Taking of evidence

Slovenja

1 The burden of proof

The rules regarding the taking and presentation of evidence and the methods of taking evidence in civil proceedings are regulated by the Civil Procedure Act (Zakon o pravdnem postopku, ZPP).

1.1 What are the rules concerning the burden of proof?

The general rule is that the parties must state all the facts underlying their claims and objections, and present evidence proving those facts (Articles 7 and 212 of the ZPP).

Claimants must prove the facts which are at the origin of their claims, while defendants must prove the facts underlying their objections. Substantive law tells us which of the parties is required to assert and prove a given fact. The consequences of a fact not being proven fall on the party which, according to the norms of substantive law, must assert and also prove that fact (Articles 7 and 215 of the ZPP).

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?

The evidence-taking procedure covers the facts on which the claims and objections are based, scientific and professional rules, and rules based on experience. The legal norms are not proved, since the rule applied to them is that the court must be acquainted with them ex officio (iura novit curia).

No proof is required for facts that are acknowledged by a party during proceedings before the court. A court may order acknowledged facts to be proved if it believes that a party has acknowledged them in order to assert a claim which it may not assert (Article 3(3) of the ZPP).

Facts which a party does not deny or denies without stating the reasons for denying them, shall be deemed to be acknowledged, unless the purpose of denial of these facts stems from other statements of the party. A party may also prevent the effect of this presumption of acknowledgement by stating that they do not recognise the facts; however, this only applies to facts that do not relate to the conduct of this party or their perception.

No proof is required for facts that are acknowledged and generally known (Article 214(1, 6) of the ZPP).

The court considers a fact acknowledged without checking its veracity (Article 214(1) of the ZPP), unless it considers that the party has acknowledged it with the intention of asserting a claim which it is not permitted to assert (Article 3(3) of the ZPP).

Facts that the law presumes do not require proof; however, it can be argued that these facts do not exist, unless the law determines otherwise (Article 214(5) of the ZPP).

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?

To take a decision on the merits of a claimant's claim, a high degree of truth (material proof) is required, i.e. the court must be convinced of the facts that are relevant in law.

On some occasions a demonstration of probability is sufficient to issue a decision, in particular for the issuing of certain interim procedural decisions which do not bring the proceedings to an end and by which the court settles interim procedural questions. For the judge to apply a specific procedural rule, the legally relevant facts must be shown to be probable. However, it is not necessary for the judge to be convinced of their existence. The ZPP does not define facts that can be shown to be probable in order that a certain norm be taken into account.

2 The taking of 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?

In accordance with the adversarial principle in place, it is mainly the parties that apply for evidence to be taken.

The court may also take evidence ex officio (Article 7(2) of the ZPP) if it considers that the parties intend to make inadmissible use of their claims (Article 3(3) of the ZPP).

The court takes evidence ex officio in parental disputes, where it is not bound by the claim and even though a claim has not been raised; it may also take evidence even though neither of the parties have stated evidence and if this is required in order to protect children’s interests (Article 408 of the ZPP).

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

The court decides which evidence should be taken for the purpose of establishing the decisive facts (Article 213(2) and Article 287 of the ZPP). It adopts a decision on the evidence by which it accepts or rejects the parties’ applications, and may also order the taking of certain evidence ex officio.

If a party’s application concerning evidence is approved by court decision, this is then implemented and evidence actually taken. The court is not bound by its decision on evidence. It may change it in the course of the proceedings and take evidence regarding which it rejected a previous application, and may also take new evidence (Article 287(4) of the ZPP).

Evidence is generally taken at the main hearing before a judge, who issues the final decision (Article 217(1) of the ZPP). If there are valid reasons, evidence may be taken before a specified judge upon request (Article 217(1) of the ZPP). In exceptional cases, it is also possible to take evidence after the main hearing is completed, when the judges’ panel decides that the completed main hearing is to be reopened. This occurs, if required, in order to supplement proceedings or to clarify specific important issues (Article 292 of the ZPP).

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

The ZPP specifically provides that the taking of evidence may be rejected only where the evidence is irrelevant to the decision (Article 287 of the ZPP); i.e. the evidence does not serve to establish the legally relevant facts. However, the ZPP contains no specific provisions regarding the possibility of rejecting inadmissible evidence, or evidence which cannot be obtained cost-effectively or which cannot feasibly be obtained.

A party must, no later than by the first main hearing, state all facts necessary to support their motions, adduce the evidence required to establish the truth of their statements, and state their position with regard to the statements and the evidence adduced by the opposing party. This means that the court does not take into account evidence which a party is too late in proposing. This means that the court does not take into account evidence which a party is too late in proposing. The party is generally precluded by such a motion (Article 286 of the ZPP). The only exceptions involve cases where a party can prove that they were prevented from presenting evidence at the first hearing by reasons beyond their control or if the admission of the evidence would not, in the court's opinion, delay the dispute (Article 286(3) of the ZPP).

Regarding inadmissible evidence and evidence that cannot feasibly be obtained, it is important to comply with Article 3(3) of the ZPP, which states that the court will not recognise the motions of parties which are contrary to binding regulations or contrary to moral rules.

2.4 What different means of proof are there?

The ZPP recognises the following means of proof: inspections, documents, the hearing of witnesses, the hearing of expert witnesses and the hearing of parties.

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?

Witnesses: Anyone summoned to be a witness must attend and, unless otherwise provided by law, must testify (Article 229(1) of the ZPP). Witnesses are heard at the proposal of a party, which must state about what the witness is to testify and give their personal details (Article 236 of the ZPP). Witnesses are called to a hearing by a special summons; this summons must advise them of their obligation to testify, the consequences of an unjustified failure to attend, and their right to a reimbursement of their costs (Article 237 of the ZPP).

Witnesses are heard at the main hearing. Witnesses who, because of age, illness or serious physical disability, cannot comply with the summons may be heard at their place of residence (Article 237(2) of the ZPP). Each witness is heard individually and not in the presence of other witnesses who are to testify later (Article 238(1) of the ZPP). The court advises witnesses of their obligation to speak the truth and not to omit anything; it also warns them of the consequences of giving false testimony. The witness first states what he or she knows about the case; the judge presiding over the chamber or the members of the chamber and the parties and their representatives and proxies then put questions in order to test the witness's statements or to supplement or clarify them. If witnesses give statements that are inconsistent, they may be confronted with the fact (Article 239(3) of the ZPP). The ZPP no longer recognises the witness oath.

The ZPP makes no distinction between the procedure for hearing ordinary and 'expert' witnesses, and lays down no special procedural provisions in that regard. There is no difference between the procedures for hearing witnesses and expert witnesses.

Documents: Although the ZPP does not rank the different means of proof, documents are deemed to be the most reliable. These can be divided into public and private documents. Public documents are those issued in a prescribed form by a state body acting within its sphere of competence or documents issued in such a form by a self-governing local community, a company or other organisation or an individual in exercising a public authority entrusted to them by law (Article 224(1) of the ZPP). Private documents are all documents that are not public. In a private document, a signature may be authenticated by an authorised state body or a legal or natural person exercising a public authority (e.g. a notary public). Such authenticated clauses in private documents are of public significance, and that part of the document may also be regarded as a public document. The evidential value of public documents is defined separately in the ZPP. A public document proves the veracity of the facts confirmed or specified therein (Article 224(1) of the ZPP). While the ZPP proceeds from the assumption that the contents of a public document are true, it is admissible to argue that facts have been inaccurately recorded in a public document or that a public document has been drawn up incorrectly (Article 224(4) of the ZPP). That is the only rule of evidence in Slovenian civil procedure.

Foreign public documents authenticated under the relevant regulations have the same evidential value as Slovenian documents, provided that reciprocity arrangements are applied, unless an international agreement determines otherwise (Article 225 of the ZPP).

The ZPP also lays down rules on the delivery of documents (the duty to provide documents), which depend on whether the document is with the party referring to it, with the opposing party, with a state body or organisation exercising a public authority, or with a third person (natural or legal person).

Expert witnesses: The court takes evidence from an expert witness when technical knowledge is required to establish or clarify a given fact and such knowledge is not available to the court (Article 243 of the ZPP). The civil court appoints an expert witness by special decision, and may give the parties an opportunity to present their views on the matter prior to the appointment. An expert witness may also be appointed by the judge presiding over the chamber or by a specially requested judge, if they are authorised to take such evidence (Article 244 ZPP). Expert witnesses are generally appointed from a special list of court-appointed witnesses; the task may also be entrusted to a specialised institution. Only natural persons may act as expert witnesses. Expert witnesses are bound to accept their duties and give their findings and opinion (Article 246(1) of the ZPP). The court may impose a fine on an expert witness who has been summoned in the proper manner and fails to attend without justifying their absence; an expert witness who declines to carry out their tasks without giving a justified reason; an expert witness who fails to notify the court immediately of the reasons preventing them to perform the expert work (in a timely manner); and an expert witness who, without giving a justified reason, fails to perform their expert work within the time limit determined by the court (Article 248(1) of the ZPP). Expert witnesses may be released from their duty by the court, at their request, only for the reasons which they may invoke to refuse to testify or answer an individual question. The court may also release expert witnesses from their duty, at their request, for other justified reasons (e.g. excessive workload). An exemption for that reason may also be requested by an authorised employee of the body or organisation in which the expert witness works (Article 246(2) and (3) of the ZPP). An expert witness may also be disqualified in the same way as a judge; the only exception to this is where someone who has already previously been heard as a witness may serve as an expert witness (Article 247(1) of the ZPP).

The work of an expert witness comprises findings and an opinion. The court also decides whether an expert witness is to give their findings and opinions only orally at the hearing or whether they must also submit them in writing before the hearing. The court also sets the deadline by which an expert witness is obliged to give their findings and opinion. If more than one expert witness is appointed, they may give their findings and opinions jointly, if they agree on them. If they do not agree, each expert witness gives their findings separately (Article 254 of the ZPP). If fundamental differences emerge between the information provided by expert witnesses or if the findings of one or more expert witness are unclear, incomplete or self-contradictory, or contradict the circumstances that have been investigated, and such anomalies are not rectified by a fresh hearing of the expert witnesses, evidence is taken again from the same or other expert witnesses (Article 254(2) of the ZPP). However, if there are contradictions in the opinion of one or more expert witnesses or their opinion contains anomalies or if reasonable doubt arises regarding the correctness of the opinion provided, the opinions of other expert witnesses are requested (Article 254(3) of the ZPP). Expert witnesses have the right to a reimbursement of their costs and the right to remuneration for their work (Article 249(1) of the ZPP).

2.6 Are certain methods of proof stronger than others?

The principle applied in the evaluation of evidence is that of the free assessment of evidence. The court, acting according to its own convictions, decides which facts are deemed to have been proved, based on a thorough and careful appraisal of each item of evidence separately and of all the evidence together, and on the success of the proceedings as a whole (Article 8 of the ZPP). Slovenian civil procedure does not therefore recognise 'rules of evidence', whereby the legislator lays down in advance in abstract fashion the value of specific types of evidence. The only exception to this is the rule on the evaluation of public documents (see point 2.5).

In practice, however, the rule applied is that documentary evidence, for example, is more reliable (but not stronger) than other methods of proof, such as the testimony of witnesses or parties.

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

The ZPP contains no provisions on whether certain items or means of proof are obligatory in order to establish the existence of certain facts.

2.8 Are witnesses obliged by law to testify?

Yes. Anyone summoned to be a witness must attend and, save where otherwise provided by law, must testify (Article 229(1) of the ZPP).

2.9 In which cases can they refuse to give evidence?

A person may not be heard as a witness if their testimony would violate the obligation to preserve an official or military secret unless the competent authority releases them from that obligation (Article 230 of the ZPP).

The judge presiding over the chamber may exceptionally allow the hearing of a witness revealing an official or military secret, if conditions are met to disclose secret information in judicial proceedings (depending on the significance of the information and document content for the proceedings; the nature and sensitivity of the classified information; the significance and gravity of the material rights in question; and whether the disclosure of the classified information would compromise the functioning of a body or national security).

Witnesses may refuse to testify (Article 231 of the ZPP):

on matters which a party has confided in them as their authorised representative;

on matters which the party or another person has confessed to them as a religious confessor;

on facts which they have discovered as a lawyer or doctor or when practicing any other profession or activity where they are bound by an obligation to keep secret any facts they discover in practicing that profession or activity.

Witnesses may refuse to answer individual questions if they have good reason, particularly if, by answering, they would bring serious shame, considerable financial damage or criminal prosecution on themselves or lineal blood relatives up to any degree, or on collateral blood relatives up to the third degree, or if they would bring serious shame, considerable financial damage or criminal prosecution on their spouse or a relative by marriage up to and including the second degree (even where the marriage has already been terminated), or to their guardian or charge, or to their adopted parent or adopted child (Article 233 (1) of the ZPP).

However, the risk of causing financial damage may not be used by a witness as a reason for refusing to testify on legal transactions at which they were present as a summoned witness, on actions which they performed, in relation to a dispute, as a legal predecessor or representative of any of the parties, on facts relating to property relations linked to family ties or marriage, on facts relating to birth, marriage or death, or wherever, pursuant to special regulations, they are obliged to submit an application or give a statement (Article 234 of the ZPP). A witness may also not refuse to testify on the grounds of protection of a business secret, if the disclosure of certain facts is necessary in order to benefit the public or another person, provided that such benefit outweighs the damage caused by disclosure of the secret (Article 232 of the ZPP).

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

Yes. If a witness who has been summoned in the proper manner fails to attend and their absence is unjustified, or if they leave the place where they were to have been heard without permission, the court may order them to be brought by force, at their expense, and may also impose a fine of up to EUR 1 300). The court may also impose such a fine on a witness who attends but who then, after having been warned of the consequences, declines to testify or to answer specific questions for reasons that the court deems to be unjustified. In the latter case the court may, if the witness is still unwilling to testify, imprison the witness until such time as they are willing to testify, or until they no longer need to be heard, but for no longer than one month (Article 241(1, 2) of the ZPP).

2.11 Are there persons from whom evidence cannot be obtained?

A witness may be any person who is capable of giving information on the facts to be proved (Article 229(2) of the ZPP). Eligibility to be a witness does not depend on legal capacity. A child or a person who has been declared partly or wholly legally incapable can be a witness if they are capable of giving information on the legally relevant facts. The question of whether or not a witness is capable of testifying is assessed by the court on a caseby-case basis.

A party or a party's legal representative may not act as a witness; however, an ordinary representative (pooblaščenec) or an intervenor (stranski intervenient) may act as a witness.

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?

With regard to the hearing of witnesses, see the reply above.

Videoconferencing is regulated by Article 114a of the ZPP, which states that a court may, with the consent of the parties, permit the parties and their representatives to be at another location during the hearing and conduct procedural acts at that location if sound and video transmission is provided from the location at which the hearing is being conducted to the location or locations at which the parties and/or representatives are present. The same conditions apply to the taking of evidence by way of inspections, documents, hearing parties, witnesses and expert witnesses.

3 The evaluation of the evidence

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

Generally speaking, evidence obtained illegally (e.g. through unlawful phone tapping) may not be used in civil proceedings. However, case law does exceptionally allow the use of such evidence if there are substantiated reasons for doing so or if the taking of evidence would have special importance for the implementation of a constitutionally protected right. In this case, in addition to the fact that some evidence might have been obtained illegally, the decisive role is played by the fact of whether the evidence provided in civil proceedings would lead to re-violation of human rights.

Regarding inadmissible evidence and evidence that cannot feasibly be obtained, Article 3(3) of the ZPP states that the court will not recognise the motions of parties which are contrary to binding regulations or contrary to moral rules.

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

If the statement forms part of an action or an application of some kind, it will not count as evidence, but will have the status of an actual assertion by the party, for which the party must also present appropriate evidence. If the statement is contained in a document submitted as evidence of a party's assertions, that statement will have the status of a document.

A statement given by a party during their hearing also counts as evidence, as the ZPP also recognises the hearing of parties as evidence (Article 257 of the ZPP).

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