the process or taken by surprise at the way in which it works, and so assist witnesses to give their best at the trial or hearing in question without any risk that their evidence may become anything other than the witnesses' own uncontaminated evidence. As such, witness familiarisation arrangements are not only permissible; they are to be welcomed.²²

The same is true for civil cases.

3.3 Experts

- 30 The expert is a person who shall provide the court with professional opinions necessary for deciding a case. As already stated, in continental law countries, experts are classified in a separate category from witnesses, with different procedural rules for each, whereas in common law countries, experts are classified as witnesses, and are subject to the same procedural rules as witnesses. Thus, although there are differences between continental law and common law systems in terms of legal classification and the application of procedural rules, there is not much difference in the actual handling in practice. For example, even in the US courts, non-expert witnesses are not permitted to offer opinions, such as 'defendant drove negligently'. An exception is made for what is called 'lay opinion', which enables a witness to describe accurately what she observed and described in court. For example, consider 'She looked surprised when she walked into the tree'. A witness would usually be permitted to express that opinion about the expression on the person's face. But ordinary witnesses' expressions of opinion may not go beyond that elaboration on what they observed. Expert witnesses, on the other hand, may offer opinions about matters they did not observe, such as the cause of auto accidents, causation of medical conditions, competence of professional services and the like.
- 31 Given the above differences in the categorization of experts, the differences in the system that have practical significance are who appoints the experts and what role is entrusted to the experts.
- 32 In Germany, for example, the determination of the number of experts and the selection of persons is made only by the courts,²³ with consideration of the wishes of the parties. If both parties agree about the person to be nominated, the court has to appoint this person.²⁴ Courts have lists of potential publicly appointed experts. If there are experts for the relevant area, the court shall appoint them and choose other persons as experts only with regard to special circumstances.²⁵ The lists are prepared by the court administration office informally together with the judges. Those lists are, however,

²² Ibid para 6.

²³ Art 404(1) GCCP.

²⁴ Art 404(5) GCCP.

²⁵ Art 404(3) GCCP.

neither complete nor exclusive. Parties may nominate other experts and the court can appoint them. If the appointed person is in an official position, she is obliged to accept the appointment.²⁶ Under the German law, the expert appointed by the court is regarded as a person supporting the judge to find the truth. Therefore, the expert is akin to an officer of the court. She must be independent like a judge and may be challenged for reasons of possible bias also like a judge.²⁷ The court shall direct the conduct of the expert, and may instruct the expert about the nature and scope of her work.²⁸ The expert, in general, has to prepare a written opinion within a time limit fixed by the court.²⁹ If the parties are unsatisfied with the expertise of the expert and object to it, the court has either to order a supplement of the opinion or to appear in oral court hearing to explain his expertise and to answer the questions of the parties.³⁰ The court-appointed experts are paid by the court according to the tariff provided by the Judicial Remuneration and Compensation Act.³¹ These payments are a part of the necessary costs of the proceedings which have to finally be paid by the parties according to the outcome of the case.³² To prepare the case or to challenge the expert's opinion, the party may in addition engage a private expert. When the party presents the opinion of a private expert who is not ordered by the court, it is considered as a part of his own pleading. The private opinion may give cause to appoint an expert or to order a supplement of the expertise or a completely new expertise.³³ When the private expert is examined in court, he testifies as an ordinary witness. The party who presents the private opinion bears the costs. However, if the court finds that the private opinion was necessary to prepare the claim or to defend against the opinion of the official expert, these costs are treated as necessary costs of the proceedings which both parties have to pay according to the outcome of the lawsuit.³⁴

- 33 As for Japan, there are several similarities with the system described for Germany above. However, there are some significant differences from Germany. The most important difference is the initiative to use public experts as human evidence who provide the testimony. In Germany, not only may the court appoint an expert at the request of the parties,³⁵ but the court may also appoint an expert *ex officio* on its own initiative.³⁶ On the other hand, in Japan, where the adversarial elements are relatively strong among continental law countries, the process for the appointment of experts begins only with the initiative of the parties. To be more concrete, a petition to appoint experts must be

²⁶ Art 407 GCCP.

²⁷ Art 406 GCCP.

²⁸ Art 404a(1)GCCP.

²⁹ Art 411 GCCP.

³⁰ Art 411(3) and (4) GCCP.

³¹ Art 413 GCCP.

³² Art 91 GCCP.

³³ Art 411(3)(2), 412(1) GCCP.

³⁴ Art 91 GCCP.

³⁵ Art 403 GCCP.

³⁶ Art 144(1) GCCP.

filed by either or both parties.³⁷ In other words, the use of experts by the initiative of the court is not permitted. In this respect, witnesses and experts are treated in the same procedural manner in Japan as the common law countries, and this is the consequences of the party-led system as introduced by the 1948 amendment of the Code of Civil Procedure after the war. This is the uniqueness of the Japanese system among civil law countries. However, the selection of the individual experts shall be made by the court.³⁸ The parties may express their desires to the court regarding the selection of experts, but it is only meant as one of the information for the court's selection. This is the difference between the Japanese system and the common law system. And in this respect, Japan's system is the same as the other continental law systems. The experts selected in this way is the persons the court considers to be neutral from both parties.

- 34 In contrast in the United States, judges are basically not involved in the selection of experts, and the role of experts in court is something like a private army for the party. To avoid misunderstanding, it is theoretically possible in the United States to do the same as in Germany.³⁹ However, the reality is that American judges rarely do that. There is no 'official' list of 'certified' experts in the US. Instead, marketing expert witness services is a fairly big business. The ordinary role of expert in American courts is therefore the 'battle of the experts' – each side puts forward its hired expert to present its view of the case.⁴⁰ Not only the judge but the lay jury is left to evaluate those presentations, even if they are about very complicated matters. Prominent illustrations include claims that exposure to certain substances cause certain medical disorders, and can involve extremely intricate presentations of voluminous experimental efforts. Concern has grown about the risk that 'fake' expertise will delude American juries.⁴¹ In 1993, the US Supreme Court directed that federal judges act as 'gatekeepers' and exclude expert opinions proffered by parties when they found these opinions unreliable.⁴² Since then, the Evidence Rule has been revised to implement that directive.⁴³ Resolution of these issues often absorbs large quantities of lawyer and judicial time, and is the subject of multi-volume treatises.⁴⁴ In terms of access to evidence, the disclosure requirements applicable to expert witnesses play a central role. Often in toxic exposure and other litigation, that expert disclosure and expert depositions are the last piece of discovery done in a case, and are followed by a defence

³⁷ Art 180-1 JCCP.

³⁸ Art 213 JCCP.

³⁹ See Rule 706 USFRCP (authorizing the court to appoint an expert of its own choosing).

⁴⁰ See eg, S R Gross, 'Expert Evidence' (1991) *Wisconsin Law Review* 1113, 1119 (reporting that in the 1980s experts testified in 86% of the civil trials before California state courts); M Green, 'Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation' (1992) 86 *Northwestern University Law Review* 643, 669 (between 1974 and 1989, the number of regularly-testifying experts in Cook County, Ill., increased 1500%, from 188 to 3100).

⁴¹ For such an argument, see P Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1991).

⁴² *Daubert v Merrell Dow Pharmaceuticals Inc* [509 U.S. 579 (1993)].

⁴³ See Rule 702 USFRE.

⁴⁴ See D Faigman, D Kaye, M Saks, J Sanders and E Chang (ed), *Modern Scientific Evidence* (Two Vol, West Academic Publishing 2017-2018).

motion for summary judgment asking the court to rule that the plaintiff's expert opinion evidence should be excluded, and that judgment should be entered for defendant on the ground that, without the expert evidence on causation, plaintiff cannot prevail in the case.

3.4 Parties

- 35 The parties are sometimes essential evidence for finding the facts, as well as being the subject of litigation. This is common in most judicial systems around the world. However, the classification and treatment of parties as evidence by procedural laws or rules are not same between countries. In particular, there are differences between many continental law countries and the common law countries as to whether parties are classified in a different category from witnesses and are treated differently, or whether parties are included in the same category as witnesses and naturally subject to the same treatment.
- 36 Germany, for example, is a typical example of a country that classifies parties into a separate category from witnesses. Originally, the German Code of Civil Procedure of 1877 did not have any kind of system to interview parties in court in order to procure evidence. In line with common Roman law and French law at the time, the 1877 Code contained rules on proof of facts by oath taken by a party. A party could demand an oath from the other party about the other party's own acts or the acts of his predecessor.⁴⁵ When the other party took the oath, this was full evidence for the sworn fact⁴⁶ and the court had to decide the case according to the oath.⁴⁷ This very formalistic way of finding the truth was replaced in 1933 under the influence of the Austrian Code of Civil Procedure of 1895 by the rules of interviewing parties in court as a subsidiary means to take evidence. This is the historical background behind the classification of parties into a separate category from witnesses in Germany. However, there is also substantial rationality in that the rules thus established are still maintained today. Parties are by definition partisan, and in that sense are neither independent nor neutral. Therefore, their testimony has low credibility as a default, and it makes sense both theoretically and practically to establish specific rules to cope with it.⁴⁸

⁴⁵ Art 445 GCCP (1877).

⁴⁶ Art 463(1) GCCP (1877).

⁴⁷ Art 460 GCCP (1877).

⁴⁸ It goes without saying that the parties as evidence is neither independent nor neutral and that their testimonies are not credible does not mean that the witnesses have the opposite nature. In reality, some witnesses may have no interest in either party and may be in a neutral position, but such witnesses are rather rare. Many of the witnesses have stakes in one party and are partisans in some sense. For example, when a big company is one of the parties, the employees of that company are typical. On the other hand, the whistle-blower employees of the company can be the partisan of the other party. The reason why many continental law countries treat parties and witnesses as separate categories is that while the parties always lack independence and impartiality with no exception, there is a great variety in their interests with the parties.

- 37 The rules specific to parties different from witnesses in Germany are as follows. Examination against parties can be conducted as a supplementary means of proof only when the proof by the other evidences does not sufficiently find the facts.⁴⁹ The court may not only initiate examination of a party on the motion of the other party, but can also initiate examination of a party or both parties *ex officio* on its own initiative.⁵⁰ Questions to the parties are mainly asked by the judge.⁵¹ If the party refuses to be questioned or refuses to comply with the court's request, the court must take into consideration all the circumstances including the grounds for the reason of the refusal and determine whether the facts have been proved or not.⁵² The same applies when the party refuses to make a statement or to take an oath.⁵³ Whether or not the testified party has committed perjury as a crime in the event of false testimony depends on whether or not the party has sworn an oath at the time of the testimony. In accordance with German Penal Code, if the witness has not sworn, perjury should not be applied, but if she has sworn, she may be charged with perjury and sentenced to imprisonment.⁵⁴
- 38 Japan has rules that are to a considerable extent similar as those in Germany. However, there are also important differences. First, in Germany, the parties are positioned as supplementary evidence only when the other evidence does not sufficiently clarify the facts, but in Japan, this supplementary requirement has been abolished.⁵⁵ In the past, Japan also followed the German Code of Civil Procedure and placed the supplementary requirement on the examination of the parties. This was because it was considered that it would be difficult to obtain objective and reliable information from parties who have a direct interest in the outcome of the litigation. However, there had been strong criticism that it is usually the parties who know best the truth about the case, and that the testimony of the parties is not always unreliable. In addition, it was difficult to say that the supplementary requirement had been complied with in the actual practice of court, and the significance of the supplementary requirement has been diluted. Therefore, in Japan, when the Code of Civil Procedure was revised in 1996, the supplementary requirement was deleted. Second, in Japan, the provisions of witnesses are applied *mutatis mutandis* to the procedures for questioning the parties.⁵⁶ Therefore, in Japan, the order of the examination to the parties in the ordinary case is, first direct-examination by the parties' lawyer, cross-examination by the opposing party, and supplementary examination by the court if necessary, whereas in Germany, the court almost exclusively questions to the parties. Third, in Japan, unlike Germany, even if a

⁴⁹ Art 445 GCCP.

⁵⁰ Art 448 GCCP.

⁵¹ Art 451, 375 GCCP.

⁵² Art 446 GCCP.

⁵³ Art 453(2) GCCP.

⁵⁴ Art 153, 154 Penal Code (Germany).

⁵⁵ Art 207 JCCP.

⁵⁶ Art 210, 202 JCCP.

party gives false testimony under oath, she is not charged with perjury. However, administrative monetary sanctions may be imposed.⁵⁷

4 PHYSICAL EVIDENCE

4.1 General Remarks

- 39 In this Chapter, ‘documentary evidence’ and ‘material evidence’ are grouped by the higher-level concept of ‘physical evidence’. Both of these have in common that physical objects are used as evidence, unlike ‘testimonial evidence’ in which human testimonies are used as evidence. However, documentary evidence and material evidence differ greatly in their function as evidence. When a certain object appears in court as material evidence, the shape, nature or function of that object is the evidence. In contrast, when a certain object appears in court as documentary evidence, the evidence is what is written on the object. Therefore, when a piece of paper is presented as evidence to prove a contract, the piece of paper is documentary evidence, because what is written on the paper serves as the means of proof. On the other hand, when a piece of paper is presented as evidence to prove that the fact that it was made with new technology that did not exist at the time the contract was supposedly concluded, the piece of paper is material evidence. This is because what is written on the paper is not the issue in the case, but the physical nature of the paper is the target of proof.

4.2 Documents

4.2.1 Definition of Document

- 40 A document is a tangible object upon which the mental state (recognition, intention, thought, judgment, report, emotion, etc) of the creator is expressed by means of characters or other symbols. A tangible object as a document is not limited to paper, and could be anything such as wood, cloth, metal, leather, synthetic resin, as long as the mental state of the creator is expressed on the object. Characters include foreign words, ancient words, and braille.
- 41 In modern times, the development of recording methods has expanded the reach of the legal term of document to a variety of media other than paper, which has traditionally typified documents for hundreds of years. Examples of new types of documents include, audio, video or audio-video recordings (eg, surveillance footage, zoom meeting recording), screenshot images (eg, screenshot of a web page containing a defamatory photo), electronic records on computer hard disks (eg, employee records, past case files), in addition to classic photos, films and tapes.

⁵⁷ Art 209 JCCP.

4.2.2 Official Documents

- 42 In the medieval court system of many countries, documents were sometimes dispositive in determining the outcome of the case. In contrast, in modern civil litigation, documents are generally not treated as dispositive, because most countries adopt the principle of free assessment of evidence by fact-finder. However, even in modern times, documents belonging to a certain type are given status almost like dispositive in many countries. For example, in the United States, records of governmental activities are often nearly irrefutable evidence that what they say is true.⁵⁸
- 43 A typical example of giving a special status to official documents can be found in the German Code of Civil Procedure. The German Code distinguishes between official documents and private documents for the treatment as evidence in civil litigation. With regard to official documents, when they are drawn up within the scope of the ordinary duties of official authority, they furnish the full proof for the recorded statements or for the events which were recorded.⁵⁹ Other official documents furnish full proof as to the facts attested therein.⁶⁰ Electronic documents created by official authorities are treated like ordinary public documents.⁶¹ In contrast, a private document is not treated in such a way unconditionally, unlike official documents that are treated specially just because they are public documents. A private document furnishes the full proof that they were made by the person claimed to be its creator only if it bears the signature of the creator or handwriting certified by a notary public.⁶² In other words, even a private document with the signature of the creator only furnishes the full proof of its authenticity, not full proof of its contents as is the case with an official document. 'Full proof' means that the evidence alone constitutes a legal fictitious completion of proof and precludes the free assessment power of the court. Therefore, as far as private documents are concerned, courts are still free to assess their content.
- 44 In Japan, similar to Germany, the Code of Civil Procedure distinguishes between official documents and private documents as evidence. However, the legal effects of the Code are different from those of Germany. With regard to official documents, if they can be recognized as official documents from their format, their authenticity is presumed.⁶³ Since most of public documents have a fixed format and are more difficult to forge than private documents, the burden of proof shall be placed on those who contest their authenticity. As it is only a presumption, unlike the German 'full proof', the other party can overturn this presumption by rebuttal evidence. In addition, the subject of 'full proof' in Germany is the content of the document, but the subject of 'presumption' in Japan is the authenticity of the document, which is another difference between

⁵⁸ Rule 803(8), 902 USFRE.

⁵⁹ Art 415(1) GCCP.

⁶⁰ Art 418(1) GCCP.

⁶¹ Art 416a GCCP.

⁶² Art 416 GCCP.

⁶³ Art 228(2) JCCP.

Germany and Japan. With regard to private documents, if it bears the signature or seal of the creator, its authenticity is presumed. In private documents, the signature and the authenticity are linked in common with Germany, but the legal effect is not ‘full proof’ but ‘presumption’.

4.2.3 Best Evidence Rule

- 45 One of the rules of evidence for documents that must be addressed is the ‘best evidence rule’ in the common law countries. In principle, the ‘best evidence rule’ is not necessarily limited to documents, but in reality, it functions as a legal principle that places superiority on the original documents, and is generally well known as the ‘original document rule’. This rule has its roots in eighteenth century British law. At that time, copying documents was handwritten, and hence their accuracy was more vulnerable. Born in this way, this rule was subsequently inherited by other common law countries including the United States. However, it should be noted that the best evidence rule is not a legal requirement that a party can only use the ‘best’ evidence to support its case. One American book states as follows.
- 46 Early in the history of evidence law, it was frequently stated as fundamental doctrine that a party must produce the best evidence available. How strictly this broad principle was followed even at early common law is questionable, and despite its early reiteration in earlier American authorities, it clearly has been rejected today. Under modern authority, litigants are generally allowed freedom of choice among admissible forms of evidence, and they may choose to offer ‘lesser’ forms of proof for reasons of practicality, economy, or tactics.⁶⁴
- 47 Nevertheless, for the parties in reality, there are practical reasons to produce the ‘best’ evidence for its side even if there is no legal requirement to do that. For one thing, failure to produce certain available evidence can support the inference that the evidence not produced would hurt the party's case. Today, with the development of modern technology, the reach of the best evidence rule extends beyond writing to include digital materials and other recorded materials.
- 48 The best evidence rule only applies when the evidence is offered in order to prove the content of the document or any other recording. Therefore, the fact that somebody made a recording of an event is irrelevant if the witness testifies she saw the event and can describe what happened. You might say that the recording is ‘better’ evidence of what happened in many instances, but the witness is not testifying about the content of the video, but instead about her own recollection of the events described in the testimony. In other words, the ‘original’ is required only if the party is trying to prove its contents.

⁶⁴ C Mueller and L Kirkpatrick, *Evidence* (5th edn, 2012) 1159.

- 49 The next question is what 'original' means. Rule 1001 (d) of the Federal Rules of Evidence in US defines 'original' as follows.

An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout - or other output readable by sight - if it accurately reflects the information. An 'original' of a photograph includes the negative or a print from it.⁶⁵

- 50 This rule says that there could be multiple 'originals'. For example, at the closing of a corporate deal, the parties may sign multiple copies of the agreements. Each of those is intended to be an original.

Typically, multiple originals are found in the case of preprinted receipts, credit card vouchers, deposit slips, bills of lading, and offers to buy or sell that are included in a formpack where the signature and all fill-in terms are reproduced on succeeding carbon or carbonless copies.⁶⁶

- 51 Then, the next question is whether the duplicate is entirely not admissible as evidence? The answer today is, unlike in the past, it may be admissible. We have left the age when the best evidence rule was born or needed a scrivener for duplicate documents far behind, and modern methods permit routine creation of reliable duplicates that are nearly identical with the original. Hence, even when a party wants to prove the content of a document, the US Federal Rules of Evidence say that 'A duplicate is admissible to the same extent as the original unless a genuine question is raised by the original's authenticity'.⁶⁷ In addition, several modern methods make it easier to produce admissible duplicates. The US Federal Rules say that 'A duplicate means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original'.⁶⁸ Hence, a photocopy of the original is a duplicate admissible when the rule directs that the original be produced.
- 52 There are also some exceptions to the requirement for the original, even though the party is seeking to prove the contents of the evidence. These exceptions are directed by the US Federal Rules.
- 53 An original is not required, and other evidence of the content of a writing, recording, or photograph is admissible if:

⁶⁵ Rule 1001(d) USFRE.

⁶⁶ Mueller and Kirkpatrick (n 64) 1169.

⁶⁷ Rule 1003 USFRE.

⁶⁸ Rule 1001(e) USFRE.

(a) all the originals are lost or destroyed, and not by the proponent [of the evidence] acting in bad faith;

(b) an original cannot be obtained by any available judicial process;

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

(d) the writing, recording, or photograph is not closely related to a controlling issue.⁶⁹

- 54 When the above rule is satisfied, 'secondary evidence' such as witness testimony about the contents of the document, is admissible.⁷⁰

4.3 Material Evidence

- 55 Material evidence is a physical object as evidence in and of itself, and the court directly perceives the shape, nature, or function of the object through its own five senses. Material evidence is usually the essential evidence in criminal cases, but it often plays an important role in civil cases as well, in any country.
- 56 For example, in an American case in which the plaintiff was a mechanic injured when a tyre exploded while he was mounting it on a car, the plaintiff's manager had the tyre on the mounting taken to his office after calling an ambulance for the plaintiff. Later, experts for both plaintiff and defendant examined the tyre in the manager's office, and the tyre was brought to court for trial. The tyre so examined was a 'white wall' tyre. But at trial, the plaintiff testified that the tyre that exploded was a 'black wall' tyre, even though the manager testified that the tyre was the one that exploded. The trial court dismissed the case because considering the tyre in court would 'fly in the face of Plaintiff's clear and unequivocal denial that this was the tire that injured him'. The court of appeals ruled this dismissal was an error.⁷¹ All that is needed to establish that the item in court is the 'real' item is evidence that would suffice to permit a jury to find that it is the real thing.⁷²
- 57 In the continental law countries such as Germany and Japan, material evidence belongs to an independent category of evidence and has its own procedural rules in the Code of Civil Procedure. In those countries, material evidence is given the name 'evidence by

⁶⁹ Art 1004 USFRE.

⁷⁰ See Mueller and Kirkpatrick (n 64) 1185-1192.

⁷¹ *Guenther v Armstrong Rubber Co* (Court of Appeal, Third Circuit, US) [406 F.2d 1315 (1969)].

⁷² Rule 901 USFRE.

inspection' because it is examined as evidence directly by the court through the inspection of judges. For example, the rules of the German Code are as follows. Inspection of material evidence is generally initiated at the request of a party.⁷³ If the material evidence requested by the party is relevant to the facts in dispute, the court shall inspect the object. In addition, the court can even order the inspection of material evidence *ex officio* when it finds necessary.⁷⁴ The court may freely assess the result of the inspection.⁷⁵ For the inspection, the court may call one or more experts for their advice.⁷⁶ Examinations to determine parentage are also traditionally classified as 'inspection'.⁷⁷ The rules for material evidences in Japan are similar to those in Germany in many respects, but there is one significant difference. Japan has adopted a system with relatively strong adversarial elements, so unlike Germany, inspection of material evidence by the initiative of the court *ex officio* is prohibited.⁷⁸ Therefore, the inspection of material evidence should be conducted only at the request of a or both parties.

⁷³ Art 371(1) GCCP.

⁷⁴ Art 144(1) GCCP.

⁷⁵ Art 286 GCCP.

⁷⁶ Art 372(1) GCCP.

⁷⁷ Art 372a GCCP.

⁷⁸ Art 232(1) JCCP.

ABBREVIATIONS AND ACRONYMS

Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
ch	chapter
edn	edition/editions
ed	editor/editors
etc	et cetera
eg	<i>exempli gratia</i> (for example)
EU	European Union
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations 2021 (Israel)
JCCP	Code of Civil Procedure (Japan)
JPY	Japanese Yen
n	footnote (internal, ie, within the same chapter)
no	number/numbers
NIS	Israeli New Shekel
para	paragraph/paragraphs
Sec	Section/Sections
supp	supplement/supplements
UK	United Kingdom
UKCPR	Civil Procedure Rules 1998 (UK)
US / USA	United States of America
USFRCP	Federal Rules of Civil Procedure (US)
USFRE	Federal Rules of Evidence (US)
USD	United States Dollar
v	versus
vol	volume/volumes

LEGISLATION

Berufsordnung of 22 March 1999 (Professional Regulation for Lawyers) [BRAK-Mitteilungen (1999) (3) 123] (Germany).

Bundesrechtsanwaltsordnung 1959 (Law Regulating the Profession of Lawyers) (Germany)

Code of Civil Procedure (Japan).

Court Constitution Act (Japan)

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

Penal Code (Germany).

Supreme Court Rules (Japan)

Zivilprozessordnung (Code of Civil Procedure) (Austria).

Zivilprozessordnung (Code of Civil Procedure) (Germany).

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