

PART VII

ACCESS TO INFORMATION AND EVIDENCE

CHAPTER 5

Admissibility of Evidence

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1 INTRODUCTION

- 1 The present chapter focuses on issues of admissibility and exclusion of evidence. Four main topics were identified as pertinent to this analysis, which are 1) relevance; 2) illegally obtained evidence; 3) hearsay; 4) undue prejudice. Privileges may also be included into the standards of admission in legal systems with broad recognition of in advance judicial control of evidence gathering.
- 2 The analysis of the admissibility of evidence could include two main groups of issues. First, issues referring to the limits of the parties' right to access to the evidence before the trial begins. Second, issues referring to the admissibility of the evidence presented or required to be produced during the proceedings or at trial.
- 3 Although it is not easy and probably not strictly possible to draw a rigid line between the two issues, in this chapter we will focus on the second issue. The subject of access to evidence has been treated in Chapter 1 and 3 of Part VII, where pre-trial mechanisms that enable lawyers to demand evidence without any advance judicial review were deeply examined. Here, we will concentrate on judicial review of evidence gathering during court proceedings, whether in jury trial settings (in which judges have a predominant 'gate keeping role') or in 'continental style' civil procedure (where courts have a more general control over compelled production of evidence).
- 4 As explained in previous chapters, there are significant differences between legal systems based on the broad recognition of pre-trial mechanisms to obtain the counterparty's records (subpoenas) or to depose witnesses before the judicial proceedings begin, and those with strong advanced judicial intervention over evidence gathering. In the last jurisdictions (in general terms, civil law countries), the analysis of (legal) limits to access to evidence overlap with those of admissibility of evidence.
- 5 In all the analysed legal systems, evidence admissibility control includes common factors, such as the supervision of the opportunity in which the evidence can be presented (with some differences over preclusion effect) or the exclusion of evidence obtained in violation of fundamental rights, confidentiality requirements or protection against self-incrimination. Relevance is also a common requirement for evidence admission, although some differences can be noted in the parameters used by courts to evaluate it.
- 6 In the US Federal Rules of Evidence (USFRE) and similar state regulations, some other criteria can be found, justified in their jury trial setting.¹ In those systems, as explained

¹ We allude to a jury trial 'setting' to express that the American procedural system (and especially its evidentiary law) is in many ways structured as if most cases were decided in that way. Although this is not the case in real life, the rules of evidence provide for jury trials and for trials in which the fact decision maker is a professional judge. As Taruffo explains, in the last case, judges act 'in the shadow' of the jury. See M Taruffo, *La prueba* (Marcial Pons 2008) 49.

before, judges have a predominant ‘gatekeeping’ role, in order to prevent undue influence over jurors. To do that, they should filter the evidence presented at trial, to avoid juries (common citizens) from being emotionally or irrationally influenced by evidence of low epistemic quality.² Exclusionary rules like the rule against hearsay³, the ‘character’ evidence prohibition⁴, or the standard-based reliability test established by the Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* to guide trial courts when deciding on the admission of expert testimony, are examples of that filtering mission.⁵

- 7 In non-jury-trial systems, where professional judges are supposedly better equipped to resist such inappropriate emotional influence, the epistemic quality of the evidence is not a main problem of the admission stage. If the evidence is relevant (useful to decide over the facts) and does not violate fundamental rights or privileges, it will be generally admitted and its quality (or ‘weight’) will be evaluated when deciding on the existence of the controversial facts. An example of this principle (all relevant non-privileged proof is admissible), can be found in Rule 25.1 of the Reporter’s Study on the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure (PTCP).⁶
- 8 Also, in the recent Model European Rules of Civil Procedure (ERCP), explicitly influenced in this point by the just referred PTCP ‘Reporter’s Study’, states:

Rule 89. Relevance

(1) Relevant evidence is admissible.

² When presenting the main hypothesis that could explain the remarkable peculiarities of the ‘American way’ on law of evidence, Damaska refer to two main competing theories. The first one, led by Thayer, finds the fundamental reason of that particularism in the jury system. The second theory focuses instead on the way in which the parties develop their strategies in court (adversarial system). See J Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown 1989) 266. Damaska considers that both theories are not incompatible and that their explanatory quality probably depends on the concrete aspect of fact finding that we pay attention to. See M Damaska, *El derecho probatorio a la deriva* (Marcial Pons 2015), 20 (emphasis added): ‘if we pay attention to access to evidence, the competitiveness can justify the adversarial system [theory]. And if we direct it towards some rules of evidence exclusion, the jury system [theory] would be the most appropriate.’

³ Rule 801, 802 USFRE.

⁴ Rule 404(a) USFRE. See for the foundations D P Leonard, ‘In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character’ (1998) 73 Indiana Law Journal 1161.

⁵ *Daubert v Merrell Dow Pharmaceuticals Inc* [509 U.S. 579 (1993)]. See S Haack, *Filosofía del derecho y de la prueba* (Marcial Pons 2020), 157-345.

⁶ G Hazard, R Stürner, M Taruffo and A Gidi, ‘ALI/UNIDROIT Principles of Transnational Civil Procedure. Appendix: rules of transnational civil procedure’ (Study LXXVI, UNIDROIT 2005). The comment to Rule 25.1 in this Study explains that ‘[t]he basic principle is that any factual information that is rationally useful in reaching judgment on the relevant facts of the case should be admissible as evidence.’ The 2001 version of the TRCP published by the reporters provided a similar solution on this matter. See G Hazard, R Stürner, M Taruffo and A Gidi, ‘Rules of Transnational Civil Procedure’ (2001) 833. <https://scholarship.law.upenn.edu/faculty_scholarship/1085> accessed 30 June 2023.

(2) *The court, whether of its own motion or on application by a party, shall exclude evidence that is irrelevant. Relevance is determined by the court by reference to the matters alleged in the parties' pleadings.*

- 9 Let's consider with some more detail the most important criteria to determine whether the evidence presented or required by the parties to be produced during the trial, is admissible.

2 TIME LIMITS AND PRECLUSION

- 10 In general, parties have certain time limitations to offer and produce the evidence in trial. Consequently, the evidence offered or presented departing from that time limit, will be -by rule - inadmissible.
- 11 However, preclusion's rigidity varies among legal systems.
- 12 In Argentina, for example, the Code of Civil Procedure (ACCP) establishes that, at the very beginning of the litigation (that is: together with the written claim for the plaintiff and with its response to the defendant), parties are required to: (1) present the evidence that they have in their possession (typically: documents); and (2) 'offer' the rest of the evidence (for example, scientific evidence, witnesses, direct judicial recognition of places, etc).⁷ In principle, if (1) they don't present evidence in their possession or (2) offer the rest at this early stage of the proceedings, they won't be able to do it in the future, except when new facts, new evidence or newly known evidence arise. If those time limits are not respected, the evidence is inadmissible (preclusion). However, the Supreme Court has developed a doctrine designed to relax this and other rigorous effects of preclusion, when it leads to an unreasonable adherence to formalities that excessively distance the judge from the truth ('manifest ritual excess' doctrine or *exceso ritual manifiesto*).⁸ Thanks to this flexible doctrine, courts have considerable discretionary powers to set aside the harsh effects of preclusion on the late offering of

⁷ 'Offering' evidence implies identifying the means of proof that are not in the offering-party's possession, and requiring the court to order its incorporation to the case. For example, parties must ask the court in this initial stage of the proceedings, to: i) appoint official experts, indicating the technical or scientific points that they will have to respond; ii) require information held by the counter party or third parties (ie, corporations, private persons, state agencies, etc.) like documents or registries; iii) personally inspect a place; iv) cite the witnesses to the future hearing (parties must indicate them at the beginning), etc.

⁸ The leading case of this doctrine is *Colalillo Domingo v España y Río de la Plata* (Supreme Court, Argentina), Judgment 18 September 1957 [Fallos: 238:550], in which the Supreme Court allowed a party to present his driver's licence way after the deadline to present evidence (he presented it at the appeal stage, when that kind of evidence is inadmissible) to dismiss the insurance company's defence based on the necessity of that license to be insured. The Supreme Court considered reasonable that the rules of civil procedure establish time limits to offer and produce evidence. However, those rules should be relaxed in some cases, because 'the civil process cannot be conducted in strictly formal terms. It is certainly not about the fulfilment of capricious rites, but about the development of procedures aimed at establishing the objective legal truth that is its north.'

evidence. However, in practice, the application of this doctrine is quite exceptional. It has only attenuated (and not very considerably in a day-to-day experience) the strength of the abovementioned principle.

- 13 In Japan, the court is in charge of determining a litigation plan, in order to hold a fair and speedy trial. For that purpose, especially in complex cases, they shall consult with both parties and formulate the plan, including the appropriate time for allegations and presentation of evidence according to the Japanese Code of Civil Procedure (JCCP).⁹ As a rule, 'allegations and evidence shall be presented at an appropriate time, in accordance with the status of progress in the litigation'.¹⁰ But preclusion is not as rigid as in other legal systems, because judges have considerable discretion to evaluate the party's intentional conduct or 'gross negligence', or the delay that late allegations or submissions of evidence may produce:

Art. 157(1): 'With regard to allegations or evidence that a party has presented after the time for doing so, whether intentionally or through gross negligence, if the court finds that such allegations or evidence will delay the conclusion of litigation, it may rule to dismiss them without prejudice, upon petition or *sua sponte*

(2) The provisions of the preceding paragraph also apply if a party does not give the necessary explanation ...'

- 14 In Germany, the Code of Civil Procedure (GCCP) also introduces considerable judicial discretion to limit preclusion effects, allowing courts to admit extemporaneous allegations or defences, which may include late presentation of evidence,¹¹ unless they produce undue delay on the proceedings or the party has no reasonable explanation for their conduct.¹²
- 15 The system of pleadings and discovery in the US introduce notable differences in terms of the opportunity to offer and produce evidence. The Federal Rules of Civil Procedure (USFRCP) do not require parties to identify the evidence they will rely upon in their initial pleadings. Instead, only a 'short and plain statement of the claim showing that the pleader is entitled to relief' is required.¹³ About ten years ago, the Federal Supreme

⁹ Art 147-3 JCCP.

¹⁰ Art 156 JCCP.

¹¹ According to Art 130 GCCP, the preparatory written pleadings should provide, along with other requirements '[t]he designation of the evidence that the party intends to submit as proof of any facts alleged, or by way of rebutting allegations, as well as a declaration regarding the evidence designated by the opponent.'

¹² Art 296 GCCP. See B Hess and O Jauerling, *Manual de Derecho procesal civil* (Marcial Pons 2011) 192-194.

¹³ Rule 8(a)(2) USFRCP.

Court added that the ‘factual’ allegations of the complaint must make the claim ‘plausible’.¹⁴ But none of that requires presentation of evidence.

- 16 Lawyers should not sign pleadings making factual assertions unless, based on an adequate investigation, they can certify that those allegations ‘have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.’¹⁵ So the most that the US system require at the initial stage (pleadings), is a lawyer's certification that there is evidentiary support or that there is good faith basis for expecting that, after discovery, these allegations will have evidentiary support.
- 17 In the ‘initial disclosure’, each side is called on to identify to the other side (not the court) the witnesses and documents it may use to support its claim or defence.¹⁶ This requirement was introduced nearly 30 years ago, but Marcus reports that parties routinely disobey this rule.
- 18 In addition, by a deadline set by the court the parties must provide extensive reports from their expert witnesses.¹⁷ After these reports are submitted, the other side can take the deposition of the expert witness. That may lead to a challenge to admissibility under *Daubert v Merrell Dow Pharmaceuticals Inc.*¹⁸
- 19 Then, shortly before trial, the parties are to exchange disclosures, which enumerate their likely witnesses and identify their likely testimony, and also enumerate their likely exhibits at trial.¹⁹ This is done by disclosure exchange between the parties, and does not involve presenting the court with the evidence.
- 20 Meanwhile, US discovery rules permit the parties to demand additional material from each other, and (using the subpoena) to demand it from non-parties. That discovery does not even go into the court's file ordinarily, as disclosure and discovery responses ‘must not be filed [in the court] until they are used in the proceeding.’²⁰ That ordinarily means on a motion for summary judgment or at trial.

¹⁴ *Bell Atlantic Corp v Twombly* (Supreme Court, US) [550 U.S. 544 (2007)] and *Ashcroft v Iqbal* (Supreme Court, US) [556 U.S. 662 (2009)].

¹⁵ Rule 11(b)(3) USFRCP.

¹⁶ Rule 26(a)(1)(a) USFRCP.

¹⁷ Rule 26(a)(2) USFRCP.

¹⁸ *Daubert v Merrell* (n 5).

¹⁹ Rule 26(a)(3) USFRCP.

²⁰ Rule 5(d)(1)(a) USFRCP.

- 21 An important feature of this regime is that there is requirement to present proposed evidence to the court, and the judge is not informed about the exchange.²¹ So unlike many other countries, in the US there is no general requirement to provide proposed evidence to the court before trial. Instead, if a party failed to disclose a witness or document or failed to identify a witness or document as required by formal discovery (Rule 26(a)(1) and (3) USFRCP), it cannot use the evidence in the case.²² The idea is that if a party failed to reveal the evidence to the other party at the required time the court should exclude it unless the failure to identify at the required time was 'substantially justified' or was 'harmless' (Rule 37(c)(1) USFRCP).²³

3 RELEVANCE

- 22 In Chapter 1 of Segment VII, we have explained the different functional scope of the parties' right to access to 'relevant' evidence. The amplitude of the discovery or disclosure mechanisms affect the definition of relevance in this preliminary phase of the litigation.
- 23 In this chapter, we won't focus on relevance as a parameter to determine the parties' right to subpoena records or to privately depose witnesses, but as an admission criteria to: (a) allow parties to present in trial previously obtained evidence (whether or not it was acquired by disclosure mechanisms or other ways to access to useful information); or (b) judicially decide whether or not some evidence should be obtained to be used in trial (ie, to design official experts, to conduct judicial inspections, to require third parties to give testimony, to present documents or to inform on their records).
- 24 Almost every legal system embraces the idea that only relevant evidence should be admitted in trial. But what counts as *relevant* evidence to admit them on trial? The Reporters' Study on the PTCP presents a general definition for this standard, considering that relevant evidence is any 'probative material that supports, contradicts, or weakens a contention of fact at issue in the proceeding.'²⁴ In similar sense, Taruffo speaks of relevance as a logical standard, according to which the only means of proof that should be admitted and taken into consideration by the decision maker, are those that maintain a logical connexion with the disputed facts, so that they can support a conclusion about

²¹ Rule 5(d)(1)(a) USFRCP provides that disclosure or discovery responses must not be filed in court unless they are used in the proceeding or the court orders filing. So almost all the discovery activity occurs outside the court's view and is not contained in the court's file. So, this exchange occurs entirely among the parties without direct involvement of the court.

²² Rule 37(c)(1) USFRCP. This provision was added nearly 30 years ago, and it is often invoked by the parties. It is not invoked by the court, which is largely unconcerned with these matters.

²³ There is significant case law on the application of Rule 37(c)(1) USFRCP, much of it dealing with belated 'supplementation' of expert witness reports. See C Wright, A Miller and R Marcus, *Federal Practice & Procedure* (3rd edn, Thomson Reuters 2010) sec 2289.1.

²⁴ G Hazard, R Stürner, M Taruffo and A Gidi 2005 (n 6) comment to Rule P-16A.

the truth of such facts.²⁵ This logical connexion – Taruffo explains – is cognitively instrumental: “relevant means of proof” are those that can offer a cognitive ground to establish the truth of the disputed facts, in other words, an information about that fact that is “superior to 0”.²⁶

- 25 In the US, Rule 401 USFRE determines that is evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. Also, Rule 402 USFRE determines a ‘positive’ or ‘inclusive’ version of the relevance standard,²⁷ that stipulates that every relevant evidence is admissible, unless otherwise provided by law (the Constitution, a federal law, the federal rules of evidence themselves or a Supreme Court regulation).
- 26 In Argentina, the court has to analyze, when deciding on the admissibility of the evidence offered by the parties, if it is ‘pertinent’, that is, if it refers to facts: a) alleged by the parties; b) conducive to the resolution of the case; and c) controversial (facts on which the parties do not agree).²⁸ Therefore, for evidence to be relevant, it should be effective to prove disputed (not admitted) circumstances that integrates the factual background necessary for the application of the law in the specific case.
- 27 In Israel, the standard is broad, requiring only that evidence make a fact more probable or less probable. As a rule, all relevant evidence is admissible, unless exclusion is justified by some other rule.²⁹
- 28 In Japan, the analysed requirement is not generally considered important to evaluate admissibility, because courts have significant discretion whether to accept or reject the evidence, including the issue of relevance.³⁰
- 29 In England, relevance is the main criterion regarding admissibility of evidence.³¹ The notion is used in case law in a broad sense. In words of Lord Steyn: ‘(...) to be relevant the evidence need merely have some tendency in logic and common sense to advance

²⁵ Taruffo (n 1) 38. The author adds that the relevance standard exists in every procedural system, although some of them do not stipulate it expressly (Ibid 38-40).

²⁶ See Ibid 38-40.

²⁷ See Ibid 40-41. Distinguishing inclusive (positive) or exclusionary (negative) versions of the relevance standard (also called ‘major’ or ‘minor’ versions of that principle) in comparative law, the author considers the Rule 402 USFRE as an example of the positive variant and the European continental approach as example of negative ones.

²⁸ Art 360.3, 364 ACCP.

²⁹ Y Vaki, *Evidence Law* (Nevo, 2020, in Hebrew) 183ff.

³⁰ See Art 181.1 JCCP on the court's high degree of discretion in the admission or rejection of evidence involving issues of relevance. Also, Supreme Court (Japan), Judgment April 14, 1966, [Minshu vol. 20, No 4] 649.

³¹ C Tapper, *Cross & Tapper on Evidence* (12th edn, Butterworth 2010) 64.

the proposition in issue.’³² Tapper adopts Stephen's definition of relevance, considering it difficult to improve, when he said that

the word ‘relevant’ means that: any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence, of the other.³³

- 30 In Spain, after enunciating the means of proof available in civil litigation, the Code of Civil Procedure (SCCP) determines that:

When by any other means not expressly provided for in the previous sections of this article, certainty about relevant facts could be obtained, the court, at the request of a party, will admit it as evidence, adopting the measures that are necessary in each case.³⁴

- 31 In some jurisdictions, it is not enough for evidence to be relevant in the logical traditional sense (its usefulness to prove a controversial fact). Relevance also includes a proportionality test, allowing (or even requiring) courts to evaluate factors such as the cost or delays of producing the evidence required, in relation to the complexity of the controversy, the probative value of the evidence required or the magnitude of the interests at stake.
- 32 In England, the ‘overriding objective’ of the Civil Procedure Rules (UKCPR)³⁵ may justify the dismissal of evidence that causes disproportionate efforts.

Pursuant to Rule 1.1 UKCPR:

(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.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

³² Lord Steyn in *R v A (No. 2)* (House of Lords, UK) [2002] 1 AC 45.

³³ Tapper (n 31) 65.

³⁴ Art 299.3 SCCP.

³⁵ Rule 1.1 UKCPR.

- (ii) to the importance of the case;
- (iii) to the complexity of the issues; and
- (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.

33 Pursuant to Rule 1.2 CPR, the court must seek to give effect to the overriding objective when it – '(a) exercises any power given to it by the Rules; [...].'

34 Courts have applied that principle to exclude relevant but disproportionately expensive or time-consuming evidence. For example, in *GKR Karate (UK) Ltd.* a post-Woolf case, May LJ argued:

[T]he Parties no longer have any absolute right to insist on the calling of any evidence they choose provided only that it is admissible and arguably relevant. The court may exclude admissible and relevant evidence or cross-examination which is disproportionately expensive or time-consuming, provided that to do so accords with the overriding objective.³⁶

35 Also, expert evidence is limited to a single joint expert, unless there are justified reasons to require more.³⁷ Applying proportionality to expert evidence admission, Lord Woolf said in *Daniels*: 'It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances.'³⁸

36 In Cross and Tapper on Evidence, the point is clearly made:

[L]ack of relevance can be used to exclude evidence not because it has absolutely no bearing upon the likelihood or unlikelihood of a fact in issue but because the connection is considered to be too remote. Once it is regarded as a matter of degree, competing policy considerations can be taken into account. These include [among

³⁶ *GKR Karate (UK) Ltd v Yorkshire Post Ltd* (Court of Appeal, UK) [2000] 1 WLR 2571.

³⁷ Cf Rule 35.7 UKCPR. In *Peet v. Mid-Kent Healthcare Trust* (Court of Appeal, UK) [2002] 1 WLR 210, 215, Lord Woolf stated that '[t]he starting point is: unless there is no reason for not having a single expert, there should be only a single expert.'

³⁸ *Daniels v Walker* (Court of Appeal, UK) [2000] 1 WLR 1382, 1387.

others] the desirability of shortening trials (...) None of these matters would be determinative if the evidence in question were of significant probative value.³⁹

- 37 In the US, the court may also exclude relevant evidence if its probative value is substantially outweighed by, among others, a danger of undue delay or needlessly presenting cumulative evidence.⁴⁰
- 38 Argentine procedural legislation and judicial practices does not show a strong concern on a relevance proportionality test. Relevance is required applying the classic logical standard previously explained. In practice, there is no general 'proportionality' concern to evaluate the importance of admitting evidence. It's not a common practice for courts to analyze, when admitting the means of proof offered by the parties, if the importance of the case justifies such evidential energies. To verify, for example, if the information required is useful in light of the evidence already available or taking into consideration the comparative efforts required to produce one or another alternative type of evidence offered by the parties to prove the same set of facts (cost-benefit analysis). Active judges, who are more jealously concerned on the efficiency of adjudication, can occasionally use the pertinence or relevance test with the last broader scope, but it is not usually the case. And, in case of doubt, judges will most certainly decide in favor of the production or incorporation of the evidence (*'favor probationes'* principle).⁴¹
- 39 In summary, the admission test based on the relevance of evidence can be approached in two main ways: First, as a rule associated with the adequacy of evidence to prove a contentious fact (logical evaluation), or, second, as a standard requiring evidence not only to be useful to prove a disputed fact, but to do it in a reasonable way, balancing the strength of its probative value with the magnitude and complexity of the issues and interests at stake and with the costs and delay that it may produce (proportionality test). The first criteria can be found in different forms in almost every legal system. The second has not seem to be developed in the same way in different latitudes.

4 ILLEGALLY OBTAINED EVIDENCE

- 40 Relevant evidence can be dismissed, declared inadmissible, removed from the record and even subtracted from any ulterior evaluation by the fact decision maker, when it was obtained by illicit means, or its future production would violate fundamental rights.

³⁹ Tapper (n 31) 65 ff, citing *R v Wilson* (Court of Appeal, NZ) [1991] 2 NZLR 707, 711.

⁴⁰ Rule 403 USFRE.

⁴¹ Ferrer Beltrán considers this principle to be the right way to approach evidence filtering based on its relevance (*'el filtro de relevancia debería tender a la admission en caso de duda sobre la relevancia de la prueba'*), although the author makes clear that this 'pro-admission principle' should not incite over-inclusion of evidence or information overload. See J Ferrer Beltrán, *La valoración racional de la prueba* (Marcial Pons 2007) 69, para 15.

- 41 Different legal systems approach in distinctive ways to the admission of illegally obtained evidence. In general, rules of civil procedure do not provide an exhaustive regulation on the matter. As a result, case law is the most important authoritative source of law on the matter.
- 42 The notion of illegal evidence can be used in a restricted sense, referring only to situations in which evidence is produced in violation of fundamental rights (for example, privacy, physical or mental integrity, etc), or in a broader sense, including deviations from legal prohibitions or other procedural irregularities.⁴²
- 43 In the US, there is a long tradition and discussion over the reach of the exclusionary rule, which, in criminal cases, prevents the government from using evidence gathered in violation of the United States Constitution. For example, evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment⁴³, or from self-incriminatory statements gathered in violation of the Fifth and Sixth Amendment (protection against self-incrimination and right to counsel).⁴⁴ The exclusion affects not only the illegally obtained evidence, but also – with a few exceptions – other evidence which law enforcement officers would not otherwise have located ('fruit of the poisonous tree' doctrine). However, the US Supreme Court has left the exclusionary rule for secondary evidence out of civil proceedings, like the deportation hearings.⁴⁵
- 44 In Brazil, the Federal Constitution expressly provides a specific rule of exclusion for illegally obtained evidence:

All people are equal before the law, without any distinction whatsoever. Brazilians and foreigners residing in the country are ensured the inviolability of their right to life,

⁴² For an in-depth overview of the different ways of understanding the term 'unlawful' or 'illicit' evidence, see L Passanante, *La prova illecita nel processo civile* (Giappichelli 2017) 63-130 and L Passanante, 'Illegally obtained evidence in civil litigation: a comparative perspective' in, *La prueba en el proceso. Evidence in the process* (XXVI Jornadas Iberoamericanas de Derecho Procesal, Atelier 2018), 175, 176-180. See also J Nieva Fenoll, *La valoración de la prueba* (Marcial Pons 2010) 189-191, emphasising an important aspect of the distinction referred in the text: the author considers that in the first case (violation of fundamental rights) there's a constitutional and, in some cases, epistemic justification for the exclusion of illegally obtained evidence, but not in the second (deviation of other evidential prohibitions or irregularities). In similar sense, Ferrer Beltrán (n 41) 77-86. Also, distinguishing the consequences and effectiveness of evidence obtained illegally, when those violations do or do not compromise fundamental rights in Brazil, see L Marinoni, S Cruz Arenhart and D Mitidiero, *Curso de Processo Civil* (Vol. 2, Revista Dos Tribunais 2015) 316-325.

⁴³ *Dolree v Ohio* (Supreme Court, United States) [367 U.S. 643 (1961)].

⁴⁴ *Miranda v Stewart* (Supreme Court, United States) [384 U.S. 436 (1966)].

⁴⁵ *INS v Lopez-Mendoza* (Supreme Court, United States) [468 U.S. 1032 (1984)]. In that case, one of the defendants admitted to his illegal entry into the United States. He unsuccessfully objected to his admission's being offered as evidence at the deportation proceeding, contending that the evidence should have been suppressed as the fruit of an unlawful arrest. The Supreme Court reversed, noting that a deportation proceeding is purely a civil action and developing a cost benefit analysis (balancing test) to dismiss the application on the criminal proceeding's exclusionary rule, to civil matters like deportation.

liberty, equality, security, and property, under the following terms: (...) LVI – evidence obtained through unlawful means is unacceptable in proceedings.⁴⁶

- 45 However, especially in civil proceedings, Marinoni, Arenhart and Mitidiero explain that the rule is subject in Brazil to a proportionality test, when the fundamental rights that justifies the exclusion of evidence collide with other relevant and constitutionally recognized values in a concrete case.⁴⁷
- 46 Statutory law in Spain provides an example of explicit statutory law, declaring ineffective the evidence ‘obtained, directly or indirectly, violating fundamental rights or freedoms’⁴⁸, and legislating on the procedure to challenge the incorporation of this kind of evidence in civil proceedings.⁴⁹
- 47 Under English law, the source of evidence is generally irrelevant to its admissibility.⁵⁰ So illegally obtained evidence is generally admissible if it is relevant. The court has the power to exclude evidence which would otherwise be admissible. However, in exercising that power it is necessary to balance the achieving of justice in a particular case and promotion of the observance of law.⁵¹ In *Kuruma v R* it was held that evidence is admissible even where it has been stolen.⁵² However, a notable exception will be made in cases where evidence has been obtained by torture. If illegally obtained evidence is not excluded, the court can always express its disapproval in other ways, such as by imposing punitive costs consequences, or by refusing interest on damages.⁵³
- 48 In Japan, the Code of Civil Procedure does not provide for the admissibility of illegally obtained evidence, and there is no precedent of the Supreme Court on this issue. However, in the renowned case of the Tokyo High Court, the admissibility of the evidence was denied for being collected by a significantly antisocial method and involved

⁴⁶ Art 5.LVI Federal Constitution (Brazil) of the for an analysis of this constitutional provision, see Marinoni, Cruz Arenhart and Mitidiero (n 42) 319-330.

⁴⁷ Marinoni, Cruz Arenhart and Mitidiero (n 42) 322.

⁴⁸ Art 11.1 Judiciary Act (Spain).

⁴⁹ Art 287 SCCP.

⁵⁰ Cf *Ras Al Khaimah Investment Authority v Azima* (Court of Appeal, UK) [2021] EWCA Civ 349.

⁵¹ Rule 32.1(2) UKCPR.

⁵² *Kuruma v R* (East African Court of Appeal, Kenya) [1955] AC 197. Lord Goodard’s opinion in that case is considered a classic to explain this approach: ‘The test to be implied in considering whether evidence is admissible is whether it is relevant to the matters at issue. If it is, it is admissible and the Court is not concerned with how evidence was obtained.’ See Passanante 2018 (n 42) 187.

⁵³ See *Jones v University of Warwick* (Court of Appeal, UK) [2003] EWCA Civ 151: ‘Excluding the evidence is not, moreover, the only weapon in the court’s armoury. The court has other steps it can take to discourage conduct of the type of which complaint is made. In particular it can reflect its disapproval in the orders for costs which it makes.’ In that case, the Court ended admitting evidence produced by an agent (investigator for the defendant) who trespassed by entering the claimant’s house, infringing her privacy. But the party responsible for the illegal action was charged with the costs of the hearings dedicated to the issue. See Passanante 2018 (n 42) 187.

infringement of an important personal right (tapes illegally recorded). Leading scholars, like Miki, have the following view:

(a) Where the means of collecting evidence are criminal acts, the admissibility of the evidence should be unconditionally denied;

(b) Where the means of collecting evidence is an infringement of personal rights, such as an unauthorized recording, the admissibility should be determined ponderating different factors, such as the degree of illegality, the value of the evidence, the type of litigation or the content of the case.⁵⁴

49 In Israel, in criminal cases, courts tend to admit illegally seized evidence, and consider this evidence as a matter of weight rather than admissibility. The situation seems to be different in civil cases, as Einhorn explains.

50 Sec. 32 of the Israeli Protection of Privacy Law n° 5741-1981, provides the following:

Material inadmissible as evidence. Material obtained by the commission of an infringement of privacy shall not be used as evidence in court without the consent of the injured party, unless the court, for reasons which shall be recorded, permits it to be used or if the infringer, being a party to the proceedings, has a defense or enjoys exemption under this Law.

51 Case law does not provide any criteria or guidelines for the courts to rule on this matter. A balancing test relying on the necessity of the evidence to do justice in the present case may be used. Pictures taken in breach of privacy rights⁵⁵ or information obtained by hacking a former wife's cell phone⁵⁶ have been ruled out by courts. However, SMS messages exchanged between the husband and his mother, intended to prove rights

⁵⁴ See K Miki, *Civil Procedure Law* (4th edn, 2023) 256. See also Passanante (n 42) 190-191.

⁵⁵ A divorce case may be used as an example: *Plonit v. The District Rabbinical Court Netanyah*, HCJ (Israel Supreme Court sitting as a High Court of Justice) Judgment 13 May 2006, 6650/04, Nevo e-database. During the divorce proceedings of a separated couple in the Rabbinical Court, the husband entered with two friends to the wife's apartment, without her permission, and took photos of her having intercourse with another man. The Rabbinical Court admitted the photos as evidence over the wife's objection and held that the husband is entitled to divorce his wife (a decree that does not of by itself dissolve the marriage, since the wife must agree to accept the get, ie, Jewish bill of divorce). The wife petitioned the Supreme Court, sitting as a High Court of Justice and the decision was reversed. The Supreme Court held that the public interest in maintaining the wife's privacy in her home should prevail in this case and therefore held the photos inadmissible.

⁵⁶ Einhorn explains the case in the following terms. The former husband hacked his divorcée's cell phone and found evidence that he sought to use to vacate the couple's divorce agreement. The Court held that such evidence, which violated the wife's privacy as well as her basic right under the Basic Law (Human Dignity and Liberty), was inadmissible. The husband acted in bad faith and the court saw no special reasons to justify the admission of evidence obtained in such flagrant violation of privacy.

that the wife allegedly had in their residential home, were admitted in another divorce case, for been essential to prove disputed facts.⁵⁷

- 52 In Germany, Passanante elucidates that in silence of statutory law, the civil courts adopted similar standards than those used in criminal litigation.⁵⁸ In 1973, a renowned decision of the *Bundesverfassungsgericht* (Constitutional Court) excluded the admissibility on a tape recording of a conversation made by a private person in a civil case.⁵⁹ It is important to underline that standards used by German Supreme Courts to analyze the admissibility of evidence in these cases refuse a 'black and white approach', because courts have to carefully evaluate the opposing interest of the parties.⁶⁰
- 53 In Argentina, there are not clear stipulations around this problem in the federal Code of Civil Procedure.⁶¹ In criminal matters, the Supreme Court case law provides some basic standards for the 'rule of exclusion', substantially influenced by the US Supreme Court' doctrine. This doctrine of the Supreme Court can be summarized as follows:⁶²

(a) evidence obtained by illegitimate means cannot be used in trial (it's inadmissible and should be excluded),⁶³

⁵⁷ *Ploni v. Plonit*, Family Appeal (District Court, Haifa), Judgment 20 January 2022, 24072-09-21, Nevo e-database. In that case, the Court noted that the wife obtained the messages illegally, violating the husband's right to privacy. Nevertheless, the Court considered that the evidence should be admitted as evidence, since it was central to the dispute.

⁵⁸ Passanante (n 42) 185–187.

⁵⁹ Case 2 BvR 454/71 (BVerfG, Germany) Decision 31 July 1973, [NJW 1973 891], cited by Passanante (n 42) 185.

⁶⁰ Passanante (n 42) 186.

⁶¹ Article 378 of the National Code of Civil Procedure provides that any evidence is admissible, even if it is not enunciated in those rules, unless they affect morality, the parties or third parties' personal liberty or are forbidden for the case. It is commonly stated that this provision is a legislative ground for non-admitting evidence that violates fundamental rights. However, the direct imperative force of the Constitution general clauses (due process, intimacy, dignity, personal liberty, protection against auto-incrimination, etc) is enough to.

⁶² The following principles are recognized in most Iberoamerican countries, whether by explicit legislation (like in Article 157 of the Brazilian Code of Criminal Procedure or in the Colombian criminal and administrative procedural regimes) or by case law doctrine (see G Priori Posada, 'Reglas de exclusión probatoria y prueba ilícita en Iberoamérica: un reporte desde el derecho fundamental a probar' in *La prueba en el proceso. Evidence in the process* (XXVI Jornadas Iberoamericanas de Derecho Procesal, Atelier 2018) 153, 173–174.

⁶³ See Supreme Court (Argentina), case *Montenegro*, Judgment 10 December 1981 (Fallos: 303:1938); case *Florentino*, Judgment 27 November 1984 (Fallos: 306:1752); case *Ruiz* Judgment 17 September 1987 (Fallos: 310:1847), case *Francomano* Judgment 19 November 1987 (Fallos: 310:2384); case *Daray* Judgment 22 December 1994 (Fallos: 317:1985). For example, when the investigation that led to a conviction was based on a judicially ordered telephone intervention adopted without substantiating the grounds for suspicion (Supreme Court (Argentina), case *Quaranta*, Judgment 31 August 2010, (Fallos: 333:1674).

- (b) The same happens with evidence obtained thanks to the former (fruit of the poisonous tree)⁶⁴
- (c) However, there is no injury to due process if there is evidence, other than that considered illegal, that allows the disputed facts to be proven⁶⁵
- (d) In addition, in order to decide on the admissibility of illegally obtained evidence, the court must verify the possibility that the evidence could have been obtained by other autonomous or independent legitimate sources.⁶⁶ In that case, the evidence can be admitted.

According to important scholars, a ponderative approach can be reasonably employed in civil cases when the need for justice (and access to the truth) collide with essential guarantees.⁶⁷

As anticipated, procedural legislation is not very clear on this point. Article 378 of the Argentine National Code of Civil Procedure provides that any evidence is admissible, even if it is not enunciated in those rules, unless they affect morality, the parties or third parties' personal liberty or are forbidden for the case. It is commonly understood that this provision is a legislative ground for non-admitting evidence that violates fundamental rights. However, the direct imperative force of the Constitution general clauses (due process, intimacy, dignity, personal liberty, protection against auto-incrimination, etc) is enough to verify if, in a concrete case, for example, an admission of

⁶⁴ For example, in a case in which the authorship of a homicide had been proven, in part, through the conclusions of a legally performed autopsy on a corpse found through illegal methods (the defendant had been taken to the place without his attorney present and with signs of having been beaten), the Supreme Court considered that the evidence should have been excluded for application of the principles indicated in (a) and (b) (case *Paulino* (Supreme Court) Argentina, Judgment 17 September 2013).

⁶⁵ Case *Gordon* (Supreme Court, Argentina), case Judgment 4 October 1988 (Fallos: 311:2045).

⁶⁶ Case *Luque* (Supreme Court, Argentina), case Judgment 26 November 2002 (Fallos: 325:3118). In that situation, the Argentine Supreme Court has followed the opinion of Justice Powell in *Stone v. Powell*, saying that 'an erroneous application of the exclusion rule can divert the process of searching for the truth and unjustifiably distort the principle of justice that must prevail in all judicial pronouncements' (see explicit reference in case *Paulino*, n 64). The Colombian Constitutional Court has extended the 'poisonous tree' metaphor to explain its non-application in cases of 'independent sources' or 'inevitable finding': 'This Court also rejects the insinuation that an illicit piece of evidence contaminates the whole body of evidence ... *The doctrine of the fruits of the poisoned tree cannot be confused with the theory of the contaminated apple in the fruit basket*' (Corte Constitucional, Colombia, SU 159, 6/3/2022, cited by Priori Posada (n 63) 173).

⁶⁷ See A Morello, *La prueba. Tendencias modernas* (2 edn, Platense 2001) 327-332. Arazi sustains that in civil cases the admissibility of illegally obtained evidence should depend on a balancing test, taking into consideration the entity of the disputed rights and the values at stake. See R Arazi, 'La prueba ilícita. Declaración de menores de catorce años y des testigos excluidos en el proceso civil' (2001) (3) *Jurisprudencia Argentina* 1063 ff. Priori Posada considers this complex test between the collision of the fundamental right to prove and other fundamental rights that could be affected as a result of the production of evidence, as typical of the Iberoamerican approach to the problem of illicit evidence. See Priori Posada (n 62) 153-154, 167-170).

wrongful action (abusing a child) obtained by an unauthorized access to their cell phone, can be used in civil courts by the child's parents to ask for preventive measures.

5 PRIVILEGES

- 54 The issue has been addressed in Chapters 1 and 3 of Segment VII, to which we refer. There is no appreciable difference between the standards used to limit access to evidence in the form of discovery or disclosure, and to admit or refuse means of proof presented during the proceeding or in trial, based on the potential breach of privileges.

6 HEARSAY

- 55 The hearsay rule of exclusion is a typical feature of the traditional Anglo-American approach to evidence.⁶⁸ Wigmore defined it as the rule:

which prohibits the use of a person's assertion, as equivalent to testimony to the fact asserted, unless the assertor is brought to testify in court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it. Therefore, (...) when a specific person, not as yet in court, is reported to have made assertions about a fact, that person must be called to the stand, or his assertion will not be taken as evidence.⁶⁹

- 56 In most legal systems hearsay testimony is not a matter of admissibility, but of weight. As hearsay statements cannot be effectively controlled, because the 'real' witness of the facts is not in Court, subject to oath, criminal liability in case of lying and cross-examination by the counterparty, this kind of declaration has little or no probative value. But, in general, there are no explicit rules of exclusion for these witnesses.
- 57 On the contrary, in the U.S. federal procedure, hearsay testimony (and more generally: hearsay evidence⁷⁰) is, by principle, inadmissible. Apart from the low quality of this statements (problem that could be prevented at the moment of weighing the evidence and deciding on the facts), the non-admission principle seems to be justified in the absence of authentic cross examination⁷¹ and in similar reasons than those explaining

⁶⁸ J Wigmore, 'The History of the Hearsay Rule' (1904) 17 Harvard Law Review 437, 458 considers it the 'most characteristic rule of the Anglo-American law of evidence, – a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure (...).'

⁶⁹ Ibid 437.

⁷⁰ The hearsay rule is mostly important in witness statements, but it includes also non-verbal conducts and written documents (see Taruffo (n 1) 44 and references in n 23).

⁷¹ Wigmore (n 68) 338 indicates that this was the main reason for consolidating the rule in the early 1700's in England: 'What is further noticeable is that in these utterances of the early 1700's the reason is clearly put forward why there should be this distinction between statements made out of court and statements made on the stand; the reason is that "the other side hath no opportunity of a cross-examination".'

other jury setting exclusions: the need to prevent low quality evidence to be produced in trial and unduly influence non-professional jurors acting as fact decision makers.⁷²

58 Rule 801(c) of the U.S. Federal Rules of Evidence define hearsay as a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

59 The hearsay rule links up to the general preference (in theory) for live testimony in court. Thus, a statement is hearsay even if the declarant is the witness if the statement was made out of court.⁷³ One exception to that idea is the deposition (previous statement made out of court). If a witness testifies in a deposition, that testimony can be offered in court if the witness is unavailable⁷⁴ even though it is an out-of-court statement.

60 But the fact that proffered evidence includes an out-of-court statement does not mean it is automatically subject to the hearsay rule. A statement is hearsay only if offered 'to prove the truth of the matter asserted.'⁷⁵

61 So American lawyers often stretch to find uses for out-of-court statements that could be said to do some other relevant work beyond proving the truth of the matter asserted.⁷⁶

62 Should an out-of-court be offer both a non-hearsay and a hearsay use, that might be a reason to exclude it as unfairly prejudicial (if the jury would be much more likely to use it for the forbidden hearsay purpose) or at least to instruct the jury to restrict its use of the statement to the permissible purpose.

⁷² Taruffo explains it in these terms: 'The basic reason for the hearsay rule is to avoid the danger of guiding the jury to make mistakes when evaluating the reliability of the statement.' See Taruffo (n 1) 43.

⁷³ The point is made in reverse by Rule 801(d)(1) USFRE, which identifies situations in which the out-of-court statement of the witness is admissible over a hearsay objection. The basic point is that, other than such situations, the out-of-court statement would be excluded as hearsay.

⁷⁴ Rule 32(a)(4) USFRCP.

⁷⁵ Rule 801(c)(2) USFRE. A leading American Evidence casebook offers an imaginary illustration to make the point. A husband and his second wife were in a plane that crashed. The husband's will left his estate to his second wife, if she survived him, but if she did not to the children from his first marriage. The witness in court was the sheriff who was the first person to reach the downed plane. He immediately saw that the wife was dead. Then he approached the other passenger (the husband), who whispered 'I'm still alive.' This statement was offered to prove that the husband was still alive after the wife died. See R Park and R Friedman, *Evidence* (12th edn, 2013) 203-07. Although it is true that in this imaginary case the statement is offered to prove what the husband said - that he was still alive - the content of the statement was essentially irrelevant to proving that point. Had he said 'I am dead,' or merely groaned, that would suffice to show that he was still alive. This would be a non-hearsay use of the statement.

⁷⁶ The intricacies of such offers of proof are often quite challenging. In their treatise, Professors Mueller and Kirkpatrick have more than 40 pages of text devoted to such issues. See C Mueller and L Kirkpatrick, *Evidence* 737-82 (5th edn, 2012).

- 63 There are multiple exceptions to the hearsay rule in the US.⁷⁷ Even if none of them fits exactly, the court may nevertheless admit the hearsay under the ‘residual exception’⁷⁸ if it is ‘supported by sufficient guarantees of trustworthiness’ and is ‘more probative than any other evidence that the proponent can obtain through reasonable efforts.’
- 64 But given the importance of business and public records in many countries, it seems worth highlighting these exceptions to the hearsay exclusion. Any record of a ‘regularly conducted activity’ made near the time of the event recorded by a person with a business duty to record the event is admissible though hearsay to prove the matter recorded.⁷⁹ And a public record of ‘a matter observed while under a legal duty to report’ is similarly admissible to prove the matter.⁸⁰
- 65 Also, the Israeli law has several rules regarding hearsay. A statement made by a witness is hearsay if: (a) it was made out of court; (b) its purpose is to prove that the statement was true.⁸¹
- 66 The Israeli Supreme Court expressed that the hearsay rule cannot be considered as being of a technical nature, but rather as a fundamental basis for the evidence rules that apply in Israel. Such evidence is given in circumstances that do not allow the other party to examine their truthfulness by carrying out a cross-examination.
- 67 The rule applies in both civil and criminal cases, and at all stages the examination of witnesses (principal examination, cross-examination and the re-examination).
- 68 Some exceptions, regarding the admission of hearsay statements, were included in the new version of the Evidence Ordinance, permitting statements made by a witness at the time the offence was committed (Sec 9), and statements made, under certain circumstances, by victims of violence who could not testify because of death, infirmity, sickness, or absence from Israel (Sec 10).
- 69 Some other exceptions were included subsequently in an amendment to the Evidence. Sec 10A(a) of the Evidence Ordinance (New Version) allows, under certain circumstances, the admission as evidence in *criminal proceedings* of a statement made by a witness out of court: (a) when the person who made the statement is a witness and

⁷⁷ See Rule 801(d)(1); 801(d)(2), 803; 804 USFRE.

⁷⁸ Rule 807 USFRE.

⁷⁹ Rule 803(6) USFRE.

⁸⁰ Rule 803(8) USFRE.

⁸¹ T Einhorn explains the importance of this second requirement, emphasizing that if the purpose of bringing an out-of-court statement is just to prove that it was made, rather than to prove that it was correct, then it is not considered hearsay. Therefore, for example, in a libel case, if a witness on behalf of the plaintiff confirms that he heard the defendant say that the plaintiff is a thief and a liar, such a statement will be admitted. Likewise, if there is a dispute whether a person could speak French, a witness testifying that he heard him speak French is not hearsay, since the testimony does not seek to prove the truthfulness of whatever that person may have said.

the parties have had the opportunity to cross-examine him; (b) when the testimony differs substantially, in the court's opinion, from that statement, or if the witness denies having made the statement, or claims that he does not remember its contents; (d) the statement made out of court by a person, even not a witness, either because he refuses to testify or is unable to testify, or because he is not alive or cannot be found, provided that the court has been convinced that, in the circumstances, an illicit measure has been used to prevent him from testifying (Sec 10A(b), Evidence Ordinance).

- 70 No similar exceptions have been introduced in Israel with respect to civil proceedings. Nevertheless, Einhorn reports that courts have admitted hearsay evidence in circumstances that they found appropriate.

Among others, they relied on Sec 17(a), Evidence Ordinance [New Version], providing that if the person who made a statement out of court, 'does not appear in court [even though he was ordered to do so], the court may disqualify the affidavit from serving as evidence' (emphasis added). The court is not obliged to disqualify the affidavit. It may apply its discretion to admit it and decide separately the weight it is going to give that statement.

Rule 178(c) ICPR, provides that if the person who signed an affidavit, submitted to the court, has refrained from appearing in court for a cross-examination attached to a statement of pleadings will not, as a general rule, be admitted as evidence in favor of the party that submitted that affidavit, unless the court gives its permission, for special reasons, to such admission.

This rule too implies that the court may apply its discretion, even if that discretion should be used sparingly.

The court for family affairs has wider discretion and flexibility to apply the procedure that it considers best to doing justice in any matter that has not been otherwise regulated.

Regarding business, bank and public institutional records of a regularly conducted activity made near the time of the event, recorded in a manner that can be demonstrated to prove the truthfulness of its contents, is admissible though hearsay to prove the matter recorded (Sec 35-39B, Evidence Ordinance [New Version])

- 71 In England, nowadays, there are no rules or practices that *exclude* hearsay testimony in civil proceedings. This kind of testimony is admissible since the Civil Evidence Act 1995.⁸²

Article 1 of the Civil Evidence Act 1995 provides the following:

Admissibility of hearsay evidence.

⁸² N Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (Oxford University Press 2003) 727.

(1) *In civil proceedings evidence shall not be excluded on the ground that it is hearsay.*

(2) *In this Act—*

(a) *“hearsay” means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated; and*

(b) *references to hearsay include hearsay of whatever degree.*

The same Act provides some guidance to the court in order to weigh hearsay evidence,⁸³ among other limits and procedural arrangements left to a large discretion of the court.

72 In Japan, the Code of Criminal Procedure has provisions regarding hearsay evidence, but the Code of Civil Procedure do not have any provision, and hearsay evidence is considered admissible in practice and theory. There also no rules or practices that direct the judge to restrictively assess hearsay testimony.

73 Also, in Argentina hearsay testimony (*‘testimonio de oídas’* or *‘de referencia’*) is not prohibited, but courts are strict on their evaluation.⁸⁴

7 UNDUE PREJUDICE

74 In line with the filtering function granted to American judges to avoid undue influence on the jury, Rule 403 of the Federal Rules of Evidence establish that: ‘the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice’. The Notes of the U.S. Federal Rules of Evidence’s Advisory Committee indicate that ‘unfair prejudice’ means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

75 A common example of risk of unfair prejudice is the evidence produced regarding the details of prior convictions of the defendant that may lead the jury to rule on the facts of the case on an improper basis, like generalizing from a past bad act that a defendant is, by propensity, the probable perpetrator of the current crime.⁸⁵

⁸³ Art 4 Civil Evidence Act 1995 (UK).

⁸⁴ See for instance, case *Molle c. Mayocchi* (Second Civil and Commercial Court of Appeal, 2nd Chamber, La Plata, Argentina), Judgment 23 February 2021: ‘Reference witness are those that transmit knowledge related to a fact to which they have accessed through the sensory perception of a third party (the true witness of what happened). The probative effectiveness of the statements of these “hearsay witnesses” (*testigos de oídas*) is extremely restricted, since they only prove that they have heard a story from someone else’s mouth (Art 384 and 456 of the C.P.C.C.).’

⁸⁵ Applying this rule, *In Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court reversed a conviction considering that the district court had abused its discretion under Rule 403 by spurning a defendant’s offer to concede a prior judgment and admitting the full judgment record over the defendant’s objection, when the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations.

- 76 It is a typical example of the previously explained distinct approach of the American civil procedure on the issue of evidence admissibility.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ALI	American Law Institute
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (Germany)
BVerfG	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court) (Germany)
cf	<i>confer</i> (compare)
ch	chapter
CFR	Charter of Fundamental Rights of the European Union
edn	edition/editions
ed	editor/editors
etc	et cetera
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
ERCP	Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT) Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT)
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCC	Civil Code (Germany)
GCCP	Code of Civil Procedure (Germany)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations 2021 (Israel)
ie	<i>id est</i> (that is)
JCCP	Code of Civil Procedure (Japan)
n	footnote (internal, ie, within the same chapter)
no	number/numbers
para	paragraph/paragraphs
PTCP	Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT)
Sec	Section/Sections
SCCP	Code of Civil Procedure (Spain)
supp	supplement/supplements
TRCP	Transnational Civil Procedure
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules 1998 (UK)

UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
US / USA	United States of America
USC	United States Code
USD	United States Dollar
USFRCP	Federal Rules of Civil Procedure (US)
USFRE	Federal Rules of Evidence (US)
v	versus
vol	volume/volumes

LEGISLATION

International/Supranational

American Convention on Human Rights.

Charter of Fundamental Rights of the European Union.

European Convention on Human Rights.

Geneva Convention of 1930.

IBA Rules on the Taking of Evidence.

Model European Rules of Civil Procedure 2020 (ELI / UNIDROIT).

Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT).

Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

Regulation (EU) 2016/679 (General Data Protection Regulation).

National

Children and Young Persons Act 1933 (UK).

Civil and Commercial Code 2015 (Argentina).

Civil Code (Germany).

Civil Evidence Act 1995 (UK).

Code of Civil Procedure (Japan).

Código Procesal Civil y Comercial de la Nación (Code of Civil Procedure) (Argentina).

Civil Procedure Regulations 2021 (Israel).

Civil Procedure Rules 1998 (UK).

Family Law Reform Act 1969 (UK).

Federal Constitution (Brazil).

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

Ley de Enjuiciamiento Civil (Code of Civil Procedure) (Spain).

Ley de Organización del Poder Judicial (Judiciary Act) (Spain).

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Zivilprozessordnung (Code of Civil Procedure) (Switzerland).

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Peter Puškár, Case C-73/16 (CJEU), Judgment 27 September 2017 [ECLI:EU:C:2017:725].

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Ashcroft v Iqbal (Supreme Court, US) [556 U.S. 662 (2009)].

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Daray (Supreme Court, Argentina), Judgment 22 December 1994 [Fallos: 317:1985].

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Florentino (Supreme Court, Argentina), Judgment 27 November 1984 [Fallos: 306:1752].

Francomano (Supreme Court, Argentina), Judgment 19 November 1987 [Fallos: 310:2384].

GKR Karate (UK) Ltd v Yorkshire Post Ltd (Court of Appeal, UK) [2000] 1 WLR 2571.

Gordon (Supreme Court, Argentina), Judgment 4 October 1988 [Fallos: 311:2045].

In Old Chief v. United States (Supreme Court, US) [519 U.S. 172 (1997)].

INS v Lopez-Mendoza (Supreme Court, United States) [468 U.S. 1032 (1984)].

Jones v University of Warwick (Court of Appeal, UK) [2003] EWCA Civ 151.

Kuruma v R (East African Court of Appeal, Kenya) [1955] AC 197.

Luque (Supreme Court, Argentina), Judgment 26 November 2002 [Fallos: 325:3118].

Miranda v Stewart (Supreme Court, United States) [384 U.S. 436 (1966)].

Molle c. Mayocchi (Second Civil and Commercial Court of Appeal, 2nd Chamber, La Plata, Argentina), Judgment 23 February 2021.

Montenegro (Supreme Court, Argentina), Judgment 10 December 1981 [Fallos: 303:1938].

Paulino (Supreme Court, Argentina), Judgment 17 September 2013 [Fallos: P. 528. XLVI].

Peet v Mid-Kent Healthcare Trust (Court of Appeal, UK) [2002] 1 WLR 210.

Ploni v. Plonit (District Court of Haifa, Israel), 24072-09-21, Judgment 20 January 2022.

Plonit v. The District Rabbinical Court Netanyah (Supreme Court, Israel), 6650/04, Judgment 13 May 2006.

Quaranta (Supreme Court, Argentina), Judgment 31 August 2010, [Fallos: 333:1674].

R v Wilson (Court of Appeal, NZ) [1991] 2 NZLR 707.

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Ruiz (Supreme Court, Argentina), Judgment 17 September 1987 [Fallos: 310:1847].

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