The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI / UNIDROIT Principles of Transnational Civil Procedure

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I. – INTRODUCTION

The standard of proof in civil matters has been and still is at the centre of considerable and at times fierce debate, not only within common and civil law jurisdictions but also between the two systems. Just recently, two American law professors "rudely wonder[ed] how civilians can be so wrong".[1] The *ALI / UNIDROIT Principles of Transnational Civil Procedure* (hereinafter: the *Principles*) must be praised not only for dealing with this sensitive matter at all,[2] but for developing a formula that accurately addresses the core elements of fact-finding at trial while reflecting influences from both legal traditions.

In this paper, I will attempt to rebut the proposition that the civilian standard is indeed as high as many depict it. I will try to demonstrate that the divergences between common and civil law jurisdictions with respect to the standard of proof are a matter of words rather than of substance, a view also expressed in Comment *P(rinciple)-21.*

After giving a preliminary definition of the standard of proof and outlining its functions in civil procedure, I will deal with the divergent formulae used in common and civil law systems to describe the standard applicable to civil trials. The final part reflects on the compromise struck by the *Principles* and discusses possible constructions of *P-21.2.*

II. – THE STANDARD OF PROOF – A PRELIMINARY DEFINITION AND ITS AMBIGUITIES

The term "standard of proof" (*Beweismaß*), describes the threshold that has to be met in order to allow the trier of facts to regard a factual allegation as proven. If this standard is not met, *i.e.* if the trier either does not know what to believe (*non liquet*) or is convinced that a certain allegation is untrue, the party bearing the burden of persuasion (*charge de la preuve, objektive Beweislast*) loses on this issue.

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1 K.M. CLERMONT / E. SHERWIN, "A Comparative View of Standards of Proof", 50 *American Journal of Comparative Law* (2002), 243, 274; see also the reply by M. TARUFFO, "Rethinking the Standards of Proof", 51 *idem* (2003), 659.

2 None of the sets of Rules for International Commercial Arbitration by the ICC, the LCIA and UNCITRAL or the IBA *Rules on the Taking of Evidence in International Arbitration*, for example, contain a provision on the subject.

The actual nature of this threshold – the truth as such, the belief of the trier of facts, the probability of an event or an allegation – is rather ambiguous. Some legal systems and some authors use this term to refer to the degree of warrant for an allegation found by the trier of facts in the evidence. Others, however, use the expression to describe the required strength of belief in order to consider an allegation as proven.[3]

The former is true for phrases such as "preponderance of the evidence" and "balance of probabilities". These expressions go to the weight of the evidence presented. In German literature, the aggregated weight of the evidence presented to support a proposition at trial is sometimes called *Gesamtbeweiswert*,[4] however, many use the term *Beweismaß*.[5]

The standard of "beyond reasonable doubt", on the other hand, as applied in criminal cases in common law countries, is an example of a description of the standard of proof that refers to the strength of the belief on the part of the trier of facts. Similarly, German and French law emphasize the degree of persuasion a judge must gain from the evidence.

Even though the distinction between the quality of the evidence and the strength of the trier's belief as possible points of reference for the standard of proof seems to be fundamental, this ambiguity is rarely appreciated and could very well be the root of the apparent confusion among some comparativists. The *Principles*, however, rightly recognize that a correctly phrased standard of proof must address both elements, the belief of the trier of facts that a certain allegation is true as well as this belief's reasonable foundation in the evidence presented.

III. – A COMMON CONCEPT DESPITE DIFFERENT FORMULAE

Even in times when the relevance of statistical evidence is increasing,[6] fact-finding remains a highly intuitive process, which is hard to press into a formula. However, all jurisdictions have developed phrases or metaphors to describe the standard of proof in order to preserve legal certainty. These formulae, though, must not be mistaken for the theory they are supposed to represent.

1. Common law systems – the concept of probabilities

In the common law world, as well as in many mixed jurisdictions,[7] the standard of proof in civil cases is most frequently described by the "balance of probabilities" formula.

3 See R.K. WINTER, "The Jury and the Risk of Nonpersuasion", *Law and Society Review* [1971], 335 at 339.

4 See, *e.g.*, H. PRÜTTING, *Gegenwartsprobleme der Beweislast*, Munich (1983) [PRÜTTING, *Gegenwartsprobleme*], at 85.

5 See *e.g.* B. MAASSEN, *Beweismaßprobleme im Schadensersatzprozeß*, Cologne / Berlin / Bonn / Munich (1976), at 1; M.G. PERBAND, *Der Grundsatz der freien Beweiswürdigung im Zivilprozeß (§ 286 ZPO) in der Rechtsprechung des Reichsgerichts*, Frankfurt a.M. (2003), at 96.

6 See R.L. MARCUS, "Evidence: Discovery along the Litigation/Science Interface", 57 *Brooklyn Law Review* (1991), 381.

7 See Art. 2804 Civil Code of Quebec; Louisiana Code of Evidence Art 302; for Scotland: *Brown v. Brown*, [1972] S.C. 123; *D. Field, The Law of Evidence in Scotland*, Edinburgh (1988), at 38; for South Africa: *Road Accident Fund v. Mungalo*, The Supreme Court of Appeal of South Africa, 02.12.2002, <http:wwwserver.law.wits.ac.za/scrtappeal/2002/48701.pdf>, as of February 2005.

Sometimes it is also referred to as "proof on a preponderance of evidence" or "proof on a preponderance of probabilities".[8] The application of the preponderance standard is limited to civil cases, whereas in criminal cases the standard of "beyond reasonable doubt" applies. According to the "preponderance" standard, the trier of facts has to believe that a fact is more probable than not to regard it as proven. "Preponderance", however, is not supposed to mean that the evidence adduced by the party bearing the burden of persuasion is stronger than the evidence adduced by its adversary. The question really is whether the evidence is of sufficient probative value to create in the mind of the trier of facts a belief as to the probable existence of the disputed fact.[9]

Since the notion of probabilities does not at all refer to a clear and distinct concept, it is important to clarify which idea of probability one applies. Continental authors in particular tend to be misled by the reference of the standard of proof formulae to the concept of probability. They frequently depict the common law standard as a purely objective concept.[10] To avoid this misinterpretation, one has to distinguish between Bayesian or Pascalian (mathematical) and inductive or logical (non-mathematical) probabilities.[11] For the purposes of legal fact-finding, most common law courts and authors employ a non-mathematical concept of probabilities and understand the word in a specific legal sense.

Some North American scholars, however, attempt to express the probability of a fact in dispute numerically. This branch of evidence theory translates the "balance of probabilities" formula into the mathematical term of a Bayesian probability of more than 50%.[12] It would go well beyond the purpose of this paper to review the debate on this ("rather naive" [13]) idea of probability in any great detail.[14] The persuasiveness of this approach is, however, highly contested.[15] Many regard it as neither accurate [16] nor helpful,[17] since judicial cases

8 These phrases are synonymous and do not indicate a lower or a higher burden. *See* J. SOPINKA / S.N. LEDERMAN / A.W. BRYANT, *The Law of Evidence in Canada*, 2d ed., Toronto / Vancouver (1999), at 154.

9 J.W. STRONG, *McCormick on Evidence*, 5th ed., St. Paul, Minn. (1999), vol. 2, at § 339; J.P. MCBAINE, "Burden of Proof: Degrees of Belief" 32 *California Law Review* (1944), 242 at 247.

10 K.H. SCHWAB, "Das Beweismaß im Zivilprozess", in *Festschrift für Hans W. Fasching*, Wien (1988), 451 at 457; W.J. HABSCHEID, "Beweislast und Beweismaß", in *Festschrift für Gottfried Baumgärtel*, Cologne / Berlin / Bonn / Munich (1990), 105 at 118.

11 See for further details, TWINING, *Rethinking Evidence*, Oxford (1990), at 119; groundbreaking with respect to inductive probability J. COHEN, *The Probable and the Provable*, Oxford (1977).

12 For an overview, see D.A. NANCE, "Naturalized Epistemology and the Critique of Evidence Theory", 87 *Virginia Law Review* (2001), 1551.

13 TARUFFO, *supra* note 1, at 669.

14 For a brief description of the development of the debate, see TWINING, *supra* note 11, at 119-122.

15 See *McCormick on Evidence*, *supra* note 9, at § 339, n. 13. See for the normative consequences if the temptations of statistical methods are not overcome, L.H. TRIBE, "Trial by Mathematics: Precision and Ritual in the Legal Process" 84 *Harvard Law Review* (1971), 1329.

16 See e.g. V.R. WALKER, "Preponderance, Probability and Warranted Factfinding" 62 *Brooklyn Law Review* (1996), 1075 at 1079; TARUFFO, *supra* note 1, at 669-70.

17 See M. DAMAŠKA, "Free Proof and its Detractors", 43 *American Journal of Comparative Law* (1995), 343 at 354; A.S. ZUCKERMAN, "Probability and Inference in the Law of Evidence", 66 *Boston University Law Review* (1986), 487 at 504; R.J. ALLEN / B. LEITER, "Naturalized Epistemology and the Law of Evidence", 87 *Virginia Law Review* (2001), 1491.

rarely consist of facts occurring in exactly the same manner on a regular basis, and often the law requires proof of matters not at all amenable to statistical methods, such as knowledge or intent.[18] Consequently, there are few judgments adopting a statistical understanding of the notion of probabilities in the preponderance formula.[19]

Thus, according to the dominant view in the commentaries, the reference to probabilities does not allude to the statistical frequency of the alleged fact. Most authors and courts instead adopt an understanding that construes "probability" either as the strength of a belief in the existence of a fact (subjective probability) or as the degree of justification for an intuitively developed belief (inductive probability) in the existence of a fact, *i.e.* the truth of a factual claim. In any event, the subjective opinion of the trier of facts is a key criterion in the fact-finding process.[20]

To content oneself with the trier's belief in the truth of a certain allegation, however, would mean to apply a purely subjective test and thus allow this belief potentially to lack any kind of warrant by the evidence presented. This danger is even higher in the context of a jury trial since the verdict of the jury comes out of a black box without any explanation or justification. To prevent or correct factual findings that are not sufficiently warranted, common law systems employ the concept of the evidentiary burden and the review of factual determinations by appellate courts. The court will give a directed verdict if the evidence adduced is not strong enough "to satisfy a reasonable trier of fact on the balance of probabilities".[21] In this case, the evidentiary burden is not discharged. This criterion of reasonableness serves as a barrier guaranteeing that the case shall not come into the hands of the jury when the facts in issue could be established only by employing superstitious beliefs. Correspondingly, even though an appellate court does generally not interfere with the trial court's factual findings, the higher court will vacate a judgment containing a "manifest, palpable error" [22] and reverse the verdict if "it could be shown that the evidence reasonably could not result in justifying the conclusion made by the trial judge." [23]

2. Civil law systems

Speaking of "the" civil law world may be as overly simplifying as speaking of "the" common law.[24] Just as there are considerable differences between American and English law, there are clearly recognisable differences between different civil law traditions.[25]

18 *Ibid.*

19 For the awkward consequences of such attempts, see *People v. Collins*, 68 Cal.2d 319 (Sup. Ct. Cal., 1968).

20 J.P. MCBAINE, *supra* note 9, at 247: "The degree of belief which should exist before it may be concluded that an assertion of fact is true is the element in the fact-finding problem which must be emphasized and made plain."

21 C. TAPPER, *Cross & Tapper on Evidence*, 9th ed., London / Edinburgh / Dublin (1999) [*Cross on Evidence*] at 140. *Metropolitan Railway Co. v. Jackson*, 3 App. Ca. 193 (1877), at 197. Adopted for Canada by the Supreme Court in *R. v. Morabito*, [1949] S.C.R., 172 at 174. SOPINKA, *supra* note 8, at 138, n. 9, with further references.

22 *Lapointe v. Hopital Le Cardeur*, [1992] 1 S.C.R., 351 at 352.

23 *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491 at 504.

24 H. P. GLENN, *Legal Traditions*, Oxford (2000), at 144, 228.

25 TARUFFO, *supra* note 1, at 660.

With respect to the standard of proof, however, the differences within the family of civil law systems appear to be negligible.

(a) German Law

The German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) deals with the standard of proof in § 286 (1):

> "The court shall decide at its free conviction, by taking into account the whole substance of the proceedings and the results of any taking of evidence, whether a factual allegation should be regarded as true or untrue. The grounds that prompted the court's conviction shall be stated in the judgment." [26]

In its interpretation of the rule, the German Federal Supreme Court (*Bundesgerichtshof*, BGH) underlines the subjective component of the process of weighing the evidence. The court emphasizes that even a very high objective probability as such does not suffice to treat a fact as established as long as it does not induce the judge's conviction of its truth. This conviction, however, does not have to be completely free from any doubts. Thus, a judge can find for the party bearing the burden of proof even though he has doubts. With respect to the necessary degree of conviction and the corresponding degree of acceptable doubts the BGH refers to a common-sense concept by holding that it has to be "suitable for daily life".[27] This phrase is interesting in the sense that the standard we apply to decisions in daily life varies from instance to instance. The passage, however, is often cited as evidence for the proposition that the BGH requires a fixed "high" standard of proof.

Most of the commentaries agree with the BGH on the proposition that the judge's conviction of the truth is the key criterion. Many authors, however, point out that this conviction must not be understood completely subjectively, as being the judge's personal and maybe arbitrary opinion. They emphasize that the standard of proof must have an objective component as well.[28] Accordingly, developing his conviction the trier of facts must not ignore logical or empirical rules,[29] as he cannot base his decision on a fact that, objectively seen, is highly improbable. The main argument for this proposition is that, according to § 286 (1) 2 ZPO, a judge has to give reasons for his factual findings in the judgment. It is argued that it would be impossible to give rational and convincing reasons for a decision that is based on purely subjective and perhaps even superstitious beliefs of the judge.[30] In other words: German law transforms the requirement of justification for a

26 Translation by the author. C.E. STEWART, *German Commercial Code & Code of Civil Procedure in English*, New York (2001), however, translates the crucial word *Überzeugung* ("conviction") with "discretion".

27 See *e.g.* BGHZ 53, 245, at 256.

28 PRÜTTING, *Gegenwartsprobleme*, *supra* note 4, at 64; MUSIELAK / FOERSTE, *ZPO*, U. FOERSTE, in H.-J. MUSIELAK (ed.), *Kommentar zur Zivilprozessordnung*, 4th ed., Munich (2004), § 286 para. 17; D. LEIPOLD, in F. STEIN / M. JONAS (eds.), *Kommentar zur Zivilprozessordnung, Band 3 §§ 253 – 299a*, 21st ed., Tübingen (1997), § 286 para. 2.

29 H.-J. MUSIELAK & M. STADLER, *Grundfragen des Beweisrechts. Beweisaufnahme – Beweiswürdigung – Beweislast*, Munich (1984), at para. 137.

30 H. PRÜTTING, in G. LÜKE / P. WAX (eds.), *Münchener Kommentar zur Zivilprozessordnung, Band 1 §§ 1 – 354*, 2d ed., Munich (2000) [PRÜTTING in MüKo], § 286 para. 21; W.H. RECHBERGER, "Maß für Maß im Zivilprozeß?

judge's belief into the judge's duty to give reasons for his factual determinations. The German standard of proof becomes thus a two-fold concept: decisive is the judge's belief, this belief, however, only represents a valid basis for a decision in favour of the party bearing the burden of proof if the court is able to give rational and comprehensible reasons why he has adopted this view.

(b) Romanic traditions

In French law, there is no explicit or implicit definition of the standard of proof in civil cases. Several Articles in the French Civil Code (*Code Civil, CC*) and in the Code of Civil Procedure (*Nouveau Code de Procédure Civile, NCPC*), however, refer to the truth as the goal of fact-finding.[31] Only with respect to criminal cases, Article 427 I of the Code of Criminal Procedure (*Code de Procédure Pénale, CPP*) states that the judge decides according to his *intime conviction*:

> "Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout mode de preuve et le juge décide d'après son intime conviction."

As to civil procedure, many authors emphasize that the result of proof is, just as in criminal cases, the conviction of the judge.[32] In this sense, *preuve* constitutes the means to convince the court.[33] Consequently, they expressly distinguish between historic truth and the conviction of the judge as the outcome of legal fact-finding.[34] The judge's conviction (in civil and in criminal proceedings) is conceived to be neither different in nature nor in degree from the conviction on which important decisions outside of the courtroom are based.[35] If often the standard is described by the phrase, *quand la réalité d'un fait est devenue certaine, on dit que sa preuve est faite*,[36] "*certaine*" must not be understood as "absolutely certain" or "subject to no doubts at all". The conviction of the judge does not need to be (and in fact cannot be) completely free of any doubt.[37] GIVERDON, finally, draws an almost adversarial picture of French law of evidence when he argues that "judicial proof comes down to a simple probability; the party who gains the better position in the argument wins the case." [38]

The conviction of the judge is at the core of the Romanic approach to the standard of proof. These traditions seemingly put rather little emphasis on the element of justification

Ein Beitrag zur Beweismaßdiskussion", in *Festschrift für Gottfried Baumgärtel*, Köln / Berlin / Bonn / Munich (1990), 471; SCHWAB, *supra* note 10, at 457.

31 See e.g. Art. 10 CC and Art. 181, 218, 231 NCCP.

32 J. BREDIN, "Le doute et l'intime conviction", 23 *Droits* (1996), 21, at 24; P. THÉRY, "Finalités du droit de la preuve", 23 *Droits* (1996), 41; C. GIVERDON, "The Problem of Proof in French Civil Law", 31 *Tulane Law Review* (1956), 29 at 38.

33 M. PLANIOL, *Traité élémentaire de droit civil*, Traité élémentaire de droit civil, T. I., Paris (1952), no. 2.

34 THÉRY, *supra* note 32, at 48.

35 BREDIN, *supra* note 32, at 27.

36 M. PLANIOL, *supra* note 33; P. FORIERS, "Introduction au droit de la preuve", in *La Preuve en droit*, Brussels (1981), 7 at 18.

37 GIVERDON, *supra* note 32, at 38; TARUFFO, *supra* note 1, at 671.

38 GIVERDON, *supra* note 32, at 38.

or rationality. It would be wrong, however, to think that a French judge might base his decision on irrational and unjustified personal beliefs. Based on the philosophy of enlightenment, in the French understanding *conviction* does not constitute a purely subjective concept.[39] Accordingly, the criterion of rationality constitutes an integral part of the term *conviction*, and it was thus superfluous to address it explicitly.

3. The common concept

The starting point for all civil and common law systems is the truth as the intrinsic goal of fact-finding.[40] Each system has rules serving other, extrinsic purposes, such as privilege rules.[41] The law of evidence as a whole, however, is designed as an instrument to ascertain the truth. Rule 102 of the *American Federal Evidence Rules* for example states that it is the goal of the law of evidence "that the truth may be ascertained".[42] And this same ideal is expressed in § 286 (1) ZPO, which requires that the judge decide whether he "regards an allegation as true".

In almost every trial, however, the jury or the judge is confronted with the problem to decide upon past or present phenomena, of which he has no direct knowledge. By collecting and weighing the evidence the trier of facts attempts to find out what has happened and which factual allegations are true. But in many cases it is impossible to determine the objective truth by judicial means. In this sense, the determination of what has happened necessarily involves a subjective element and cannot be detached from the person determining it. This epistemological axiom is basically accepted in all reviewed common or civil law traditions. Hence, all systems emphasize the importance of a belief of the truth on the part of the trier of facts and do not require the objective truth of the facts.

Neither common nor civil law systems, however, employ a purely subjective test as standard of proof in civil matters. The belief of the truth is a necessary but not a sufficient condition for proof.[43] Just as epistemologists define "knowledge" as "justified true belief",[44] legal fact-finding requires justification. Therefore, evidentiary decisions have to be objectively justifiable. The judge's belief that a statement is true has to be warranted in the sense that it must be coherent, consistent, and reasonably inferable from the evidence.[45] An inference that is based on metaphysical or superstitious beliefs is not justifiable and thus not acceptable for the purposes of judicial fact-finding.

39 For KANT, a personal belief in the truth can only be called conviction (*Überzeugung*) if it was valid for everybody with reason and thus objectively sufficient. *See*, I. KANT, *Kritik der reinen Vernunft* (Riga 1781) Methodenlehre II. Hauptstück III. Abschnitt.

40 See also TARUFFO, *supra* note 1, at 674-76, who, however, deals with the goal of civil procedure in general.

41 See, for the treatment of privileges, *P-18*.

42 For Canada, see SOPINKA, *supra* note 8, at 3.

43 See DAMAŠKA, "Atomistic and Holistic Evaluation of Evidence: A Comparative View", in *Comparative Private International Law*, Berlin (1990), 91 at 97.

44 A.I. GOLDMAN, *Epistemology and Cognition*, Cambridge (Mass.) / London (1986), at 4; WALKER, *supra* note 16, at 1081; DAMAŠKA, "Truth in Adjudication", 49 *Hastings Law Journal* (1998), 289 at 294-97; ALLEN / LEITER, *supra* note 17, at 1494.

45 WALKER, *ibid.* at 1092.

In short: Proving a fact means, in all systems, to create a justified belief in the trier's mind that a given statement is true.[46] The formulae developed in the common law world put more emphasis on the element of (objective) justification,[47] whereas in civil law systems the requirement of personal persuasion on the part of the trier of facts is stressed. But neither system allows either unwarranted conviction or evidence that does not create the trier's belief in the truth to suffice on its own.

4. Differences in degree?

But even if one cannot detect any conceptual difference between the approaches in common and civil law systems, there is still room for deviation with respect to the key question of the standard of proof: when is the trier's belief strong enough and when is the degree of warrant sufficient to regard a fact as proven? [48] In this respect, according to the stereotypes, civil law traditions have a high standard of proof, whereas the requirements in common law jurisdictions are traditionally depicted as being considerably lower.

Intending to distinguish the German approach from the common law approach, many German authors maintain that a mere preponderant probability does not suffice to make proof of a fact.[49] These authors accentuate that the German standard of proof is higher than a 50% probability. This argument presupposes (incorrectly) that common law jurisdictions use a statistical concept of probability. As this premise is neither corroborated by the practice of common law courts nor by the dominant theoretical view, such an attempt to differentiate the Continental and the common law approach must go wrong.

To me it seems that the stereotypes of the "low" common law and the "high" civil law standard are right and wrong at the same time. For in neither one of the two systems the standard of proof is preset and fixed for every case and for every issue. As the applicable standard varies from case to case it is not possible or at least not accurate to speak of a higher standard in one of the systems. The only sensible question is, whether a common law trier of facts would accept a fact in dispute as existing under the same circumstances as a civil law court would. I am reasonably convinced that this is the case.

(a) Reasonable degree of warrant for the trier's belief

Since Lord DENNING's famous words in *Bater v. Bater* a floating standard of proof is a widely accepted notion at least in Commonwealth jurisdictions. He argued that "there is no absolute standard in either [criminal and civil law] case", but "[t]he degree required

46 M. GRÄNS adopts this view in her comparison of the American and the German standard of proof as well. "Das Risiko materiell fehlerhafter Urteile", Berlin (2002), at 258.

47 This problem has been impressively addressed by W. TRICKETT, cited in J.H. WIGMORE, *Wigmore on Evidence*, Vol. 9, rev. by J.H. CHADBOURN, Boston / Toronto (1981), at § 2498, (p.) 421.

48 The position most widely accepted in common law systems seems to be that belief comes in degrees according to the probability for a given statement. *Cross on Evidence*, *supra* note 21, at 141. WALKER, *supra* note 16, however, suggests that the variable is the degree of warrant that can be relied on for a certain belief.

49 PRÜTTING in MüKo, *supra* note 30, § 286 para. 35; C. KATZENMEIER, "Beweismaßreduzierung und probabilistische Proportionalhaftung", 117 *Zeitschrift für Zivilprozess* (2004), 187 at 201.

must depend on the mind of the reasonable and just man who is considering the particular subject-matter." [50]

In the United States, however, the standard of "clear and convincing evidence" has been adopted. This third standard, positioned between the "preponderance" and the "beyond reasonable doubt" standard, may be appropriate for some of the cases in which a stronger degree of belief is desirable but it is certainly not flexible enough for the variety of circumstances that affect the standard of proof. The need to adapt the standard becomes apparent in particular with respect to proof of damages.[51] As early as 1863 CHRISTIANCY J. held in *Allison v. Chandler*:[52]

> "And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit."

In *Story Parchment Co. v. Patterson Parchment Paper Co.* this approach was pushed further with respect to cases "[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty".[53] It was held that

> "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." [54]

Here it becomes apparent that the notion of flexible proof requirements is not foreign to U.S. American law. External factors, such as the conduct of the defendant, may lower the applicable standard.[55]

With respect to German law one finds striking similarities. It is important to stress that § 286 ZPO does not answer the decisive question when the amount and the strength of the evidence are strong enough to justify the judge's belief.[56] One should not try to read more into the word *Überzeugung* than the proposition that the judge has to believe

50 [1950] 2 All E.R. 458 (C.A.) at 459, parenthesis added.

51 See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 25 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

52 11 Mich. 542 (1863), at 555.

53 282 U.S. 555 (1931), at 563.

54 *Ibid.*

55 See for further details on this problem, R.D. FRIEDMAN, "Dealing with Evidentiary Deficiency", 18 *Cardozo Law Review* (1961), at 1968-75; A. PORAT / A. STEIN, "Liability for Uncertainty: Making Evidential Damage Actionable", 18 *Cardozo Law Review* (1997), 1891. Endorsing the notion of a flexible standard of proof in the United States GRÄNS, *supra* note 46, at 183. This doctrine is a remarkable parallel to the way damages are determined under German Law according to §§ 287 ZPO, 252 2 BGB.

56 H. RÜßMANN, *Alternativkommentar zur ZPO*, Neuwied (1987), § 286 para. 20.

that a certain allegation is true. If we indeed tried to infer from the use of the word *Überzeugung* a high standard of proof, we would mistake labels for the things labeled. Nevertheless, only a minority of German theorists shares the proposition that the required degree of warrant varies from case to case.[57] This is surprising given that the BGH has never expressed the view that the same standard applies to all cases. In fact, the sparse judicial authority suggests that the trial judge is not constrained by strict rules as to whether or not he is sufficiently convinced. The court claimed "the trial judge is free to make a decision whether he can overcome possible doubts and be convinced of a certain set of facts as real. He is not restrained by any rules of legal proof and is only bound by his conscience".[58] In a paternity case the BGH held furthermore that it is the province of the trial judge to decide which risk of error is acceptable and that "it would violate the principle of free proof if a threshold for the acceptable risk of error was imposed on the trial judge".[59]

Certain provisions in German law that provide for a lower standard of proof such as § 294 ZPO can be convincingly interpreted not as exceptions to a fixed ordinary standard but as specific instances in which the judge may be content with a lower degree of warrant. But this is not to say that these instances are conclusive in the sense that they are the only cases in which the standard of proof can be lower. The reason why the law addresses these instances in a particular way is merely that, here, a low standard is *typically* appropriate. When dealing with hypothetical issues (§§ 287 (I) ZPO, 252 BGB), or when the decision has to be based on evidence from only one party (*ex-parte* decisions) and/or is only of a preliminary nature (§ 294 ZPO), it is *typically* reasonable to ask for a lower degree of warrant than in cases where facts have to be proven for the purpose of a final decision and the judge can rely on evidence adduced by both sides.

The main argument adduced against a flexible standard in German law corresponds in substance to the criticism directed against *Bater v. Bater*.[60] Many scholars argue that making the standard of proof flexible forces the trier of facts to determine the appropriate degree anew for each case. The law would not provide one standard for all cases, but an infinite number of standards. It has been argued that this creates considerable uncertainty as to what the law is – a situation particularly unsatisfying for lawyers coming from a civil law tradition – and makes the determination of the appropriate standard subject to the trial judge's idiosyncrasies.[61]

57 P. GOTTWALD, "Das flexible Beweismaß im englischen und deutschen Zivilprozeß", in *Festschrift für Dieter Heinrich*, Bielefeld (2000) [GOTTWALD, "Das flexible Beweismaß"] 163; GOTTWALD, *Schadenszurechnung und Schadensschätzung*, Munich (1979); RÜßMANN, *supra* note 56, § 286 para. 20; O. ROMMÉ, *Der Anscheinsbeweis im Gefüge von Beweiswürdigung, Beweismaß und Beweislast*, Köln / Berlin / Bonn / München (1989). A Scandinavian view on the German law also comes to this conclusion, GRÄNS, *supra* note 46, at 178.

58 BGHZ 53, 245, at 256.

59 BGHZ 61, 165 at 172-3, translation by the author.

60 See, e.g., R. PATTENDEN, "The Risk of Non-Persuasion in Civil Trials: The Case Against a Floating Standard of Proof", 7 *Civil Justice Quarterly* (1988), 220.

61 STEIN / JONAS / LEIPOLD, *supra* note 29, § 286 para. 5a.; PRÜTTING in MüKo, *supra* note 30, § 286, paras. 17, 35, 40.

This argument is convincing insofar as it addresses the necessity to apply the same care and diligence in every case, no matter how small a sum is claimed.[62] This, however, is not what a flexible degree of warrant is concerned with. The evidence must in any event be evaluated with the greatest diligence possible, regardless of the standard of proof. To adapt the required degree of warrant to the characteristics of the specific case does not mean to apply lesser or greater care. It would be wrong to believe that in common law systems the trier of facts scrutinizes the evidence with greater care in criminal than in civil cases.[63] A flexible degree of warrant simply recognizes the epistemic reality that the *facta probandi* in judicial fact-finding are "actually a jumbled mixture of unequal ontological status, with an unequal degree of accessibility to our cognitive nature".[64]

(b) Instances of a low degree of warrant

Remarkable parallels between common and civil law systems as to the required degree of warrant for a belief exist in those fields where it is typically particularly difficult for the party bearing the burden of proof to adduce conclusive evidence. Hence, wherever it seems just and fair both laws apply rather low proof requirements. For our purposes, the instances where proof is facilitated are particularly interesting since these facilitations should in theory be less important and less frequent in common law systems if the common law standard of proof was indeed lower in general. However, the examples of product liability, medical malpractice and theft insurance cases do not support this proposition.

In all common law jurisdictions and throughout continental Europe the consumer's problem of proving the negligence of the manufacturer, the existence of a defect in the product, and the causal nexus between the damage and the defect is regarded to be so fundamental that each systems grants respective alleviations of proof.[65] With respect to medical-malpractice cases the situation is very similar, and in all reviewed legal systems the courts have developed means to alleviate the patient's proof requirements in order to deal with his structural lack of conclusive evidence.[66]

Basically, two devices are employed by the courts to help the suing patient overcome the difficulties in making his case. The first is to apply the *res ips loquitur maxim* (similar to the German *Anscheinsbeweis* [67]) generously if direct, substantial

62 Sir C. ALLEN, *Legal Duties and Other Essays in Jurisprudence*, Oxford (1931), at 288.

63 See *Hornal v. Neuberger*, [1957] 1 Q.B. 147 at 266.

64 DAMAŠKA, "Truth in Adjudication", *supra* note 44, at 299.

65 W. LORENZ, "Some Thoughts About International Product Liability", in P. CANE / J. STAPLETON (eds.), *The Law of Obligations*, Oxford (1998), 319.

66 For a comparative study of evidentiary question in medical malpractice law with abundant references from common law jurisdictions and from the German Law, see D. GIESEN, *International Medical Malpractice Law*, Tübingen (1988), at § 41.

67 *Anscheinsbeweis* has also similarities with the common law's 'presumptions of fact' (sometimes also referred to as 'permissible inferences'). Both of these doctrines do not shift the burden of persuasion (for the common law see *Cross on Evidence*, *supra* note 21, at 122) and they may both be rebutted by proving extraordinary circumstances. The scope of application of *Anscheinsbeweis*, however, seems to be wider than that of *res ipsa loquitur*, since it is neither confined to negligence cases nor restricted to cases in which the defendant had exclusive

evidence is not available. Thus, the patient can make his case by proving such circumstantial facts that enable the court to infer the facts in issue.[68] The other, more rigid device is to reverse the persuasive burden. In a number of typical instances [69] the burden of proof is shifted on the sued physician or on the hospital.[70] This is not the appropriate place to analyze whether a reversal of the burden of persuasion is really the best way to solve the problems for the patient to adduce conclusive evidence.[71] What is of relevance here is the fact that in common and in civil law traditions alike, the patient's position with respect to evidentiary questions is perceived as being unsatisfactory and that both systems, consequently, try to resolve these issues by deploying similar devices.

With respect to theft-insurance cases one finds even more striking parallels to the effect that courts in both systems use almost the same words to explain and justify the low standard they apply. According to general burden-of-proof rules the insured has to prove theft of the insured property to support his claim for payment against the insurer. Since making this proof, for obvious reasons, usually is very difficult it suffices under U.S. American law "that the insured may prove theft by proving that the circumstances surrounding the disappearance of the property support an inference that theft probably was the cause of the disappearance." [72] The insured must prove such circumstances "tending to show it [the insured property] was not accidentally mislaid or lost and did not stray by itself." [73] German courts describe the substantially same requirement by holding that it suffices if the insured proves the "outer appearance" (*äußeres Bild*) of a case of theft.[74]

Finally, the practice of international litigation and arbitration supports the proposition that there are no substantial differences neither conceptually nor in degree between common and civil law systems, at least as far as the standard of proof is concerned. If the standards employed to determine when a fact is proven indeed differed in common and in civil law traditions, one would expect that this question was an issue in cross-border cases. It seems safe, however, to infer from the striking taciturnity on the matter of the most frequently used sets of arbitration rules as well as the IBA "Rules on the Taking of Evidence in International Commercial Arbitration" [75] that the applicable

control over the cause of injury. See H. KÖTZ / K. ZWEIGERT, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed., Tübingen (1996), at 655.

68 GIESEN, *supra* note 66, at paras. 1059-67.

69 Such as increased risk due to the treatment, a physician's gross negligence, the interference with medical records, or organizational failure.

70 See GIESEN, *supra* note 66, paras. 1068-90. See furthermore from the German perspective BGHZ 85, 212; BGHZ 85, 327 at 330. For a discussion of this problem in Canada: *St-Jean v. Mercier*, [2002] S.C.C. 15 at 107.

71 Confirming this approach for Germany, BGH NJW 2004, 2011; BGH NJW 2005, 425.

72 See e.g. *Lovas v. St. Paul Ins. Cos.*, 240 N.W.2d 53 (1976) at 60-61. *Coastal Plains Feeders, Inc. v. Hartford Fire Ins. Co.*, 545 F.2d 448 (1977) at 452; *Long v. Glidden Mut. Ins. Ass'n*, 215 N.W.2d 271 (1974). See also J.A. APPLEMAN, 5-144, *Appleman on Insurance Law & Practice* (1997), Supp. to § 3151.

73 M. BENDER (publisher), 1-2 Insuring Real Property; § 2.04[16].

74 *See* BGHZ 130, 1; BGH NJW-RR 1996, 981. H. KOLLHOSSER, "Beweiserleichterungen bei Entwendungsversicherungen", *Neue Juristische Wochenschrift* (1997), 969; W. RÖMER, "Der Kraftfahrzeugdiebstahl als Versicherungsfall", *Neue Juristische Wochenschrift* (1996), 2329.

75 Online: <http://www.ibanet.org/pdf/rules-of-evid-2.pdf> as of February 2005.

standard of proof is a non-issue in international arbitration. Even reported awards rarely address the question. Apparently, the deviations in the wording of the formulae employed in civil and common law systems do not result in any (practical) differences or even difficulties in cases that cross the borders of legal traditions.

5. Possible explanations of the divergences of the formulae

Given that civil and common law traditions all pursue the same intrinsic goal in judicial fact-finding, and that they both apply the same epistemological concept with respect to the standard of proof, one cannot but wonder why the formulae employed to describe the standard are so very different.

The most obvious explanation of the common law way to describe the standard of proof is – once more – the jury system.[76] If laymen are supposed to determine the facts in issue, they need intelligible instructions as to the criteria according to which they are supposed to make their decision. Hence, the judge has to address the standard of proof explicitly in her instructions to the jury.[77]

The importance of the need to formulate the standard explicitly becomes apparent when looking at the standard applicable to the evidentiary burden. The decision whether the evidentiary burden is discharged is within the province of the judge. Therefore, it is not necessary to address the respective standard explicitly, neither in the instructions for the jury nor in the final judgment. This has had the effect that, contrary to the burden of persuasion, commonly accepted formulae have not been adopted with respect to the evidentiary burden.[78]

Historically, the influence of Jeffrey GILBERT [79] on the law of evidence and in particular on the wording of the standard of proof in the common law world must not be underestimated. Gilbert's love of mathematics strongly influenced the language he used to describe his theory of the law of evidence. He established various degrees of evidence and graded them in terms of probabilities.[80] Even though this approach was later fiercely contested by BENTHAM,[81] a "baneful influence" has prevailed and is still strongly felt in the popular application of statistical methods and a Pascalian understanding of probabilities.[82]

76 See CLERMONT & SHERWIN, *supra* note 1, at 257.

77 It is, however, a completely different matter, how well these instructions are indeed understood by the jurors. See D.G. HAGMAN / M.D. MACARTHUR, "Evidence: The Validity of a Multiple Standard of Proof", *Wisconsin Law Review* [1959], 525. *See* also S.H. ELSEN, "An American Lawyer's View of Litigation", *Unif. L. Rev. / Rev. dr. unif.*, 2001, 971, 973.

78 *Cross on Evidence*, *supra* note 21, at 138.

79 Lord Chief Baron of the Court of Exchequer from 1722 to 1726.

80 J. GILBERT, *The Law of Evidence*, London (1801), at 1.

81 J. BENTHAM, 6 *Works*, ed. by J. BOWRING (Edinburgh 1843), at 142-5, 183-7.

82 For an overview of BENTHAM'S influence, see W. TWINING, "The Rationalist Tradition of Evidence Scholarship", in *Well and Truly Tried* (1982), at 217.

The Continental law of evidence on the other hand is strongly influenced by the ideas and values of the Enlightenment and the French Revolution.[83] Consequently, the principle of free proof was embraced in the late eighteenth and early nineteenth century when the old system of legal proof was abolished at least for criminal trials.[84] This "apotheosis of free proof" has also influenced the law of civil procedure and particularly its rhetorical adornment.[85] It was generally not *en vogue* to establish strong constraints on the judge in his search for the truth. Imposing strict guidelines and rules on the judge as to how strong the evidence has to be, maybe even expressing them by a numerical probability, would have undermined the tendency to do away with legal proof.[86] The consequences of this emphasis of free proof on the standard of proof are still apparent in German law, where in § 286 ZPO the standard of proof and the principle of free proof are inseparably intertwined within one sentence.[87]

Finally, the style of judicial procedure influences the wording of the standard. Whether (or to which extent) the commonly used categories of *adversarial* versus *inquisitorial* indeed allow an accurate portrayal of common law and Continental civil procedure may be very questionable.[88] It is, however, hardly contestable that the styles of administering justice differ in some ways in the common and the civil law world. DAMAŠKA has tried to explain these differences with "variations in the structure of the judicial apparatus" and with "divergent ideas about the function of government, including its role in the judicial process." [89] He depicts continental European States as being traditionally more oriented towards an active model, in which the State partly manages the relationships among its citizens, whereas Anglo-American States traditionally play a more reactive role, to the effect that the State is more constrained in its involvement in these relationships.[90] This notion may explain why civil law systems address the conviction of the judge, who is the representative of the State, and thus emphasize the involvement of the State in the proceedings. The formulae employed in common law systems on the other hand focus on the evidence, which is adduced by the parties, and thus depreciates the engagement of the State.[91]

83 See DAMAŠKA, *supra* note 43, at 97.

84 See R. STÜRNER, "Geschichtliche Grundlinien des europäischen Beweisrechts", in *Festschrift für Söllner*, München (2000), 1170, 1180.

85 DAMAŠKA, *supra* note 43, at 103.

86 TARUFFO, *supra* note 1, at 667.

87 For an overview as to the historical development of the law of evidence and its influence on the wording of the standard of proof in Continental and Anglo-American jurisdictions, see DAMAŠKA, *supra* note 17.

88 See, *e.g.*, P. LALIVE, "Principe d'inquisition et principe accusatoire dans l'arbitrage commercial international", *Unif. L. Rev. / Rev. dr. unif.*, 2001, 887 at 900.

89 DAMAŠKA, *The Faces of Justice and State Authority*, New Haven / London (1986), at 90.

90 See, for divergent attitudes, S. GOLDSTEIN, "The Proposed ALI / UNIDROIT Principles and Rules of Transnational Civil Procedure: the Utility of Such a Harmonization Project", *Unif. L. Rev. / Rev. dr. unif.*, 2001, 789 at 790.

91 Damaška himself, however, seems to presume that the standards of proof in common law and in civil law traditions substantively and not only semantically differ. Consequently, he employs his distinction as to reactive and active states to explain the allegedly divergent degrees required. See *supra* note 89, at 119.

IV. THE SYNTHESIS OF THE FORMULAE IN THE ALI / UNIDROIT PRINCIPLES (*P-21.2*)

P(rinciple)-21.2 and the corresponding *R(ule)-28.2* [92] are clearly influenced by both styles, civil and common law, of phrasing the standard of proof. The text merges them elegantly into one rule and brings the similarities of the systems to light that were covered by divergent wordings. From my point of view which I have tried to support by the overview above, the commentary on *P–21.2* is absolutely right in holding that the "standard of 'reasonable conviction' is in substance applied in most legal systems" and that this is essentially functionally the same as the "preponderance of the evidence" standard applied in American jury trials.

P-21.2 combines objective and subjective elements in the sense that it requires the judge's subjective conviction as well as the objective reasonableness of this conviction. The necessity of a rational finding is also addressed in *P-6.6 and P-23.2*, which underline that the process of weighing the evidence, though it is free from any rules of legal proof, has to be justifiable.

The standard of proof put forward by *P-21.2* is neither the truth nor an objective mathematical probability nor the absolute conviction of the truth. Interestingly enough, *P-21.2* does not endorse the view that a fact *is proven*, if the judge is reasonably convinced but that it then *is considered to be proven*. This slight change in fact humbly puts the result of fact-finding at trial into perspective. Even though the goal of fact-finding is to ascertain the truth, the law would be pretentious if it went as far as purporting that the established facts were necessarily the real facts. They are real only for the purposes of the trial. In other words, we have to differentiate between the goal – the truth – and the result of fact-finding – the conviction of the judge as to what is true.

The reference of *P-21.2* to the judge's conviction of the truth demonstrates the Continental influence. It is this subjective side of the fact-finding process that is emphasized in many civil law systems. The qualification of this conviction by *P-21.2* as *reasonable*, however, is clearly inspired by the way LORD DENNING has phrased the standard of proof in *Bater v. Bater*,[93] where he referred to the "reasonable and just man".

Beyond addressing the condition of objective justification for the judge's conviction, the word "reasonable" also indicates that the degree of conviction required is not the same for all cases. What is reasonable in one case may mean asking for too much in the next case. One might argue that "reasonable" is too vague as a criterion in order to give the trier a clear guideline. But the factors influencing the required degree of warrant and thus the achievable degree of belief are so manifold that it is impossible to address each and all of them in a provision. Does the fact in issue still exist or is it an event long ago? Is

92 The *ALI / UNIDROIT Principles of Transnational Civil Procedure* are reproduced in this issue of *Uniform Law Review* at 758; the *Rules of Transnational Civil Procedure* are reproduced as a Reporters' Study and appear in an Appendix to *ALI / UNIDROIT Principles of Transnational Civil Procedure*, Cambridge University Press (2005).

R-28.2: "The court should make free evaluation of the evidence and attach no unjustified significance to evidence according to its type or source. Facts are considered proven when the court is reasonably convinced of their truth."

93 [1950] 2 All E.R. 458 (C.A.).a

it a fact in the real world, a connection between two events (causation), or is it the state of mind of a person? Is ample evidence available or is evidence scarce? What are the consequences of a false positive or a false negative? Has one party destroyed [94] or negligently failed to produce evidence? [95] No sophisticated legal system can lump all these cases together and ignore the specific characteristics of the individual case to be adjudicated. The uncertainty resulting from making the standard of proof flexible by referring to the concept of reasonableness is not the consequence of the theory we apply but a feature intrinsic to legal fact-finding. However, through the application of the rule in the practice of international litigation a more sophisticated understanding of what is "reasonable" will eventually evolve, which will in turn improve the predictability of the strength or weight of the evidence necessary to convince a judge.

The factors influencing the standard of proof are manifold and further research is necessary to explore how they may be categorized.[96] For now, in my view one basic distinction is helpful: One should differentiate between factors affecting the quality or the quantity of the evidence available and factors affecting the necessary degree of persuasion. Speaking in terms of a scale metaphor, we have to differentiate between factors that affect the weight of the things on the scale and factors that concern the question whether a simple preponderance is sufficient or a higher degree is required. With respect to the first group we will find that in a tort case, say a traffic accident, where evidence is often sparse the judge might content himself with purely oral evidence given by a single witness, even though it is often unreliable. In a contract case between two businesses, on the other hand, he may only be convinced if documentary evidence of a contract is produced even if the applicable substantive law does not require a contract in writing. Factors from the latter category explain the distinction between the standard of proof in civil and in criminal cases. Since a wrong conviction (false positive) is held to be worse than a wrong acquittal (false negative), the degree of certainty required for a conviction is higher. In a civil case, on the other hand, the consequences of a false positive and a false negative are usually equally unfavorable. In this sense the consequences of a wrong decision affect the standard of proof.

P-21.2, together with *R-28.2*, is an elegant and concise way of addressing the core elements of fact-finding in judicial proceedings and defining their role with respect to the standard of proof: truth, belief, and objective justification for this belief. The only valid objection that could be raised against the wording of *P-21.2* is that it refers to "truth of facts". For the purposes of judicial fact-finding "truth" is generally construed as the correspondence between a statement and what exists in reality.[97] Consequently, one can

94 See on this problem, R.D. FRIEDMAN, *supra* note 55, at 1971.

95 *See P-18.2* and *P-18.3*.

96 See from a civil law perspective, H. RÜßMANN, *supra* note 56, § 286 para. 20. See WALKER, *supra* note 16, at 1096, on how to develop a theory of warrant for legal fact-finding. GRÄNS suggests a method based on decision-theory to identify the appropriate standard of proof for a single case (*supra* note 46, at 211).

97 DAMAŠKA, "Truth in Adjudication", *supra* note 44, at 291; DAMAŠKA, *Evidence Law Adrift*, New Haven / London (1997), at 94. See also RÜßMANN, *supra* note 56, § 286 para. 14; S. KOUSOULIS, "Beweismaßprobleme im Zivilprozess", in *Festschrift für Karl Heinz Schwab zum 70. Geburtstag*, Munich (1990), 276 at 280.

only speak of true allegations or true statements.[98] Hence, *P-21.2* would maybe be phrased even more accurately if it read: "*Factual claims* are considered proven when the court is reasonably convinced of their truth."

V. – CONCLUSIONS

The divergence between the standard of proof as it is applied to civil cases in civil and common law jurisdictions have proven to be largely a question of rhetoric. The formulae employed by civil law traditions may sound pretentious for common law lawyers, while the common law's "preponderance" standard may suggest a higher degree of objectivity than achievable. In substance, however, they describe the same requirements.

In the sense that the determination of unknown historical or current phenomena is not specifically a judicial problem, it would be more than surprising if the systems indeed had conceptually different solutions given that all common and civil law systems regard the truth as the intrinsic goal of the law of evidence.[99]

Furthermore, both legal families take a flexible approach as to the necessary degree of certainty. Common law systems, however, have been somewhat more honest with respect to the flexibility of the standard of proof. On the Continent and particularly in Germany, the idea of a floating standard of proof is not as broadly and as openly accepted. In this respect, *P-21.2* offers an excellent opportunity for civil law systems to rethink the paradigm of the fixed standard of proof. The project of developing Principles for Transnational Civil Procedure may in this sense not only be of relevance to trans-border cases but also generate changes within the respective national laws. Furthermore, the carefully chosen words of P-21.1 will hopefully put an end to the belief that lawyers from common and from civil law countries live in epistemologically different worlds.

98 H. WEBER, *Der Kausalitätsbeweis im Zivilprozess*, Tübingen (1997), at 14.

99 GOTTWALD, "Das flexible Beweismaß", *supra* note 57, at 175.