Taking of evidence

Poland

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The matters of evidence and evidence-taking are governed by the Civil Code (*kodeks cywilny*, Article 6) and the Code of Civil Procedure (*kodeks postępowania cywilnego*, Articles 227– 315).

According to Article 6 of the Civil Code, the burden of proving a fact lies with the person who asserts legal consequences arising from this fact. The burden of proving certain facts will lie with the claimant, of certain other facts – with the defendants.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

Exemptions from the rule that the burden of proving a fact lies with the person who asserts legal consequences arising from this fact must follow directly from a legislative act.

In certain particular cases it is possible to shift the burden of proof to the other party, i.e. to reverse the burden of proof. That may take place if e.g. evidence is destroyed or the evidence-taking is prevented. In the case law the view has been adopted that whenever a party behaves in a way preventing or seriously hampering the demonstration of facts by the other party with whom the burden of proving them lay, then the former party must prove that those facts did not occur.

The issue of the burden of proof is closely linked with the institution of legal presumptions. Pursuant to Article 234 of the Code of Civil Procedure a legal presumption is binding for the court. As a general rule, it is acceptable to rebut a legal presumption.

Legal presumptions that change rules of evidence concern e.g. good or bad faith (Article. 7 of the Civil Code), the assumption of live birth (Article 9 of the Civil Code), illegality (Article 24(1) of the Civil Code), the equality of co-owners' shares (Article 197 of the Civil Code), the debtor acting while being aware of the creditors' detriment (Articles 527(3) and 529 of the Civil Code), the equal value of partners' shares in a civil law partnership (Article 826(2) of the Civil Code).

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

In accordance with the principle of the free assessment of evidence (Article 233 of the Code of Civil Procedure) the court assesses the reliability and strength of evidence to its satisfaction, based on a comprehensive examination of the gathered evidence.

The court may base its conviction only on evidence taken properly, in compliance with the requirements regarding the sources of evidence and with the principle of direct adduction of evidence.

Also expert opinions are freely assessed by the court.

Moreover, Article 243 of the Code of Civil Procedure provides for the institution of the proof of plausibility. Proof of plausibility is a measure alternative to evidence in the strict sense and provides no certainty but only renders plausibility to a statement concerning a fact. Formal evidence-taking is a rule, while proving plausibility is an exception in favour of the party invoking a certain fact. In matters incidental by their nature and in cases expressly specified in a legislative act the proof of plausibility is sufficient.

2 The taking of evidence

Every statement made both by the claimant and by the defendant must be based on evidence.

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

The court may admit evidence not invoked by a party, but that evidence must only concern that party's statements relating to material and disputed facts if, in the court's opinion, the evidence gathered in the course of the case is not enough to resolve it (Article 232 of the Code of Civil Procedure)

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

In principle, the court admits evidence at the request of the parties, as it is their obligation to indicate evidence necessary to solve the case. However, the court examines whether the admission of evidence invoked by the parties is expedient or necessary (Article 236 of the Code of Civil Procedure).

The court should issue an evidentiary ruling whenever taking evidence, also when admitting evidence *ex officio*.

When deciding whether to admit evidence submitted by a party to the proceedings, the court should examine:

whether a given fact is relevant to the case (Article 227 of the Code of Civil Procedure),

whether the fact needs to be proven (it may, for instance, be a matter of common knowledge – Article 228(1) of the Code of Civil Procedure, or admitted by the parties – Article 229 of the Code),

whether given evidence is not excluded in the specific case (e.g. Articles 246 and 247 of the Code of Civil Procedure),

whether the fact to be demonstrated by the evidence has not been sufficiently clarified yet or the evidence has not been invoked just to protract the proceedings (Article 217(2) of the Code of Civil Procedure).

2.3 In which cases can the court reject an application by a party to obtain evidence?

The court will reject a party's application to obtain evidence if it concerns facts not relevant to the case (Article 227 of the Code of Civil Procedure), facts that are common knowledge, facts admitted in the course of proceedings by the other party, if the admission raises no doubts, as well as facts known to the court *ex officio*, although the court should then make the parties aware of such facts during the hearing (Articles 228 and 229 of the Code of Civil Procedure).

The court may deem facts relevant for the resolution of the case to be established if that conclusion can be drawn from other established facts (factual presumption, Article 231 of the Code of Civil Procedure).

2.4 What different means of proof are there?

documents (Articles 244 – 257 of the Code of Civil Procedure)

Documents are written statements; they may be official or private. In the case of official documents drafted in an appropriate form by the competent public authorities it is presumed that their officially certified content is accurate and that they have indeed been issued by the issuing authority.

testimony of witnesses (Articles 258 – 277 of the Code of Civil Procedure)

Nobody can refuse to testify as a witness, except the parties' spouses, their relatives in the ascending and descending lines, siblings and relatives by marriage in the same line and degree as well as their adoptive parents or children. The right to refuse to testify continues after the termination of marriage or of the relationship of adoption.
expert opinion (Articles 278 – 291 of the Code of Civil Procedure)
An expert opinion is an opinion on facts, states and events whose examination and clarification requires particular specialised knowledge, helping the court to assess facts properly and to resolve a given case.
inspection (Articles 292 – 298 of the Code of Civil Procedure)
The inspection is the direct sensory examination of the properties or state of persons, a place or an object by the court.
hearing of parties (Articles 299 – 304 of the Code of Civil Procedure)
If upon exhausting the evidence or in its absence there remain unexplained facts that are relevant for the case, the court orders the hearing of parties in order to clarify such facts.
When a legal person is a party, the court hears persons included in a body entitled to represent that party.
Moreover, the court may admit evidence in the form of blood group test results, video footage, television footage, photocopies, photographs, plans, drawings, audio discs or tapes and other devices recording and storing images or sounds.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

Pursuant to Article 266 of the Code of Civil Procedure, before hearing the witness is informed of his right to refuse to testify and of the criminal liability for giving false testimony. The witness who is to testify takes an oath before the court.
Pursuant to Article 271(1) of the Code of Civil Procedure the witness testimony is oral. The witness testimony is read out to the witness and supplemented based on his comments, if applicable.
As a rule, witnesses not heard yet cannot be present at the hearing of other witnesses (Article 264 of the Code of Civil Procedure), while witnesses giving contradictory testimony may be confronted with each other (Article 272 of the Code of Civil Procedure).
The court may call on one or more experts to provide their opinions, informing them whether the opinions are to be presented orally or in writing (Article 278 of the Code of Civil Procedure). The expert may refuse to testify for the same reasons as witnesses (Article 280 and 261 of the Code of Civil Procedure). The expert also takes an oath unless the parties release him from that obligation. Every opinion must include a statement of reasons (Article 285 of the Code of Civil Procedure). Experts may demand compensation for their work (Article 288 of the Code of Civil Procedure).

2.6 Are certain methods of proof stronger than others?

There are no grounds for accepting a formal hierarchy of methods of proof from the viewpoint of their reliability and strength in separation from the facts of a specific case. As a rule the court assesses the evidence at its discretion (Article 233 of the Code of Civil Procedure). Its assessment should take account the principle laid down in Articles 246 and 247 of the Code of Civil Procedure according to which documentary evidence is superior to the testimony of witnesses or parties.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

Some legal actions require an appropriate form and the requirement to use such a specific form may be introduced by a legislative act or an agreement between parties. Written evidence in accordance with Article 74(1) of the Civil Code (*ad probationem*) is used so that if the requirements of a legislative or agreement are not met, the person who failed to perform an action in the appropriate form bears negative procedural consequences as his ability to take evidence is restricted.

2.8 Are witnesses obliged by law to testify?

As a rule, nobody is allowed to refuse to testify as a witness. Indeed, giving testimony is a statutory obligation. That obligation includes three requirements:
to appear before the court at a specified time,
to testify,
to take an oath.

2.9 In which cases can they refuse to give evidence?

However, the Act provides for certain exceptions to the rule that nobody can refuse to give evidence in Article 261 of the Code of Civil Procedure pursuant to which the parties' spouses, their relatives in the ascending and descending lines, siblings and relatives by marriage in the same line and degree as well as their adoptive parents or children may refuse to give evidence. The right to refuse to testify also continues after the termination of marriage or of the relationship of adoption.
Refusal to give evidence is not acceptable in family status cases, except divorces.
The court should inform the witness of his right to refuse to testify and to refuse to answer questions before hearing the witness. The reasons for the refusal to give evidence (submitted in writing or orally, with reference to statutory causes) are verified by the court.
A statement of the refusal to give evidence may be revoked. However, after giving evidence the witness cannot use the right to refuse, unless he was not previously instructed that he had such a right.
The witness may also refuse to answer questions if the testimony could expose him or his relatives (their spouses, relatives in the ascending and descending lines, siblings, relatives by marriage in the same line and degree as well as their adoptive parents or children) to criminal liability, disgrace or severe and direct financial damage or if it would involve the infringement of a material business secret.
The prevalent view holds that the term 'relatives' does not extend to persons actually living together as a couple (cohabitation).
A priest may refuse to give evidence regarding facts confided to him through confession.
Under a court order everybody has to submit, at the specified place and time, any document held by him and proving a relevant fact of the case, unless the document contains confidential information. Only persons who, regarding the facts discussed in the document, could refuse to give evidence as a witness or who hold the document on behalf of a third party who for the same reasons could object to submitting the document can escape the above obligation. However, even then a refusal to submit the document is unacceptable if its holder or the third party are required to do so in reference to at least one of the parties or if the document is issued in the interest of the party that requests the taking of evidence. Moreover, a party cannot refuse to submit a document if the damage to which that party would expose itself by submitting the document consists in losing the case (Article 248 of the Code of Civil Procedure).

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

In the event of an unjustified refusal to give evidence or take an oath the court, after examining all the present parties regarding the validity of the refusal, imposes a fine on the witness (Article 274 of the Code of Civil Procedure).
Regardless of the above fine, the court may have the witness detained for no more than a week. The court releases the witness from detention if he testifies or takes an oath or if his case was resolved by a court where that witness's evidence was admitted (Article 276 of the Code of Civil Procedure).

2.11 Are there persons from whom evidence cannot be obtained?

The court, acting *ex officio*, should prevent from testifying a person who is unable to perceive or to communicate what he perceives. The cessation of the causes of that inability may lead to the lifting of the prohibition to testify. Psychiatric treatment or incapacitation as such cannot automatically render testimony unreliable (Article 259 of the Code of Civil Procedure).
The Act does not define the age above which a child is deemed able to perceive and to communicate what he perceives. Whether a child can be examined depends therefore on his individual capabilities and degree of development. In marital cases the Act provides for limitations as regards examining as witnesses minors below the age of 13 and the parties' relatives in the descending line below the age of 17 (Article 430 of the Code of Civil Procedure).
Article 259 of the Code of Civil Procedure gives rise to a general rule that nobody may be examined in the same case once as a witness and once as a party. A party's statutory representative may thus be examined when hearing the parties. In turn, a party's attorney may be examined as a witness, but he must then relinquish his power of attorney.
Also an intervener cannot be a witness (Article 81 of the Code of Civil Procedure).
Military personnel and civil servants who have not been released from the duty to keep secret information identified as 'classified' or 'confidential', if their testimony would involve the infringement of that secrecy, do not have to give evidence unless released from the obligation to keep professional secrecy.
A mediator cannot be a witness as regards facts that he became aware of in the course of mediation, unless the parties release him from the obligation to keep the secrecy of mediation (Article 2591 of the Code of Civil Procedure).

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

A witness is heard by the court. In some cases the court may entrust the hearing to a designated judge (Article 235 of the Code of Civil Procedure). If the nature of the evidence does not prevent that, the presiding court may decide to conduct the hearing using technical devices making it possible to conduct it at a distance.
Parties have the right to be present when witnesses are examined and to put questions to them.
The witnesses may be examined by using videoconference and teleconference (Article 10(4) of Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters).

3 The evaluation of the evidence

As a rule, anything that serves to establish facts relevant for the case may be evidence. The Code of Civil Procedure does not provide for a general prohibition against the use of unlawfully obtained evidence in civil proceedings. However, an analysis of the provisions of the Constitution, of the different provisions of the Civil Code and of the Code of Civil Procedure, the Act on the protection of classified information and of international treaties ratified by Poland lends substance to the thesis that it is unacceptable to use unlawfully obtained evidence in civil proceedings.

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

In civil proceedings it is inadmissible to use evidence obtained in a manner that resulted in infringing and thus depriving a person of rights to freedom of thought, freedom of speech, intimacy and personal freedom. Evidence obtained by deceit or by a promise the fulfilment of which would infringe the law, e.g. offering a pecuniary benefit for wiretapping, is considered unlawful.
Article 403(1)(2) of the Code of Civil Procedure stipulates that a judgment obtained by means of crime may be revised. The request provided for in Article 403 (1)(2) of the Code of Civil Procedure is only possible when its fulfilment is confirmed by a final conviction. The judgment must be final to ensure the persistence of the grounds for revision. A copy of the judgment should be attached to the application for the revision of a judgement.

3.2 As a party to the case, will my own statement count as evidence?

If upon exhausting the evidence or in its absence there remain unexplained facts that are relevant for the case, the court may hear the parties (Article 299 of the Code of Civil Procedure).

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