Taking of evidence

Poland

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European Judicial Network (in civil and commercial matters)

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

Matters relating to evidence and the taking of evidence are governed primarily by Article 6 of the Civil Code of 23 April 1964 (‘the Civil Code’) and Articles 227-315 of the Code of Civil Procedure of 17 November 1964 (‘the Code of Civil Procedure’).

In accordance with 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 therefore lie with the claimant, and that of proving certain other facts with the defendant.

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?

In accordance with Article 228 of the Code of Civil Procedure, there is no need for proof of well-known facts. There is no need to prove facts of which information is generally available and facts known to the court of its own motion, but the court must draw the attention of the parties to them. Nor is there any need for proof of facts acknowledged by the opposing party in the course of the proceedings if there is no doubt as to the acknowledgment (Article 229 of the Code of Civil Procedure). If a party does not express a view on the opposing party’s assertions of the facts, the court may, having regard to the outcome of the hearing as a whole, consider those facts to be acknowledged (Article 230 of the Code of Civil Procedure). In accordance with Article 231 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).

Presumptions established by law (legal presumptions) are binding on the court; however, they may be rebutted whenever the law does not exclude it (Article 234 of the Code of Civil Procedure).

As the law currently stands, there are no irrebuttable legal presumptions in Poland, i.e. those that may not be rebutted. However, certain legal presumptions can only be rebutted in separate proceedings – for example, the presumption that a person died on the date set in the decision declaring the death, the presumption that the child is from the mother’s husband or the presumption that the person who has been declared to have acquired the succession is in fact the heir. The finding of a final criminal judgment concerning the commission of a criminal offence can also be called into question only in proceedings challenging that judgment.

Other legal presumptions may be rebutted by evidence to the contrary in the same proceedings. For example, the presumption of good faith, the presumption that the child was born alive, the presumption that an act threatening personal well-being is unlawful, the presumption that the joint owners’ shares in the common property are equal, the presumption that the debtor acted with the knowledge that the creditors were harmed, the presumption that the contributions of the members of the civil-law partnership are of equal value, and the presumption that what is certified in an authentic instrument is true.

In accordance with Article 233(2) of the Code of Civil Procedure, the court shall, on the basis of its own conviction and on the basis of a comprehensive consideration of the evidence collected, assess the significance of the party's refusal to produce evidence or of the impediments to its performance contrary to the court's decision. Thus, in practice, the court may consider that the burden of proof to the contrary is passed on to a party whose conduct makes it difficult to prove a particular fact, that is to say, that the fact did not occur.

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?

Civil proceedings apply the principle of the free assessment of evidence (Article 233 of the Code of Civil Procedure), according to which the court assesses the reliability and strength of evidence to its satisfaction, based on a comprehensive examination of the gathered evidence. In order to base its decision on the existence of a given fact, the court must be satisfied that that fact actually occurred.

Exceptionally, in civil proceedings, the belief that a fact is likely to have occurred may be sufficient. This is the case in situations where the law requires only a prima facie case and not proof of the fact (Article 243 of the Code of Civil Procedure). A prima facie case is provided for in civil proceedings as being sufficient to rule, for example, on the grant of a security, on the intervention of an auxiliary intervening party in the proceedings, or on the suspension of the immediate enforceability of a judgment by default.

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?

The court may accept evidence not indicated by a party (Article 232 of the Code of Civil Procedure), but in contentious proceedings this is exceptional and is at the court's discretion. This is not the case in certain situations in non-contentious proceedings where the law provides for the possibility of initiating proceedings of the court's own motion (e.g. in matters of parental responsibility or guardianship) or where the law requires the court to determine of its own motion certain facts (for example, in proceedings for a declaration of inheritance, the court examines of its own motion who is the heir). In such a case, the court is obliged in practice to accept evidence of its own motion in the absence of sufficient evidence provided by the parties to the proceedings.

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

The court is not bound by the application for evidence. Evidence provided by a party may be admitted or omitted. Both the omission of evidence and its acceptance requires an order to be issued (Article 235^2(2) of the Code of Civil Procedure, Article 236(1) of the Code of Civil Procedure). An exception is made for the documents in the case file or their attachments. Such a document is evidence without a separate decision – the court must issue a decision only if it wishes to omit it (Article 243^2 CCP). When issuing a decision on the admission of evidence, the court shall indicate the evidence and the facts to be proved and, where necessary and possible, the date and place of the taking of evidence.

The court is not bound by its decision to admit or omit evidence and may, where appropriate, cancel or amend it (Article 240(1) of the Code of Civil Procedure).

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

In accordance with Article 235^2 of the Code of Civil Procedure, the court may, in particular, omit evidence:

- the implementation of which is excluded by a provision of the Code;
- that aims to prove a fact that is uncontested, irrelevant to the outcome of the case or proven as claimed by the applicant;
- unsuitable to demonstrate the fact in question;
- impossible to provide;

- seeking only an extension of the procedure;
- and where the application does not state the evidence in such a way as to permit it to be provided or does not specify the facts to be proved, and the party has failed to remedy that omission despite the request.

2.4 What different means of proof are there?

The means of evidence may include, in particular:

- documents containing text and enabling their issuers to be identified (Articles 243^1-257 of the Code of Civil Procedure);
- testimony of witnesses (Articles 259-277 of the Code of Civil Procedure);
- expert opinion (Articles 278-291 of the Code of Civil Procedure);
- visual inspection (Articles 292-298 of the Code of Civil Procedure);
- hearing of parties (Articles 299-304 of the Code of Civil Procedure)
- group blood testing (Articles 305-307 of the Code of Civil Procedure);
- documents containing an image or sound recording (Article 308 of the Code of Civil Procedure).

This list is not exhaustive – Polish civil procedure allows for the use of means of evidence other than those expressly referred to in the Act (Article 309 of the Code of Civil Procedure).

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 shall, as a rule, give evidence orally at the hearing. A witness who cannot appear when summoned because of illness, disability or other insurmountable obstacle shall be heard at his or her place of residence (Article 263 of the Code of Civil Procedure). The court may decide that the witness should give his or her testimony in writing (Article 271^1 of the Code of Civil Procedure). In such a case, the witness is obliged to submit the text of the testimony to the court within the time limit set by the court. Deaf and mute witnesses give evidence in writing or with the assistance of an expert (Article 271(2) of the Code of Civil Procedure). For unjustifiable non-appearance, the court will order the witness to be fined and issue a new summons and, in the event of repeated non-appearance, will impose an additional fine and may order that the witness be forced to appear in court (Article 274(1) of the Code of Civil Procedure).

Pursuant to Article 266 of the Code of Civil Procedure, before hearing the witness is informed of their right to refuse to testify and of the criminal liability for giving false testimony (Article 266 of the Code of Civil Procedure). A witness who is to testify takes the following oath: “Understanding the importance of my words and my legal obligations, I solemnly swear to tell the truth, and not to dissimulate anything of which I have knowledge.” A witness testifying in writing takes the oath by signing this text.

When giving an oral testimony, the witness begins by answering the court’s questions, what is known to them and from what source with regard to the case, after which the parties may put questions to them (Article 271(1) of the Code of Civil Procedure).

Witnesses whose testimony contradicts one another may be confronted (Article 272 of the Code of Civil Procedure).

The examination of a witness using technical devices enabling this action to be carried out remotely depends on the court’s decision, which assesses whether or not the nature of the evidence precludes it (e.g. because of the personal characteristics of the witness; Article 235(2) of the Code of Civil Procedure). In such a case, the witness should be kept in the premises of another court, or in prison or in custody when deprived of liberty, so that the

hearing can be transmitted between the courtroom of the court conducting the proceedings and the place where the witness is present. At the place where the person deprived of liberty is present, a representative of the administration of the prison or detention facility, an agent, if any, and an interpreter, if appointed, shall be involved in the proceedings (Article 151(2) of the Code of Civil Procedure).

It is for the court to decide whether the expert's report will be made orally or in writing (Article 278(3) of the Code of Civil Procedure). Every opinion must include a statement of reasons (Article 285 of the Code of Civil Procedure). After the submission of the opinion, the court may request an oral or written supplement to the opinion or an explanation thereof, as well as an additional opinion of the same or other experts (Article 286 of the Code of Civil Procedure).

Where evidence is taken through a designated judge or a requested court, the court may leave it to the designated judge or the requested court to choose an expert (Article 278(2) of the Code of Civil Procedure).

Until the expert's activity has been completed, a party may request that the expert be excluded on the same grounds on which a judge's exclusion may be requested (Article 281(1) of the Code of Civil Procedure).

An expert may refuse to give an opinion on the same grounds as those on which witnesses may refuse to testify (Articles 280 and 261 of the Code of Civil Procedure). An expert who is not registered in the register of court experts shall take an oath.

The court may order that the case file or the subject-matter of the inspection be presented to the expert to the extent necessary and order that they be present or participate in the taking of evidence (Article 284 of the Code of Civil Procedure).

In the event of unjustified non-appearance, unjustified refusal to give an oath or opinion, or undue delay in submitting an opinion, the court may order the expert to be fined, but may not order that the expert be forced to appear in court (Articles 287 and 289 of the Code of Civil Procedure).

The court may accept evidence from an opinion drawn up on behalf of a public authority in another procedure provided for by law. (Article 278^1 of the Code of Civil Procedure).

Anyone ordered to do so by the court must submit, at the specified place and time, any document held by them and proving a relevant fact of the case, unless the document contains confidential information (Article 248(1) of the Code of Civil Procedure). Only persons who, regarding the facts discussed in the document, would be entitled to refuse to give evidence as a witness or who hold the document on behalf of a third party who would be entitled to object to submitting the document for the same reasons can be dispensed of 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(2) 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. As a rule the court assesses the evidence at its discretion. However, documents must, to the extent provided for by law, constitute sufficient proof of certain facts. Official documents drawn up in the prescribed form by the public authorities appointed to that effect and other State bodies within the scope of their activities, as well as other entities within the scope of the public administration tasks entrusted to them by law, constitute evidence of what has been officially certified therein (Article 244 of the Code of Civil Procedure). A party who denies the veracity of an authentic instrument or claims that the statements made therein by the authority from which it originates are incorrect must provide proof of this (Article 252 of the Code of Civil Procedure). A private document drawn up in written or electronic form proves that the person who signed it has made the declaration contained in the document (Article 245 of the Code of Civil Procedure). If a party denies the veracity of a private document or claims that the declaration of the person who signed it does not emanate from that person, they must provide proof of this. However, if the dispute concerns a private document originating from a person other than the opposing party, the veracity of the document must be proven by the party wishing to use it (Article 253 of the Code of Civil Procedure).

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

No, but where the law requires the use of a particular form for the conclusion of a particular contract, the possibility of proving the conclusion of that contract by means of evidence other than the contract document is considerably restricted. A person who has not acted properly shall be penalised by a procedural disadvantage in the form of a limitation on the possibility of introducing evidence. If a law or contract requires that a legal act be in writing, evidence from witnesses or from the questioning of the parties in a case between the parties to that act is admissible if it concerns the fact that the document covering the act has been lost, destroyed or taken away by a third party and, if the written form was reserved for evidentiary purposes only, also in the cases specified in the Civil Code (that is to say, in the case of disputes other than between traders, if both parties so agree, if the consumer so requests in a dispute with the seller or supplier or if the fact that the legal act was concluded is shown to be plausible by means of a document; Article 246 of the Code of Civil Procedure, Article 74(2) and (4) of the Civil Code). Similarly, evidence from witnesses or from the hearing of the parties against or over the content of a document containing a legal act may be accepted between the parties to that act only if it does not lead to circumvention of the reserved form, failing which it will be null and void, and where, in the light of the particular circumstances of the case, the court considers it necessary (Article 247 of the Code of Civil Procedure).

2.8 Are witnesses obliged by law to testify?

Yes.

2.9 In which cases can they refuse to give evidence?

Spouses of the parties, ascendants, descendants, siblings and relatives to the same line or degree, as well as persons who are in an adoptive relationship, may refuse to testify. The right to refuse to testify also continues after the termination of marriage or of the adoptive relationship. However, refusal to testify is not permitted in matters of civil status (e.g. determination or denial of the parentage of a child, annulment of marriage, adoption and dissolution of adoption, declaration of death), except for divorce cases (Article 261(1) of the Code of Civil Procedure).

The witness may also refuse to answer the question referred if the witness's testimony could expose them or their relatives referred to above to criminal liability, shame or severe and direct material damage, or if the testimony could constitute a violation of essential professional secrecy. In addition, members of the clergy may refuse to testify on facts made known to them in confession (Article 261(2) 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. Regardless of the above fine, the court may have the witness detained for up to a week. The court releases the witness from detention if they testify or take an oath or if the 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?

Yes. Persons who are unable to observe or communicate their observations may not be witnesses (Article 259(1) of the Code of Civil Procedure). The cessation of the causes of that inability may lead to the lifting of the prohibition to testify. The mere fact of psychiatric treatment or incapacity does not automatically prohibit questioning. Nor is there an age limit above which a child is deemed able to perceive and to communicate what they perceive. Whether a child can be examined depends therefore on their individual capabilities and degree of development. In marital cases, the law 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).

In addition, there is a general rule that nobody may be examined in the same case once as a witness and once as a party. The party's legal representative may therefore be heard in the context of the hearing of the parties and not as a witness (Article 259(3) of the Code of Civil Procedure). The representative of a party may be heard as a witness, except that they should, in such a case, appoint a substitute for the hearing and, as soon as the

testimony has been given, terminate the power of attorney. Joint participants may not be witnesses (Article 259(4) 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‘ may not give evidence if their testimony would involve the infringement of that secrecy (Article 259(2) of the Code of Civil Procedure).

A mediator cannot be a witness as regards facts that they became aware of in the course of mediation, unless the parties release them from the obligation to keep the secrecy of mediation (Article 259^1 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. The presiding judge shall first check the identity of the witness, inform the witness of the criminal liability for giving false testimony and take an oath from the witness. The witness begins to testify by answering questions from the presiding judge regarding what is known to them in the case and from what source, and then questions may be asked by the other judges and parties (Article 271(1) of the Code of Civil Procedure). The presiding judge gives the floor, entitles them to ask questions and may take the floor if they abuse it, and cancels the question if they consider it inappropriate or superfluous (Article 155 of the Code of Civil Procedure). The witness may not leave the room before obtaining permission to do so from the presiding judge (Article 273(2) of the Code of Civil Procedure).

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?

Polish law does not provide for a general prohibition against the use of unlawfully obtained evidence in civil proceedings. The case-law of the courts and the views of the legal literature are not consistent. The prevailing view is that the court should assess on a case-by-case basis which legal interest should be better protected: the right violated by obtaining evidence or the right to judicial redress. Consequently, while evidence obtained as a result of a criminal offence should, in principle, be disregarded as inadmissible, that does not necessarily apply to evidence obtained through minor infringements of the law (e.g. infringement of personal interest in the form of the right to privacy), in particular where there is an important public interest in the acceptance of evidence.

As a general rule, evidence in the form of a recording of an interview in which the party requesting the taking of evidence took part is admissible, even if the recording was made without the knowledge and consent of the interlocutor.

In any event, if evidence has been obtained by means of an offence (as established by a final conviction), it may then be taken into account by the court as a basis for re-opening the proceedings (Article 403(1)(2) of the Code of Civil Procedure).

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

The oral and written submissions of the parties do not constitute evidence. However, if, after exhaustion of evidence or in the absence of such evidence, certain facts relevant to the resolution of the case remain unexplained, the court may hear the parties in order to clarify the facts (Article 299 CCP) and this hearing is considered as evidence.

4 Has this Member State in accordance with Article 2(1) of the Taking of Evidence Regulation specified other authorities that are competent to take evidence for the purposes of judicial proceedings in civil or commercial

matters under the Regulation? If so, what proceedings are they competent to take evidence in? Can they only request taking of evidence or also assist in the taking of evidence on the basis of a request from another Member State? See also notification under Article 2(1) of the Taking of Evidence Regulation.

In Poland, only the courts are competent to take evidence for judicial proceedings in civil or commercial (economic) matters.

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