

PART VII

ACCESS TO INFORMATION AND EVIDENCE

CHAPTER 6

ASCERTAINMENT OF FACTS

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1 PARTY AUTONOMY AND THE ADVERSARIAL TRADITION

- 1 Most, if not all, systems of civil procedure around the globe are governed by the principle of party autonomy. This implies that both the initiatives for commencing and ending proceedings as well as for the presentation of factual allegations and evidence lie on the parties. The court's role is to decide which of these factual allegations are true. In some systems, the most prominent example being the USA, the jury is entrusted with this task. Likewise, procedural systems in the civil law tradition mostly adhere to the principles of party prosecution and party presentation. The roots of this approach lie in a liberal philosophy of party autonomy. Consequently, such systems can be said to be adversarial.
- 2 Traditional opinion in common law has it that the continental, especially the German, procedure, is inquisitorial rather than adversarial.¹ Comparative scholarship, however, tends to agree on the adversarial nature of such systems. Zuckerman writes that '[i]t may come as a surprise to many common lawyers, but the German system is largely adversarial.'² From a US perspective, Langbein confirms that '[o]utside the realm of fact-gathering, German civil procedure is as adversarial as our own.'³ However, the German judge assumes a more active role in the process of gathering facts and evidence. In that, the judge is confined to the factual framework provided by the parties in the course of the lawsuit. Nonetheless, in both systems it is of vital importance for litigants to adduce evidence in order to prove factual allegations. Typically, procedural systems implement a filter of relevance to avoid information overload during proceedings (Section 2).
- 3 In a system of party presentation, rules have to determine which of the parties has to persuade the judge of the existence of the facts necessary to their case. This is done by the allocation of burden of proof. The distribution of the burden of proof is thus the most central tool of risk-allocation on the parties (Section 3).
- 4 In order to streamline proceedings and to avoid delay, procedural systems contain rules on the presentation and management of evidence. In implementing those rules, however, they differ as to what extent the court bears responsibility for the furthering of the proceedings (Section 4).
- 5 Once the taking of evidence is over, the court has to decide the case on the basis of what has been presented in the hearings. The process of evaluation of evidence is thus one of the most important steps in reaching a decision. Typically, procedural systems give the courts ample discretionary powers under a principle of free evaluation of evidence. However, in system which entrust the jury with fact-finding, like the US, judges may

¹ Cf J Jacob, *The Fabric of English Civil Justice* (Stevens & Sons 1987) 7.

² See A Zuckerman, 'Justice in Crisis. Comparative Dimensions of Civil Procedure', in A Zuckerman (ed), *Civil Justice in Crisis - Comparative Perspectives of Civil Procedure* (Oxford University Press 1999) 2, 31.

³ Cf J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, 841.

enter judgment only when they determine from the evidence presented at trial that no reasonable jury could be persuaded by the evidence offered by the party with the burden of proof (Section 5).

- 6 In sifting and evaluating the evidence, the courts must reach a degree of conviction as to the credibility of the witnesses, the persuasiveness of the expert's report, etc. Some systems require full conviction of the court, others adhere to a more lenient 'more probable than not' conviction. In practice, however, it seems that all systems reach a workable compromise as to the standard of proof. Again, the US system uses a different approach, as it is up to the jury to form the necessary conviction (Section 6).

2 RELEVANCE

- 7 In many cases, the success of a claim will hinge on the available evidence. In light of this, a rejection of evidence offered by a party may affect the essential content of the fundamental right to effective judicial protection.⁴ By the same token, access to evidence in itself must be seen as a facet of the general principle of fair trial, and, with similar justification, of the overarching right to be heard. It is regarded as being an aspect of the right to a fair trial under Art 6 of the European Convention on Human Rights, in Art 8 of the American Convention on Human Rights or in Art 47 of the Charter of Fundamental Rights of the European Union (CFR). The 2020 ELI / UNIDROIT Model European Rules of Civil procedure (ERCP) sums up quite neatly what may be said to be a standard for most European legal systems:

Each party has, in principle, a right to access all forms of relevant, non-privileged and reasonably identified evidence. In so far as appropriate, parties and non-parties must contribute to disclosure and production of evidence. It is not a basis of objection to such disclosure by a party that disclosure may favour the opponent or other parties.⁵

- 8 Different approaches exist relating to the question, how broad the evidentiary basis should be in order to conduct proceedings. The common law process classically starts with discovery of documents, and is concerned with sorting out their relevance for the parties' claims only later on. In civil law jurisdictions, typically the criterion of relevance dominates the phase before trial, so that only evidence pertinent for a party's case will be admitted. The different approaches to relevance are dealt with in greater detail in Chapter 5 on admissibility of evidence.

⁴ Cf *Peter Puškár*, Case C-73/16 (CJEU), Judgment 27 September 2017 [ECLI:EU:C:2017:725] para 90 (referring to Art 47 CFR). For French law, see L Cadiet and E Jeuland, *Droit judiciaire privé* (11th edn, LexisNexis 2020) para 531 with further references; for Swiss law Art 152 Code of Civil Procedure (Switzerland); for a comparative account cf M Nissen, *Das Recht auf Beweis im Zivilprozess* (Mohr Siebeck 2019).

⁵ Rule 25(2) ERCP.

- 9 Pursuant to Rule 89(1) ERCP, any relevant document may be offered as evidence.⁶ This Rule has to be read in conjunction with Rules 23 and 25 ERCP, which deal with the scope of the pleadings and with the burden placed on each party to produce evidence in order to prove issues of fact. According to Rule 25(1) ERCP, parties must offer evidence supporting their factual contentions. Consequently, they must be given access to all forms of relevant, non-privileged and reasonably identified evidence.⁷ To that end, a party may apply for an Access to Evidence Order pursuant to Rules 100-110 ERCP, which may be dubbed to be a 'European way to discovery'.⁸
- 10 Clearly, this still reflects the civil law tradition. But with the recent developments in England and Wales, where disclosure was severely restricted, this seems to reflect a broad consensus at least in Europe. Even in England, relevance is the main criterion regarding admissibility of evidence.⁹ The notion of relevance is used in case law in a fairly broad sense. As Lord Steyn put it in *R v A (No. 2)*: '(...) to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. (...) Relevance and sufficiency of proof are different things.'¹⁰ In a similar vein, Tapper writes:

It is difficult to improve on Stephen's definition of relevance 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.¹¹

- 11 This statement was approved with regard to the identical earlier 9th ed of Cross & Tapper by the Court of Appeal Criminal Division in *R v Lee Nethercott*.¹² As Tapper further writes:

lack 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 the desirability of shortening trials, avoiding emotive distractions of marginal significance, protecting the reputations of those not represented before the Courts

⁶ Cf M Stürner, 'Evaluation of Evidence and Standard of Proof in the ELI/UNIDROIT European Rules of Civil Procedure' L Tichý (ed), *Standard of Proof in Europe* (Mohr Siebeck 2019) 269, 273.

⁷ Cf Rule 25(2) ERCP.

⁸ F Gascón Inchausti and M Stürner, 'Access to Information and Evidence in the ELI/UNIDROIT European Rules on Civil Procedure: Some fundamental Aspects' (2019) *Uniform Law Review* 14, 29.

⁹ C Tapper, *Cross & Tapper on Evidence* (12th edn, Butterworth 2010) 64.

¹⁰ *R v A (No. 2)* (House of Lords, UK) [2002] 1 AC 45.

¹¹ Tapper (n 9) 65.

¹² *R v Lee Nethercott* (Court of Appeal, UK) [2001] EWCA Crim 2535 para 13.

and respecting the feelings of a deceased's family. None of these matters would be determinative if the evidence in question were of significant probative value.¹³

- 12 Under English law, the source of evidence is generally irrelevant to its admissibility.¹⁴ Thus, illegally obtained evidence is generally admissible if it is relevant. In *Kuruma v R* it was held that evidence is admissible even where it has been stolen.¹⁵ A notable exception will be made in cases where evidence has been obtained by torture.¹⁶ Again, these issues are dealt with in greater detail in Chapter 5.
- 13 In the US, where the jury is the trier of fact, the filter of relevance serves a slightly different purpose.¹⁷ Rule 403 of the US Federal Rules of Evidence (USFRE) permits the court to protect the jury against what is called 'cumulative' evidence. Here, information overload is not the primary concern. Rule 403 USFRE permits the judge to exclude relevant evidence when its relevance is significantly outweighed by the risk of unfair prejudice. Moreover, Rule 404 USFRE protects particularly against use of 'character' evidence, ie, as Marcus explains, inviting the jury to decide against a party because the party is a 'bad man', not because of what the evidence shows with regard to the out-of-court events involved in the lawsuit.

3 THE BURDEN OF PROOF

3.1 Burden of Persuasion and Burden of Proof

- 14 If a party comes up with a set of facts and wants the judge to find in her favour, that party will have to prove these factual allegations if they are contested by the opponent. Failure to do so (a *non liquet* situation) will entail a refusal of the judge to decide according to the claimant's plea. This risk of losing the case is commonly referred to as the burden of persuasion,¹⁸ or *objektive Beweislast*.¹⁹ In order to avoid a *non liquet* decision of the judge, a party will also bear the burden of adducing evidence. The burden of adducing evidence, or *subjektive Beweislast*,²⁰ denotes the duty of a party to raise an

¹³ See Tapper (n 9) 65 ff, citing *R v Wilson* (Court of Appeal, NZ) [1991] 2 NZLR 707, 711.

¹⁴ Cf *Ras Al Khaimah Investment Authority v Azima* (Court of Appeal, UK) [2021] EWCA Civ 349.

¹⁵ *Kuruma v R* (East African Court of Appeal, Kenya) [1955] AC 197.

¹⁶ *Shagang Shipping Company Ltd (in liquidation) v HNA Group Company Ltd* (Supreme Court, UK) [2020] UKSC 34 para 105.

¹⁷ On the difference regarding access to evidence in the US compared to the approach in the ECRP cf R Marcus, 'Reflections from an Outlier: An American Reaction to the EU Rules on Evidence' (2021) 11 International Journal of Procedural Law 106.

¹⁸ Other terms are being used in a mostly synonymous way, eg, probative burden, legal burden, or risk of non-persuasion. Cf Tapper (n 9) 119 ff.

¹⁹ The *objektive Beweislast*, or *Feststellungslast*, determines which of the parties bears the risk of losing the case if a factual allegation cannot be established. See L Rosenberg, K Schwab and P Gottwald, *Zivilprozessrecht* (18th edn, C.H. Beck 2018) sec 116, para 3.

²⁰ The term *Beweisführungslast* has the same meaning, see *ibid* sec 116, para 4 ff.

issue and to provide sufficient evidence for the judge to call on the other party to answer the case.²¹

- 15 The burden of adducing evidence, once placed, cannot usefully be seen as being shifted to the other party. Nevertheless, in practice, this effect may be, and indeed often is, reached when one party adduces sufficient evidence to prove a factual allegation raised by her. If the opponent cannot, in turn, cast doubt on the probative material introduced by the other party, this particular issue will be settled in favour of the other party. In this sense, the opponent also bears a burden of adducing evidence. However, this is not a burden of proof in a technical sense, as it does not constitute a formal technique of risk-allocation. It is referred to as the tactical shifting of burden, or *konkrete Beweisführungslast*.²²
- 16 Under the rule of law, it must be clear at the outset who will bear the burden of persuasion, and who will bear the burden of adducing evidence. In an adversary system, both parties present their arguments and evidence in court and an impartial tribunal has to decide who is right. The aim of both parties will be to try to convince the judge of their version of the facts in order to be able to apply those substantive provisions that are favourable to them. Consequently, the normal rule that applies is that each party has to prove those factual allegations that lead to the applicability of a substantive right in their favour. The default rule in most, if not all, systems is that the party who asserts a fact and not the party who denies it has to support it with evidence (*ei qui affirmat non ei qui negat incumbit probatio*).²³ It can be inferred from this that in principle both the burden of persuasion and, consequently, the burden of adducing evidence, are generally on the claimant.²⁴ Conversely, allegations advanced in defence against the claim will have to be proven by the defendant.
- 17 There seems to be a broad international consensus on that approach. Rule 21.1 of the 2004 ALI/UNIDROIT Principles of Transnational Civil Procedure (PTCP) formulates as follows: 'Ordinarily, each party has the burden to prove all the material facts that are the basis of that party's case.' With only minor changes in the wording, the ERCP found the

²¹ Other terms include evidential burden, or duty of passing the judge, from the times when there was a jury in civil trials. See Tapper (n 9) 119 ff.

²² Cf P Gottwald, *Grundprobleme der Beweislastverteilung* (JURA 1980) 225, 227.

²³ See *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd* (House of Lords, UK) [1942] AC 154 (HL), 174 (Viscount Maugham). For German law see Case III ZR 139/67 (BGH, Germany), Order 17 February 1970 [BGHZ 53, 245] 253 and Rosenberg, Schwab and Gottwald (n 19) sec 116, para 7 ff.

²⁴ See *Abrath v North Eastern Railway Company* (Court of Appeal, UK) [1883] 11 QBD 440, 456 (Bowen LJ), neatly summing up the allocation of burden of proof and its fate during trial.

following formulation in Rule 25(1): ‘Each party is required to prove all the relevant facts supporting its case. Parties must offer evidence supporting their factual contentions.’²⁵

- 18 Again, the approach taken in the US is rather different. The main threshold here consists in persuading the judge that the party on whom the burden of proof lies can ‘get to the jury’. Under Rule 50 of the Federal Rules of civil Procedure (US) (USFRCP), when the plaintiff ‘rests’ (that is to say that there is no further proof at this time), the other side can move for judgment as a matter of law. However, if that motion is denied, it is for the defendant to put on his proof, which must be at hand, as the US system is based on a single continuous jury trial. In that sense, there is some shifting of the burden of proof in the US, too.

3.2 Substantive Law to Determine Allocation of Proof

- 19 Civil procedure serves to enforce substantive rights. Hence, substantive law determines which facts have to be presented before the court to establish rights and defences. It follows from this, that substantive law also determines the distribution of the burden of proof among the parties. The ERCP put it neatly into the following wording: ‘Substantive law determines the burden of proof.’²⁶ This reflects the position of EU Private International Law, as exemplified eg, by Art 18 of the Regulation on the law applicable to contractual obligations (Rome I), 593/2008 of 17 June 2008 (EC) and Art 22 of the Regulation on the law applicable to non-contractual obligations (Rome II), 593/2008 of 17 June 2008 (EC). Consequently, at the outset substantive law also determines in which situations the burden of proof may be reversed.²⁷
- 20 In Japan, the ‘Substantive Provisions Sorting Theory’ is the dominant theory among scholars and the established precedent of the Supreme Court of Japan in civil procedure. According to this approach, the burden of proof is understood to mean the disadvantage that the legal effect in its own favour is not recognized. Consequently, the parties shall bear the burden of proof for the facts that are the requirements for the legal effect in their favour. Therefore, the allocation of burden of proof is determined by whether or not a certain provision of a substantive law is advantageous to the party. The criteria for determining whether a particular substantive law provision is advantageous to a particular party can be found in the mutual logical relationship of the substantive law provisions.

²⁵ Cf eg, Art 377 of the *Código Procesal Civil y Comercial de la Nación* (Code of Civil Procedure) (Argentina): ‘The burden of proof shall fall on the party that affirms the existence of a disputed fact or of a legal precept that the judge or court does not have the duty to know. Each of the parties must prove the factual assumption of the rule or rules that they invoke as the basis for their claim, defense or exception.’

²⁶ Rule 25(1) ERCP.

²⁷ See below Section 3.3.

- 21 It follows from this that a simple assumption that the plaintiff has to prove everything while the defendant may limit himself to deny and disclaim is ill-founded. Substantive law may require the plaintiff to prove relatively little to argue his case, eg, the conclusion of a written contract or the existence of damage as a result of an objectively risky activity conducted by the defendant under strict liability rules. Conversely, the defendant must prove factual allegations amounting to a viable defence which are far more difficult to establish, eg, the existence of a fortuitous, unforeseeable or unavoidable event, or the fault of the victim. In other terms, the allocation of the burden of proof is at the outset a mirror image of the rights and obligations existing under substantive law.

3.3 Different Allocations of Burden of Proof

3.3.1 General Remarks

- 22 Many legal systems provide for facilities for proving factual allegations by imposing duties on the parties to disclose documents, either in pre-trial, or during trial, or by conferring substantive rights on the parties to claim information. And yet in some situations this might not be enough to help litigants. They might lack the facilities needed to evaluate the information obtained. A presumption can help the party in that situation. It operates as an exception to the rule that the party proposing an assertion has to prove it. A presumption can facilitate proof, or altogether dispense with it. Its effect is a different allocation of the burden of proof.

3.3.2 Justification

- 23 Presumptions very often operate to facilitate proof in cases where there is a certain probability that the presumed fact is true. An example would be the presumption of ownership in case of possession of goods.²⁸ Another justification for the re-allocation of the risk of error derives from the principle of equality of arms. A gross difference of strength between the litigants does not normally help to achieve a just and lasting settlement of the dispute. On the contrary, public confidence in the procedural system will increase if the system takes care of the weaker litigants. Presumptions are often used to implement a certain public policy, eg, consumer protection. They will commonly be used in cases where one of the litigants has relatively easy access to evidence whereas the other doesn't have the necessary facilities to get evidence.

3.3.3 Presumptions

- 24 A presumption is a rule of law by which proof of a fact (the basic fact) leads to the inference that a second fact (the presumed fact) exists, unless the opposing party can

²⁸ Eg, Art 1006 of the German Civil Code (GCC).

adduce evidence to defeat that presumption.²⁹ Presumptions thus serve as instruments of risk-allocation. There is no uniform terminology in comparative perspective.³⁰ However, one can distinguish three different categories of presumptions.

- 25 First, there are presumptions of fact. They describe a situation where the judge may draw a certain inference from the existence of a given factual situation, but is not bound to do so by the law.³¹ An example for a factual presumption would be the maxim of *res ipsa loquitur*. It applies in a situation where it is for the claimant to prove negligence, but although he is able to prove the accident, he is unable to prove how it occurred. However, according to the evidence as it stands it is highly likely that the opponent acted negligently, so the accident 'speaks for itself'.³² *Res ipsa loquitur* just sums up what a reasonable judge will decide when the evidence is suggestive of negligence, but lacks completeness. Therefore, it is closer to circumstantial evidence than to a legal presumption.³³ Other systems like the German refer to evidence of first appearance (*Anscheinsbeweis*), which has been introduced by the courts to alleviate the burden of adducing evidence.³⁴ There is a number of cases which say that courts have a discretion to accept factual allegations as true even if the party didn't provide full evidence if these allegations appear to be the highly probable consequence of an ordinary course of events.³⁵ If presumptions are perceived to be rules of law allocating the burden of proof, it becomes clear that factual presumptions cannot fall within that category. They are just used to describe a situation where upon circumstantial evidence a certain inference is commonly drawn.³⁶
- 26 Second, there are irrebuttable presumptions of law, or conclusive presumptions. They denote situations in which the proof of a basic fact does not leave the court any option but to draw a particular inference irrespective of the existence of any contradicting evidence.³⁷ They do not fit into the category of presumption either since they do not

²⁹ Cf N Andrews, *Principles of Civil Procedure* (Sweet & Maxwell 1994) para 15-007; A Zuckerman, *Principles of Criminal Evidence* (1989) 110, C Tapper, *Cross and Tapper on Evidence* (9th edn, Butterworth 1999) 122.

³⁰ Cf A Denning, 'Presumptions and Burdens' (1945) 61 Law Quarterly Review 379, and H Prütting, *Gegenwartsfragen der Beweislast* (C.H. Beck 1983) 48.

³¹ See Zuckerman (n 29) 112.

³² See *Byrne v Boadle* (Court of the Exchequer, UK) [1863] 9 LT 450 (ExCh).

³³ See *Lloyde v West Midlands Gas Board* (Court of Appeal, UK) [1971] 1 WLR 749 (CA) 755 (Megard LJ): 'I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.' This view, however, has not remained uncontested. See Zuckerman (n 29) 115.

³⁴ See Prütting (n 30) 50.

³⁵ See for instance Case I ZR 54/53 (BGH, Germany), Order 21 December 1954 [BGH NJW 1954, 1119]. For more examples see Prütting (n 30) 50-53.

³⁶ See Prütting (n 30) 48.

³⁷ An example can be found in the Children and Young Persons Act 1933 (UK), where sec 50 provides that 'it shall be conclusively presumed' that a child under the age of 10 cannot be guilty of any offence.

leave any scope for the parties to re-allocate the risk by rebutting the presumption.³⁸ They are simply rules of substantive law dictating certain legal consequences.

- 27 Third, there are rebuttable presumptions of law, which denote that the judge must infer a certain legal consequence upon proof of a basic fact unless the other party manages to rebut it.³⁹ They are the only presumptions in the precise meaning of the definition. To show the relation between burden of proof and presumptions, it seems useful to build two sub-categories. As has been described earlier, there are two different burdens: The burden of persuasion and the burden of adducing evidence. Consequently, presumptions of law can operate either to allocate the burden of proof or they can allocate the burden of adducing evidence.⁴⁰ Which of the burdens is concerned by a particular presumption can sometimes be inferred from the wording of the provision itself, sometimes (and this refers to common law presumptions) it depends on the situation which burden is being allocated.
- 28 An example for a presumption of law is the presumption of legitimacy. Once a child is proved to have been born in wedlock, that is at a time when the mother was lawfully wedded to the alleged father (basic fact), it is presumed to be legitimate (presumed fact). Once the basic facts of that presumption are proved, the party bearing the burden of persuasion for that issue has successfully discharged that burden. The opponent can rebut the presumption, for instance by proving non-access or incapacity of the husband.⁴¹ In that, however, he bears the burden of persuasion.⁴² By contrast, in a criminal trial only the burden of adducing evidence will be affected by the presumption of legitimacy.⁴³
- 29 Eg, in German legal terminology, presumptions of law are commonly subdivided according to their effect, that is, if upon proof of a basic fact the result is the inference of a second fact (*gesetzliche Tatsachenvermutung*) or a legal consequence (*gesetzliche Rechtsvermutung*).⁴⁴ An example for the former would be Art 1253(2) of the German Civil Code (GCC) which contains the presumption that, if the pledgor is in possession of the pledged chattel, it has been given back to him by the pledgee.⁴⁵ An example for the

³⁸ See Denning (n 30) 381: 'It is a misuse of language to speak of any presumption being conclusive, ...'.

³⁹ See Art 292 of the German Code of Civil Procedure (GCCP).

⁴⁰ Lord Denning suggested that presumptions concerning the burden of persuasion be called compelling presumptions for the judge is duty-bound to decide the issue accordingly in a *non-liquet* situation. Presumptions concerning the burden of adducing evidence should be called provisional presumptions since the judge is not bound to infer the existence of the fact in issue. In that, however, they are similar to factual presumptions. See Denning (n 30), 380.

⁴¹ Ibid.

⁴² See Family Law Reform Act 1969 sec 26.

⁴³ See Zuckerman (n 29) 116.

⁴⁴ See Prütting (n 30) 48.

⁴⁵ The return of the pledged chattel is condition for the pledge to terminate, see Art 1253(1) GCC.

latter is the presumption in Art 1006 GCC that the possessor of a chattel is its proprietor.⁴⁶

- 30 Hence, presumptions of law are a central tool of risk-allocation by means of which a certain public policy is put into place. The presumption of legitimacy may again serve as an example. This presumption reflects the degree of protection a social institution like marriage is meant to obtain, by shifting the persuasive burden once the basic facts of the presumption of legitimacy are established. In the criminal trial, however, the public commitment for the protection of the innocent overrides this element, and so only the burden of adducing evidence is cast on the accused.⁴⁷

3.3.4 Reallocation of Burden of Proof on Procedural Grounds

- 31 Procedural law also knows redistributions of burden of proof. For instance, if a party doesn't follow a court order to produce or disclose a certain document in support of a factual allegation made by the opponent, the court may treat the factual allegations as being proved. Effectively, a presumption in favour of the plaintiff is being created.⁴⁸ The same effect stems from the deliberate destruction of the document by the opponent.⁴⁹ Other systems like the English confer a discretionary power on the court to strike out a statement of case if the party has not complied with a rule, practice direction or court order.⁵⁰ The courts have thus a wide discretion to react to failure to disclose documents which adversely affect the party's case. In the US, default is used as an important sanction for failure to respond properly to broad American discovery.
- 32 This discretionary approach seems to reflect a standard more and more recognized in Europe, even though considerable differences remain as to the ambit of the discretion. Again, the ERCP try to find some middle ground. Pursuant to Rule 99 ECPR:

The court, whether on its own motion or on application by a party, may impose sanctions under Rule 27 when: (a) a person has unjustifiably failed to attend to give evidence or to answer proper questions, or to produce a document or other item of evidence; (b) a person has otherwise obstructed the fair application of the rules concerning evidence.

- 33 Pursuant to Rule 27(3) ERCP, in turn, the court may, among other consequences, draw negative factual inferences as a sanction for non-compliance with evidentiary rules. As the Comments to this Rule explain, 'drawing adverse inferences may also imply taking

⁴⁶ See Gottwald (n 22) 225, 235. Further examples are Art 891, 1362(1) and 2365 GCC.

⁴⁷ See Zuckerman (n 29) 116.

⁴⁸ Eg, Art 427 GCCP.

⁴⁹ Cf Art 444 GCCP.

⁵⁰ Rule 3.4 Civil Procedure Rules 1998 (UK) (UKCPR).

facts as having been established and this, in turn, could lead to claims, defences, or allegations being dismissed in whole or in part.’⁵¹

- 34 By the same token, in case of non-compliance with Access to Evidence Orders under Rules 100 ff ERCP the court may impose sanctions upon the addressee of such order, eg, by destroying or concealing such evidence, or otherwise rendering it impossible to carry out the order successfully. Pursuant to Rule 110 (1) ERCP, such sanctions include (a) declaring as admitted the facts which form the subject-matter of the relevant order for access to sources of evidence; and (b) treating the defendant or prospective defendant as having impliedly conceded the basis or any relevant part of the claim which has been made or which was proposed by the applicant.

3.3.5 Reallocation of Burden of Proof on Grounds of Fairness

- 35 On a slightly different plane, some procedural systems know a shifting of the burden of proof on grounds of fairness. Notably in Argentina, the ‘dynamic burden of proof’ doctrine,⁵² developed in legal doctrine and applied in case law, has now been transformed into statutory law with the enactment of the Argentine 2015 Civil and Commercial Code. Other Latin American countries like Brazil and Colombia have followed suit. This approach is designed to bring some flexibility to the application of the traditional rules of burden of proof, especially in cases characterized by evidentiary difficulties and unequal possibilities among the parties in terms of access to relevant information to go on trial. The main idea of this doctrine is to allow courts to reallocate in those cases the burden of proof to the party that ‘is better able to prove’ those particular facts in which parties have unequal access to information.
- 36 Such broad discretion naturally implies the danger of arbitrary decisions and lack of predictability. Its goal to promote equality of arms may thus well be reversed. Professor Giannini has suggested to carefully distinguish two categories in which the doctrine may be applied: First, it may be seen as a way to impose in those cases cooperation from the party that can provide useful evidence to determine the facts, evaluating his/her lack of collaboration as a (sometimes strong) argument against him/her (an adverse inference). Second, it may be seen an exceptional rule distribution of the burden of proof *stricto sensu*, that is a rule that allows judges to reallocate the risk of uncertainty over the party that is better able to prove on a case-by-case basis. In any case, in order to prevent arbitrariness and other negative disruptive results in the application of this doctrine, its scope should be limited, as it only required the party who is in better position to clarify certain facts, to come up with available information, allowing presumptions against her in the absence of information that should reasonably be in her possession. The strength

⁵¹ Comment 4 to Rule 27 ERCP.

⁵² J Nieva Fenoll, J Ferrer Beltrán and L Giannini, *Contra la carga de la prueba* (Marcial Pons 2019) 89-115. For an English presentation, see L Giannini, ‘New insights on the “dynamic burden of proof” doctrine’, (2019) 9 *Revista Iberoamericana de Derecho Procesal* 255-266.

or seriousness of the presumptions established against whoever does not fulfill this standard of conduct could even be measured according to the inequality of the parties on access to information regarding those facts. However, the dynamic burden of proof doctrine should not be applied or adopted as an institution oriented to distribute the weight of uncertainty over the party that is better positioned to prove (burden of proof reversal *stricto sensu*). Using an American terminology, but with a completely different purpose than the original, the first of the two burdens of proof (limited to the imperative of providing reasonably available evidence) could be called 'burden of producing evidence'. And the second, referring to the burden of putting an end to uncertainty about a certain fact would retain the classic name of burden of proof (or burden of persuasion). The latter should not be adjudicated or reallocated 'dynamically'.

4 PRESENTATION AND MANAGEMENT OF EVIDENCE

4.1 General Remarks

- 37 Every procedural system has to devise rules as to how evidence is to be presented before the court, or, as the case may be, the jury. It may be seen to be a rather technical issue, but it is of great practical importance. See Chapter 2 of Segment VII for evidence gathering techniques (eg, use of modern technologies etc).

4.2 Powers of the Court

- 38 The approach towards the management of evidence is closely linked to the obligations of parties, lawyers, and judges in a particular system. More and more systems entrust the court with the case management, which encompasses the responsibility for the management of evidence. This is the position reflected in the ERCP:

Whenever necessary and appropriate, the court must order the taking of relevant evidence offered by a party. Where the court makes such an order it may make case management orders concerning the sequence and timing of the production of evidence.⁵³

- 39 It has to be decided how ample the powers of the court should be, and, more specifically, if the court should have the power to order *ex officio* the taking of evidence not proposed by the parties. The latter does not receive a uniform answer in national procedural legislations: some see it as normal, especially when it comes to expertise;

⁵³ Rule 92(1) ERCP.

others, however, are very reluctant, probably because of a strict notion of the principles of disposition and of judicial impartiality.⁵⁴

- 40 The ERCP propose what can be seen as an acceptable compromise. The starting point should always be the parties' burden to identify and to propose all relevant evidence they consider appropriate. Nevertheless, a situation may be given where the court, after a first assessment of the case and of the evidence proposed by the parties, considers that additional evidence would be useful or necessary in order to assess the truth of relevant facts as asserted by the parties. In that case, Rule 92(2) ERCP sets two possible ways to overcome this situation, on an 'escalation' basis.⁵⁵ The first possibility, existing in some jurisdictions, grants the court the (limited) power to suggest what other evidence could be proposed by a party in order to cover the detected evidentiary need:

The court, while affording the parties an opportunity to respond, may suggest evidence not previously proposed by a party, which it considers may be relevant to an issue in dispute. If a party accepts such a suggestion, the court will order the taking of that evidence so that it may be offered in support of that party's contentions of fact and law.

- 41 Moreover, the court has the power to order *sua sponte* the taking of evidence, even though this should not be the general rule, as Rule 92(3) ERCP puts it: 'Exceptionally, the court may, while affording the parties an opportunity to respond, order the taking of evidence not previously proposed by a party.'
- 42 In jurisdictions where the court can order on its own motion the taking of any measure aimed at establishing legally admissible evidence (for example, appointing an expert witness, ordering the performance of a genetic test or directly interrogating any of the parties), it is still in practice an exception, not the rule. An exceptional power to require further evidence might be exercised by the court under this rule where, for example, the court apprehends that the transaction or dealings between the parties are illegal, or that a contract term is null and void (as follows from recurring Court of Justice of the European Union (CJEU) case law⁵⁶). It might also be necessary for the court to take an active role under this rule if one, or even both, parties are not legally represented. Additionally, these powers are considered as more acceptable in litigation areas where the principle of party autonomy does not apply in full.

⁵⁴ Cf C van Rhee, 'Obligations of the parties and their lawyers in Civil Litigation: The ALI/UNIDROIT Principles of Transnational Civil Procedure' in J Adolphsen, J Goebel, U Haas, B Hess, S Kolmann and M Würdinger (ed), *Festschrift für Peter Gottwald zum 70. Geburtstag* (C.H. Beck 2014) 669-679; C van Rhee, 'The development of civil procedural law in twentieth-century Europe: from party autonomy to judicial case management and efficiency' (2011) 7-8 *Russian Yearbook on Civil Procedure & Arbitration* 82-95.

⁵⁵ Rule 25(3) ERCP sets this out already in a more general manner.

⁵⁶ Cf M Stürner, *Europäisches Vertragsrecht* (Walter de Gruyter 2021) 386 with further references.

- 43 But in general caution is required. Before doing so, the court should consider the cost of the measure and choose the less or least expensive one if the expected results are otherwise equally satisfactory (this implies, again, the application of the proportionality principle). If the court orders the taking of evidence on the basis of this rule, the parties will also be granted opportunity to propose the taking of relevant evidence as a reaction to the court's initiative.
- 44 In both cases it must be emphasised that the court may not introduce new facts. In other terms, this rule does not derogate from the principle of party disposition.
- 45 Again, the US approach is markedly different. As explained above, the defendant can challenge the plaintiff's evidence before trial by moving for summary judgment. But even in such situations, the court may not decide whether additional evidence would be important for it to resolve a factual dispute. Rather, for the plaintiff a motion for summary judgment 'is the put up or shut up moment in a lawsuit, when a party must show what evidence has that would convince a trier of fact to accept its version of the events.'⁵⁷ Under Rule 56(d) USFRCP, the plaintiff can ask for more time: 'If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition', the court may defer ruling. But the party must make that showing, and it's not the court's responsibility. In practice, the judge often denies the request and proceeds to rule. So the judicial role in the US may be said to be almost the opposite of 'free evaluation' of the evidence, as a court recently explained at some length in *Stewart v Wexford Health Sources Inc*:

Before delving into the facts, we must return to first principles of summary judgment. We are faced once again with a case where the moving parties have presented some of the facts with a loose allegiance to the requirement that, on summary judgment, facts should be taken in the light most favorable to the non-moving party. Often this happens when the moving party appears, at first glance, to have more robust or convincing evidence to support its version of the facts. And because this is such a case, we will begin with the reminder that no matter how tempting it might be on summary judgment to be distracted by the sparkle of seemingly compelling facts, our assigned task is to take the facts in the light most favorable to the non-moving party -- in this case Stewart. *On summary judgment, we do not weigh conflicting evidence, resolve swearing contests, determine credibility, or ponder which party's version of the facts is most likely to be true.* We have one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.(emphasis added)⁵⁸

⁵⁷ *Hammell v Eau Galle Cheese Factory* (Court of Appeal, Seventh Circuit, US) [407 F.3d 852 (2005)] 859.

⁵⁸ *Stewart v Wexford Health Sources Inc* (Court of Appeal, Seventh Circuit, US) [14 F.4th 757 (2021)] 760.

4.3 Time and Preclusion

46 Another important and controversial topic regarding the management of evidence concerns time and preclusion: In a comparative perspective, national systems diverge, from very strict preclusive rules to very flexible regimes. The fundamentals underpinning the notion of preclusion need not be explained here; the importance of permitting the court to get as close to the truth as possible is equally relevant, although fairness of proceedings and the right of defence of the opposing party should not be forgotten. At a certain moment all the cards should be on the table.

47 The ERCP have opted for a system that is based on the notions of preclusion and of early identification of evidence, although with necessary degrees of flexibility. The starting point is the basic provision establishing the duty for the parties to make an early identification of evidence, which is embedded in a very general plea for the parties to conduct litigation carefully. Rule 47 ERCP reads:

Parties must present their claims, defences, factual allegations and offers of evidence as early and completely as possible and as appropriate to the careful conduct of litigation in order to secure procedural expedition.

48 This requirement is in accordance with the principles of loyalty – to the court and to the due administration of justice –, co-operation, and good faith. This early identification by the parties of their evidence should be made at the initial phase of the procedure where the parties present their contentions (usually in writing).

49 As a complement of this rule, and also in accordance with loyalty, co-operation and good faith, it is mandatory that evidence is notified to the opposing party. This is the rationale behind Rule 95 ERCP:

- (1) Parties must make documentary or tangible evidence available to other parties.
- (2) Parties may only propose witness evidence if notice is given to all other parties of the relevant witnesses' identity and the subject-matter of their proposed evidence.
- (3) The court may direct that parties keep evidence of which they have been notified confidential.

50 This duty of notification is necessary in order to render proceedings fair, since it enables the other party to challenge that evidence in due course. Therefore, the lack of proper prior notification should entail preclusive effects and the affected evidence should not be admissible.

51 In any case, this requirement of notification is a central issue in the preparation of evidence and is the core, in practice, of evidence, since it prevents the parties from abusive presentation of evidence and bad faith practices. Therefore, notification of

evidence must be done in such a manner and within a time that enables the opposing party to duly analyse it and, as the case may be, challenge its admissibility.

52 In any case, any rule based on preclusion needs a certain degree of flexibility. This may be the case when the need to offer evidence arises at a later moment of the procedure, namely because of amendments to the initial contentions of fact. This issue is addressed by Rule 96 ERCP, pursuant to which ‘The court may, while affording the parties an opportunity to respond, permit or invite a party to clarify or amend their contentions and to offer additional evidence accordingly.’

53 The idea behind preclusion is to promote the orderly production of evidence and the fairness of the proceedings. The parties are required to be reasonably diligent in identifying and producing evidence. Preclusion, however, should not apply in exceptional cases, namely when the parties were not in a position to comply with the burden to identify and produce evidence at an early stage of the procedure. Thus, many systems allow a party to adduce further evidence if that party shows good reason for not having produced it during that earlier phase. Thus, Rule 55 (1) ERCP provides that:

A party, upon showing good cause to the court and upon notice to other parties, has a right to amend its claims or defences when the amendment does not unreasonably delay the proceeding or otherwise result in injustice. In particular, amendments may be justified to take account of events occurring after those alleged in earlier pleadings, newly discovered facts or evidence that could not previously have been obtained through reasonable diligence, or new evidence obtained from the exchange of evidence.

54 Late presentation of evidence, therefore, must be regarded as an exception that must be based on justified reasons, such as in cases of new or newly discovered evidence.

55 In the US, there is no duty for the parties to make an early identification of evidence to the court. Although there is limited ‘initial disclosure’ in federal courts, almost all evidence production occurs due to discovery. If parties do not disclose or produce evidence they want to use later, those discovery failures may preclude their using the evidence under Rule 37(c)(1) USFRCP. And as trial approaches, pre-trial preparation includes some obligation to make a disclosure about what evidence is to be presented at trial under Rule 26(a)(3) USFRCP.

4.4 Conduct of hearing where evidence is to be adduced

56 It is more a matter of pragmatism how to conduct the hearing in which evidence is to be adduced. Pursuant to Rule 97 (1) ERCP: ‘Whenever appropriate, the court will hear and receive evidence directly at a hearing before the parties unless, exceptionally, it has authorised evidence to be taken by an individual authorised to act on its behalf or at another location.’ In Israel, prior to the reform of the Civil Procedure Regulations (ICPR)

in 2021, the decision which party had to discharge the onus of proof was left to the trial court. Under Art 158 ICPR prior to the reform, it was usually the plaintiff who had to present his evidence first to the court. However, under this provision, in cases in which the defendant had to discharge the onus of proof, the order was reversed, and the defendant was the first to present his evidence. Following the reform, Rule 66 ICPR provides that, unless another determination is called for in the circumstances, the plaintiff will be the first to bring his evidence, and the defendant will follow. Refuting evidence is allowed only after receiving the court's permission.

- 57 In the US, however, the jury trial is a single, continuous hearing, as the jurors are summoned from their ordinary occupations and assured that this civic duty will not be any more onerous than is necessary. To some extent, later presentations of evidence (often called rebuttal) are limited in terms of earlier presentations.

5 EVALUATION OF EVIDENCE

5.1 Formal v Substantive Approach

- 58 On the basis of all evidence which has gone through the filter of relevance the judge has to evaluate the evidentiary weight of each item in order to decide on the merits of the case. Roughly speaking two models are conceivable.⁵⁹ The first, to be found in the Roman cognition procedure of Justinian, determines the probative force of means of evidence according to abstract criteria. For instance, documents were said to have superior evidentiary value over other means of evidence. There were also rules concerning the number of witnesses necessary to arrive at full proof equal to what could be proven by means of a document. Such rules existed throughout the Middle Ages on the continent in the 'learned process' (*Gelehrter Prozess*), where learned judges would ascertain the truth according to strict evidentiary rules.
- 59 The Common Law process developed similar rules. Historically, the jury trial can be seen as one of the key factors for such formalism. The rule against hearsay evidence, for example, was intended to prevent the jury from relying too much on statements with typically low evidentiary persuasion.⁶⁰ Generally, under English law, as it stands today, there do not seem to exist binding rules as to evidentiary weight, ie, attributing fixed amounts of evidential value to certain pieces of evidence. Some rules on the admissibility, however, seem to be based on concerns regarding evidential value and

⁵⁹ See R Stürner, 'The Principles of Transnational Civil Procedure, An Introduction to Their Basic Conceptions' (2005) 69 *The Rabel Journal of Comparative and International Private Law* 201, 237 ff; J Scherpe, 'Alleviations of Proof in German and English Civil Evidence' (2016) 80 *The Rabel Journal of Comparative and International Private Law* 888, 895 ff.

⁶⁰ See M Brinkmann, *Das Beweismaß im Zivilprozess aus rechtsvergleichender Sicht* (Heymann 2005) 15.

there are guidelines regarding the assessment of some evidence as shows Sec 4 of the Civil Evidence Act 1995 (UK) regarding hearsay evidence.

- 60 The second model, which has gained much influence in modern civil process, puts much more reliance on the judge. It is the principle of free evaluation of evidence. While the formalist model stems from the scholastic ideal of an absolute truth to be ascertained by means of technical rules without relying too much on subjective impressions, the age of enlightenment brought about a fundamental shift towards the individual. The abolition of formal rules of evidence was a consequence of this development.

5.2 Free Evaluation of Evidence

- 61 The PTCP pin down what can be described as a consensus in many systems: '[t]he court should make free evaluation of the evidence and attach no unjustified significance to evidence according to its type or source.'⁶¹ As the comments clarify, the idea is to do away with the more formal approach and place no special legal value on any specific means of evidence.⁶² However, as the comments further explain, this is not meant to be interpreted as a complete ban on national laws that require a specified formality in a transaction, such as written documentation of a contract involving real property.⁶³

- 62 Rule 98 of the ERCP on 'Evaluation of Evidence' puts it even in a more succinct manner: 'The court will freely evaluate evidence.' This seems to reflect a consensus accepted in all European systems. This holds true even for the English system: Considering that there are generally no fixed quanta of evidentiary weight, one may regard the English legal system as acknowledging a principle of free evaluation of evidence even though this term does not seem to be used by the courts.

- 63 Pursuant to Art 286(1) Code of Civil Procedure (Germany) (GCCP):

The court is to decide, at its discretion and conviction, and taking account of the entire content of the hearings and the results obtained by evidence being taken, if any, whether an allegation as to fact is to be deemed true or untrue. The judgment is to set out the reasons informing the conviction of the judges.

- 64 The Japanese Code of Civil Procedure (JCCP) also employs the principle of free evaluation of evidence by judges. Pursuant to Art 247 JCCP (a legal transplant from Germany), in reaching a judgment, the court decides whether to find allegations of fact to be true

⁶¹ Rule 16.6 PTCP.

⁶² Ibid comment P-16G.

⁶³ See Art 9(1) IBA Rules on the Taking of Evidence (Admissibility and Assessment of Evidence): 1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. [...]. Without spelling out clearly this amounts to the same result as the principle of free evaluation of evidence.

based on its freedom of personal conviction, in light of the entire import of oral arguments and the results of the examination of evidence.

65 In the terminology used in the heading of the question, the general rule in Argentina is the free evaluation of evidence, according to which the judge is responsible for the assessment of the evidentiary value of the elements provided in the case. The probative value of the means of evidence provided is determined by the court in each case. Procedural rules and a constant jurisprudence of the Supreme Court limits the judge discretion, imposing that the evaluation of evidence must be rational. The Spanish formula used also in Argentina and many Latin American Countries for this method of evaluation is '*sana crítica*' (healthy criticism) (which may be seen as a true legal transplant). It is a very uncertain formula that is supposed to require judges to use their logic and experience to evaluate the evidence, to give reasons for their weighing judgment or, in other words: to be reasonable and prevent arbitrariness. However, as Taruffo has written, 'there is no "positive" rationality in that standard, just a general imperative of rationality, valuable in itself, but insufficient to guide the work of the judge in the process of selection and evaluation of the evidence.'⁶⁴

66 Note that in the US system, the jury is the trier of fact. Hence, American judges are generally forbidden to resolve disputed factual issues. Instead, they may enter judgment only when they determine from the evidence presented at trial (or, before trial, on motion for summary judgment) that no reasonable jury could be persuaded by the evidence offered by the party with the burden of proof. As Rule 50(a)(1) USFRCP reads:

If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained only with a favorable finding on that issue.

67 Consequently, the American judge is not entitled to make a 'free evaluation' of the evidence, or decide the case under the 'preponderance of the evidence' burden of persuasion described above. Instead, the judge must submit the case for a jury decision even if the judge herself is persuaded that the actual events did not occur in the way the party with the burden of proof must prove to win. This approach serves to protect the role of the jury: Suppose the judge had to submit the case to the jury only if she (the judge) was persuaded by the evidence, the right to a jury trial would be worth very little to plaintiffs. Instead, it would in a sense be a backup for defendants, who might manage to persuade the jury that the events did not occur as the plaintiff claims, even though the judge was persuaded by the plaintiff's evidence (or the case would not have gotten

⁶⁴ M Taruffo, *La prueba de los hechos* (Jordi Ferrer Beltrán tr, Trota 2002) 396.

to the jury at all). The right to a jury trial and the low standard of proof together are advantages to plaintiffs in the US system.

- 68 Note that actually very few American cases result in resolution of factual disputes in court. Instead, the defendant frequently moves for summary judgment before trial under Rule 56(a) USFRCP,⁶⁵ presenting evidence obtained through discovery and arguing that in light of that evidence no reasonable jury could find for the plaintiff.

5.3 Remaining Rules on Enhanced Value of Means of Evidence

- 69 In some national systems, despite the adherence to the principle of free evaluation of evidence, there are rules on a binding or enhanced value of certain types of evidence. For example, in French Law, in civil (but not in commercial) matters, claims with a value of over EUR 1,500 may only be established by a written document (*'par écrit sous signature privée ou authentique'*), save in exceptional circumstances.⁶⁶ Likewise, but with a different historical underpinning, the interpretation of a written contract is seen as a matter of law rather than a matter of fact. As a consequence, permission to appeal against such decisions is more readily granted, as the higher instances are less concerned with factual issues. Conversely, in a dispute pertaining to establishing the contents of an unwritten contract, this is seen as a factual issue.
- 70 Furthermore, as mentioned above, in England statute law provides for considerations relevant to eg, the weighing of hearsay evidence.
- 71 In Argentina the party confession has, as a general rule, 'full probative value', with some exceptions. That means that confession proves against any other mean of evidence, no matter how convincing it may be, unless a legal exception applies. Likewise, public documents have a special legal evidentiary value.⁶⁷
- 72 Other systems like the Japanese system do not know any formal rules of evidence as far as ordinary proceedings are concerned. In special proceedings such as bill proceedings or check proceedings, the types of evidence are limited to documents in accordance with the Geneva Convention of 1930.
- 73 But even in the absence of formal rules on the specific weight of certain types of evidence, in forensic practise documentary evidence seems to be by all means the most reliable source of evidence: If a party claiming contractual performance can produce a

⁶⁵ 'The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'

⁶⁶ See Art 1359 Civil Code (France), as modified by Ordonnance n°2016-131 du 10 février 2016, to be read in conjunction with Décret n°80-533 du 15 juillet 1980 pris pour l'application de l'article 1341 du code civil.

⁶⁷ See Chapter 4 of Segment VII on Types of Evidence.

written document containing the respective duties which is signed by both parties, it will be difficult for the opponent to prove that in fact there is no contract. By contrast, where there is no such documentary evidence, a witness statement (by the claimant or a third person) to that effect will probably not convince the judge to the same degree.

5.4 Mandatory Nature of Principle of Free Evaluation of Evidence

- 74 Under the principle of party autonomy, one might ask if parties should have the power to derogate from the free evaluation of evidence by concluding an agreement on the evidentiary value of certain types of evidence. However, apparently in all systems, in evaluating evidence, the court is not bound by the parties' allegations, or indeed stipulations. As a fundamental procedural principle, the parties may not derogate from the power of the judge as to the free evaluation of evidence by concluding an agreement on the evidentiary value of certain types of evidence.

5.5 Limits of Free Evaluation of Evidence

- 75 It goes without saying that the principle of free evaluation of evidence does not justify arbitrary decisions. The trust the approach puts on the person of the judge, or the collegiate organ on the bench, does not come boundlessly.
- 76 First, in a system of party autonomy, the parties determine the scope of the dispute (in German: *Dispositionsmaxime*). Likewise, they are responsible for the introduction of factual allegations and, if necessary, the proof of those facts (in German: *Verhandlungsmaxime*; true also for Japan). This basic principle is reiterated in Rule 23(1) ERCP on the Scope of the Dispute: 'The scope of the dispute is determined by the claims and defences of the parties in the pleadings, including amendments.' Consequently, the judge may not consider facts which were not introduced by the parties, nor may he disregard undisputed facts even though he may see them as not reflecting the truth. Moreover, the laws of logic and natural science must be observed. Lastly, private knowledge of the judge can never be the basis of the judgment.⁶⁸ This serves to ensure neutrality and impartiality of the court. The dividing line is blurred, however, as it may still happen that the judge's specialist knowledge has some influence on his decision.⁶⁹
- 77 The process of weighing of the evidence presented before the court must be made transparent, and it must follow rational patterns. For this reason, as exemplified in Rule 131(f) ERCP, court decisions must normally be accompanied by explanations concerning the legal and factual grounds for the judgment: Thus, the aggrieved party will be able to

⁶⁸ See Comments to Rule 87 ERCP on Standard of Proof: 'A court may only consider itself to be convinced or satisfied of the truth of a factual allegation, when it has taken account of all relevant evidence, or other valid methods of proof such as those described in Rule 88. A court may never base its decision on issues of fact upon its own private knowledge.' For England, cf Tapper (n 9) 81.

⁶⁹ Cf Tapper (n 9) 82 ff.

determine the chances of success of an appeal against the decision. Moreover, the duty to give reasons reflects a more general aspect of the right to a fair trial.⁷⁰ In the words of the UK Supreme Court,⁷¹ ‘It is important to make it plain to the losing party that its case has been fully considered and to leave no doubt about the reasons which have led to its rejection.’

5.6 The Use of Artificial Intelligence in the Process of Evaluating Evidence

- 78 The use of artificial intelligence (AI) in civil proceedings currently still appears to be a rather distant vision. This is at least true with regard to the replacement of human decision-making by machines, which, at least until recently, had their place more in dystopian novels than in scientific papers.⁷² And yet, the use of AI to support legal processes can in principle be envisaged in all phases of the proceedings.⁷³ In systems with a high standard of data protection, decisions can be anonymised by AI and made accessible to the public in large numbers in this way. Legal analytics tools may be used to check the chances of success in proceedings concerning legal aid. The use of chatbots in the run-up to the filing of a lawsuit is also conceivable, and is indeed being practised, eg, in Denmark or the Canadian Province of British Columbia.⁷⁴ Opportunities for realising AI applications may also be seen in the area of costs law, which, with its relatively clear rules, is likely to be very well suited to automated decision-making.
- 79 In the medium term, an upgrade of legal analytics to a real decision-making tool seems conceivable. However, probably in all systems under the rule of law the actual decision must still be made by the court itself. Ultimately, human dignity prohibits a judicial decision being made entirely by algorithms. But even if AI is only used for preparation, for example in the form of generating a proposal for a decision, there is always a concern that the judicial decision will generally follow it. Studies suggest a tendency to follow the computer-generated solution proposal even in the presence of contrary indicators, or to not even look for such indicators from the outset (‘automation bias’).⁷⁵ This seems all the more serious because the AI itself only seems to solve a legal question more objectively than a judge would: an algorithm ultimately only follows the specifications of those who programmed it. These are not comprehensible, at least not to outsiders; the path from the raw data to the decision is not comprehensible (‘Black Box’

⁷⁰ Cf *Trade Agency*, Case C-619/10 (CJEU), Judgment 6 September 2012 [ECLI:EU:C:2012:531] para 53; *ASML*, Case C-283/05 (CJEU), Judgment 14 December 2006 [ECLI:EU:C:2006:787] para 28.

⁷¹ Lord Hamblen und Lord Leggatt in *Shagang Shipping Company Ltd (in liquidation) v HNA Group Company Ltd* (Supreme Court, UK) [2020] UKSC 34 para 117.

⁷² Cf H Eidenmüller and G Wagner, *Law by Algorithm* (Mohr Siebeck 2021) 254 ff.

⁷³ Cf R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 263 ff; R Marcus, ‘Technology and Litigation: The 21st Century American Experience’ (2020) 25 *Zeitschrift für Zivilprozeß international* 99, 115 ff.

⁷⁴ Cf Civil Resolution Tribunal Act 2012 (Canada, B.C.).

⁷⁵ Cf M Cummings, ‘Automation and Accountability in Decision Support System Interface Design’ (2006) 31 (1) *Journal of Technology Studies* 23, 25.

problem).⁷⁶ Thus, here too, there is ultimately only a pseudo-rationality. A minimum requirement for the use of AI in judicial decision-making must therefore be that there is transparency in this regard: it must be disclosed to the parties that a certain algorithm is being used and how it works.

6 STANDARD OF PROOF

6.1 General Remarks

- 80 That leads to the closely related question of according to which standards the judge should evaluate the evidence presented in court.⁷⁷ The aim is to establish the facts of the case in order to determine the legal consequences arising out of the situation. Much has been written about the goal of civil proceedings. Clearly, the absolute truth can never be reached, and may not even be the ultimate goal in a party-driven litigation. Indeed, the parties have the power to alter the legal ties that exist between them. Likewise, they may determine the factual framework within which the court then operates. Thus, there is no need, or justification, for the court to look beyond this setting. But within these procedural boundaries the court must strive to ascertain the true facts of the case. This ‘procedural truth’ is not second best, as it derives its legitimacy from the rules of procedure, which operate fairly between the parties. As noted above, in the US system, such goal to establish the true facts may be said to be much less entrusted with the judge. Rather, there is what may be described as a division of labour with the jury in that respect.
- 81 Clearly, if evidence serves to prove that factual allegations are true, the ultimate goal of free evaluation of evidence must be some degree of conviction of the judge pertaining to the version put forward by one party or the other. The standard of proof determines the threshold established in each procedural system.⁷⁸

⁷⁶ Cf in the context of the Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2016/679 of 27 April 2016 (EU) S Wachter, B Mittelstadt and C Russell, ‘Counterfactual Explanations without Opening the Black Box: Automated Decisions and the GDPR’ (2018) 31 Harvard Journal of Law and Technology 841.

⁷⁷ Certainly, with respect to the standard of proof forum law applies. See H Nagel and P Gottwald, *Internationales Zivilprozessrecht* (7th edn, Verlag Otto Schmidt 2013) sec 10, para 56; M Brinkmann, ‘Das lex fori-Prinzip und Alternativen’ (2016) 129 Zeitschrift für Zivilprozess 461, 482.

⁷⁸ For a detailed analysis see M Schweizer, *Beweiswürdigung und Beweismaß. Rationalität und Intuition* (Mohr Siebeck 2015); L Tichý (ed), *Standard of Proof in Europe* (Mohr Siebeck 2019).

6.2 Different Standards

- 82 In comparative perspective, different standards of proof can be found.⁷⁹ The traditional formula used in English civil procedure refers to a ‘balance of probabilities’. This means that the judge must be slightly more convinced by the version of the party on whom the onus lies than by the other. It does not mean, however, that the judge must prefer the allegations of one party over those of the other. The evidence adduced by the defending party may simply cast doubt on the story told by the claimant’s witness without being convincing itself.⁸⁰ The preponderance-standard in civil proceedings has to be distinguished from the standard of proof in criminal proceedings, where the guilt of the accused has to be ‘beyond reasonable doubt’.
- 83 In the US, in some cases a middle ground between those two standards seems to be established by the formula of ‘clear, convincing and satisfactory evidence’. However, at the end of the day the standard of proof is only a jury instruction: The jury decides, not the judge. But also in the rest of the common law world, the preponderance formula seems to be far from satisfactory in all cases. Following Lord Denning’s dictum in *Bater v Bater*, a floating standard of proof was introduced:⁸¹ ‘There may be degrees of probability within that standard. The degree depends on the subject matter.’ The perspective of a reasonable and just man has to be chosen. That really leaves a broad margin of appreciation for the judge. Later on, English courts have advocated a return towards the probabilities-test.⁸² In a similar vein, in civil claims under Israeli law, the party that has to discharge the onus of proof has to show that it is ‘more likely true than not true’ that what it claims to have occurred actually did occur.
- 84 Continental civil law seems to have the highest standard of all as it requires proof beyond reasonable doubt.⁸³ But in practise this boils down to a workable compromise, as set out in one of few judgments of the German *Bundesgerichtshof* (Federal Court of Justice) on the standard of proof: Pursuant to the decision in the so-called *Anastasia* case, a personal conviction of the judge is enough, which can be said to exist even though small doubts may persist.⁸⁴ Moreover, the law sometimes confers on the judge the power to

⁷⁹ For a comparative analysis see L Tichý, ‘Die Wahrscheinlichkeit und das Beweismaß im Schadensersatzrecht’ in P Mankowski and W Wurmnest (ed), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier 2014) first page, 709; H Kronke, ‘Standard of Proof in International Arbitration’ in K-N Peifer, B Raue and M Stieper (ed), *Ius Vivum: Kunst - Internationales - Persönlichkeit: Festschrift für Haimo Schack zum 70. Geburtstag* (Mohr Siebeck 2022) 687.

⁸⁰ See Brinkmann (n 60) 29 ff.

⁸¹ *Bater v Bater* (Court of Appeal, UK) [1950] 2 All E.R. 458, 459 (Lord Denning).

⁸² *Re B* (House of Lords, UK) [2009] 1 AC 11, 5, 13 (Lord Hofmann).

⁸³ See Art 286(1) GCCP: ‘The court shall, at its discretion and conviction, and taking account of the entire content of the hearings and the outcome of any taking of evidence, freely decide whether an allegation of fact is to be considered true or not true.’

⁸⁴ Case III ZR 139/67 (BGH, Germany), Order 17 February 1970 [BGHZ 53, 245] 256.

estimate the extent of the damage (eg, Art 287 GCCP) or of lost profits (eg, Art 252 GCC). In those cases, the standard of proof for causality and other issues is said to be slightly lower than usual.⁸⁵

- 85 Likewise, in Japan, there are no legal provisions regarding standard of proof, so there are no black-letter rules. In 1975 the Supreme Court of Japan stated that the standard of proof of civil procedure should be ‘high degree of probability’ of the existence of the fact to be proven, and the judge must have ‘confidence’ to the extent that ordinary people do not doubt it.⁸⁶ This precedent was followed in subsequent Supreme Court decisions.⁸⁷ Thus, the Japanese Supreme Court precedents adopt the ‘high degree of probability’ and ‘confidence’ standard for proof of facts. Regarding the relationship between ‘high degree of probability’ and ‘confidence’, the former is an objective expression and the latter is a subjective expression, and both are considered to have essentially the same meaning. When the first judgment was made, it was generally understood that the meaning of this ‘high degree of probability’ and ‘confidence’ standard was almost equal to ‘beyond reasonable doubt’ in the US system. However, recently, there has been a growing understanding that it is rather close to the ‘clear and convincing’ standard. In any case, both understandings are considered to be at least lower than the standards of criminal proceedings.
- 86 In light of this, some authors in fact claim that in reality the standard of proof in common law and in civil law is equal.⁸⁸ For them, the decisive criterion is the personal conviction of the judge. In both civil law and common law this leaves a broad corridor for an approximation of all formula used without having to change the systems in substance.⁸⁹ Statistical evidence seems to suggest that the degree of conviction is around 70% in both civil law and common law systems despite the seemingly fundamental divergence of the theoretical approach.⁹⁰

⁸⁵ Case IX ZR 12/92 (BGH, Germany), Order 5 November 1992 [NJW 1993, 734]: ‘a clearly preponderant probability based on a secure foundation is sufficient for the judicial formation of conviction.’ Contra Brinkmann (n 60) 51 ff.

⁸⁶ Supreme Court, Japan, Judgment 24 October 1975 [Minshu Vol. 29 No. 9] 1417.

⁸⁷ Supreme Court, Japan, Judgment 18 July 2000 [Hanji Vol. 1724] 29.

⁸⁸ See Brinkmann (n 60) 61 ff; Rosenberg, Schwab and Gottwald (n 19) sec 114, para 13 ff. The flexible approach towards standard of proof advocated by Gottwald has found considerable support in German doctrine. Cf H Rüßmann, ‘Das flexible Beweismaß – eine juristische Entdeckung’ in J Adolphsen, J Goebel, U Haas, B Hess, S Kolmann and M Würdinger (ed), *Festschrift für Peter Gottwald zum 70. Geburtstag* (C.H. Beck 2014) 539.

⁸⁹ Contra Scherpe (n 59) 902 ff.

⁹⁰ Schweizer (n 78) 576 ff. For a critical account of this approach see P Gottwald, ‘Auf dem Weg zu einer rationalen Beweismwürdigung’ in R Fankhauser, C Widmer Lüchinger, R Klingler and B Seiler (ed), *Das Zivilrecht und seine Durchsetzung: Festschrift für Professor Thomas Sutter-Somm* (Schulthess Juristische Medien 2016) 125.

6.3 Towards a Compromise

- 87 Indeed, the PTCP set off from the comparative result, as the comments point out, that '[t]he standard of "reasonably convinced" is in substance that applied in most legal systems. The standard in the United States and some other countries is "preponderance of the evidence" but functionally that is essentially the same.'⁹¹ Consequently, Rule 21.2 PTCP on Burden and Standard of Proof reads: 'Facts are considered proven when the court is reasonably convinced of their truth.' Following up on this, Rule 87 ERCP on Standard of Proof reads: 'A contested issue of fact is proven when the court is reasonably convinced of its truth.' The notion of 'reasonable conviction' is intended to signify that in theory a 'full' conviction would be desirable, but will only rarely be reached in practice. The term 'reasonably' should therefore be understood as meaning 'as closely to the full conviction as possible'. By the same token, it gives the judge the necessary flexibility while maintaining a fairly high standard. At the end of the day, it seems, this solution substantially aims at echoing the civil law standard, but at the same time alludes to the flexibility characterising the common law. As the comments to Rule 87 ERCP make clear, 'convinced' may be understood as 'satisfied'. This could be taken as a further concession to common law thinking, giving the judge some flexibility to adapt to the circumstances of the case. It should not, however, be understood as introducing a floating standard of proof, as advocated by Lord Denning in *Bater v Bater*.
- 88 While it is true that from a comparative viewpoint, the 'merger thesis' of common law and civil law standards of proof may be difficult to sustain,⁹² the compromise reached in both PTCP and ERCP Rules seems to please proponents of both legal families. At the same time, as model rules they leave enough room for a national, or indeed supranational, legislator to adapt the content to its procedural tradition.
- 89 In Japanese scholarship it has been underlined that, since the degree of conviction of the judge is an individual's inner thought and cannot be objectively measured from the outside, the above-mentioned Supreme Court precedent is not considered to be very binding. Therefore, it is said that court practice does not always follow this standard, and some judges comment that the practice is carried out with a lower degree of proof. In addition, quite a number of inferior court decisions clearly state that 'considerable degree of probability' is sufficient for the standard of proof in civil procedure. In light of this, some of the leading procedural law scholars in Japan argued that the degree of proof in civil procedure should be lower than the 'high degree of probability' that the Supreme Court adopted, and they insisted on the 'predominant probability' as the standard of proof. Professor Miki has advanced a new approach based on comparative insights: When the degree of proof is expressed numerically, the 'beyond reasonable doubt' in criminal proceedings is 90% or more, the 'high degree of probability' of Japanese Supreme Court is 80% or more, the 'clear and convincing' is 70% or more, and

⁹¹ Comment P-21B PTCP.

⁹² See the account by Scherpe (n 59) 906.

the 'preponderance of evidence' = 'more likely than not' is 51% or more.⁹³ In civil procedure, since the positions of the plaintiff and the defendant are equal, the burden of proof and the risk of error on the part of the judge should be equal between the two. Therefore, in principle, the 'preponderance of evidence' = 'more likely than not' = '51% or more' standard should be justified. However, in the light of the theory of cognitive psychology, it does not make much sense to quantify the degree of conviction in detail, and it can be classified into only about three stages at most. Therefore, numerical conversion of the 51% that is frequently used as the 'more likely than not' is misleading, and consequently, the standard of proof in civil proceedings should be 60% or more, which may be called 'predominant probability' standard.

6.4 A Flexible Standard of Proof?

- 90 The floating standard of proof advocated by, amongst others, Lord Denning in *Bater v Bater* has not found many supporters. However, in the light of the principle of free evaluation of evidence, there is a certain degree of flexibility in the process of decision-making, which has repercussions on the standard of proof. As has been explained earlier, the principles of fair trial and equality of arms may influence judicial preparedness to help the weaker party by alleviating the burden of proof. In a similar vein, that party's position may be effectively bolstered by lowering the standard of proof.
- 91 Eg, for Argentina, in fields like environmental law, there are principles that allow judges (and other authorities) to make a certain decision even under qualified uncertainty. For example, the widely known 'precautionary principle' in environmental law, determines that 'when there is a danger of serious or irreversible damage, the absence of information or scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. This principle could amount to determining a lower standard of proof to adopt preventive measures, injunctions or even final decisions in environmental cases. Legal scholars advocate for introducing general standards of proof as a way to improve rational fact adjudication in civil cases, but the discussion is far from being over.
- 92 On a slightly different plane, in some systems there are discussion as to whether a proportionate standard of proof should be advocated to alleviate evidential shortcomings. Such an approach would depart from the all-or-nothing standard prevailing in many areas of substantive law: Once the court is convinced of the factual allegations, the claimant gets 100%, even though the conviction might only be 51% (as the case may be). If the court is only a little less convinced of the claimant's version, the claim fails and he gets nothing. Under a proportionate approach, if the court is convinced of what the claimant says to only 51%, it would award only 51% of the damages. Such an approach is advocated where proof of causality is exceedingly difficult, eg, in the field

⁹³ K Miki, 'Standard of Proof in Civil Procedure' (2010) 83.1 *Hougakukenyu* 15.

of medical malpractice.⁹⁴ However, it does not seem to have found too many supporters. This is true at least for Germany. In a similar vein, some Japanese scholars argued that the amount of damage should be calculated by multiplying it by the same percentage of the conviction of the judge. However, that scholarship did not gain general support. Court practice also denies such an approach.

6.5 Other Types of Relaxation of Standard of Proof ‘through the Back Door’

- 93 Sometimes difficulties to prove a case are alleviated under different headings. Eg, under German law, the judge has the power to estimate the amount of the damage (Art 287 GCCP) or of lost profits (Art 252 GCC). This is considered to be an indirect alleviation of the standard of proof. Likewise, in the 1996 revision, the Japanese Code of Civil Procedure introduced a new Art 248 JCCP modelled after Art 287 of the German Code of Civil Procedure (GCCP). However, unlike German law, Japanese law allows alleviation of proof only for the assessment of the amount of damage, and requires normal proof for the existence of any damage.
- 94 In Argentina, ‘prudential’ determination of the amount of some kinds of damage (for example, moral or spiritual damage), is also present in case law. But it is not generally considered a relaxation of a (non-existent) standard of proof. It is more common to refer to this phenomenon as part of the ‘inescapable judicial discretion’ or similar formulations.

⁹⁴ Cf C Katzenmeier, ‘Beweismaßreduzierung und probabilistische Proportionalhaftung’ (2004) 117 *Zeitschrift für Zivilprozess* 187; G Wagner, ‘Proportionalhaftung für ärztliche Behandlungsfehler de lege lata’ in G Müller, E Osterloh and T Stein (ed), *Festschrift für Günter Hirsch zum 65. Geburtstag* (C.H. Beck 2008) 453; C B Ehlgén, *Probabilistische Proportionalhaftung und Haftung für den Verlust von Chancen* (Mohr Siebeck 2013).

ABBREVIATIONS AND ACRONYMS

AI	Artificial Intelligence
ALI	American Law Institute
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) (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)
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)
NZ	New Zealand
no	number/numbers
para	paragraph/paragraphs
PTCP	Principles of Transnational Civil Procedure 2004 (ALI / UNIDROIT)
Sec	Section/Sections
SCC	Supreme Court Canada
supp	supplement/supplements
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
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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 on the law applicable to contractual obligations (Rome I), 593/2008 of 17 June 2008 (EC).

Regulation on the law applicable to non-contractual obligations (Rome II), 593/2008 of 17 June 2008 (EC).

Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 2016/679 of 27 April 2016 (EU).

National

Children and Young Persons Act 1933 (UK).

Civil and Commercial Code 2015 (Argentina).

Civil Code (Germany).

Civil Evidence Act 1995 (UK).

Civil Resolution Tribunal Act 2012 (Canada).

Code Civil (Civil Code) (France).

Code of Civil Procedure (Japan).

Codigo Procesal Civil y Comercial de la Nacion (Code of Civil Procedure) (Argentina).

Civil Procedure Regulations 2021 (Israel).

Civil Procedure Rules 1998 (UK).

Family Law Reform Act 1969 (UK).

Federal Rules of Civil Procedure (US).

Federal Rules of Evidence (US).

Zivilprozessordnung (Code of Civil Procedure) (Germany).

Zivilprozessordnung (Code of Civil Procedure) (Switzerland).

CASES

International/Supranational

ASML, Case C-283/05 (CJEU), Judgment 14 December 2006 [ECLI:EU:C:2006:787].

Trade Agency, Case C-619/10 (CJEU), Judgment 6 September 2012 [ECLI:EU:C:2012:531].

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

National

Byrne v Boadle (Court of the Exchequer, UK) [1863] 9 LT 450 (ExCh).

Abrath v North Eastern Railway Company (Court of Appeal, UK) [1883] 11 QBD 440.

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Shagang Shipping Company Ltd (in liquidation) v HNA Group Company Ltd (Supreme Court, UK) [2020] UKSC 34.

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