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Evidence in Civil Law - Slovenia

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ABSTRACT Under the Article 22 of the Slovenian Constitution the right to equal protection of rights guarantees the right to state the facts and submit evidence, the right to be present at the taking of evidence and to be informed on the results of the taking of evidence. The principle of free assessment is a fundamental principle in Slovenian civil procedure included in Article 8 of the CPA. In the system of free assessment the judge is the one to evaluate the evidence without being bound by any formal rules on probative value of certain evidence. Probative value depends only on individual belief or conviction of the trial judge in each matter separately. The free assessment of evidence is the right and duty of the court to assess each piece of evidence separately and collectively. In the evidence-taking stage the CPA includes the special rules for each type of evidence, meant as a minimum guarantee for the right free assessment of the taken evidence and the free assessment of evidence presupposes that the evidence were taken by this rules. Even though, court decides which evidence will be produced for determination of the ultimate facts, the court is bound by the parties' right to propose evidence – with their procedural burden of proof. If the court rejects the proposal of a certain piece of evidence this rejections must be explained.

In the following book the author discusses the key principles of the law of evidence in Slovenian civil procedure. The book provides analysis of the law of evidence, while placing the subject within its theoretical context. The subject is presented in a logical structure following on from the introduction of the basic principles through the rules for burden of proof, types of evidence, costs of evidence, the question of unlawful evidence, and the cross-border taking of evidence.

KEYWORDS: • civil procedure law • Slovenia • law of evidence • fundamental principles • evidence taking • burden of proof • means of evidence • cross border taking of evidence • Regulation No 1206/2001 on taking of evidence

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After obtaining her graduate diploma at the Faculty of Law University of Maribor she was selected for the position of young researcher to obtain PhD with the support of Technological research agency of Slovenia. She was awarded from ministry of economic development and technology for gaining her PhD and for contributing to the cooperation between scientific sphere and practice.

Dr. Tjaša Ivanc is author or co-author of several books and scientific articles in the fields of her interests. She participates in domestic and international scientific conferences and was an invited lecturer at the European Justice Training Network – Seminar on cross-border Inheritance Law, Academy of Justice and at the conference "Europe for Notaries" from Austrian Chamber of Civil Law Notaries, Vienna.

She cooperated in number of successfully completed international and national projects (Simplification of debt collection in the EU; Reform of Non-Contentious Procedure in Slovenia; Medicine and Law; Legal consistency of ACE, AETS and TOLL+ with 1) European Union Law, 2) Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road and transport 3) National Law of Austria, Italy, Germany, Slovenia, France and Switzerland and possible adjustments in case of discrepancies). Dr. Tjaša Ivanc is also an expert in the field of immovable cultural heritage in international and national dimensions. She cooperated with the Ministry for culture for drafting the amendments of the Cultural Heritage Protection Act and is author of the only scientific book available for this research area in Slovenia with the title “Protection of Immovable Cultural Heritage – legal aspect”.

Currently she is engaged as an expert and researcher in EU project “Dimensions of Evidence in European Civil Procedure” and several bilateral research projects.

Foreword

The civil procedure rules enhance the court`s powers to control evidence and this powers need to be applied in accordance with overriding objective. Evidence can be described as an information that may be properly presented to the court to support the certainty of facts being asserted before it.

In civil procedure evidence is governed by the dispositive principle and the principles arising out of it. The rights disputed in civil procedure are private rights, that is, available to the parties. In this regard the parties are entitled to take action and therefore bring a claim, which means that they define the court's powers of decision as it is bound by the parties' petitions and by all those facts and legal grounds they bring which they consider appropriate to protect their rights. The parties are responsible for providing the means of proof they consider opportune for guaranteeing the successful outcome of their respective claims.

The following book is one of the results of the European project with the title "Dimensions of evidence in European civil procedure" within framework programme "Civil and Criminal Justice".[2] The project is combined initiative involving cooperation between 11 foreign universities and 28 national reports under the successful management of Prof. Dr. Vesna Rijavec, University of Maribor, Faculty of Law. This European research cooperation has already established itself as a key scientific research network in which the most influential experts in the European civil procedure law are working together to exchange their expertise and to contribute to a better understanding of national and unified requirements in the area of Evidence Law.

The major objective of this project was to explore whether there exists a common core of European Law of Evidence (and taking evidence in particular). By providing a clear picture of common core principles, the project will serve as a starting point for further harmonization or unification processes in this field. The important objective was to research the functioning of Regulation (EC) No 1206/2001 as well as cross-border taking of evidence within the EU, contribute to the development of mutual trust in order to eliminate obstacles in cross-border civil proceedings, provide information to individuals and businesses to

[2] Official website: http://www.acj.si/en/presentation-evidence.

improve their access to justice and provide training for legal practitioners with emphasis on communication tech.

The purpose of this book is to provide the explanation of national civil procedure dealing especially with evidence law regulated in Slovenian Civil Procedure Act. The book should be a valuable resource to those involved in the processes of litigation as well as a teaching and research material.

Therefore, the present book is only one small cornerstone in the mosaic of more than 22 national reports on evidence law which will serve as basis for scientific book "Dimensions of Evidence in European Civil Procedure" published by Kluwer Law International by the end of the year.

The Author

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Part I

1 Introduction

Slovenian Civil procedure Act (Zakon o pravdnem postopku) relates to Austrian Code of Civil Procedure (Zivilprozessordnung). The stated results from the fact that Slovenia was once a part of Austria, more precisely Austro-Hungarian Empire, which lasted until the end of World War I. When Slovenia became a part of Yugoslavia the new Civil Procedure Act, which was adopted in 1929, was nearly a complete copy of Austrian ZPO and was in force until 1999, when Slovenia got the first Slovenian Civil Procedure Act. From 1999 the CPA was amended four times, with the last amendment (CPA-D) from 2008. The last amendment brought many reforms to Slovenian civil procedure which relate also to evidence taking. For example, Article 214 CPA explicitly requires that the parties when disputing the facts give explicit explanation. The facts which a party has not denied or has denied without stating any reason are deemed to have been admitted unless the denial's purpose arises from the other statements made by the party. The party is able to avoid the presumption of admission by stating that they are not familiar with the facts, but this statement would suffice only if the facts do not relate to the actions of that party or to that party's opinion.

A welcome novelty is also the possibility for the court to order the parties to file written summaries of the most significant statements and information in the attached documents and to indicate the pages on which the statements or information are located in the filed documents, if the parties file extensive documentary evidence. If the party fails to follow the court's instructions, the evidence shall be deemed to have been withdrawn.

Another novelty relates to examination of witnesses and possibility of the parties to submit written witness statements. The parties may, by order or consent of the court, submit written and signed statements by the witnesses concerning the facts to which the witnesses would testify at the hearing.

Present book examines the evidence law as it is regulated in Slovenian civil procedure law. The work provides analyses of fundamental principles in Slovenian civil procedure and concentrates on general principles of evidence taking. In the system of free assessment the judge is the one to evaluate the evidence without being bound by any formal rules on probative value of certain evidence. The free assessment of evidence is the right and duty of the court to assess each piece of evidence separately and collectively. The provisions that enable court establishing the truth are provisions on the basic principles: the principle of free evaluation of evidence, the *audiatur et altera pars*

principle, principle of public hearing, orality and immediacy, the duty to tell the truth, the inquisitorial principle. Furthermore, all the provisions on the evidential system help courts find the truth and witnesses' duty to testify, experts' duty to give their findings and opinions, and the party's duty to submit documents corroborating their statements.

Chapters relating to evidence law will give an overview of evidence in general, focusing on standards of proof to consider a fact as established, mans of proof, duty of parties and third persons to deliver evidence. We discuss burden of proof which relates to procedural duty or burden and to the rules which determine which party bears the consequences of unproved statements on the existence and nonexistence of ultimate facts. Our CPA regulates means of proof but the list is not exhaustive, so the principle of numerus clausus does not apply. The book concentrates on the analyses of the following means of proof: documents, witness testimony, expert witness testimony, and party testimony. The rules on legal costs caused by taking evidence and rules on language and translation are analyzed. Since the Slovenian CPA is silent on the question if illegally obtained, the book deals with this topic examining scholarly literature and case law in Slovenia.

Added value of the book is also synoptic presentation of ordinary civil procedure, which shows the timeline of the ordinary form of civil procedure in Slovenian legal system. In the last part of the book we provide case based analyses of scenarios that consider different topics, relating also to cross border taking of evidence with connection to Regulation No 1206/2001 on taking of evidence.

2 Fundamental Principles of Civil Procedure

2.1 The Principle of Free Disposition of the Parties and the Officiality Principle

The principle of free disposition of the parties derives from the principle of the autonomy of the parties based in civil substantive law, and thus represents a functional connection between civil procedure law and substantive law. This connection is manifested in the protective nature of the procedure in relation to substantive law.

In its purest form, the principle of free disposition means that proceedings can be initiated only by the party. The parties are *domini litis* of the procedure; they have the right to dispose of their claims and the court is bound by the evidence offered by the parties and the claim(s) asserted by the parties.[3]

On the other hand, the officiality principle is a contrary precept to the principle of free disposition of the parties. Proceedings may be started *ex officio* and the procedure runs irrespective of the will of the parties.[4] According to the officiality principle, the court is not limited to evidence presented by the parties and is authorised to examine all the circumstances which it deems important to the case. The court may thus decide more or something else than claimed. *Ne eat iudex ultra et extra petita partium*.

[3] L. Ude, Civilno procesno pravo, Uradni list RS, Ljubljana, 2002, p. 108.
[4] J. Juhart, Civilno procesno pravo, Univerzitetna založba Ljubljana, p. 38.

The Slovenian Civil Procedure Act[5] recognises the free disposition of evidence as a general procedural principle. The extent of this principle is delineated in Articles 2 and 3 of the CPA. In civil procedure, the court may not decide beyond the extent of the claim(s) as defined by the parties to the litigation (par. 1 Art. 2 CPA). There are two rules which stem from this provision. Namely, the court may not commence the procedure without an action and the court is bound by the claim. The action must seek a specified relief or remedy claimed in respect of the cause of action, the collateral claims, the statement of facts establishing the cause of action, the statement of evidence proving these facts, and other details necessary in each pleading (Art. 180 CPA).[6] As the principle of free disposition means that the parties have the power to start the proceedings, the principle further influences the procedural course. The parties are free to resolve their claims during the procedure (par. 1 Art. 3 CPA). The procedural actions (material dispositions) by which parties influence the procedure are particularly dismissal of the claim, acknowledgment of the claim and conclusion of the court settlement (par. 2 Art. 3 CPA). The court will deliver judgment on such an action by abandoning the claim (Art. 317 CPA) or judgment by acknowledgement (Art. 316 CPA) or may accept that a court settlement be made on the record. These actions have res iudicata (*ne bis in idem*) effect and the court may not prevent parties from such a disposition, unless it determines that the parties wish to perform a dispositive act which is not in conformity with (1) compulsory rules or (2) with moral principles. (par. 3 Art. 3 CPA.)

Moreover, the party may with procedural dispositions withdraw the action (Art. 188 CPA)[7] or legal remedy (par. 2 Art. 334 CPA)[8] or the parties may agree to stay the proceeding (Art. 209 CPA)[9]. Such actions have no res iudicata effect.

The court may not refuse to hear any dispute that is within its jurisdiction (par. 2 Art. 2 CPA – prohibition of *non liquet* rule). If the court is competent to adjudicate the case,

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[5] Official Gazette of the RS, No. 73/07 – officially consolidated text, 45/08 – ZArbit, 45/08, 111/08 – decision of Constitutional court, 57/09 – decision of Constitutional court, 12/10 – decision of Constitutional court, 50/10 – decision of Constitutional court, 107/10 – decision of Constitutional court, 75/12 – decision of Constitutional court, 40/13 – decision of Constitutional court, 92/13 – decision of Constitutional court and 10/14 – decision of Constitutional court).

[6] For the court to adjudicate something to the claimant, the claim, which is incorporated in the action, must be properly formulated. It is not enough for the claimant to describe a disputed legal relationship and leave to the court the decision as to which legal consequence is appropriate. With monetary claim it is necessary to specify the exact amount of money. For more see, A. Galič in L. Ude, N. Betetto, A. Galič et al, Pravdni postopek – zakon s komentarjem, vol. 2, 2006, p. 123 and the following.

[7] At any time during the proceedings, the plaintiff may withdraw the action without the consent of the defendant, except if by the time of withdrawal the defendant by submitting a statement of defense engages in trying of the main subject of the dispute.

[8] The party may withdraw the appeal until the court of second instance delivers the decision.

[9] The proceedings shall be stayed provided both parties have agreed thereupon prior to completion of the main hearing. The proceedings shall be stayed from the day on which the court has been informed of it by the parties.

the court must then decide the case. This means that if the court cannot ascertain legally relevant facts, the rules on burden of proof apply (Art. 215 CPA).

The free disposition principle is limited by the officiality principle in exceptional circumstances such as when the parties wish to dispose of the claim, but they do not have the right to do so under the substantive law. Disposition is not allowed if such is contrary to compulsory and moral rules. Another exception can be found in matrimonial and paternity matters.

If the court finds the claimant's claim to be grounded in substantive law, the court may adjudicate only what the party has claimed in the claim. The court may not adjudicate more or something else.[10] The court, however, may adjudicate something less.[11] Only on a motion by a party may the court of second instance examine whether the limits of the claim has been exceeded by the judgment (par. 3 Art. 350 CPA). Such a violation constitutes an absolute violation of procedural law.[12] Under the CPA, the rule of reformation *in peus* is prohibited.[13] The appellate court may not modify the judgment to the loss of the appellant if only appellant has lodged the appeal (Art. 359 CPA).

In exceptional cases, the court may adjudicate more or something else than claimed by a plaintiff in a family dispute. In such disputes, the court may decide without a proper claim about maintaining the child when the court grants the request for declaration of paternity (Art. 422 CPA). When deciding about a divorce case, the court may decide beyond or without the claim for the protection, upbringing and maintenance of the child (Art. 421 CPA).

Parties are domini litis of the procedure and must plead the facts and offer evidence. (par. 1 Art. 7 CPA.) The court may not include in its decision any fact not pleaded by any party or take any evidence grounded in the parties' proposal (except when the parties dispose with their claims, which they are prohibited from doing – par. 2 Art. 7 CPA). Decision of the court which evidence to perform is limited with stated facts and importance of each evidence. Court decision regarding the performance of evidence (which evidence will be taken) is bound by that evidence that is proposed by the parties. The court may refuse to take specific evidence but this decision must be fully explained so there is no violation of the party's right to be heard. The court is bound by the party's submission regarding the means of evidence. There are, however, some exceptions to

[10] The example of adjudicating over the claim would be: the court awards the interest which was not claimed by the party; the court delivers a condemnatory judgment instead of declaratory judgment; gives judgment against more defendants for jointly payments instead of according to the shares.

[11] For example, the court may award interest at a lower rate than the rate that was claimed. For more see; A. Galič in L. Ude, N. Betetto, A. Galič et al, Pravdni postopek – zakon s komentarjem, vol. 1, Uradni list, 2005, p. 33.

[12] If the claim has been exceeded in the procedure by the appellate court, such violation can be challenged with the revision as an extraordinary remedy (par. 2 Art. 3 CPA).

[13] If the party has claimed 1,000.00 EUR, but the court awards 800.00 EUR and only the opposite party has appealed, the court of second instance may not enter judgment for more than 800.00 EUR, even though it is manifest that the plaintiff deserves 1,000.00 EUR.

this rule: Some facts may be proven only with (a) document(s) as evidence. This exception applies to proving that the agreement on territorial jurisdiction exists. The plaintiff must file (a) written document(s) proving that both parties have agreed on different territorial jurisdiction or the defendant needs to claim and attach such documentary evidence when filing an answer to the action. (par. 4. Art. 69 CPA.)[14]

2.1.1 Limitations to Introduce New Facts and Evidence

Preclusions to the introduction of new facts and evidence are foreseen in Article 286 of the CPA. The rule introduces sanctions for delay or inactivity of the parties in the proceedings. Rules on preclusion mean that the parties are obligated to state certain facts and offer evidence until a certain time or point in the proceedings or the sanction of preclusion will be imposed. According to Galič,[15] the rules of preclusion do not introduce alternative pleading (*eventualmaxime*)[16] in the Slovenian system. Alternative pleading "imposes on the parties, under the threat of no exception for preclusion, the duty to state all facts and offer all evidence already at a certain stage of the proceedings, even if the *eventualmaxime* could be considered only optionally."[17] According to the CPA parties must state all facts on which their motions are based, adduce evidence needed to determine the truth of their statements and produce declarations about the statements and evidence adduced by the opposing party until and including the first session of the hearing. (par. 1 Art. 286 CPA.) At later hearing sessions, the parties are allowed to present new facts and new evidence only if at the first session of the hearing they were prevented from presenting them by reasons beyond their control.[18] (par. 4 Art. 286 CPA). Because the CPA enables parties to plead facts and offer evidence in later hearings as well, the regulation of preclusion in the Slovenian system is different from *eventualmaxime*[19]. The possibility to present evidence and state facts at a later hearing enables parties to plead facts which emerged after the first session and also in cases where the party at the first session did not know that certain facts and evidence existed or was convinced that certain facts and evidence were not important at the first session of the main hearing.[20] Amendment D of the CPA[21] introduced new rules for procedural

[14] Agreement on territorial jurisdiction is not allowed in cases when the exclusive jurisdiction is prescribed.
[15] A. Galič in L. Ude, N. Betetto, A. Galič, op. cit., vol. 2, p. 599.
[16] Different opinion can be found with Ude (2002) and some court decisions (decision of Higher court Ljubljana, No. VSL sklep I Cp 1224/2004, 6.11.2005; decision of Supreme court RS, No. Sodba II Ips 371/2004, 24.3.2005)
[17] A. Galič in L. Ude, N. Betetto, A. Galič, op. cit., vol. 2, p. 599.
[18] Reason beyond the parties control has been evaluated in Slovenian case law: The assessment of the reasons that are beyond parties control in the system of preclusions must not be too strict, since the purpose of this institute is to accelerate the proceedings, but on the other hand this institute intervenes in the right of the party to give statements and is contrary to the principle of *audi alteram partem*. The court accepted the explanation of the party of the reasons for late submissions of evidence, because the party is legal entity with the place of business in Germany and so the circumstances for obtaining evidence are time-consuming (decision Higher court RS, No. VSL sodba I Cpg 1292/2011, 06.03.2012).
[19] Ibidem.
[20] Idem, p. 599-600.

sanctions. The court may set time limits for parties to file explanations, answers to certain questions, offer new evidence or documents to which they have been referring, give statements on expert opinions, or file written witness statements before or during the main hearing. (par. 1 Art. 286.a CPA.)

If the party fails to comply with the time limits set by the court, new submissions filed after that time limits would be admissible only if the party states such facts and produces such evidence at the first season of main hearing, provided the party was without fault and unable to state them earlier or the court estimates that their admission will not prolong resolution of the dispute. (par. 2 Art. 286 CPA.)

Provisions set in paragraph 2 Article 286 and in 286.a that enable written stages of the procedure in certain way extend substantive procedural guidance (Art. 285 CPA). However, this provisions are only possibilities for that the court may use.[22]

Amendment D has also introduced a new rule, under which the parties are obliged to invoke any violation of the civil procedure rules before the court without undue delay. Any violation to which the party objects at a later time will be considered only if the party was without fault and unable to state them previously. (par. 1 Art. 286.b CPA.) This provision introduces the presumption that the party has waived the right to object a procedural error if the party did not comply with given time limits.[23] The exception to this rule applies only to those violations of civil procedure rules which the second instance court examines *sua sponte* (par. 2 Art. 286.b CPA.)

The provision on preclusion to invoke violation of the civil procedure rules was introduced in order to speed up the procedure and to ensure effective judicial protection within a reasonable time. This is constitutionally admissible aim to restrict the parties' right to be heard. [24]

In some special proceedings, the rules of preclusion are regulated differently. In family disputes, the CPA does not impose any limit on new facts and evidence. (Art. 414 CPA.) In small claims procedures, however, parties may plead new facts and offer new evidence only in the action and answer to the action (Art. 451 CPA) and in one preparatory application per party where the parties can answer to the statement included in the application of the opposing party. (Art. 452 CPA.)

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[21] Official Gazette of the RS, No. 45/2008.

[22] A. Galič, Prve praktične izkušnje z novelo ZPP-D v postopku na pravi stopnji, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, 2009, p. 55.

[23] There is also an important question if the rejection of the court to perform a specific evidence counts as a violation of procedural rules and it is necessary for the party to objects to this violation as soon as possible according to the Article 286a of the CPA. See M. Sever, Prekluzije glede uveljavljanja procesnih kršitev po noveli ZPP-D v sodni praksi, Pravosodni bilten, vol. 1 (2011), p. 185-204.

[24] M. Sever, Prekluzije glede uveljavljanja procesnih kršitev po noveli ZPP-D v sodni praksi Pravosodni bilten, vol. 1 (2011), p. 186.

In the appeal, new facts and evidence may be presented only if the appellant establishes presumptively that for reasons beyond their control, the party has been unable to present them by the first hearing session or until the conclusion of the main hearing, or if conditions stated in Article 286 of the present Act are fulfilled. (Art. 337 CPA.)

In a case where the first instance judgement is annulled and returned to first instance court for new trial, the parties may, at the opening session of the new main hearing, adduce new facts and offer new evidence if they could not do so the proceedings then conducted for reasons beyond their control. (par. 2 Art. 362 CPA)

Slovenian constitutional court ruled that the system of the preclusions introduced by the CPA is not in conflict with the Constitution of RS and clearly explained the importance of the principle that it is the responsibility of the parties to contribute to the concentration and speeding up the procedure as well as to the substantive quality of justice.[25]

2.2 The Adversarial and Inquisitorial Principle

The adversarial and inquisitorial principles determine who collects and files procedural evidentiary material. In theory, this task is given to the parties, the court or all of them together. In its purest form, the adversarial principle means that only the parties may collect facts and evidentiary material and thus the court may consider only pleaded facts and offered evidence. This principle is also called the passivity of the court principle because the parties are the masters of the litigation and they control the procedural material.

In opposition to the adversarial principle is the inquisitorial principle or principle of active judicial role. The parties are the initiators of the proceedings, but the court collects all the factual and evidentiary material. The court is not bound by the parties' propositions and may base its decision on the facts that were not pleaded by any of the parties to the litigation.

According to the Slovenian CPA, the adversarial principle is the basic procedural principle. However, this principle is not rigidly followed. The principle is included in Article 7 of the CPA, which states the parties must state all facts on which their claims are based and must offer evidence proving these facts.

The facts are left to be pleaded by the parties, which means that the adversarial principle is enforced. If none of the parties states certain facts, the court is obliged to find that such facts do not exist. The duty of the parties to state all facts and adduce all evidence on which their claims are based is also obvious from Article 212 of the CPA. The question of which facts must be averred is closely connected to the rules on factual and evidentiary burden.[26] The general rule is that the plaintiff must present the facts and

[25] A. Galič, O namenu prekluzij v pravdnem postopku, Odvetnik, 2013, vol. 60.
[26] A. Galič and D. Wedam Lukić in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 1, p. 66.

proffer the evidence supporting the claim and the defendant must present facts and evidence supporting the defendant's objections.[27]

The adversarial principle means that the court will consider only facts and evidence presented by the parties regardless of which party has introduced the fact or evidence and regardless of the benefit or detriment such fact or evidence may occasion.[28]

The adversarial principle is unlimited in terms of evidence as well. If the party has admitted certain facts, such facts need not be proven, except on a court order which may be issued when a party is believed to have admitted the facts with to the purpose of performing a dispositive act which the party is not entitled to perform. (par. 1 Art. 214 CPA.) The facts which a party has not denied or has denied without stating any reason are deemed to have been admitted unless the denial's purpose arises from the other statements made by the party. The party is able to avoid the presumption of admission by stating that they are not familiar with the facts, but this statement would suffice only if the facts do not relate to the actions of that party or to that party's opinion. (par. 2 Art. 214 CPA.)

Facts which are presumed to exist under statute need not be proven. However, the parties may challenge the existence of such facts, unless otherwise prescribed by the statute. (par. 5 Art. 214 CPA.) Further, facts which are generally known may not require proof. (par. 6. Art. 214 CPA.)

It is not necessary for the parties to state which provision of the substantive law should be applied by the court under the facts adduced in the claim. The court must *ex officio* review all the legal bases (*iura novit curia*) on which the claim could grounded.[29] However, the parties may include their legal views in their claims and at the main hearing to ensure greater judicial efficiency and to avoid surprise judgments.

According to the Slovenian CPA, the court may not take evidence *ex officio* if one of the parties has not proffered the evidence.[30] The right of the party to proffer the evidence corresponds to the court's duty to assess which evidence is important for the decision and that such evidence is proffered. This does not mean, however, that the court must receive all proffered evidence, but rather that if evidence is rejected, the decision must be explained.[31] Further, if the party does not explain which fact is proven

[27] Ibidem.
[28] Ibid, p. 67.
[29] Ibid, p. 71.
[30] This regulation is different from the CPA from 1976, according to which the courts were able to proffer specific evidence that the court deemed necessary to be proffered *ex officio*. Ibid, p. 67.
[31] The reasons for which the court rejects to receive evidence are evident from court evidentiary decision. For more see, J. Bolta, Zavrnitev dokaznih predlogov v sodni praksi, Pravnik, vol. 9-10/2011, p. 545 and the following.

by particular evidence and why this evidence is important, the court is not obligated to consider this evidence.[32]

The exception to the adversarial principle is foreseen for cases based in par. 2 Art. 7 CPA. The court may determine the facts which were not argued by the parties and consider the evidence which parties have not proffered. This rule results from the exception to the principle of free disposition. The parties may not resolve their claims if their actions are contrary to compulsory or moral rules. If the court suspects that the parties are attempting to bypass a compulsory rule, the court may consider facts that were not alleged by the parties and admit evidence which was not proffered by the parties.[33]

The inquisitorial principle applies also for procedural preconditions which the court examines *ex officio*. The exceptions to the adversarial principle apply also in family disputes and disputes arising from relationships between parents and children. In such disputes, the court is authorised to perform all necessary actions *ex officio* for to protect rights and interests of children and other people who are not capable of protecting their rights and interests by themselves. (par. 1 Art. 408 CPA.) In disputes about the care, education and maintenance of children, the court is not bound by the claims raised by the parties; it may also decide on care, education and maintenance without a specific claim raised when the law so determines. (par. 2 Art. 408 CPA.)

For the purposes of protecting children and other persons, the court may also find facts which the parties have not stated and collect additional data needed for its decision. (par. 2 Art. 408 CPA.)

Even though we have stated that in a pure adversarial system the court plays a passive role, it nonetheless has an important duty in terms of substantive procedural guidance. (Art. 285 CPA.) The substantive procedural guidance is established for efficiently resolving disputes.[34] Consistently exercised, the adversarial principle on the one hand and rules of preclusion on the other demand greater engagement of the court in the context of substantive procedural guidance.[35]

The judge may ask questions and shall in another suitable manner ensure that all ultimate facts are stated during the hearing, that incomplete statements on important facts be supplemented, that evidence relating to the parties' statements be adduced or supplemented, and that all necessary explanations be given in order to establish the facts and legal relation in dispute. Substantive procedural guidance is a preparatory procedure

[32] D. Wedam Lukić, Ustavnopravni vidiki izvajanja dokazov v pravdnem postopku, Podjetje in delo, vol. 7/2012, p. 1384.
[33] A. Galič, D. Wedam Lukić, in L. Ude, N. Betetto, A. Galič, V. Rijavec et al., op. cit, vol. 1, p. 80.
[34] L. Ude, Civilno procesno pravo, Uradni list, Ljubljana, 2002, p. 60.
[35] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 349.

of the court and relates to the internal or substantive aspect of the proceedings, especially in gathering evidentiary material.[36]

Formal guidance relates to commencing, conducting, and concluding the proceeding, especially during the course of the main hearing.[37] Amendment D of the CPA introduced new authority for the judge in actively managing the case already at the preparatory stage of litigation.

The court may before or during the main hearing order the parties in writing or orally at the hearing to answer particular questions about the circumstances which are significant for the decision, to complete or explain in greater detail their previous statements, to produce extra evidence, to file documents to which they have referred, to state their view about expert opinion or other evidence taken, to file written statements by witnesses, to state their view about statements of the opposing party or to file judicial decisions about the case-law to which they have referred. After receiving a statement of defense or preparatory submission or after conducting a hearing, the court may set a period within which the parties may file the next preparatory submission. (par. 2 and 3 Art. 286.a CPA.) This provision provides possibility for the court that, in accordance with the principles of an open trial, parties are encouraged to list of all the circumstances that are relevant for the decision, to supplement or give additional explanation for previous statements, to propose additional evidence, present documents, already in the preparatory stage of the main hearing.[38]

In the preparatory stage, substantive procedural guidance is important to the settlement hearing. Material guidance is not allowed in proceedings with appeals and extraordinary legal remedies. At its core, material guidance relates to factual statements, to substantive proposals, to the procedure for taking evidence and to legal questions. The aim of this guidance as it relates to facts is to ensure that all important facts are averred and that all incomplete statements are completed.[39] The judge may attempt to upgrade the parties' statements by additional questions, but the judge may not intervene in such a manner that the parties would completely change their statements. Judicial independence remains paramount.

In the substantive pleadings, the court may encourage the party to change the substantive pleadings, which need to remain in the frame of the stated claim. However, the court may not help parties with forming their claims.[40] Material guidance is given

[36] N. Betetto in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 583.
[37] Ibidem.
[38] V. Bergant-Rakočević, Materialno procesno vodstvo v pisnih fazah postopka in razmerje do prekluzije, Podjetje in delo, 2008, vol. 6-7, p. 1597-1606.
[39] Ibid, p. 586.
[40] The formation of the proper claim of the plaintiff is primarily the task of the party. The court may for example encourage the parties to explain the relationship between the main and secondary claims. Ibid, p. 588.

also in gathering and taking evidence. The court may encourage parties to present relevant evidence.[41]

The principal means of material guidance is taking evidence takes the form of evidentiary orders. The court orders the taking of evidence for proving the disputed facts and deciding the means of evidence by which they are to be proved. (par. 1 Art. 287 CPA.) If the court determines that the evidence which a party has adduced is without relevance to resolution of the dispute, it enters an order rejecting the evidence and states the grounds for rejection. (par. 2 Art. 287 CPA.)

On the legal qualifications and the principle of *iura novit curia*, the question arises whether the court is bound to reveal its legal views to the parties. According to the *iura novit curia* rule, the court must state all the substantive grounds which can be applied in connection to the stated facts. If in this evaluation process it turns out the factual statements are incomplete, the court must warn the party about the possibility of different legal qualification and further encourage the party to supplement the facts.[42]

2.3 Audiatur et altera pars Principle

Based on this principle, the court must allow parties to give their statements about the claims and declarations of the opposite party in litigation. The court's application of the principle assures that all parties are heard. However, this does not mean that the court may impose coercive means to require a party or parties to give statements. The duty that falls on the court in civil proceedings is to enable the parties to actively take part and to be able to declare their position on the opposing party's statements. Parties have the right to be heard, but this right should not be equated with compulsion. Only in exceptional cases provided by law may the court decide on a claim which the opposing party did not have the opportunity to challenge.

CPA regulates this principle in Article 5, which states that each party to the litigation is granted the opportunity to be heard on the opposing party's claims and assertions. The claims on which the opposing party is not to be heard may only be decided on if the CPA so stipulates. (par. 2 Art. 5 CPA.)

The procedural mechanisms that guarantee full exercise of the principle are service of applications of parties, invitations, judgments and decisions of the court, restitution in integrum, the main hearing, and participation in the evidence-taking procedure.

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[41] When examining the witness, the court may encourage the parties to propose the examination of another witness if from the first examination it becomes evident that the second witness knows more than the first. Ibid, p. 588.

[42] Although the court must reveal its legal views on the case, the court may not act as a legal representative of the party. Important circumstances that obligate the court to reveal its legal views include instances when the court intends to depart from the case-law or when in the course of the procedure, it changes its legal views. N. Betetto in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 592.

This principle enables the court to familiarise itself with facts that are important for the final decision and is consequently implemented in many rules in the CPA. Applications (e.g. action, answer to the action, preparatory application) which are to be served on the opposing party must be submitted in a sufficient number of copies for the court and for the opposing party, and in such form that enables the court to serve the pleading on the opposing party. The same applies to attached documents. (Art. 106 CPA.) The court must summon the parties and other persons whose presence it considers necessary to the hearing in a timely manner. The pleading upon which the hearing is fixed must accompany the invitation to the main hearing, stating the time and place of the hearing. If the pleading is provided separately from the invitation, the invitation must identify the parties, the matter of dispute and the procedure to be applied at the main hearing. (par. 2 Art. 113 CPA.) Furthermore, the court is obliged to advise the parties on the consequences of nonappearance in the main hearing,[43] whose first session starts with presentation of the action by the plaintiff and is followed by the replication of the defendant. In the further course of the hearing, the court hears the parties' motions and the statements of facts by which they support their own motions or contest those made by the opposing party, considers the admission of evidence adduced by the parties, reviews the admitted evidence, and considers the legal impact of such evidence. The parties may state their legal opinions about the subject matter of dispute. (Art. 284 CPA.)

The judge convenes the main hearing and announces the scope of the hearing. The judge then determines if all summoned persons have appeared. In the case of nonappearance, theyshall verify whether they have been duly summoned and whether they have justified their nonappearance. (Art. 281 CPA.) If a party or statutory representative is not in position to make a clear and definite statement about the case in dispute and if the party is not represented by an attorney, the court must order the party to retain an attorney. (Art. 284 CPA.)

2.3.1 Right to be Heard

Under Slovenian law, there is no pre-action proceeding and no formal prerequisites which a plaintiff must fulfil before initiating an action. According to amendment D of CPA, the principle of concentration of the main hearing is even more emphasised in such a way that the parties are responsible for speeding up the litigation and for protecting their rights. Provisions included in the Slovenian CPA enable collection of the procedural material as soon as possible, and the litigation could thus be terminated in one hearing.[44] The courts are authorised to move substantive material guidance to the written stage of the procedure which influences the importance of the main hearing and the principle of orality.[45]

[43] If neither of the parties appears at the settlement hearing or at the first session of the main hearing if the settlement hearing has not been conducted, the action shall be deemed to have been withdrawn by the plaintiff. (Art. 282 CPA.)
[44] In practice, the litigation consists of several hearings.
[45] Decision of the Constitutional court of RS, No. U-I-164/09-13, 4. 2. 2010.

A special pre-trial hearing which may follow the receipt of the answer to the action is the settlement conference, which is not compulsory. At the settlement conference, the court openly discusses with the parties the factual and legal aspects of the dispute to define the disputed and the resolved issues, explores the possibility of court settlement and endeavours to reach such conclusion. (par. 2 Art. 305.a CPA.)

The public is not permitted to attend settlement hearings. The court may decide not to call a settlement hearing if the parties already unsuccessfully conducted one of the out-of-court alternatives to dispute resolution (e.g. mediation), or if the court assesses that there is no possibility of achieving a court settlement, or if the court determines that the settlement does not provide an appropriate method to resolve the dispute. (par. 3 Art. 305.a CPA.)[46] The parties may at a later stage of the proceeding conclude settlement of the dispute.

The defendant is obligated[47] to file a defence plea within thirty days from the service of the plaintiff's pleadings. In the proceedings' preparatory stage, the court may address procedural questions, but not substantive ones.[48] The judge may, according to Articles 286 and 286.a of the CPA, determine the time within which the parties may file written comments or explanations of their factual assertions and offer additional evidence. Before the main hearing, the parties have the right to file preparatory submissions even without court order to answer particular questions about the circumstances which are significant for the decision, to complete or explain in greater detail, their previous statements, produce additional evidence, file documents that they have referred to, state their positions on the expert opinion or other evidence taken, submit written statements by witnesses, reply to the pleadings of the opposing party, give their legal views, or file judicial decisions about referenced case-law. (par. 4. Art. 286.a CPA.)

The right to be heard applies also to the phase of evidence taking, where the parties' equal treatment must be ensured. The parties must be permitted to offer evidence and to respond to the statements of the opposite party, to be present at evidence taking and to put questions to witnesses and experts and to state their views on the results of the

[46] If the parties agree to use some of ADR procedure, the court may stay the proceedings for three months at the most. Under the Slovenian CPA the out of court ADR are to a limited extend acknowledged. A. Galič, Slovenia: Civil procedure, Wolters Kluwer, 2008, p. 104.

[47] The sanction for passivity of the defendant in terms of filling the timely defense plea is delivery of the default judgment (Art. 318 CPA).

[48] The judge has the power to decide: on entry of a predecessor in the litigation; on intervention; on securing of evidence; on amendment of action; on discontinuation of the proceedings due to withdrawal of action; on suspension and stay of the proceedings; on temporary injunctions; on joinder and severance of claims; on determination and prolongation of time periods specified by the court; on fixing and adjournment of hearings; on restitution in integrum; on exemption of a party from payment of the costs fees, postponement of the payment of the court fees, or payment of the court fees by instalments; on security for costs of proceedings; on advancement for costs of specific acts of procedure; on appointment of an expert; on appointment of a representative ad litem; on service of court writings; on measures for correction of pleadings; on validity of the authorization of attorney; on all other issues referring to the direction of the proceedings (Art. 270 CPA).

evidentiary procedure. The parties may file preparatory submissions before the main hearing if they are served on the opposing party prior to the hearing.

When parties offer evidence in the form of the witness testimony, they must identify the witness(es) and the facts about which the witness(es) will be examined. A witness is first examined by the court. If a party believes that the question asked by the judge is not legally appropriate, the party may object to the questions but the judge is not required to consider this objection.[49] When the judge is finished questioning the witness, the parties may ask questions with the permission of the judge. The same applies to the parties' right to ask questions of experts and the opposing party. (par.2 Art. 289 CPA.) Parties are not allowed to ask leading (suggestive) questions, which indicate how the questioned person should answer and questions that are based on the presumption that a certain fact is already proven.[50] Questions not related to the matter at issue are also not allowed. (par. 3 Art. 289 CPA.) Parties may also submit written witness statements. The parties may, by order or consent of the court, submit written and signed statements by the witnesses concerning the facts to which the witnesses would testify at the hearing. If the court orders a party to submit the written statement of a witness for whom the party has made a motion to be heard and the party fails to comply with such order, the oral testimony of the witness shall only be taken if it is established that the party has tried to obtain a written statement from the witness, but was unable to do so. The parties may also agree in the course of the proceedings to exchange written witness statements. The court has the right to order the persons called as witnesses directly to make written statements or to answer certain questions, particularly in cases where the court assesses, on the basis of the contents of the questions or on the ground of the identity of the witness called, that such a statement will suffice. However, the witness shall be heard if either of the party requests it. (See Art. 236.a CPA.).

Examining the parties as a mean of evidence was in the past regulated as subsidiary evidence according to the CPA from 1976. The current CPA loosened this limitation and the evidence from hearing the parties as witnesses is regarded as equal to evidence in other forms. (Art. 257 CPA.). The principal rule in relation to the examination of the parties is that both parties must be examined. Even if only one party offers themselves as a witness, the court will examine the other party as well. This rule stems from the provision that the court may decide that only one party will be questioned if the other party is without knowledge on the disputed facts or that examination of a party is not possible. (par. 1 Art. 258 CPA.) The court may examine only one party also in the event that the other one refuses to testify or does not appear at the hearing. (par. 2 Art. 258 CPA.) The theory[51] behind the rule in hearing both parties as witnesses is a consequence of justified doubt regarding the reliability of the parties as a means of evidence and the realization that the most effective means against partiality of one party is partiality of the other.[52]

[49] J. Zobec in L. Ude, N. Betetto, A. Galič et al. op. cit., vol. 2, p. 463.
[50] N. Betetto in L. Ude, N. Betetto, A. Galič et al. op. cit., vol. 2, p. 617.
[51] J. Zobec and L. Ude, N. Betetto, A. Galič et al. op. cit., vol. 2, p. 513.
[52] Idem, p. 514.

The parties may offer explained and substantiated facts to the contested facts or the presumption that such undisputed facts have been admitted will hold. (par. 2 Art. 214 CPA.) The facts which a party has not denied or has denied without stating any reason are deemed to have been admitted unless the purpose of the denial arises from other statements made by the party.

Following the example of English law[53], the court may order the parties to file written summaries of the most significant statements and information in the attached documents and to indicate the pages on which the statements or information are located in the filed documents, if the parties file extensive documentary evidence. If the party fails to follow the court's instructions, the evidence shall be deemed to have been withdrawn. (par. 4 and 5 Art. 226 CPA.)

The court is authorised to exercise substantive material guidance in the preparatory stage to the main hearing with the power to fix the time limits for parties to conclude procedural actions and to shift the deadline to state facts and offer evidence to the time before the main hearing. (First three paragraphs of Art. 286.a CPA.)

The defendant needs to answer the plaintiff's pleadings to avoid the delivery of the default judgement. (Art. 318 CPA.)

The law determines the exceptions to the principle. If the request for *restitutio in integrum* is based on facts that are commonly known or the motion has been brought for clearly unjustified reasons, the court may decide without the hearing of the opposing party and without the main hearing (par. 2 Art. 120 CPA).

In the procedure for securing the evidence, the court may, in emergency cases, decide on the motion for securing the evidence and admit the evidence, even if the opponent has not yet been served with the decree granting the motion to secure evidence. (par. 5. Art. 267 CPA.)

Through a special procedure, the payment order may be issued on the basis of the pleadings of the plaintiff alone without the opportunity for the defendant to file an answer or otherwise respond. The payment order is issued without the main hearing and is served on the defendant together with the pleadings. (Art. 433 CPA.) After the service of the payment order, the defendant has the right to file a statement of opposition. By timely filing of the opposing pleadings, the case returns to ordinary civil procedure. At the first session of the main hearing, the parties may state new facts and offer new evidence.

If the right to be heard is denied, such a violation is regarded as an absolute violation of the procedure (error in the procedural law) (point 8, par. 2 Art. 339 CPA),[54] but the

[53] N. Betetto, Predvidene novosti v ZPP glede dokaznega postopka, Podjetje in delo, vol. 6-7/2007, p. 1071.

[54] Violation as such means any unlawful proceeding, particularly in respect of the service of process.

appellate court does not examine this violation *ex officio* (Art. 350 CPA). This violation also constitutes a ground for revision (point 1, par. 1 Art. 370 CPA) and reopening of the proceedings. (Point 2 Art. 394 CPA.)

2.3.2 Right to Equal Treatment

The right to equal treatment requires equal treatment of those who are in an equal position and different treatment where the state of facts is different. In accordance with par. 2 art. 14 of the Slovenian Constitution, all persons are equal before the law. The principle of equality rests on particular constitutional provisions directly referring to equality and equal rights. In this manner, Article 22 of the Constitution guarantees the equal protection of rights. The fundamental procedural guarantees, which include the right to a statement and the right to equal treatment of parties in the procedure, are accorded to all parties. The court treats everyone the same and decides the matter in such a way as in substantially similar cases. The court may use substantive law in the same way as in similar cases. When a decision of the court deviates from the settled case-law on same matter, a violation of this right is noted.[55] The Slovenian Supreme Court of resolves the divergence in case law.[56]

The Supreme Court is responsible for reconciling case law. Special instruments enabling reconciliation are the legal opinions of the General session of the Slovenian Supreme Court on questions of importance in the unification the law. (Art. 110 Courts Act.) [57] Such instrument serves the goal of unification in cases where reconciliation is not readily achieved even before the Supreme Court. The legal opinion on a specific issue is used to thus demonstrate the unity of case-law.[58]

Under Article 22 of the Slovenia Constitution, the court is prohibited from treating parties unequally. The court may not in a particular case deliver judgment which would arbitrarily depart from unified and established court practice. A violation of this right occurs if three conditions are met: 1. that on a particular issue, there is uniform and consistent case-law; 2 that the court departed from this norm and 3. that the departure was arbitrary.[59] This does not mean, however, that the lower courts may not depart from settled case law. Pursuant to Article 22, a court may depart from settled case law if it explains its decision, as it would when the judge thinks that the settled case law is unconstitutional.[60]

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[55] But case law has no binding character. The court must not arbitrary depart from settled case law. The procedural requirement for the court to depart from settled case law obligates the court to provide special reasons. More on this: A. Galič, Inconsistency of Case Law and the Right to a Fair Trial, Procedural Human Rights and Access to Justice in the World of Emergencies and Economic Crisis, in Public and Private Justice, course material, Dubrovnik, 2014, available at: alanuzelac.from.hr.

[56] Decision of the Supreme Court of RS, No. Sodba in sklep II Ips 14/2002, II Ips 400/2002.

[57] Official Gazette of the RS, No. 94/07 – official consolidated text, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12 – ZSPDSLS-A, 63/13.

[58] Decision of the Constitutional Court of RS, No. Up-440/04, 23.03.2006.

[59] Decision of the Constitutional Court of RS, No. US Up-689/05, 31.01.2007.

[60] Decision of the Constitutional Court of RS, No. US U-I-155/10, 06.07.2011.

2.3.3 Sanctions for Passivity or Absence of the Party in the Procedure

The court must allow the parties to participate in the litigation and to state their positions. However, the parties have a right and not a duty actively to participate in the proceedings. The law imposes different sanctions for passivity of the parties.

If a defendant does not submit their defence plea within thirty days from the day the action was served on them, the court may render a judgment granting the claim (default judgment), provided that (1) the action has been duly served on the defendant, (2) the action does not set forth a claim which the parties may not dispose of (par. 3 Art. 3); (3) the claim is based upon the facts stated in the action and (4) the facts upon which the claim is based are not in contradiction of evidence adduced by the plaintiff or facts subject to judicial notice. (Art. 318 CPA.)

Under the CPA, parties are obligated to state all facts upon which their motions are based, adduce evidence to establish the truth of their statements, offer declarations regarding the statements and evidence adduced by the opposing party, until and including the first session of the hearing. (par. 1 Art. 286 CPA.) At later sessions, the parties may present new facts and new evidence only if at the first session of the hearing they were prevented from presenting them by reasons beyond their control. (par. 4 Art. 286 CPA.)

Sanctions for not appearing at the main hearing are set forth in Article 282 of the CPA:
- If neither of the parties appears at the settlement hearing, or at the opening hearing if the settlement hearing has not been held, the action shall be deemed to have been withdrawn by the plaintiff.
- If both parties fail to appear at a subsequent hearing, the court shall decide on the basis of the file provided the hearing at which evidence was taken has been conducted and the facts sufficiently established (judgment on the basis of the file). The court shall decide in the same manner if one of the parties fails to appear at the hearing and the opposing party makes a motion for decision on the basis of the file. No appeal shall be allowed against the order by which the court denies a motion for decision based on the facts in the file.

In special small claims procedure, CPA provides additional sanctions. Namely, in the small claims procedures, the plaintiff must state all facts and adduce all evidence in the action, while the defendant shall do so in their defense plea. (Art. 451 CPA.) Additionally, each party may file one preparatory pleading. (par. 2 Art. 452 CPA.) Facts and evidence presented in pleadings other than those referred to in Article 452 are to be ignored.

If a defendant who has been timely served with the plaintiff's pleadings fails to file a defense pleading, the claim shall be deemed to be acknowledged. The court shall without further acts render its judgment on the basis of such acknowledgment. (Art. 316 CPA.)

If the plaintiff has requested that a hearing be conducted[61] and does not appear at said hearing despite having been duly summoned, the court shall render a judgment on the basis of denunciation. (Art. 317 CPA.) If the hearing has been requested by the defendant and the defendant does not appear at the hearing despite having been duly summoned, the court shall render a judgment on the basis of acknowledgement, provided the conditions laid down in Article 316 have been fulfilled. In a case where both parties have made a request for a hearing to be conducted and they both fail to appear despite having been duly summoned, the action shall be deemed to have been withdrawn. (par. 3. Art. 454 CPA.)

2.4 Principle of Orality – Right to Oral Stage of Procedure, Principle of Written Form

The Slovenian CPA combines the principle of orality with the principle of written form. According to the CPA, the court decides the claim on the basis of an oral, immediate, and public consideration of the case. (Art. 4 CPA.) The principal part of the proceeding is the main hearing, which is conducted orally. Paragraph 2 of the same Article regulates that in cases specified by the CPA, claims may also be determined on the basis of procedural acts made only in written form and on the basis of circumstantial evidence. If for a certain procedural act no particular form is prescribed, such act shall be made in writing if offered outside of the main hearing, and orally if taken at the main hearing (Art. 16 CPA). Where a written form is required, electronic form is considered the equivalent of the written form, provided the information in electronic form is suitable for processing by courts, available and appropriate for later use. Information offered in electronic form may not be denied its evidentiary value simply because it is provided in electronic form. (Art. 16.a CPA.)

The principle of orality is emphasised at the trial (settlement hearing, main hearing) at the first instance. At the first session of the main hearing, parties present their complaint and answer to the claim orally. (Art. 284 CPA.) Witnesses are examined orally, except in cases where written statements may be submitted. (Art. 238 and 236.a CPA.)

The court decides whether the expert is to offer the findings and the opinion orally at the hearing or in writing prior to the hearing. (Art. 253 CPA.) The CPA regards the written opinion as an alternative, in practice, however, experts offer written opinions in most cases. Each written opinion should be recited orally as well as at the main hearing.[62]

The principle of orality comes particularly to expression within the procedural guidance of the court.[63] The judge conducts the main hearing, puts questions to the parties,

[61] In small claims proceedings the principle of written form has primacy. If, after the receipt of the defense plea and the preparatory pleadings of the parties, the court finds that no dispute exists the facts and that no other obstacles hinder the rendition of a decision, it shall decide the case without a hearing (par. 1 Art. 454 CPA).
[62] V. Rijavec in L. Ude, N. Betetto, A. Galič, op. cit., vol. 1, p. 154.
[63] Ibidem.

examines witnesses and experts, admonishes the parties, their statutory representatives and/or attorneys and announces the decisions rendered by the court. (Art. 298 CPA.)[64]

At the settlement hearing, the court openly discusses with the parties the factual and legal aspects of the case in order to define the essence of the dispute, reviews the possibility of a court settlement and endeavours to reach such a conclusion. (Art. 305.a CPA.) The principle of written form is prescribed for proceedings conducted outside the main hearing. The complaint, defence plea, ordinary and extraordinary legal pleadings, and other declarations, motions and notices which are to be made out of court must be filed in writing. (Art. 105 CPA.)

The principle of written form is mostly applied in special proceedings in commercial litigation where the parties are not able to give statements outside the main hearing (Art. 494 CPA) and the court may decide the case without the main hearing. Also in proceedings for issuing a payment order, the court issues the payment order without the main hearing. (Art. 431 CPA.) The principle of written form prevails in special small claims proceedings as well.

2.5 Principle of Directness or Immediacy

The core of this principle is that the judgement should be rendered by the judge who conducted the trial and was personally present at the taking of evidence. This principle is included in Art. 4 of the CPA together with principle of orality and principle of public hearing. The court shall decide upon the claim on the basis of an immediate consideration of the case.

This principle is especially relevant in connection with the free assessment of evidence, which provides that the judge may freely assess the evidence only if they are present at the time evidence is taken.[65] The principle is chiefly applied in litigation at the first instance.

There are many provisions in the CPA that ensure application of this principle. Thus, the court may, upon a motion by the opposing party, order the party submitting the transcript to produce the original document if only a transcript of the document has been submitted, and allow the opposing party to inspect it. (par. 3 Art. 107 CPA.) Notwithstanding representation by an attorney a party may be ordered by the court personally to give a declaration as to the facts in dispute. (Art. 86 CPA.)

Especially important is the provision that the evidence must be produced before the judicial panel at the main hearing. However, for justified reasons the panel may decide that specific pieces of evidence be produced before the presiding judge or before the judge of a requested court. In such event, the record on production of evidence shall be

[64] In practice, courts do not announce decisions orally but in written form without prior oral pronouncement. Ibidem.
[65] L. Ude in L. Ude, N. Betetto, A. Galič, op. cit., vol. 1, p. 48.

read at the main hearing. (Art. 217. CPA.) The exception to this principle is also the rule included in Article 302 of the CPA.

In the event that the hearing is adjourned, a new hearing must be held before the same judicial panel or judge, if possible. If the session is planned to be conducted before a changed panel, the main hearing must start again. The panel may decide upon hearing of opinion by the parties, however, not to repeat the examination of witnesses, experts and parties and not to repeat recitation of its legal opinion, but rather to read the records on the production of this evidence. (Art. 302 CPA.)

If the main hearing is held before the panel, the judgment shall be rendered by the presiding judge and other members participating in the session in which the main hearing shall have been completed.

This principle is consistently enforced in the proceedings at the first instance. The appellate court may only in exceptional cases change the factual findings made by the court of first instance.[66] This is possible only when the appellate court conducts the appellate hearing or if the court evaluates the documents or indirect evidence differently or makes different decision on the basis of indication. (Art. 358 CPA.)

If the appellate hearing is conducted, the principle is fully enforced.[67]

2.6 Principle of Public Hearing

The principle of public hearing is based on the constitutionally prescribed principle of the public nature of court proceedings. (Art. 24 Slovenian Constitution.) According to the Slovenian Constitution, court hearings shall be public and judgements shall be pronounced publicly. Only statutory law may provide exceptions.

The principle of public hearing is included in Article 4 of the CPA, which states that the court shall decide on the basis of public hearing and consideration of the disputed case. This principle applies to the main hearing (Art. 293 CPA) and for sessions outside main hearing. (Art. 297. CPA.)

The main hearing may be attended by persons of legal age. The CPA does not include any rules on public voice and audio recording. The answer to the question of the public's right may be found in the previously indicated report about the events at the main hearing Article 24 of the Constitution regarding other constitutionally guaranteed rights. In deciding whether to allow public recording, the court will take in to the account the interest of the public on the one hand and right to privacy of the parties on the other. In practice, the civil court limits the publicity to allowing the general public to take pictures at the beginning of the main hearing.[68]

[66] Ibid, p. 50.
[67] Ibidem.
[68] N. Betetto in L. Ude, A. Galič, N. Betetto et al., op. cit., vol. 2, p. 626.

Apart from publicity for the general public, we need to distinguish publicity for the parties. Publicity for the parties does not extend to all procedural acts of the parties. The judge communicates with parties at the main hearings. The acts that parties conduct outside the main hearing must be in writing. (Art. 16 CPA.) The principle of public hearing applies to the appellate main hearing as well.

2.6.1 Exceptions to the Principle of Oral Hearing

The public may be excluded by statutory law or by order of the court. In family and paternity cases the public is excluded by statute. The court may exclude the public from all or part of the main hearing, when exclusion is required in the interest of official, business or personal secrets or for moral considerations. The court may also exclude the public from the main hearing when the court cannot maintain order and ensure the undisturbed progress of the proceedings.

2.7 Other General Principles in the Slovenian Legal System

1) The duty to tell the truth: in a court of law, the parties, their statutory representatives and attorneys shall speak the truth and exercise the rights stipulated by the CPA in a fair manner (Art. 9 CPA).
2) The principle of accelerating the proceeding and principle of economy: The court shall see that the proceedings be completed without any unreasonable delay or unnecessary expenses, and shall prevent any abuse of procedural rights by the parties to the litigation (par. 1 Art. 11 CPA).
3) The principle of prevention from abuse of procedural rights: parties should exercise right stipulated by the CPA in a fair manner. Article 11 CPA determines that in the event that the parties, interveners, their statutory representatives or attorneys, with intention of harming another person or achieving goals contrary to the custom and usage or good faith and fairness, abuse the rights stipulated by the CPA, the court may impose on them a fine or other measures provided hereinafter. In the event of abuse, the fine should not exceed 1,300.00 EUR.
4) The principle of assistance for party without legal expertise: the court must advise a party who is not represented by an attorney and who by reasons of ignorance fails to exercise their procedural rights as to which of the acts of procedure the party is entitled to execute (Art. 12 CPA). This duty of the court to instruct the party about the rights refers only to procedural rights and not to substantive rights.[69]
5) The principle of binding nature of final decisions of other authorities: if adjudication of the dispute is dependent on a prior resolution of the question of whether a right or legal relation exists (preliminary question of law), which has not yet been decided by a judicial or other competent body, the court may resolve such question as well, unless otherwise provided by special regulations (Art. 13 CPA). When the claim is based on the same state of facts that has already been adjudicated in the criminal proceedings, the court shall be bound by a final condemnatory sentence issued in the

[69] Except in family and paternity matters, where the court also instructs on substantive rights. N. Betetto in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 1, p. 113.

criminal proceedings, but only in respect of the existence of the criminal offence and criminal liability of the offender (Art. 14 CPA).

3 Evidence Law

3.1 General Principles of Evidence Taking

3.1.1 Free Assessment of Evidence

The principle of free assessment is a fundamental principle in Slovenian civil procedure included in Article 8 of the CPA. In the system of free assessment the judge is the one to evaluate the evidence without being bound by any formal rules on probative value of certain evidence. Probative value depends only on individual belief or conviction of the trial judge in each matter separately.[70] The free assessment of evidence is the right and duty[71] of the court to assess each piece of evidence separately and collectively. In the evidence-taking stage the CPA includes the special rules for each type of evidence, meant as a minimum guarantee for the right free assessment of the taken evidence and the free assessment of evidence presupposes that the evidence were taken by this rules.[72] The free assessment of evidence is a method that functions in concrete judicial proceedings for determining the actual substrate judicial decisions.[73]

The free assessment relates to the selection of evidence, methodology for taking of evidence and on evaluation of their probative value. Our CPA does not impose restrictions on the selection of means evidence, which means that parties may propose any mean of evidence not only those included in CPA. However, the law regulates some prohibitions. A witness may not be examined if, by giving a testimony, a person might violate their duty to keep an official or military secret, as long as the competent authority releases them from such duty (Art. 230 CPA). A witness may also refuse testimony: on what the party has confessed to them as their attorney; on what the party or other person has confessed to them as their confessor; on facts of which they have learnt as a lawyer or a doctor or in pursuance of other activity, if they are bound to protect the secrecy of what they learn in the practice of a legal or medical profession or in pursuing such other activity (par. 1 Art. 231 CPA). A witness may refuse to answer a particular question for justified reasons (Art. 233 CPA). The same reasons refer to refusing to duty of the parties to give the documents (Art. 297 CPA) and to submit the object of the view (Art. 222 CPA).

Even though, court decides which evidence will be produced for determination of the ultimate facts (Art. 213 CPA), the court is bound by the parties' right to propose evidence – with their procedural burden of proof (Art. 212 CPA). If the court rejects the proposal of a certain piece of evidence this rejections must be explained. The court may take statements to be truthful without the need for the facts to be proved, if the facts

[70] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 1, p. 84.
[71] J. Juhart, Civilno procesno pravo, op. cit., p. 59.
[72] Ibidem.
[73] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 1, p. 88.

were admitted by the party in the court (par. 1 Art. 214 CPA). However, the court may order the taking of evidence when a party is believed to have admitted to the facts with intention to perform a dispositive act which they are not entitled to perform (par. 3 Art. 3 CPA). Furthermore, the facts to which a party has admitted or which a party has not admitted to without giving any reasons for shall be deemed to have been admitted unless the purpose of the non-admittance arises from the other statements made by the party (par. 2 Art. 214 CPA).

If the evidence produced in respect of a particular fact does not induce a sufficient degree of persuasion, the court's conclusions on such fact shall be drawn pursuant to rules on the burden of proof (Art. 215 CPA). Material burden of proof means that the party bears the consequences for not proving the stated facts – unfavourable judgment. The burden of proof rules indicate to the judge the way to make a decision if the judge was not persuaded on the existence or nonexistence of some of the important facts.[74]

The judge must carefully and thoroughly evaluate every piece of evidence in itself, and the evidence as a whole, and consider the outcome of the entire proceedings (Art. 8 CPA). This involves analysing all evidence and comparing it with other evidence, as well as all the evidence that speak to the truthfulness or falseness of a certain fact are then combined into a whole (synthesis).[75] These are the methodological instructions for assessing. The final evaluation needs to consider the success of the entire procedure, so the truth may only be determined in a formal way.[76]

In the system of free assessment of evidence, the judge is not bound by formal rules. Nevertheless, our civil procedure contains certain formal rules. According to Article 224 CPA, a document issued by a government body in the prescribed form and within the limits of its powers, or a document issued by a local government body or other statutory authority in the said form and manner (public document) shall prove the truth of what is certified or determined therein. There are also legal presumptions that fall into the term legal rule. Legal presumptions are rules on the probative value of circumstantial evidence. In situations where the judge disposes with a public document or a presumed basis, the judge is obliged to take as proven what is laid down in the document or what indicates the presumed basis.[77]

One of the exceptions to the free assessment of evidence is related to bondage to a final judgment of conviction concerning the existence of a criminal offense and criminal liability rendered in criminal proceedings (Art. 14 CPA).

According to Art. 8 of the CPA, the definition of the principle of free assessment of facts is the following: The decision on the facts which will be deemed to have been proven shall be based upon the opinion that the court shall carefully and thoroughly

[74] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 380.
[75] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 1, p. 88.
[76] Ibid, p. 92.
[77] Ibid, p. 89.

evaluate every piece of evidence in itself, and the evidence as a whole, and considering the outcome of the entire proceedings.

3.1.2 Relevance of Material Truth

The principle of material truth has been deleted from Slovenian CPA as a general principle. In the CPA from 1976 the former Article 7 stated that the court is obliged to truthfully determine disputed facts, which determine the merits of the plaintiffs claim. As the main the purpose of the deletion, the government stated that the provisions which order the court the duty to determine material truth ex officio, are not in line with the dispositive nature of civil procedure and their deletion will contribute to speeding up the procedures.[78] Nevertheless, there are provisions in the current CPA that facilitate determination of the truth and some that have a preventive[79] or restrictive nature.

The provisions that enable establishing the truth are provisions on the basic principles: the principle of free evaluation of evidence, the *audiatur et altera pars* principle, principle of public hearing, orality and immediacy, the duty to tell the truth, the inquisitorial principle.

Furthermore, all the provisions on the evidential system help courts find the truth and witnesses' duty to testify (Art. 229 CPA), experts' duty to give their findings and opinions (Art. 246 CPA), and the party's duty to submit documents corroborating their statements (Art. 226 CPA).

The court needs to state in the grounds of the judgment the claims raised by the parties, the facts asserted to give rise to these claims, the evidence, and the law applied in the judgment (par. 4 Art. 324 CPA). The judge is obliged to explain which facts were counted as proven and which were not.

The system of remedies is a tool for establishing the truth. An incorrect or incomplete determination of the state of the facts is deemed to exist when the court incorrectly determines or fails to determine a certain fact (Art. 340 CPA).

A request for revision, as an extraordinary remedy, may not be lodged on the grounds of incorrect or incomplete determination of the state of the facts (par. 3 Art. 370 CPA). However, if the incorrect and/or incomplete determination of the state of the facts is due to the incorrect application of substantive law and if, therefore, the attacked judgment cannot be modified, the revising court shall by a decree grant permission for the revision and set aside, in whole or in part, the judgment of the courts of first and second instance, or only the judgment of the court of second instance, or only the judgment of the court of first instance, and remand the case for rehearing before the court of first or of second instance (par. 2 Art. 380 CPA).

[78] A. Galič, D. Wedam Lukić in L. Ude, N. Betetto, A. Galič et al. op. cit., vol. 1, p. 78.
[79] Ibid, p. 79.

These restrictions are reflected in the rules on preclusions. Namely, parties are bound to state all the facts upon which their motions are based, adduce evidence required to establish the truth of their statements, and to produce declarations regarding the statements and evidence adduced by the opposing party at the first session of the main hearing. At later hearing sessions, parties shall be allowed to present new facts and new evidence only if at the opening session they were prevented from presenting them by reasons beyond their control (Art. 286 CPA).

In the appeal new facts and evidence may be presented only if the appellant proves presumptively that for reasons beyond their control they have been unable to present them by the first hearing session or until the conclusion of the main hearing, or if conditions stated in Art. 286 of the CPA are fulfilled (Art. 337 CPA).

The parties may present new facts and new evidence in the revision as an extraordinary remedy only if such evidence and such facts are related to a severe violation of the civil procedure provisions for which a revision may be lodged (Art. 372 CPA).

The proceedings finally concluded by a judicial decision may also be reopened (extraordinary remedy reopening of the procedure) upon a motion by a party if said party learns new facts or obtains new evidence which, if it had been presented in the earlier proceedings, might have led to a more favorable decision (point 10 Art. 394. CPA). However, a motion to reopen the proceedings which is filed for the reasons stated in point 10 of Article 394 may be granted only in the event that without the party's own fault, it was unable to allege such reasons until the earlier proceeding was concluded by a final judicial decision (par. 2 Art. 395 CPA).

Parties' dispositions may also count as restrictions on establishing the truth. The facts to which a party has admitted in court need not be proved, unless the party admitted the facts with intention to perform a dispositive act which the party is not entitled to perform (Art. 214 CPA).

If the defendant acknowledges the claim before the main hearing is over, the court shall pass without further consideration a judgment satisfying the claim (judgment on the basis of acknowledgment) (Art. 316 CPA). If the plaintiff waives their claim before the main hearing is over, the court shall pass without further consideration a judgment dismissing such claim (judgment on the basis of waiver) (Art. 317 CPA).

If the defendant fails to file the defense plea within the time limit (30 days), the court renders a judgment satisfying the claim (default judgment), provided that: 1. the action has been duly served upon the defendant to file the defense plea; 2. the action does not contain a claim which the parties may not dispose of (par. 3 Art. 3 CPA); 3. the claim is founded upon the facts stated in the action; 4. the facts upon which the claim is based are in contradiction with the evidence adduced by the plaintiff or with judicial knowledge (Art. 318 CPA).

3.2 Evidence in General

In Slovenian civil procedure all means of proof have equal weight and the law does not give preference to certain means of proof. Nevertheless, there are some exceptions in the CPA where the law foresees legal presumptions (par. 3 Art. 214 CPA) and commonly known facts (par. 4 Art. 214 CPA). The CPA recognises that public documents demonstrate the truthfulness of their content[80] (Art. 224 CPA.)

In Slovenian civil procedure there is no rule on the order of evidence. The CPA does not require that the court first take the most direct and then other more indirect or less important evidence. There was one exception according to the CPA from 1976 where the parties could be examined only if no other evidence was available or if the court considered that such an examination was necessary for establishing important facts.[81] The current CPA no longer includes such a distinction between varying means of proof.

However, certain facts may be proved only with certain means of proof: prorogatio fori may be proved only by written agreement (par. 3 Art. 69 CPA). The payment order will be issued in a special procedure if a monetary claim is supported by an authentic document, the original or a certified copy of which is enclosed with the action (Art. 431 CPA).

In the system of free assessment of evidence, the judge is not bound by formal rules. Nevertheless, our civil procedure contains certain formal rules. According to Article 224 of the CPA, a document issued by a government body in the prescribed form and within the limits of its powers or a document issued by a local government body or other statutory authority in said form and manner (public document) shall prove the truth of what is certified or determined therein. There are also legal presumptions that fall into the term of legal rule. Legal presumptions comprise rules on the probative value of circumstantial evidence. In situations where the judge disposes with a public document or a presumed basis, the judge is obliged to take as proven what is laid down in the document or what is indicated by the presumed basis.[82]

The next exception to the free assessment of evidence relates to bondage to a final judgment of conviction concerning the existence of a criminal offense and criminal liability rendered in criminal proceedings (Art. 14 CPA).

On the grounds of procedural burden of proof (adversarial principle) the court determines what evidence will be produced to establish the ultimate facts (par. 2 Art. 213 CPA).

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[80] Facts contained in a public document and correctness of composition of the same may be subject to contestation (par. 3 Art. 224 CPA).
[81] J. Juhart, op. cit., p. 358.
[82] Ibid, p. 89.

3.2.1 Minimum Standard of Proof to Consider a Fact as Established

The standard of proof in our civil procedure when the court decides on the merits is believed to be persuasion (Art. 8 CPA). This means that the court, when classifying facts under a particular substantive rule, must be convinced that the existence of the facts will not be questioned by any reasonable person.[83] However, there are many facts for which a lower standard of proof is sufficient. Probability as a lower standard of proof is informal and is not bound by the strict rules of evidence taking and represents a lower level of consciousness as a cognitive method.[84] The level of this lower standard is different and implies different procedural rules.[85] Legal theory[86] stresses that the terms with which the law refers to the standard of probability are the following: "if it is shown" (par. 1 Art 82 CPA); "in an expeditious and appropriate manner" (par. 3 Art. 44 CPA); "on the basis of facts stated in the action, and of judicial knowledge" (par. 2 Art. 17 CPA); "when the court recognises" (par. 1 Art. 116 CPA); "establishes" (par. 3 Art. 79 CPA). Lowering the standard of proof because it is determined by procedural rule can also be seen in the rule on discretion.[87] Art. 216 of the CPA provides that if a party has been awarded the right to compensation, the right to any amount of money or generic goods, and if the amount of money or quantity of goods cannot be determined or if following the determination thereof were to ensue unreasonable difficulties, the determination of such an amount of money or quantity of goods shall be left to judicial discretion. Court practice also supports a preponderate probability standard, which is considered sufficient for a causal link in tort law.[88]

3.2.2 Means of proof

Our CPA regulates means of proof but the list is not exhaustive, so the principle of numerus clausus does not apply. The CPA regulates the following means of proof: inspection of the object, documents, witness testimony, expert testimony, and party testimony. From the regulation it does not follow that some of the means of evidence are excluded. However, there are exceptions provided by law when witnesses are excused from testifying against the party, and there can be no coercive measures used to procure the parties' testimony. Evidence gained in violation of personal rights constitutes a special problem. CPA does not contain special provisions, however this does not mean that such evidence is admissible.

Examination of parties is one of the means of proof regulated by the CPA. To establish the disputed facts which are of importance in the determination of the dispute the court may also examine the parties (Art. 275 CPA). Each or both parties may propose that such examination.

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[83] T. Pavčnik, Dokazni standard, Podjetje in delo, vol. 7/2012, p. 2.
[84] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 332.
[85] T. Pavčnik, op. cit., p. 2.
[86] J. Zobec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 2, p. 335.
[87] T. Pavčnik, Dokazni standard, Podjetje in delo, vol. 7/2012, p. 3.
[88] Higer court of Ljubljana, No. VSL sodba in sklep I Cp 3193/2013, 5.3.2014; VSL sodba II Cp 2866/2013, 26.3.2014.

The fact that the evidence, or means of proof, is at the same time also a party, requires special rules. Due to the right not to self-incriminate, the party may not be forced to testify, and because of the protection of the procedural balance and equality of arms both parties must be examined.[89] A duly summoned party who has not appeared in court may not be subject to any compulsory measure and may not be forced to testify. A party may not be forced to give testimony. The sanction for breaching the duty to testify is indirect. The court shall assess, considering all the circumstances of the case, the significance of the fact that a party has not appeared at the hearing or has refused to testify. This constitutes a strong indication on which grounds the court may, by taking into account all the circumstances, conclude that the statements from the party which failed to appear at the hearing are not true, and that the statements of the opposite party are.[90] But if the reasons for not appearing at the hearing are justified, the court may determine a new session for the main hearing. The party has a right to refuse to answer a particular question for justified reasons, especially if, by answering, they might expose themselves, their relatives, their spouse or domestic partner, regardless of whether the marriage has terminated or not, or their guardian or person under guardianship, either adopter or adoptee, to a serious disgrace, considerable financial loss, or criminal proceedings (Art. 233 CPA). A party as a witness may refuse testimony: regarding what the party has confessed to their attorney; regarding what the party or other person has confessed to them as their confessor; regarding facts they have learnt as a lawyer or a doctor or in pursuit of some other activity, if they are bound to protect the secrecy of what they learn in the practice of the legal or medical profession or pursuing such other activity (Art. 231 CPA).

This evidence will be taken only if it is proposed by one or both parties. Even if a party proposes only their own testimony, the court must also examine the opposite party's. The exceptions to the rule on the party's examination may be summarized in three groups: if the court finds that a party or other person to be examined as a party lacks knowledge on the disputed facts; that examination of a party is not possible; or that the other party refuses to testify or does not appear at the hearing. In these cases it may decide to examine only the other party (Art. 258 CPA). The court is authorised to evaluate all circumstances of the case, including assessing the significance of the fact that a party did not appear at the hearing or has refused to testify.

The examples for a party's inability to testify are double: they may be factual or legal. The factual reasons include cases where a party is not capable of reproduction (mental illness), even though the facts are known to such a party, and cases when the party is unavailable (unknown residence). There are also legal barriers in which a party faculty for being examined is not recognised. A person may not be examined as a witness if by giving a testimony they might violate their duty to keep an official or military secret, as long as the competent authority releases them from such duty (Art. 230 CPA).

The party examined as a witness has three duties to fulfil: the duty to respond to the invitation to examination, the duty to testify, and the duty to tell the truth. Only the duty

[89] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec et al., op. cit., vol. 2, p. 510.
[90] Ibid, p. 525.

to tell the truth has the nature of a public, the other two are the obligation of the party towards themselves.[91] A party may not be examined under oath.

Parties under legal age are represented by parents and the court may examine any of them. However, the court may examine children and not their legal representative, but the decision depends on the actual capability of the party involved and on the appropriateness of the party to be examined (Art. 260 CPA).

The same as for witnesses, the parties have a duty to tell the truth if they decide to testify. The criminal offense of perjury is committed by a party which in the process of taking evidence by examining the party as a witness in a civil procedure gives a false statement and the court then assesses this statement as grounds for the court's decision.[92] A party which produces a false statement while being heard in civil proceedings before the court, upon which the court or other competent authority bases its decision in such proceedings, shall be sentenced to imprisonment for no more than three years (par. 2 Art. 284 Criminal Code of RS)[93].

The parties' testimony is evaluated according to methodology foreseen by the principle of free assessment of evidence. The CPA foresees some cases where certain facts must be proven by a formally prescribed type of evidence. Namely, some facts may be proven only by a document as evidence. Such a rule applies to proving that an agreement exists on territorial jurisdiction. The plaintiff must submit written documentation proving that both parties have agreed on a different arrangement for territorial jurisdiction or the defendant must claim and attach this evidence when submitting answers to the action (par. 4 Art. 69 CPA).[94] Also the power of attorney must be submitted to the court by an attorney after the first act of procedure has been conducted on behalf of the party (par. 1 Art. 98 CPA).

The payment order will be issued in a special procedure if a monetary claim is supported by an authentic document, the original or a certified copy of which is enclosed with the action (Art. 431 CPA).

Cheques and bills of exchange are securities which are regarded as authentic documents. An authentic document is a document regulated by law, which does not represent an enforcement order. However, the authentic document expresses a high level of probability that the claim exists.[95] The document is authentic if provided by law. Thus, the CPA includes a non-exhaustive list of authentic documents.[96] In the

[91] Ibid, p. 515.
[92] Decision of the Supreme Court of RS, No. Sodba I Ips 415/2007, 28.2.2008.
[93] Official Gazette of the RS, No. 50/12 – official consolidated text.
[94] Agreement on territorial jurisdiction is not allowed in cases when exclusive jurisdiction is prescribed.
[95] V. Rijavec in L. Ude, N. Betetto, A. Galič et al., op. cit., vol. 3, p. 676.
[96] According to the CPA authentic documents are: public documents; private documents on which the signature of the debtor has been authenticated by a body authorized for authentication; bills of exchange or cheques, with the protest and certificate of payment when the latter are required for

special procedure for issuing a payment order the authentic document is the grounds for the court to issue the payment order. An authentic document constitutes means of evidence only if it is also a public document at the same time. This means that the law prescribes probative value only for authentic documents which are also public documents. If the authentic document is not a public document, it is otherwise regarded only as reliable evidence, which indicates probability.[97] A cheque or bill of exchange is a private document viewed by the CPA as an authentic document upon which the plaintiff may demand from the court the issue of a payment order. This means that both of them are regarded as grounds for a payment order to be issued in the special procedure. However, if the payment order does not become final, the matter is redirected from a special procedure to a contradictory procedure, where the document as evidence must be taken. Only then can evidence be taken for proving decisive facts on which the claim is grounded.

The CPA does not provide an answer to the question of whether some pieces of evidence have a greater value than others. The court assesses evidence upon diligent and careful assessment of evidence, using the methodological instructions for evaluating the evidence presented.

Nevertheless, some types of evidence could have a higher value than other. The CPA determines the probative value of public documents compared to private documents. The probative value of both public and private documents is derived from the (legal and factual) presumption that the content of the document is the statement of the person indicated as issuer.[98] However, with the public document, the law also emphasizes the presumption that the content is authentic (Art. 224 CPA). The public documents contain two evidential rules, which may be contested, namely: the formal probative value, which means that the document was issued by a person designated as an issuer; and material probative value, which includes evidential rule on the authenticity of the document's content.[99] Facts contained in a public document or the correctness of a public document's composition may be subject to contestation (par. 3 Art. 224 CPA).

In legal theory and case law the written witness statement is considered to have lower evidential value than a contract concluded in a notarial deed and the same applies if we compare the examination of a witness.[100] A document is the most reliable and effective type of evidence, more so than witnesses, who may be an unreliable cognitive source, especially when it comes to events from the remote past and testifying about them.[101]

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the origination of the claim; certified statements of outstanding debts; invoices; other writings assuming the character of a public document under special regulations (Art. 43 CPA).

[97] Ibid, p. 687.

[98] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec et. al., vol. 2, p. 416-417.

[99] Ibid, p. 421.

[100] Ibid, p. 417.

[101] Decision of Higher court of Ljubljana, No. VSL sodba I Cpg 280/2012, 16.4.2013.

Furthermore, DNA analysis is considered to be reliable evidence, and in comparison to other evidence it is regarded as primary and most reliable.[102]

Expert witnesses are considered as an assistant to the court. This type of evidence is often used before Slovenian courts in civil cases. The reason lies not only in the fact that experts contribute professional knowledge, but because with type of evidence helps in reaching a balance against subjectivity or bias of other evidence.[103] The purpose of taking evidence from experts is therefore to obtain expertise, which the court does not have. This expertise includes knowledge of the abstract rules of science and specific professions and experience, and is only indirectly connected to concrete facts.[104] But the result of experts' work is subject to the assessment of evidence and is not binding for the judge.[105] The value of this evidence is the same as of other evidence and the same principles apply in terms of the duty of the parties to propose the expert witness as evidence and of the court's right to carefully assess the necessity and probative value of such evidence.

The CPA does not regulate the sequence in which evidence is presented. Before the current CPA, the party's testimony could only be presented as evidence if no other evidence was available; it was counted as a subsidiary type of evidence.

In order to prove that the parties agreed on territorial jurisdiction of another court, this written agreement must be submitted to the court. The plaintiff must submit a written document proving that both parties have agreed on different territorial jurisdiction, or the defendant must claim and attach this evidence when submitting an answer to the action (par. 4 Art. 69 CPA). Furthermore, power of attorney must be presented in written form.

In a special procedure for issuing a payment order, the due monetary claim must be supported by an authentic document (Art. 431 CPA).[106]

In small claims procedures, as a special, simplified procedure, the principle of the written form is more pronounced. The court may omit the oral hearing if it considers that the disputed facts could be established on the grounds of submitted written evidence.[107] However, if the oral hearing is held (by court decision or by the parties' request), parties are prevented from stating new facts and evidence. The CPA strictly regulates that the parties are allowed to state new facts and propose new evidence only in their written claim and defence plea (Art. 451 CPA). After that, the parties have one additional written submission each (par. 2 Art. 452 CPA). The court may limit the time and extent of taking evidence and at its discretion take evidence so as to ensure the

[102] A. Galič, Slovenia, Encyclopedia of Laws, op. cit., p. 176.
[103] Ibid, p. 472.
[104] V. Rijavec, Dokaz z izvedenci, Podjetje in delo, 2012, vol. 6-7.
[105] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec et. al., vol. 2, p. 474.
[106] If the claim does not exceed 2,000.00 EUR, the court may issue a payment order even though the claim is not supported by an authentic document (Art. 432 CPA).
[107] This is not the case when one or both parties demand that an oral hearing be held.

proportionality of the appropriate protection of the parties' rights and of the goal of accelerating the proceedings and their economy (par. 2 Art. 450 CPA).

3.2.3 Duty of Parties and Third Persons to Deliver Evidence

A party is obliged to submit to the court a document adduced as evidence to support their statement (Art. 226 CPA). If the party fails to deliver the document, the court is unable to take such evidence. The meaning of such an omission would depend on certain circumstances. If the document is the only means of evidence, the court decides according to the burden of proof (Art. 215 CPA). If the party proposed other evidence to establish certain facts, this party may succeed in proving an ultimate fact with other evidence. The party is also allowed to submit evidence up until and at the first session of the main hearing, as well as at later hearings, but only if the party was prevented from presenting the evidence due to force majeure.

If a party adduces a document as evidence to support statements, asserting that such a document is kept by the opposing party, the court may order the opposing party to deliver such document within a specified period of time. The party is always obliged to submit evidence: if the party has referred to such a document in their statements; if the law imposes such obligation; or if the document relates contextually to both parties to the proceedings (par. 2 Art. 227 CPA). In other cases the party has a right to refuse to submit the document claiming that the document is not in the party's possession or that special circumstances are given.

If a party ordered to submit a document asserts that it is not possession of said document, the court may take evidence to determine the truth of this assertion (par. 4 Art. 227 CPA). The party that claims that the opposing party is in possession of the document has the duty of submitting evidence to prove that the claim for delivery of the document is grounded. If the court establishes that the opposing party has the document, said opposing party has the right to prove that special circumstances exist.[108] This special circumstances give party the right to refuse the submission on grounds of Articles from 231 to 234 of CPA – reasons for which the witness may refuse to testify or to answer certain questions).

The court shall assess, at its own discretion and taking into account all circumstances of the case, the significance of the fact that a party possessing a document fails to comply with an order to produce it or asserts, contrary to the court's belief, that they are not in possession of such document (par. 5 Art. 227 CPA).

Persons other than the parties may be ordered to submit documents only if such an obligation is imposed on them by the law, or if the contents of a document to be submitted relate both to such a person and to the party adducing it as evidence. Third parties have the right to give a statement on this matter, prior to issue of a court decision ordering a third person to deliver a document (Art. 228 CPA).

[108] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec et. al., op. cit., vol. 2, p. 429.

If a third person denies the obligation to produce the document, the decision regarding such an obligation shall be given by the civil court. In this case the court may produce evidence to determine the truth of this assertion. This special proceeding may result in issuing the court decision, ordering the third party to deliver the document which is an enforcement title. In this procedure the party needs to prove that the third party is in possession of such a document and that this person is obliged to deliver it. The third party has the right to file an appeal against the court's decision. The final decision may be enforced according the provisions of Slovenian law on enforcement and security (Zakon o izvršbi in zavarovanju) only if the decision has become executable and the due date for voluntary submission of the document has expired.

3.2.4 Value of Judicial and Administrative Decisions as Evidence

The judicial and administrative decisions are public, authentic documents which constitute legal dispositions which cannot be challenged as evidence. Such judicial or administrative decisions may be challenged only in the proceedings where they were issued.[109] Civil courts are bound by decisions which already determined the interpretation of some questions important for the ruling in civil matter.

If a competent authority has already decided on a preliminary question which is not the matter of civil litigation but on which the decision in the main case nevertheless depends, the court deciding in the civil matter is bound by such a decision.[110] This means that if the preliminary question as to whether a right or legal relation exists is already decided by a final decision in other judicial or administrative procedures, the court is bound by such final decision. If the criminal court has already decided on the question of the (non)existence of a criminal offence which is a preliminary question in a civil matter for compensation, the civil court is bound by the conviction and acquittal delivered in the criminal proceedings.[111] If the court in a civil matter decides on the same historical event as the criminal court, the court in the civil proceeding is bound by a final condemnatory sentence issued in the criminal proceedings, but only in respect of the existence of criminal offence and criminal liability of the offender[112] (Art. 14 CPA).

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[109] Ibid, 422.

[110] If the competent court did not decide on the preliminary question, the court deciding in the main civil matter may resolve such a question as well, unless otherwise provided for by special regulations.

[111] By the opinion of the Supreme Court the civil court is not bound by the acquittal if the judgment was rendered on the grounds that there was not enough evidence. Furthermore, there are standpoints that the civil court is also bound by an unfounded decision because it prohibits a retrial on the same subject. Decision of the Supreme Court of RS, No. Sklep II Ips 196/2011, 5.4.2012.

[112] In a case about a car accident the civil court would determine who is responsible for the damage and what the extent of the damage is. However, the criminal court would determine if the car accident was caused with criminal offence and if the person responsible for accident is held criminally responsible. L. Ude, Civilno procesno pravo, 2002, Ljubljana, p. 93-94.

If the competent administrative body has already decided on a preliminary question concerning the existence of some right or legal relationship, the court in the civil proceeding is bound by this decision.

3.3 General Rule on the Burden of Proof

3.3.1 Main Doctrine Behind the Burden of Proof

The constitutional right to court access also has its normative basis in CPA. In Article 2 (par. 2) of the CPA it is determined that the court shall not refuse to hear any dispute that is within its jurisdiction. When deciding, the court may with some certainty come to the conclusion that the ultimate fact exists, or that it does not exist, or even that it cannot reliably decide whether such a fact exists or not.[113] This latter is called "non liquet" crisis. If the judge is obliged to decide on the claim regardless, then there is no choice other than to consider the fact upon the existence of which the judge could not make a reliable decision as not existing.

The burden of proof relates to procedural duty or burden and to the rules which determine which party bears the consequences of unproved statements on the existence and nonexistence of ultimate facts.[114] The legal doctrine distinguishes between procedural and substantive burden of proof[115] on the one hand and subjective and objective[116] burden of proof on the other.

The rules of burden of proof apply when the court upon the previously taken evidence cannot with certainty determine a certain fact. This rule is included in Article 215 of the CPA. The parties bear the burden of proof only for those statements which relate to ultimate facts. The answer as which facts must be proven may be found in substantive law. Decision-making according to the rules on burden of proof means constructing lower premise of the judge's syllogism.[117] The material burden of proof is directly applied at the moment the judgment is delivered. The party who failed to prove the ultimate facts is punished with an unfavourable judgment.[118] The main rule behind this rule is that the burden of proof is borne by the one who claims and not the one who denies.[119]

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[113] J. Zobec, Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96, p. 331.
[114] Ibid, p. 334.
[115] The burden of proof until the decision is rendered is borne by the parties and is expressed in their procedural activity (procedural burden of proof). The material burden of proof comprises the rules which determine which one of the parties is obliged to prove certain facts. Ibid, 335.
[116] Subjective burden of proof burdens and motivates the parties to prove certain ultimate facts. The objective burden of proof relates to situations where the judge cannot with certainty determine one or more facts in the dispute. This burden of proof is included in our CPA. T. Kerestes, Dokazno breme, Podjetje in delo, vol. 7/2012.
[117] J. Zobec, Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96, p. 330.
[118] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec et al., op. cit. vol. 2, p. 380.
[119] Ibid, p. 384.

There are two parallel kinds of burden of proof, namely rules on burden of proof for parties and rules on burden of proof for courts, but the latter is only a theoretical construction.[120] However, the court is also obliged to take that evidence which is not proposed by the parties if this evidence is important for deciding whether the parties dispose of claims which conflict with regulations in force and the principles of morality (par. 3 Art. 3 CPA). Also the burden of proof for the court is expressed in material procedural guidance (Art. 285 CPA).

Furthermore, there is a question in legal dogmatics on how to evaluate the rule of the burden of proof.[121] Some authors suggest that the rules are of a substantive nature, others procedural.[122,123] Nevertheless, Slovenian case law speaks in favour of the substantive nature of the rule of burden of proof.[124]

The rules on burden of proof are special legal norms which are not formulated as legal regulations, which can also be seen in Art. 215 of the CPA. This Article does not refer to certain regulation but to rules on the burden of proof.[125] The rules on the burden of proof are explicitly regulated only when the law foresees inverse burden of proof.[126] According to Zobec, the rules on the burden of proof are legal norms which cannot be classified either under substantive law nor only under procedural law. These are rules with a special legal nature, upon which the court decides on truthfulness or untruthfulness of a certain claim about ultimate fact.[127]

3.3.2 Proof Standards

The question of proof standards in civil procedure is connected to the question regarding how thoroughly must a fact on which a party is basing its claim or defense plea be proved.[128] The general standard for rendering a decision on the substantiality of the claim is the certainty of the awareness or conviction that a certain ultimate fact exists or does not exist. If evidence proposed by the parties and which are taken by the court, do not constitute sufficient grounds for establishing positive or negative beliefs regarding a certain ultimate fact, the court decides upon the rules of the burden of proof

[120] J. Zobec, Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96, p. 333.
[121] T. Keresteš, Dokazno breme, Podjetje in delo, vol. 6-7/2012.
[122] The main protagonist in ex-Yugoslavian doctrine to speak in favor of procedural nature is Čalija. Ibid, p. 338.
[123] The main opinion in Slovenian theory (Ude, Zobec, Juhart) is that these rules are of a substantive nature. T. Keresteš, Dokazno breme, Podjetje in delo, vol. 6-7/2012.
[124] Decision of the Supreme Court of RS, No. Sodba in sklep II Ips 755/2007 in II Ips 756/20079, 12.2010; Decision of the Supreme Court of RS, No. Sklep II Ips 182/2013, 24.4.2014.
[125] J. Zobec, Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96, p. 340.
[126] The law on obligation in Art. 131 foresees that in disputes for compensation, the burden of proof regarding the guilt falls on the defendant. The plaintiff must prove that the defendant's treatment is the reason that damage has been caused to the plaintiff and in what amount and that between the unlawful treatment and caused damage causal link exists.
[127] J. Zobec, Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96, p. 340.
[128] T. Pavčnik, Dokazni standardi, Podjetje in delo, vol. 6-7/2012.

(Art. 215 CPA). In this case these rules determine which party will win in the proceeding. [129]

The position of the majority of the theory is that for the substantial decision the claims on ultimate facts must be proved in such a way that any reasonable doubt in their truthfulness is excluded. However, because of the nature or specificity of the relevant fact, this proof standard is barely reachable, with the result that sometimes in case law the proof standard is lowered in such a way that the court declares a certain fact as proved on the basis of a suitable level of probability of the existence of the fact and not on the basis of certainty. The lower proof standard may be accepted in those situations when legitimate reasons demand easement of burden of proof.[130]

3.3.3 Rules Which Exempt Certain Facts from the Burden of Proof

Our legal system regulates situations where facts do not need to be proven. The facts a party has admitted in the court need not be proved (par. 1 Art. 214 CPA). Furthermore, the facts a party has admitted or which a party has not admitted without giving any reasons therefor shall be deemed to have been admitted (par. 2 Art. 214 CPA).

Legal presumptions are another legal corrective to the strict rules of the burden of proof.[131] Facts presumed to exist by law need not be proved (par. 4 Art. 214 CPA). We must distinguish between legal and factual presumptions. Factual presumptions are legal rules on which the conclusion may be made from proved facts to those facts which are a legal sign of factual status.[132] Factual presumption need not to be proved, however the presumed basis still must be proved, in which case the judge will take the presumed fact as a basis for the decision without evidence.[133] The factual presumptions may be challenged by counter-evidence.[134] The factual presumption would count as having been successfully challenged if the presumptions are called into question by counter evidence, at least so reasonable doubt would no longer be excluded.[135]

The object of legal presumptions is the existence or non-existence of a certain right or legal condition, which means that the object of presumption is the right and not the fact.[136] However, the party that refers to the legal facts needs still to prove the presumed basis – proof of the truthfulness of the claim regarding the existence of the grounds of the presumption.[137] However, the legal presumption may be challenged with evidence. which comprises the main evidential document, that the opposite is true. The main piece

[129] Decision of the Higher court Ljubljana, No. VSL Sodba II Cp 710/2009, 14.7.2009.
[130] Decision of the Higher court Ljubljana, No. VSL sodba I Cp 3490/2013, 2.4.2014.
[131] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec op. cit., vol. 2, p. 370.
[132] J. Juhart, op. cit., p. 353.
[133] Ibidem.
[134] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 371.
[135] Ibidem.
[136] J. Juhart, op. cit., p. 353.
[137] T. Keresteš, Dokazno breme, Podjetje in delo, vol. 6-7/2012.

of evidence differentiates from the counter-evidence and must provide the judge with full belief that the counter claim is truthful.[138]

Legal presumptions must be distinguished from the probative value of a public document. While with legal presumptions the main characteristic is the rule on the probative value of indirect evidence, with a public document the characteristic is the evidentiary rule on the probative value of the evidence as direct evidence.[139]

Generally known facts may not be subject to proving (par. 4 Art. 214 CPA).

3.3.4 Duty to Contest Specified Facts and Evidence

Each party must state the facts and adduce the evidence upon which the claims are based or by which the party contests the facts stated and the evidence adduced by the opposing party (Art. 212 CPA). The plaintiff's statements and burden of proof are separate from the statements and burden of proof of the defendant. The plaintiff must prove the truthfulness of the claims and the defendant is obliged to proof the truthfulness of the claims with which the party substantiates their objections or with which the party wishes to disprove the truthfulness of the plaintiffs' claims on the facts. The prerequisite for the plaintiff to succeed is to state the facts which substantiate the claim and that these facts have been proven. However, the defendant will succeed in the litigation if the plaintiff is unable to bear the burden of proof or if the defendant has claimed and proved the facts that the right which has been established by the plaintiffs action, never existed.[140] The plaintiff bears the burden of proof and the duty to state the ultimate facts, which are necessary for the legal consequence from the plaintiff's claim to arise. According to the adversarial principle the parties must state all facts giving rise to their cause of action and adduce evidence proving these facts (Art. 7 CPA). Parties need to produce evidence in respect of all facts relevant for adjudicating the case in dispute. The court is then competent to decide which evidence will be produced to determine the ultimate facts (Art. 213 CPA). Sanctions for not contesting the facts or for denying the facts without giving any reasons for doing so are deemed to have been admitted, unless the purpose of the non-admittance arises from the other statements made by the party. However, the party can prevent the effect of the alleged admittance to the facts from the preceding paragraph by stating that they are not familiar with the facts, but only if the facts relate to the actions of that party or their perception (par. 2 Art. 214 CPA).

3.3.5 Doctrine of iura novit curia

The court will grant the plaintiff's claim only if the court establishes that a certain norm is included in substantive law which refers to the facts found in the proceedings, a consequence which was included and claimed by the plaintiffs in the claim. However, the plaintiff is not obliged to state which norm foresees such a legal consequence as

[138] J. Juhart, op. cit., p. 349.
[139] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 373.
[140] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 344.

claimed by the claim. The legal qualification is not an essential component of the action and even if the plaintiff states the legal basis from the substantive law, the court is not bound to it. The court knows the law ex officio (iura novit curia). The court must consider all legal bases for deciding if the claim is grounded or not. This doctrine applies also to foreign law.[141] According to the Slovenian Private International Law and Procedure Act, the court shall establish ex officio the content of the foreign law that is to be used. The court is authorised to request information on the foreign law from the ministry responsible for justice, or obtain its content in another suitable manner. During the procedure, however, the parties may submit a public or other document, issued by a competent foreign body or institution, on the content of the foreign law. If it is not possible to establish the content of a foreign law with regard to individual relations, then the law of the Republic of Slovenia shall be used (Art. 12 ZMZPP).

3.3.6 The Duty of the Court in the Event of Incomplete Statements or Proposals for Evidence

In the event of incomplete statements or proposals for evidence the court may before the hearing or during the main hearing order the parties in writing, or orally at the hearing, to answer particular questions about the circumstances which are significant for the decision, to complete, or explain in greater detail, their previous statements, produce additional evidence, submit documents that they have referred to, provide their opinion about the expert opinion, or other evidence taken, submit written statements by witnesses, provide their opinion about the opposing party's statements, give them legal views, or submit judicial decisions about the case law that they have referred to (par. 1 Art. 286.a CPA). The stated does not mean that the court is obligated to advise parties but has the discretion to do so.

If the court has ordered the party in writing to provide their opinion about certain facts in their written preparatory submission, or about which circumstances the statements of facts, or if their evidence shall be completed, or to submit evidence in writing on which they have based their motion, and the party fails to comply, such party may at the opening hearing state such facts and produce such evidence on the condition only that they were at no fault of their own unable to state them earlier, or that the court estimates that their admission will not prolong the settlement of the dispute (par. 2 Art. 286 CPA).

After having received a statement of defence, preparatory submission, or after conducting a hearing, the court may set a term for the parties within which they can submit the next preparatory submission.

If the party submits statements and additional documents or evidence proposal on the basis of the court order after expiry of the term set by the court, may only be considered if without any fault of the party they could not be submitted earlier, or if the court estimates that their admission will not prolong the settlement of the dispute (par. 6 Art. 286.a CPA).

[141] A. Galič in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 1, p. 136.

If a party submits to the court extensive documentary evidence, the court has the right to order the party to submit within a fixed term a summary in writing of the most significant statements and information in the attached documents and to indicate the page numbers on which the statements or information are located in the submitted documents. If the party fails to follow the court's instructions, the evidence shall be deemed to have been withdrawn (Art. 226 CPA).

However, on the basis of material procedural guidance, the court may ask questions and in another appropriate manner ensure that all ultimate facts are stated during the hearing, that incomplete statements concerning important facts are supplemented, that means of evidence relating to the parties' statements are adduced or supplemented, and that all necessary explanations are given in order to establish the facts and legal relation in dispute (Art. 285 CPA). The concept of material guidance should enable the court to establish the disputed actual situation as completely and accurately as possible. Material guidance authorises the judge to encourage the parties to state the ultimate facts.[142] Which facts are relevant and which must be stated depends on the substantive law provision which will be used to decide the disputed case. It may happen that the party does not state a certain ultimate fact because the party does not know that the substantiality of the claim depends on it. The court may encourage the party with questions to state the missing facts. It may also happen that the party states some facts that are important when using a certain substantive rule to decide, but the court uses another substantive rule for which other facts must be stated, but the party was not aware of this. Namely, the court is obliged to test the stated facts from the point view of all substantive norms which might be applicable. If the stated actual state is incomplete, the court must warn the parties about the various possible legal qualifications and motivate them to complete the facts, so the judgement would not come as a surprise for parties (judgment by surprise).[143]

Regarding the submission of additional evidence, the court is authorised to summon the parties before or during the main haring to submit additional evidence, documents, their statements on the expert opinion, or a written statement of witnesses (par. 1 Art. 286.a CPA). The court sets the proper term for submitting this evidence. Evidence submitted after expiry of the term set by the court shall only be considered if without any fault of the party they could not be submitted earlier, or if the court estimates that their admission will not prolong the settlement of the dispute.

The facts stated and evidence adduced contrary to the stated rules are to be considered (par. 6 Art. 286 CPA).

3.3.7 Collecting Evidence ex officio

The adversarial principle is the general procedural principle. The general exception from adversarial principle determines that the court may decide to establish the facts which the parties have not stated and produce the evidence which they have not adduced

[142] A. Galič, D. Wedam Lukić in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 1, p. 71.
[143] Ibid, p. 74.

when the course of the main hearing and taking evidence shows that the parties intend to perform dispositive acts which they are not entitled to perform (against the mandatory rules or morality – par. 3 Art. 3 CPA), but may not found its judgment upon the facts on which the parties have been denied the opportunity to be heard. The second exception is included in the area of disputes deriving from family matters. For purposes of protection of rights and interests of children and other persons who are not capable to protect their rights and interests by themselves, the court may also establish facts which the parties have not stated and collect other data required for its decision (par. 3 Art. 408 CPA).

The parties are allowed to submit new evidence also at later sessions of the main hearing, but only if at the first session of main hearing they were prevented from presenting them by reasons beyond their control (par. 4 Art. 286 CPA). In the appeal new facts and evidence may be presented only if the appellant proves presumptively that for reasons beyond their control they have been unable to present them by the first hearing session or until the conclusion of the main hearing, or if conditions stated in Article 286 of the CPA are fulfilled (Art. 337 CPA). However the parties are not allowed to present new facts and evidence at the appellate main hearing.

3.3.8 Ordering Persons Other than Parties to Submit Evidence

Persons other than parties may be ordered to submit documents only if such obligation is imposed on them by the law, or if the contents of a document to be submitted relates both to such person and to the party adducing it as evidence. Third person has a right to give a statement on this matter, prior to passing of a court decision ordering a third person to deliver a document (Art. 228 CPA).

If a third person denies the obligation to produce the document, the decision as to such obligation shall be given by the civil court. In this case the court may produce evidence to determine the truth of this assertion. This represent special proceeding which may result in issuing the court decision, ordering the third person to deliver document, which is an enforcement title. In this procedure the party needs to prove that the third person is in possession of such a document and that this person is obliged to deliver it. Third person has a right to file an appeal against court decision. The final decision may be enforced according the provision of Slovenian Law on enforcement and security (Zakon o izvršbi in zavarovanju) only if the decision has become executable and the due date for volunteer submission of the document has expired.

3.4 Written Evidence

3.4.1 The Concept of a Document in Slovenian Legal System

In theory[144], document represents any object on which thought is expressed with human writing. Document is any object with written expression, whereby it is irrelevant what

[144] L. Ude, Civilno procesno pravo, Uradni list, Ljubljana, 2002, p. 265. Juhart, Civilno procesno pravo FLRJ, p. 369; L. Rosenberg, K. H. Schwab, P. Gottwald, Zivilprozessrecht, 16. edition, C.

the material substrate of document is and out of what means it is composed from. Significant characteristic, which is the same for electronic and real document, is the human expression, while the difference is in specificity of the carrier for the writing.[145]

The plain term document refers not only to paper forms, but also to drawings, photographs, phone records, graphs, etc.

3.4.1.1 Video or Audio Recording as a Type of Evidence

Depending on what facts need to be proven the electronic evidence can fall into different categories of evidence. Furthermore, in connection with electronic devices which produce images and voices and which record these data through technology[146] the question of classification under specific type of evidence arises. Unlike paper documents whose contents are readily apparent, electronic video/audio recordings rely on some other mechanical device to reproduce the data that is held within them. With video recorded evidence it is the image and sounds that are produced when the video is played in court that are the evidence admitted to prove what is video or audio recorded. Does the evidence in the form of video or audio recording have the same characteristics of a document or electronic document? If we originate from the definition of documents which represents the human expression, carried on a specific carrier for the writing, the video or sound recording when comparing to electronic document should be treated as document. The carrier for video recordings contains information of any description recorded and can be presented before the court. However the admissibility of such evidence will be assets on the basis of the fundamental principles of civil procedure and Slovenian legal order.

In cases where it is debatable whether the document is an authentic document, the court often recourse to experts. Threats to the reliability of electronic document, mean that more complex or unusual forms of data require more elaborate knowledge and impose more obstacles for the court to establish the authenticity and integrity of the proposed evidence. A party may also have a hard time proving that information found on the Internet (e.g. via Facebook, Twitter, etc.) is the truth. The theory emphasizes that parties seeking to introduce information from the Internet would do well to provide evidence establishing the credibility of the website from which the information is drawn, particularly if the source is a government site that carries an official imprimatur[147].[148]

H. Beck, p. 814. Documents can be divided into public and foreign, discretionary (with the direct relationship established, modified, terminated) and documentaries (instrument made solely for evidentiary purposes – e.g. Extract from the land register), classical and electronic. – See J. Zobec in L. Ude, A. Galič (ed.). op. cit., vol. 2, p. 417-418.

[145] J. Zobec in L. Ude, A. Galič (ed.). op. cit., vol. 2, p. 419.

[146] Law reform Commission, Consultation paper: Documentary and electronic evidence, 2009: http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf.

[147] Timothy J. Chorvat, E-Discovery and Electronic Evidence in the Courtroom, A Primer for Business Lawyers, Volume 17, Number 1, September/October 2007.

[148] So the important question is also to what extant can the internet be used as a source of information and consequently evidence used in proceedings? In connection to that question the

Procedural principles and provision of CPA do not include specific provisions on procedure that specifically regulates types, collection and presentation of electronic evidence. Rather the use of analogy to the provisions of traditional evidence needs to be applied. The criteria for admitting electronic evidence and assuming that an electronic document reflects the truth are based on the judge's free evaluation of evidence.[149]

3.4.1.2 Electronic Evidence

Electronically stored information differs from the traditional notion of a document. One definition is that they include metadata[150], system data[151], deleted data, and legacy data[152].[153] The categories of electronic document must reflect dynamic forms of communication and exchanging information between individuals, like emails, text messages, chat room communications, digital photographs, website content, including social media postings, computer-generated data, and computer-stored records. Compared to paper form documents electronic documents last longer and are easily changed; they contain information about the document itself.

According to CPA (Art. 16.a) the electronic form is equivalent to written form if the data in electronic form are suitable for processing, attainable[154], and appropriate for reuse[155]. In a broader sense the form is regarded as electronic if the data are contained in an electronic document or record.[156]

For the evidential value of electronic documents, according to the CPA the same rules apply for evidence as for ordinary, written, and public documents (par. 1 Art. 224

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main problem is also in the question if all the information found on internet regarded as public knowledge?

[149] The Slovenian CPA also does not acknowledge "the doctrine of the fruit of the poisoned tree" in civil proceedings.

[150] Metadata provide information about electronic resources and are indispensable for their localization. The term was introduced by the evolution of electronic sources and they help with the identification of data, as well as their description and localization. A. Kavčič-Čolić, Metapodatki za trajno ohranjanje elektronskih virov, Knjižnica 54(2010), vol. 1-2, p. 99-119.

[151] System data include records on data connected to the performance of computer tasks, like which websites a user has visited, which password has been used, documents printed, etc. S. M. Curreri, Defining Document in the Digital Landscape of Electronic Discovery, Loyola of Los Angeles Law Review, vol. 38/2005, p. 1544.

[152] Legacy data are stored information which are no longer in use. Ibidem.

[153] Ibidem, p. 1543-1544.

[154] The courts must be equipped and have technical possibilities for electronic commerce for enabling electronic applications. The courts must have proper software for processing of the applications and for readability of data. V. Rijavec in L. Ude (ed), A. Galič (ed), op. cit., vol. 4, Ljubljana, 2010, p. 25.

[155] Data in electronic form should remain unchanged. For the reuse of electronic form the document needs to be resistible also for longer period of time, its accessibility and immutability must be assured. Ibidem, p. 25.

[156] Ibidem, p. 23.

CPA).[157] The data contained in electronic form may not be declined from evidential value only because it is in electronic form (par. 1 Art. 16.a CPA).

An essential basis for the evidential value of electronic documents is Electronic Commerce and Electronic Signature Act Electronic (ZEPEP[158]), which prohibits any discrimination regarding electronic form and specifies that data in electronic form must not be denied validity or evidentiary value simply because they are in electronic form (Art. 4 ZEPEP). The condition for equal treatment is that the data in electronic form are accessible and suitable for future use. The most important division of documents is public and private. The CPA defines only the first category, while private documents are all those that are not public.

If the document is issued in written or electronic form by a state authority within the limits of its powers, or if a document is issued by a local government, company, or and any other organization or individual authorised to exercise public authority, the law establishes the truth of what is confirmed in them. This presumption may be annulled if it is proven that the facts stated in a public document are false or the document itself is not correctly drafted.

Given the increasingly widespread trend and the use of electronic commerce in the light of evidence relevant to proving the facts, the microfilm or electronic copy of the document or the reproduction of copies are equal to that document in physical form (a public document). This of course is only provided if the microfilm or electronic copy or reproduction of copies is issued by a competent state body, local authority, or public authority powers (e.g. electronic land registers extract).[159]

An important issue connected to electronic documentation is whether the law allows the electronic document to be used as evidence and in what category of electronic evidence should different electronic documents (e-mail, word-processing document, spreadsheet, etc.) be assigned to[160].

Firstly, we must stress that the law must continue to accommodate the traditional notion of a document as anything that is written and capable of being evidence, since such documents will continue to be relevant to court proceedings for the foreseeable future.

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[157] Contrary, Rüßmann argues that electronic documents with declarations in electronic form lack the necessary embodiment of the written expression and as such electronic documents used as a form of evidence are not subject to the rules on documentary evidence, but to the rules governing inspection. H. Rüßmann, Electronic documents. Security and Authenticy in M. Kengyel and Z. Nemessányi, Electronic Technology and Civil Procedure: New Paths to Justice from Around the World. Ius Gentium:Comparative Perspectives on Law and Justice: vol. 15 [Springer, Dorndrecht, Heidelberg, New York and London, 2012, XV, p. 249-250.

[158] Zakon o elektronskem poslovanju in elektronskem podpisu (Official Gazette of the RS, No. 98/04 – official consolidated text, 61/06 – ZEPT, 46/14)

[159] Compare Rechberger, Simotta, Gottwald, op. cit., p. 353.

[160] H. Rüßmann, Electronic documents. Security and Authenticy in M. Kengyel and Z. Nemessányi, Electronic Technology and Civil Procedure: New Paths to Justice from Around the World, p. 248.

But this concept must be updated and accommodated to electronically generated information capable of being presented in a permanent form. The main problem is to overcome the problems between electronically produced documents capable of being admitted as evidence in legal proceedings and physical evidence.

Digital evidence is defined by[161] as "any information of probative value that is either stored or transmitted in a digital form". This includes files stored on hard drives, digital video, digital audio, network packets transmitted over local area network, etc. Compared to written evidence digital evidence has a special characteristic, namely the type of information and method of their storage are connected to electronic carriers (software or hardware), may be subject to changes or recovery, and are considered as scientific evidence, requiring specific knowledge.[162]

Therefore, submitting evidence by a microfilm, electronic copy of a document, or by reproduction of such a copy shall be regarded as equivalent to submitting evidence in a physical document, or an electronic copy or reproduction thereof which has been issued by the competent state authority, self-managing local community, or body exercising public powers. So, the photographs, photocopies, video records, disks, magnetic tapes, and other similar means are considered physical evidence, as long as they were not obtained by violating the law or moral custom. As with the physical document, microfilm or electronic copies or reproductions of these copies can also be proven to differ from the original document.

Electronic documents are admissible as evidence under Slovenian law. The definition of document, as mentioned, is that documents are any object on which thought is expressed with human writing. Electronic document would therefore seem to fall under documentary evidence. There are some opinions that in cases where specialist knowledge is required to establish the authenticity of electronic documents the rules on expert evidence apply.[163] In a study on the admissibility of electronic evidence in court[164] conducted in 16 countries[165] three terms were primarily analyzed, namely evidence, electronic evidence, and admissibility of electronic evidence by reviewing national legislations. In all countries the results of the analysis of the legislation show

[161] C. Morgan Whitcomb, Historical Perspective of Digital Evidence: A forensic Scientists View, International Journal of Digital Evidence, vol. 1, Issue 1, 2002; available at: www.ijde.org.
[162] B. Zhang, H. Chen, Applications and Trends of Digital/Electronic Evidence in Chinese Litigation in M. Kengyel, Z. Nemessanyi, Electronic Technology and Civil Porcedure, Spinger, 2012, p. 305.
[163] Rüßmann states that electronic declarations of intent lack the necessary embodiment of written expression thoughts. H. Rüßmann, Electronic documents. Security and Authenticy in M. Kengyel and Z. Nemessányi, Electronic Technology and Civil Procedure: New Paths to Justice from Around the World, p. 250.
[164] The main objective of the project was to answer the following questions: What is electronic evidence? Is electronic evidence regulation in Europe? European Commission, Cybex: The admissibility of electronic evidence in court, available at: https://www.itu.int/osg/csd/cybersecurity/WSIS/3rd_meeting_docs/contributions/libro_aeec_en.pdf.
[165] Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Holland, Ireland, Italy, Luxemburg, Portugal, United Kingdom, Romania and Sweden.

that electronic evidence is equivalent to traditional evidence. Especially regarding electronic documents compared to paper documents most countries[166] give attribute the same value to electronic evidence as documentary evidence. Moreover, the majority also deem it to be equivalent to documentary evidence. The study also showed that none of the participating countries define in their legislation what exactly electronic evidence is.[167]

3.4.1.3 Electronic Signatures

According to the ZEPEP a signature shall not be denied legal effectiveness or admissibility as evidence solely on the grounds of its electronic form or not being based on a qualified certificate or a certificate issued by an accredited certification service provider or not being created by a secure signature creation device (Art. 14 ZEPEP).

An advanced electronic signature, verified with qualified certificate, is equivalent to an autographic signature in relation to data in electronic form, and therefore has equal legal effectiveness and admissibility as evidence (Art. 15 ZEPEP).

Those who store documents which are electronically signed with the use of signature creation data and signature creation devices shall store complementary signature verification data and signature verification devices for as long as the documents are stored (Art. 16 ZEPEP).

The use of signature creation data or signature creation devices without the knowledge of the signatory or the holder of a certificate which refers to these data or devices is prohibited (Art. 17 ZEPEP).

3.4.5 Different Categories of Documents

The most important division of documents is public and private. The CPA defines only first category, while private are all those who are not public.

If the document is issued in written or electronic form by a state authority within the limits of its powers, or a document is issued by a local government, company and any other organization or individual authorized to exercise public authority, the law establishes the truth of what is confirmed therein. This presumption may be annulled if it is proven that the facts stated in a public document are false or the document itself is not correctly drafted.

Private documents, as long as they are signed by the author and certified by a notary, provide full proof that the statement they contain were made by the author and are consequently recognized as authentic documents. To certify electronic private document the notary confirms that the party has in their presence signed the document with advanced electronic signature or that the party has recognized the signature which is

[166] Germany, Belgium, Spain, Finland, France, Ireland, Italy, Luxemburg, Portugal, Romania.
[167] Ibidem.

already on a document as their own. After the authenticity of the qualified certificate is verified, the notary adds the certification to the electronic document with an indication as to how the identity and validity of electronic signature was determined, the reference number of the register, and the date. The certification and the document are then jointly signed with advance electronic signature by the notary (Art. 64 of the Notary Act[168]).

The legal presumption is that all public documents are true and that the participants – both the parties and the Court – rely on them in the process. In cases where there is doubt as to the authenticity of the documents proving the reality of what is to be certified, the Court is also authorized ex officio to make a declaration of authority from which the document originated.

If a party disputes the authenticity of the document, the burden of proving its authenticity or inauthenticity is not borne by the disputed party, who relies on the document to establish the facts from which it exercises its rights, but by the opposing party.[169]

In such a case, it can be shown that the public document is not properly assembled, as it relates to the assumption that it is not issued by an authority which is marked as its issuer, or that its contents are not true.

If it is a public document that provides something (e.g. a final judgment or order of the court), it is not possible to doubt its content. Such a public document can be challenged in civil proceedings. Such a document is thus challenged by the extraordinary legal remedies provided for in the proceedings in which the decision was taken.

Facts contained in a public document and correctness of its composition may be subject to contestation. If the court has doubts over the authenticity of a public document, it may require the body purported that issued it to produce a statement thereon (Art. 224 CPA).

CPA expressly states that the documents that are based on specific provisions regarding the probative force equal to public documents have the same probative value as a public document (e.g., return of service, a medical certificate[170]).[171]

3.4.6 Taking of Written Evidence

Which evidence will be taken is decided by the court with the court decree. However, the court is bound to that evidence that was proposed by the parties themselves. The court decides according to the immediacy principle which written evidence will be examined and consequently read.

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[168] Zakon o notariatu, Official Gazette of the RS, No. 2/07 – official consolidated text, 33/07 – ZSReg-B, 45/08, 91/13.
[169] Juhart, Civilno procesno pravo FLRJ, p. 371.
[170] Compare Reichold v Thomas/Putzo, ZPO, p. 479.
[171] Zobec in Ude et al., Pravdni postopek, 2nd book, p. 420.

The CPA contains special provisions on the third party's duty to submit the written evidence. Persons other than the parties may be ordered to submit documents only if such obligation is imposed on them by law, or if the contents of a document to be submitted relate both to such a person and to the party adducing it as evidence. The third party has the right to give a statement on this matter, prior to the passing of a court decision ordering a third party to deliver a document (Art. 228 CPA).

Documents that must be enclosed with the application may be in the original or in copy. According to the CPA, a copy of a document, in accordance with the law that regulates the protection of documentary material, is defined as captured and stored microfilm or electronic (scanned) copy, reproduction of this copy or a certified copy, and also ordinary copy or microfilm, electronic (scanned) copy, photocopy or reproduction of copies (Art. 107 CPA). If the enclosed document is a copy, the court may, upon the request of the opposite party, invite the party to deliver the original document in order to be examined by the opposite party.

The CPA does not include formal rules which would determine that the photocopy of the document has no probative value but the principle of free evaluation of evidence applies.[172]

3.5 Witnesses

Only those persons who are capable of giving data relevant to the facts to be established may be examined as witnesses. If the person is in fact incapable of being a witness, such a person is not able to perceive and to testify about what they have perceived.[173] The court must examine the person to decide whether they are capable of being a witness. This means that the court may allow children or mentally or physically disabled persons to testify if they are able to give information about the disputed facts.[174]

Whoever is summoned as a witness has a duty to comply with the court summons, and must testify, unless otherwise stipulated by the law (Art. 229 CPA). If the witness does not respond to the court order for participating in the evidence taking procedure, the court is authorised to use coercive measure to assure that the witness will appear at the main hearing.

A party who proposed a certain person as a witness must state the facts on which such person should testify, including their name, address, and occupation (Art. 236 CPA). This witness is summoned by a writ of summons indicating name and surname, occupation, the time and place of the main hearing, the matter in respect of which the witness is summoned, and the fact that the person is being summoned as witnesses. The summons shall also provide a warning on the consequences of an unjustified failure to appear (Art. 241 CPA), as well as the right of refunding of costs (Art. 242 CPA).

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[172] Decision of the Higher Court Maribor, No. Sodba II Ips 244/2012, 27.2.2014 (in connection with the decision of Higher Hourt Maribor, No. I Cp 1752/2011).
[173] Idem, p. 440.
[174] Ibidem.

If, by giving a testimony, a person might violate the duty to keep an official or military secret, such person may not be examined as a witness as long as the competent authority releases them from such duty (Art. 230 CPA). This means that such a person is legally incapable of being a witness. The court must pay observe this duty ex officio and such a person may not testify in any event, even if this person is willing to testify as a witness.[175] Nevertheless, such a person must appear in court anyway. If the court examines such a person as a witness, this violation would not influence the correctness of the judgement, but the legality of the judgement.[176]

The privilege against self-incrimination is foreseen for witnesses who may refuse to answer a particular question for justified reasons. A justified reason may be a basis especially if by answering the witness might expose themselves, their relatives, or their spouse or domestic partner, regardless of whether the marriage has terminated or not, or the guardian or person under guardianship, or adopter or adoptee, to a serious disgrace, considerable financial loss, or criminal proceedings (Art. 233 CPA). A witness shall be instructed by the presiding judge on their right to refuse to answer the asked question.

The witness may refuse to testify and give evidence:
1) on what the party has confessed to them as their attorney;
2) on what the party or other person has confessed to them as their confessor;
3) on facts of which they have learnt as a lawyer or a doctor or in pursuit of other activity, if they are bound to protect the secrecy of what they learned in the practice of legal or medical profession or pursuing such other activity (Art. 231 CPA).

The stated persons must respond to the court's summons and must be present at the hearing, but are instructed by the judge on their right to refuse testimony. The privileged witnesses have the right to decide whether to testify or not. However, such a witness needs to prove with probability those facts which substantiate the right of refusal to testify.[177] The justifiability of reasons to withhold testimony or answers to particular questions is determined by the court before which the witness should testify. If necessary, the parties shall be heard before that (Art. 235 CPA).

3.5.1 Secrets (e.g. Business, State, Military, etc.) and Taking of Evidence

The CPA contains provisions which seek to protect certain secrets and enable the parties and the witness to exercise their right to refuse to answer to certain questions (Art. 230 et seq. CPA). A witness may refuse to testify regarding facts learnt as a lawyer or a doctor or in pursuit of other activity, if they are bound to protect the secrecy of what they learn in the practice of legal or medical profession or pursuing such other activity. (point 3 par. 1 Art. 231 CPA). These rules shall apply mutatis mutandis to the examination of parties as evidence (Art. 263 CPA). The right of the parties to refuse the submission of documents is included in a special provision. This provision applies only to documents to which they did not refer themselves (par. 3 Art. 227 CPA), and in such

[175] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 443.
[176] Ibidem.
[177] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 446.

cases Articles 231 to 234 of the CPA apply mutatis mutandis. In any case, the witness, the party, or the holder of the document itself must expressly refer to the existence of such reasons and also (in this context) to explain them. This is their right (cf. par. 1 Art. 231 CPA: "A witness may refuse to testify ...") and it is not the duty of the court to pay attention to the possible existence of secrets, as it is the parties' right.

The CPA contains only one provision for dealing with classified information (state, military), namely, if, by giving a testimony, a person might violate their duty to keep an official or military secret, they may not be examined as a witness as long as the competent authority exempts them from such duty.

Another applicable regulation for judicial proceedings that are ongoing in conformity with the mentioned CPA is the Classified Information Act (Zakon o tajnih podatkih – ZTP[178]). However, the stated act is not suited to the nature of these judicial proceedings. It is thereby not possible for an independent and unbiased court to decide on all the important issues regarding the classified information therein.

Under the provisions of this ZTP, a piece of information may be defined as classified if it is so important that its disclosure to unauthorised persons could or might obviously prejudice the security of the country or its political or economic interests, and is related to public security, defence, foreign affairs, the intelligence and security activities of the government agencies of the Republic of Slovenia, systems, appliances, projects, and plans of importance to the public security, defence, foreign affairs and intelligence and security activities of government agencies of the Republic of Slovenia, scientific, research, technological, economic and financial affairs of importance to the public security, defence, foreign affairs and intelligence and security activities of government agencies of the Republic of Slovenia (Art. 5 ZTP). Officials and employees of these bodies are bound to safeguard classified information no matter how such information has come to their knowledge (Art. 6 ZTP).

Classified information may, in view of the possible adverse effects its disclosure to an unauthorised person might have on the security of the country or its political or economic interests, be given one of the following levels of classification:
- The "top secret" classification is applied to classified information whose disclosure to unauthorised persons would put in jeopardy or do irreparable damage to the vital interests of the Republic of Slovenia;
- The "secret" is applied to classified information whose disclosure of which to unauthorised persons could seriously harm the security or interests of the Republic of Slovenia;
- The "confidential" classification shall be applied to classified information whose disclosure to unauthorised persons could harm the security or interests of the Republic of Slovenia;

[178] Official Gazette of the RS, No. 50/06 – official consolidated text, 9/10, 60/11.

- The "restricted" classification shall be applied to classified information whose disclosure to unauthorised persons could harm the activity or performance of tasks of a body or agency (Art. 13. ZTP).

Due to the applicability of the ZTP also in civil procedures, it is possible that a situation could arise in which a court's assessment of the necessity and the manner of taking a certain item of evidence or of a party's cooperation during the taking of such must yield to the assessment of the head of the authority that marked the information as classified. The head of the authority can decide that it will not allow parties to judicial proceedings to access classified information or that it will allow such under restrictive conditions which it imposes itself. Namely, according to the ZTP, classified information may be transmitted to other bodies, including courts, which must act according to the provisions of ZTP, only on the basis of written permission from the director of the body that designated the information as classified, or where so provided by law (Art. 34 ZTP). If the court is granted permission and receives classified information from the competent body, it is not authorised to transmit that information to other users without the consent of the body, except in cases defined by regulations (Art. 36 ZTP). This means that the court is not authorised to give such classified information to lawyers in litigations without the permission of the body that identified this information as confidential.

Regarding the stated problems, the Constitutional court of RS has determined that "the omission of a special statutory regulation for judicial proceedings in which in order to achieve a correct and legal decision in a dispute it is necessary, in any manner, to uncover, deal with, or manipulate classified information renders it impossible that an independent and unbiased court decide on all the important issues of the proceedings, especially on ensuring the right of the parties to make a statement (Article 22 of the Constitution)". Such an unlawful gap entails a hollowing out of the human right determined by paragraph 1 of Article 23 of the Constitution and is inconsistent therewith".[179]

CPA does not contain a special regulation for dealing with official, government, security, or similar secrets. Therefore, the provisions of ZTP apply. The court in civil proceedings has basically no competence to render a final decision regarding which evidence will be taken and in what way. Furthermore, the court may not allow the parties to participate in procedural acts, serve them the claims and applications of the opposing party or let them inspect the file, if the parties have not been granted permission to access classified information by the authorised representative of the body that gave such a definition. This permission is given according to the discretion of the body.[180] The ZPT lets the head of the body exercise this right and, at the request of competent authorities, relieves a person of the obligation of keeping secret such information that has been defined as classified by this agency, however, solely for the purpose and to the extent specified in the request of the competent authority (par. 2 Art. 33 ZTP).

[179] Constitutional court of RS, No. U-I-134/10, 24.10.2014.

[180] M. Šetinc Tekavc, Neskladje ZPP z Ustavo zaradi odsotnosti posebne ureditve za obravnavanje tajnih podatkov, Pravna praksa, No. 1/2014, p. 9.

The Constitutional Court has rendered the declaratory decision, according to which the court has ordered the lawmaker to remove the declared illegality in a determined period of time. Nevertheless, the Constitutional Court has offered a temporary solution until the new provisions are prepared and enforced, according to which the court, on the grounds of a careful evaluation of the interests, may decide how the parties to the litigation shall be acquainted with classified information.

3.5.1.1 The Question of Declaring Information as a Business Secret

Company may declare certain information as a business secret. This includes information designated as such by a company's written decision. This decision must be communicated to the Company Members, employees, members of the company's governing bodies, and other persons obligated to keep the business secret. Irrespective of whether it is covered in the company's written decision, any data whose disclosure to an unauthorised person would clearly cause substantial damage may also be deemed to be a business secret. The members, employees, members of the company's management bodies, and other persons may be liable for any disclosure of a business secret, if they knew or should have known that the data was of such a nature (Art. 39 of the Company Law Act – ZGD-1[181]).

In a written decision the company must determine the method of protecting business secrets and the responsibility of persons obliged to protect business secrets (Art. 40 ZGD-1). If, by giving a testimony, a person might violate their duty to keep official or military secret, they may not be examined as a witness as long as the competent authority releases him from such duty.

However, the theory[182] is on the position that business secrets are not covered with the rules on privileged witnessed but the business secret is only protected with the possibility of excluding the public from the main hearing. Those attending the hearing of the case from which the public is excluded have the obligation of keeping secret the information learned at the trial. Betrayal of secret may lead to criminal offence of violation of confidentiality of the proceeding.

If a company is a holder of a concession, public service is granted to a private entity. If certain facts or means from such a company's activities relate to public security, provisions of the ZTP will apply. In cases where the information is classified as a business secret according to ZGD-1, the method of protecting business secrets and the responsibility of persons obliged to protect business secrets is determined in the written decisions of such a company.

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[181] Zakon o gospodarskih družbah (ZGD-1), Official Gazette of the RS, no 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, 44/13 – odl. US, 82/13.

[182] V. Bergant-Rakočevič, Varstvo uradne, vojaške in poslovne tajnosti v civilnem sodnem postopku, Podjetje in delo, 2011, vol. 6-7.

3.5.1.2 State Secrets and the Question of Testifying by a State Official

If the state official claims that the facts are defined as a state secret, the provisions of ZTP apply. Because the CPA does not regulate the procedure in examples where there is a question of dealing with state secrets as classified information, the court in civil proceedings basically has no competence for rendering a final decision about which evidence will be taken and in what way. Furthermore, the court may not allow the parties to participate in procedural acts, serve them the claims and applications of the opposing party, or let them o inspect the file if parties have not been granted permission to access classified information by the authorised representative of the body that gave such a definition. The ZPT enables the head of the body to exercises this right and, at the request of competent authorities, relieves a person of the obligation to keep secret that information that has been defined as classified in this agency, however, solely for the purpose and to the extent specified in the competent authority's request. Such regulations may cause a situation when the court's evaluation regarding the necessity and the method of taking evidence must be relegated to the discretion of the head of the body which has defined the information as classified. In the procedure for evaluating the constitutionality of the CPA, the Constitutional Court decided that the CPA is in conflict with the Constitution in this aspect. Until a lawmaker offers a legitimate regime for handling confidential information, the Constitutional Court has offered a temporary solution, according to which the court, on the grounds of careful evaluation of the interests (between access to justice principle and the duty to protect the secret), may decide how the parties to the litigation will be acquainted with classified information.

3.5.2 Priviledge Witnesess

3.5.2.1 A Case of a Journalist as a Witness

According to the Slovenian Media Act (Zakon o medijih – ZMed[183]) editorial personnel, journalists and the authors/creators of articles may not be obliged to reveal the sources of their information, except in cases where such is stipulated by criminal legislation (par. 2 Art. 21 ZMed). Privileged witnesses are those who have the right to refuse to testify. Such privileged witness bare the decision if the confidentiality of the relationship or professional secret should be kept or the party's right to judicial protection should have priority. According to Article 231 of the CPA a witness may refuse to testify on facts they have learnt in pursuit of other activity if they are bound to protect the secrecy of what they learn in the practice of professional activity. The stated persons shall be instructed by the presiding judge on their right to refuse to testify.

Because these examples illustrate the witness' right to take advantage of these privileges or not, the unjustified disclosure of a professional does not constitute a violation of procedural rules and the court may base its decision on such a testimony.[184] The witness who violates the duty to protect a professional secret may be held responsible for violating professional ethics, responsible for damages, and even criminally responsible.

[183] Official Gazette of the RS, No. 110/06 – official consolidate text, 47/12.
[184] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., op. cit., vol. 2, p. 446.

Privileged witnesses have the right to decide whether to testify or not. However, such a witness must prove with probability those facts which substantiate the privilege of refusing to testify.[185] The justifiability of reasons for withholding testimony or answers to particular questions is determined by the court before which the witness must testify. If necessary, the hearing of the parties (first of all the party that proposed such a witness) shall be conducted before that (Art. 235 CPA). If the court establishes that the witness has the right to refuse to testify, the court may not take any other evidence which would result in either benefit or damage to the party who proposed such a witness. This witness represents the only evidence in relation to ultimate facts, and the court may decide according to the burden of proof rules.[186]

If the court decides that the witness unjustifiably refuses to testify, the witness is ordered to testify. In this case the witness may challenge the decree by means of appeal against the decree on the fine or detention imposed on them for refusing to testify or answer a particular question (par. 2 Art. 235 CPA). If the court decides in favor of the witness, the parties have no special appeal against the decree. The parties may challenge such a decree only in their appeal against the final decision. But the party needs to prove the causal link between the unlawful decree and the final result of the trial and decision.[187]

A witness may not refuse to testify on the grounds of protection of a professional secret if the disclosure of certain facts is to the benefit of the public interest or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 232 CPA).

3.5.2.2 A Case of a Priest as a Witness

A witness may refuse testimony on what the party or other person has confessed to them as such party's priest (point 2 par. 1 Art. 231 CPA). The priest may be bound by professional secrecy, but the relationship between the priest and the person is not always counted as one of professional secrecy. A witness may not refuse to testify on the grounds of protection of a professional secret if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 232 CPA). If the witness refuses to testify, the court is competent to estimate if the protection of public interest or the interest of someone else is more important than the protection of the secret. The court may decide to examine the parties before making a decision.

There is also the possibility of excluding the public from the main hearing and the present persons are bound to protect secrecy.

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[185] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 446.
[186] Ibidem.
[187] Idem, p. 456.

3.5.2.3 A Case of a Medical Doctor a Witness

The basis for the protection of professional secrecy is the confidentiality of the relationship between the doctor and patient. The doctor must protect the professional secret for the sake of the confidentiality of the relationship with the patent and for the protection of the right to the patient's privacy. According to the CPA, a witness may refuse testimony on facts which they have learnt as a doctor. A witness may not refuse to testify on the grounds of protection of a professional secret if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 232 CPA). If the witness refuses to testify, the court is competent to estimate if the protection of public interest or the interest of someone else is more important than the protection of the secret. The court may decide to examine the parties before making a decision.

3.5.2.4 A Case of an Attorney as a Witness

The relationship between the party and attorney is in principle of a confidential nature. The attorney may refuse testimony on what the party has confessed to them as the party's attorney (point 1 par. 1 Art. 231 CPA). This relationship is not always one of professional secrecy.

If the relationship overlaps with professional duty, the attorney may not refuse to testify on the grounds of protection of a professional secret if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 232 CPA).

Other professions that may refuse to give testimony on the grounds of privilege are: notaries, mediators, tax advisors, detectives, psychologists, etc.

3.5.3 Obtaining Evidence from Witnesses

The judge firstly warns the witness on the duty to tell the truth and that they may not keep anything a secret, as well as on the consequences of perjury. Then the judge lets the witness to freely explain what they know about the subject matter. Afterwards, the judge asks questions helping to evaluate a witness's credibility and to clarify uncertainties. When the witness has stated everything about the disputed facts that is of the judges' interest, the judge allow the parties and their representatives to ask questions. The parties may not ask leading questions.

The parties have the right to submit, by order or consent of the court, to written and signed statements by the witnesses called about the facts on which the witnesses could testify to at the hearing.

If the court orders a party to submit a written statement by a witness for whom the party has made a motion to be heard and the party fails to comply with such order, the evidence by hearing of the witness shall only be taken provided the party proves it as

probable that they have tried to obtain a written statement by the witness but have failed to do so. The parties may agree in the course of the proceedings to exchange written statements by witnesses. The court shall also have the right to order the persons called as witnesses directly to make written statements, or to answer certain questions, in particular in case the court assesses, on the basis of the contents of the questions, or of the person of the witness called, that such a statement will suffice. Upon any such order, the court shall point out that the persons may be called as witnesses even if they make a written statement.

The court has the right to decide that only a written statement by a witness acquired pursuant to the preceding paragraphs shall be read instead of the witness being heard in court. However, the witness shall be heard if either of the parties requests it (Art. 236.a CPA).

There are no limits to the facts witness can testify about.

A witness who gives false statement before the court shall be sentenced to imprisonment for not more than three years (Art. 284 of the Criminal Code of Slovenia).

The principle of free evaluation of evidence is a general procedural principle. There are no formal rules for evaluating the parties' testimony, but only the methodology on how to evaluate the evidence.

Slovenian CPA does not enable the cross examination. The procedure is conducted by the judge, who has the power to ask the questions the witnesses. The parties my ask questions only after the judge has finished with the examination and by the permission of the judge.

3.6 Taking of Evidence

The court has the power to decide which evidence will be produced for determination of the ultimate facts (Art. 213 CPA). However, the decision is limited only to such evidence proposed by the parties. There is no mandatory sequence in which evidence must be taken in Slovenian civil procedure.

According to the adversarial principle, parties must submit the procedural material.

The documents adduced as evidence to support their statements as evidence must be submitted to the court by the parties. However, a document which is kept with a government body or other statutory authority and which is inaccessible to a party may be provided by the court ex officio (par. 3 Art. 226 CPA). Persons other than the parties may also be ordered by the court to submit documents, but only if such an obligation is imposed on them by the statute, or if a document's contents to be submitted relate both to such person and to the party adducing it as evidence (Art. 228 CPA).

Furthermore, a party may provide or be ordered by the court to provide witness statements (Art. 236.a CPA).

Witnesses are invited by a writ of summons indicating: their name and surname, their occupation, the time and place of appearance, the matter in respect of which they are summoned, and the fact that they are being summoned as witnesses. Those witnesses who are prevented from complying with the summons due to their age, sickness or grave physical handicaps may be examined at the place of their residence. (Art. 237 CPA).

An expert witness must be proposed as evidence upon order, for the court to decide to take such evidence. The court decides on whether the expert is to give the findings and the opinion orally at the hearing, or in writing prior to the hearing. The court also determines a time period within which the expert findings and the expert opinion must be produced. The court must allow the parties to familiarize themselves with the expert findings and the opinion in writing before the hearing at which such findings and opinions are to be produced (Art. 253 CPA). Only the court has the power to decide which expert (among court experts, expert institutions) will be granted the competence to prepare the opinion (Art. 244 CPA).

The court summons the expert witness by a writ of summons indicating their name and surname, their occupation, the time and place of appearance, the matter in respect of which they are summoned, and the fact that they are being summoned as witnesses (Art. 250 CPA).

Prior to the commencement of expert examination, the expert is asked to carefully examine the matter in question, to state accurately everything they notice and discover, and to produce their opinion conscientiously and pursuant to the rules of the profession (Art. 251 CPA). The court has the power to take evidence with the expert witness, to show the expert the object to be examined, pose questions of them, and, when necessary, require additional explanations regarding their findings and opinion.

Under the Slovenian CPA parties can assert new facts and evidence until and including the first session of the main hearing, on later hearings the parties are allowed to present new facts and evidence only if they were prevented by reason beyond their control (Art. 286 CPA).

At later hearing sessions, the parties are allowed to present new facts and new evidence only if at the first session of the hearing they were prevented from doing so by reasons beyond their control (par. 4 Art. 286 CPA).

The court may set time-limits for parties to offer new evidence or documents that they have been referring to before or at the main hearing, as well as to give statements on expert opinions and submit written witness statements before or during the main hearing (par. 1 Art. 286.a CPA). If the party fails to comply with the time limits set by the court, new submissions filed after this time limits would be admissible only if the party states

such facts and produce such evidence at the first season of main hearing, provided that the party was unable to state them earlier at no fault of their own, or that the court estimates that their admission will not prolong the settlement of the dispute (par. 2 Art. 286 CPA). Otherwise, the court shall not consider evidence which was not submitted according to these rules. The court order contains instructions regarding the time limits for submitting the preliminary written submissions, additional explanations, written opinions of expert witness and the subject matter of the opinion (or relevant questions which the expert witness needs to answer), etc. The court orders the production of evidence by passing of a decree indicating the disputed facts to be proved and the means of evidence by which they are to be proved. The evidence decree presents the court's plan regarding which direction it will investigate the factual grounds and which substantive norms will be used.[188] The court presents and adopts the decree at the main hearing. The decree is per se an act of procedural guidance. Therefore, in the further course of proceedings, the court is not be bound by an evidentiary decree it has passed beforehand (par. 3 Art. 287 CPA).

If it is expected that the production of specific pieces of evidence will be impossible or hindered at a later stage, such evidence may be moved to be produced during or before the litigation. According to the CPA the motion to secure evidence may be filed even after the decision by which the proceedings are completed has become finally binding, if this is necessary for the proceeding's extraordinary judicial review (Art. 264 CPA). In the application to secure the evidence the party must state the facts to be proved, the evidence to be produced, and the reasons for which the production of evidence at a later stage is expected not to be possible or to be hindered (Art. 266 CPA). The application is then served on the opponent. However, when delaying would be dangerous, the court may decide upon the party's proposal even without hearing the opponent thereon. In emergency cases, the court may decide that the production of evidence should commence even if the opponent has not yet been served the decree granting the motion to secure evidence (Art. 267 CPA).

3.6.1 Rejection of an Application to Obtain Evidence

If the court establishes that the evidence which a party has adduced is without relevance to the determination of the dispute, it shall pass a decree on and state the grounds for the dismissal thereof (par. 2 Art. 287 CPA).

The reasons for rejection are especially[189]:
- If the evidence proposal is not substantiated;
- If the evidence proposal relates to facts proposed to be proven which are not legally relevant;
- If evidence proposal relates to the facts which are not the object of evidence taking (presumptions),or facts for which the prohibition of the evidentiary subject applies;
- If the party is already precluded to submit evidence or the evidence proposal was not submitted on time;

[188] N. Betetto in L. Ude, N. Betetto, A. Galič, V. Rijavec, op. cit., vol. 2, p. 609.
[189] Idem, p. 611.

- If the prohibition of the use of certain means of evidence applies (state secrets);
- If the facts are already proved;
- If the evidence are inappropriate for the establishing the ultimate facts.

There is a principled duty for the court to take the proposed evidence. If justified reasons exist, the court is authorised not to take proposed evidence. The decree with which the court rejects the evidence taking must be explained.

Parties must adduce evidence required to establish the truth of their statements, no later than at the opening hearing session. At later sessions of the main hearing, the parties are allowed to present new facts and new evidence only if at the first opening session they were prevented from doing so by reasons beyond their control.

The parties must identify the witness and give a description of the facts for proposed evidence to be taken.

Regarding the principle of immediacy the evidence must be taken before the trial judge. However, for justified reasons the court may decide that specific pieces of evidence should be produced before the presiding judge or before the judge of a requested court (requested judge). In such an event, the record on production of evidence must be read at the main hearing (Art. 217 CPA).

In civil procedures the civil court is not bound by the actual findings from the criminal procedure. The factual circumstances must be established according to the rules of civil procedure. If the civil court in the course of taking evidence examines the criminal file or if the court, according to the party's proposal, performs the evidence based on the reading of certain records on the testimony of the witnesses and experts from other procedures, the evidence is subject of free evaluation of civil court.[190]

In cases when deciding on the identical factual state (Art. 14 CPA) as the criminal court the civil court is bound on the established existence of criminal offence and criminal liability. The duty of the civil court to rely on the judgment of the criminal court with an identical factual state means that the civil court is bound by the findings of those facts, which were crucial in the criminal procedure for deciding that the criminal offence and criminal liability existed. Furthermore, the civil judgment may not include findings about the civil liability opposing the findings which made the grounds for the delivery of the judgment of conviction. The civil court is not authorized to find the facts if they simultaneously form the grounds for deciding on civil liability differently in such a way that the civil court decision would be in contradiction to the criminal judgment. The civil court is only bound by the criminal judgment of conviction (not on acquittal) regarding the existence of criminal offence and criminal liability when deciding in matters regarding damages. The defendant may not raise the objection that the action was not illegal and that there is no causal link between the action and the damage that arose. The civil court may only decide facts on the extent of the damage and decides in

[190] Decision of Higher court Maribor, Sklep II Ips 302/99, 27.1.2000.

the objection of the defendant on the divided liability between the plaintiff and defendant.[191].

3.6.2 The Hearing

The main principles that apply to the main hearing are: the orality principle, the principle of directness, adversarial principle, the principle that the parties are in principle liable for presenting procedural material, the principle of public hearing, the principle of fairness, and the principle of prohibition of misuse of rights.

The principle of immediacy means that the judgement should be rendered by the judge who presided over the trial and was personally present during the taking of evidence. This principle is included in Art. 4 of the CPA together with principle of orality and principle of public hearing. The court shall decide upon the claim on the basis of an immediate consideration of the case.

This principle is especially relevant in connection with free assessment of evidence, provided that the judge may freely assesses the evidence only if they are actually present at the time of taking evidence.[192]

However, for justified reasons the court may decide that specific means of evidence may be produced before the presiding judge (if the panel is competent to decide) or before the judge of a requested court (requested judge). In such event, the record on the taking of evidence shall be read at the main hearing at the requesting court. In the event that the requested judge is taking evidence, the request from the requesting judge must state the description of the stage of litigation and must specifically state the circumstances to which special attention should be paid upon the production of evidence (par. 1 and 2 Art. 217 CPA).

In the course of taking evidence, the requested judge has the same powers and duties as are vested in the requesting judge with respect to the taking of evidence at the main hearing (par. 4 Art. 217 CPA).

The requested judge, entrusted with the taking of a specific mean of evidence, may also take other evidence when they consider it fit and proper (Art. 218 CPA).

The reasons to take evidence before a requested judge are mainly in economy, if the document is damaged during transport, if property must be inspected, or the witness must be examined on the spot or when the witness's arrival is wrought with disproportionate difficulties.[193]

The decree rendered about the end of the hearing is a procedural decree, by which the court is not bound. The court may decide that the main hearing must be reopened in

[191] Higher court decision Celje, No. VSC sodba Cp 1311/2006, 22.08.2007.
[192] L. Ude in L. Ude, N. Betetto, A. Galič, op. cit., vol. 1, p. 48.
[193] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et. al., op. cit., vol. 2, p. 402.

order to complete the procedure or to clarify certain important questions (Art. 292 CPA). Therefore the evidence may be taken when the main hearing is reopened. The court will reopen the main hearing ex officio or according to the proposal of the parties on which the court is not bound.

There are no rules in Slovenian Civil Procedure Act on the order for taking of different types of evidence. This decision is up to the judge.

3.6.2.1 Presence and Participation of the Parties

According to the principle of audiatur et altera pars, the court's duty is to allow each party to the litigation the opportunity of being heard regarding the opposing party's claims and assertions (Art. 5 CPA). The parties are not obliged to be present at the taking of evidence. The CPA foresees the sanctions if the party is not present at the main hearing. If neither of the parties appears at the settlement hearing or the first session of the main hearing, if the settlement hearing has not been held, the action shall be deemed to have been withdrawn by the plaintiff. If both parties fail to appear at a subsequent session of the main hearing, the court may decide on the basis of the file, provided the hearing at which evidence was taken has been held and the facts sufficiently clarified (judgment on the basis of the file). The court shall decide in the same manner if one of the parties fails to appear at the hearing and the opposing party makes a motion for decision on the basis of the file (Art. 282 CPA).

3.6.2.2 Direct and Indirect Evidence

Slovenian doctrine distinguishes between direct and indirect evidence. The subject of direct evidence is a legal sign of the factual state, for example handing over and accepting the object in the depository.[194] The direct evidence helps establish legally relevant facts, which combine to provide an account of the factual state.[195] With indirect or circumstantial evidence first the facts that are unfamiliar to the factual state are proved; these then form the basis for making a conclusion on the facts that represent a fundamental sign of the factual state.[196] The indirect evidence indicates the existence or nonexistence of legally relevant facts, but is not per se an element of the factual state.

The CPA does not make a distinction between direct and indirect evidence. According to the principle of free assessment of evidence all evidence is evaluated thoroughly without giving any pre-determined weight to any particular piece of evidence.

Nevertheless, if the evidence is taken without any intermediaries, it is considered direct. Witness or expert testimony given by video constitutes indirect evidence.

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[194] J. Juhart, op. cit., p. 350.
[195] L. Ude, Civilno procesno pravo, Uradni list, 2002, p. 255.
[196] J. Juhart, op. cit., p. 350.

3.6.2.3 Technology Used for Collecting Live Testimonies

The amending act of the CPA (ZPP-D[197]) inter alia introduced the possibility of using videoconferences in civil proceedings (Art. 114a CPA). The law contains only one provision regarding the use of videoconferences for main hearings and relates also to examination of parties, witnesses and experts.

With consent of the parties the court shall have the right to permit them and their counsels to be at another place at the time of the hearing and to conduct procedural acts there, provided that an audio and visual transmission has been provided from the site of the hearing to the place(s) where the party (parties) and their counsels are located, and vice-versa (video conference).

In the event that the court decides that a hearing will be held via a video conferencing system, it shall issue a decision against which there is no appeal. This is an option and not an obligation for the courts.

The court may decide to take extraterritorial summons (invitation to a witness living abroad to appear before the court or to deliver a certain document from abroad) for taking evidence abroad. This means that such a measure may be taken if the court that is deciding on the subject matter conducts all activities from the home state. However, the court may not use coercive measures for taking evidence abroad. Our legal doctrine[198] is of the opinion that there are no barriers for extraterritorial summons for submitting evidence on the grounds that the Slovenian CPA does not differentiate evidence according to the criteria of where said evidence is located.

In relation to using the videoconference from the side of the domestic court to take evidence in hearing a witness, party, or expert located abroad, this means that the cooperation of the domestic court spreads to the territory of foreign country. This is allowed only with the cooperation of the court where the witness is located and in accordance with the rules of Regulation 1206/2001.

3.6.3 Witnesses

According to the Slovenian CPA, a witness is summoned by the court on the ground that the parties have proposed the taking of evidence with witnesses in a timely manner. A party calling a certain person as a witness shall state the facts on which such person should testify, as well as their name, address, and occupation (Art. 236 CPA). The writ of summons prepared by the court should indicate: the witness's name and surname, occupation, time and place of appearance, the matter about which the witness is being summoned, as well as the fact that they are being summoned as witnesses. The summons shall also state a warning as to the consequences of unjustified non-appearance, and the right to refunding of costs (Art. 237 CPA).

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[197] Official Gazette of the RS, No. 45/2008.

[198] N. Betetto in A. Galič, N. Betetto, Evropsko civilno procesno pravo, GV založba, 2011, Ljubljana, p. 66.

The witness must respond orally (Art. 238 CPA). However, the parties have the right to submit to the court, by order or consent thereof, written and signed statements by the witnesses called about the facts on which they could testify at the hearing. If the court orders a party to submit a written statement by a witness for which said party has made a motion to be heard and the party fails to comply with such order, the evidence by hearing of the witness shall only be taken, provided the party proves it as probable that they have tried to obtain a written statement by the witness but have failed to do so.

The parties may also agree in the course of the proceedings to exchange written statements by witnesses.

Furthermore, the court also has the right to order those persons called as witnesses directly to make written statements, or to answer certain questions, in particular if the court assesses, on the basis of the contents of the questions or of the person of the witness called, that such a statement will suffice. Upon any such order, the court shall point out that the persons may be called as witnesses even if they make a written statement.

In cases when the court decides on or enables written statements from the witness, the statements are read instead of the witness being heard in court. However, the witness must be heard if either of the parties requests it. (Art. 236.a CPA)

Witnesses are examined separately and in the absence of other witnesses who are examined subsequently (Art. 238 CPA).

A witness does not have to take an oath before giving the evidence.

The parties are not allowed to prepare the witness before the hearing. The court instructs the witness of their duty to tell the truth and not to withhold anything, whereupon they shall be warned of the consequences of perjury. Thereafter, the witness is asked about their name and surname, their father's name, occupation, place of birth, age, and their relationship to the parties (Art. 238 CPA).

After general questions stated by the court, the witness is ordered to tell everything known to them in respect of the facts on which they are testifying. Thereupon, the court may ask questions to check, complete, and clarify their testimony. Witnesses shall not be asked leading questions. The court is in power to always ask the witness to tell the source of their knowledge of the fact about which the witness has testified. Witnesses may be confronted when their testimonies differ with respect to important facts (Art. 239 CPA).

3.6.3.1 Expert Witnesses

The court examines an expert witness when expert knowledge is required for the purposes of determining or clarifying a certain fact in dispute. The party must submit the proposal for taking evidence with an expert witness stating the evidentiary topic.

But the decision regarding whether evidence from an expert witness is necessary is determined by the court. The court decides whether to allow such an evidence or not with procedural decree. The court leads the taking of expert witness evidence, marks the object to be examined by the expert, states the questions, and, when necessary, requires additional explanations regarding the findings and opinion (par. 1 Art. 252 CPA).

An expert may be given explanations and may be allowed to inspect files. Upon their motion, additional evidence may be produced in accordance with to establish the circumstances important for him to prepare the opinion (par. 2 Art. 252 CPA).

Expert witnesses are appointed by the court, which means that the court has the power to decide whom it will select from among the experts for a certain scientific area. Prior to the appointment of an expert, the court shall give the parties the opportunity to be heard thereon. The court may at all times decide to appoint a new expert in place of the one currently appointed (Art. 244 CPA).

As a rule, expert testimony shall be taken by a single expert; if, however, the court assesses that expert examination is complex, two or more experts may be appointed to the case. Experts are mainly appointed among court experts in the concerned profession. Expert examinations may also be entrusted to scientific institutions (hospitals, chemical laboratories, universities, etc.) (Art. 245 CPA).

The expert witness has a lot in common with the witness. Namely, the expert needs to be capable to give information on the subject matter, has a duty to respond to the invitation for the examination and to state the findings and the opinion, they may be issued a with monetary fine in the event of unjustifiable absence at the hearing, and also has the right to claim costs. Taking expert testimonies in certain stages is also similar to the taking of evidence with the witness, with the main difference in the subject of the examination. While the witness is being questioned on certain facts that came to the witness's knowledge outside the process, the object of examining an expert witness is to gain professional knowledge which is not available to the court. This includes abstract rules of science, the profession, and special experience, and only indirectly particular facts. The stated is the reason that the expert witness may be changed but the witness may not.[199]

Prior to the commencement of the taking of evidence with an expert witness, the expert is asked to examine carefully the matter in question, to state accurately everything they notice and discover, and to produce an opinion conscientiously and pursuant to the rules of science and art. The expert in practice produces written opinions, so already in the decree the court usually determines the task. The result is grouped into findings (which are the result of careful examination of the subject matter) and opinion. Oral hearings with expert witnesses are held only when the court evaluates that the hearing is necessary or when the parties demand such. The judge has the duty to give the expert

[199] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et. al., op. cit., vol. 2, p. 472-473.

witness questions (included already in the decree) needing to be examined by the expert witness which are as precise as possible.[200]

The court decides on whether the expert is to give the findings and the opinion orally at the hearing, or in writing prior to the hearing. The court must specify a time period within which the expert findings and the expert opinion must be produced (par. 1 Art. 253 CPA).

Whenever possible, the court shall serve on the parties the findings and the opinion in writing before the hearing in which such findings and opinions are to be produced. The parties have the right to give remarks on the opinion, to demand further explanations, and to propose that the expert witness should be orally examined.

The party may propose that the court appoint a different expert witness, but it is in the power of the judge to decide whether to grant such a proposal or not.

If several experts are appointed to the case, they may produce common findings and a common opinion if they agree thereupon. If their findings and opinions do not accord, each of them shall give their own findings and their own opinion. If the data contained in the expert findings do not accord in essential points, or if the findings or one or more experts are ambiguous, incomplete, self-contradictory, or in contradiction with the facts examined, and if such shortcomings cannot be done away with by a re-examination of the experts, a new expert examination shall be conducted by the same or by different experts. If the opinion of one or several experts contains contradictions or other shortcomings, or if a reasonable doubt arises as to accuracy of their opinions, and if such shortcomings or doubt cannot be removed by a re-examination of experts, other experts' opinion must be produced. (Art. 254 CPA)

An expert witness has the right to be refunded for travel costs, costs of food, and accommodation for the loss of earnings, as well as to be paid effective costs incurred in the expert examination and award for the same. The party proposing the taking of evidence with an expert witness must pay in advance for all the expenses before the court appoints the expert witness by decree (par. 1 Art. 153 CPA). If the party fails to do so, the court will drop the taking of such evidence (par. 2 Art. 153 CPA).

Private opinions are academic or professional work from a particular area of the expertise prepared by the expert upon the order of the party on substantive and procedural issues. Such opinions may be submitted to the court. However, these opinions are not regarded as expert opinions but merely as a part of the parties' arguments.[201] If the opinion is prepared according to party's order before the procedure started and the opposing party objects to the opinion, the court will consider such an opinion as a part of a party's arguments and not as an evidence. Such an expert who prepared an opinion is not regarded as an expert acting as a court assistant but is a

[200] Ibid, p. 493.
[201] V. Rijavec, Dokaz z izvedenci, Podjetje in delo, 2012, vol. 6-7.

helper to the party, and consequently the provisions of CPA for expert witness do not apply.

The court is not bound by the content of the expert opinion. Namely, the findings and expert opinion are subject to the free assessment of evidence, which means that the judge will form their own opinion about whether the claims are truthful or not.[202]

3.7 Costs and Language

3.7.1 Costs

The CPA does not state accurately which cost are considered to be the costs of the proceedings, but only descriptively defines according to their origin that the cost of the proceedings include those expenses incurred during or due to the litigation (Art. 151 CPA).

The expenses that appear during the civil procedure are: expenses for taking evidence, for court fees, for procedural actions outside the court building, for travel expenses, and expenses for the loss of income, expenses in relation to the service provided by the natural person who serves the documents as a registered activity. The costs of the proceedings shall also consist of fees of lawyers and other persons foreseen by the law (translators, expert witnesses, etc.).

Expenses which appear due to the proceedings include material costs (photocopies and postal expenses), expenses for securing evidence, expenses for trying to agree on a court settlement, expenses that were caused to the party in obtaining private opinions or for detective services, etc.[203]

Each party must advance the payment for costs incurred by procedural acts performed or caused to be performed by them (Art. 152 CPA). The stated means that the party must assure payment for the taking of evidence.

The party proposing the taking of certain evidence must pay in advance, upon a court order, the amount necessary to cover the costs which are envisaged to be incurred in the production of such evidence.

If both parties propose the taking of the same evidence, the court orders them to advance the necessary payment in equal amounts.

If the amount necessary for the taking of evidence is not paid in the specified time period, such evidence will not be produced. In that case the court assess, on the basis of an opinion formed with respect to all circumstances, the relevance of the fact that the party has failed to advance payment for the costs in due time.

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[202] J. Juhart. op. cit., p. 390.
[203] N. Betetto in L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., vol. 2, p. 24-25.

The CPA includes the rules upon which the court finally decides who bears the expenses of the procedure. As a general rule, the criteria of success are foreseen. The party losing the litigation must refund the costs incurred by the winning party (Art. 154 CPA).

There are additional rules for deciding the costs in the case of the party's partial success of the party in Art. 154 CPA. Namely, if one party wins the litigation only in part, the court may decide, with respect to the outcome of the litigation, that each party is to cover their own costs of the proceedings, or may, considering the circumstances of the case, order one party to refund the other party and their intervener for an appropriate amount of the costs. The court may decide that one party refund the total costs incurred by the opposing party if the latter fails to succeed only in respect of a relatively small part of their claim and when no extra expenses are due to that particular part of claim.

When the court decides ex officio to take evidence to ascertain facts (because the parties were trying to dispose with their claims against mandatory or moral rules) and the parties fail to make the prescribed advance payment, the costs envisaged for the production of such evidence shall be advanced by the court from its funds.

With respect to the success of the taking of evidence, the court shall decide on whether the costs will be paid by one of the parties, by both of them, or by the court from its funds (par. 4 Art. 154 CPA).

The compensation for appearance of a witness before a court includes travel costs, costs of food, accommodation and costs for the loss of the income. The witness in obliged to claim the refund immediately after having been examined, or else the witness loses this right. However, the court is bound to advise the witness thereof. The court decides on the costs for witness with the decree with which the court orders that a witness be refunded the determined sum from the funds advanced by the parties. If such advanced payment has not been deposited, the court orders a party to refund the witness within eight days (Art. 242 CPA).

Specific amounts for compensation of the costs for witnesses, experts and translators are specified in Rules for reimbursement of civil procedure-related costs[204]

The travel costs of witnesses, experts, or translators include costs for public transport (train, bus, ship, airplane) or mileage for private transport. These costs include the expenditures for traveling from the permanent or temporary residence to the location where the hearing will take place. The costs are reimbursed for the shortest possible route and with the most economic means of transportation. The travel costs are reimbursed in the amount of actual expenditure. For high-speed trains, the costs will be reimbursed only if the person travelled more than 100 km in one direction.

[204] Pravilnik o povrnitvi stroškov v pravdnem postopku (Official Gazette of the RS, No. 15/03, 32/13).

Witnesses, experts, or translators have the right to reimbursement for costs of food and accommodation if the person must stay outside of their permanent or temporary residence for more than 12 hours due to the invitation (Art. 10 of the Rules). These costs are decided by the court, which calculates them according to the bill or in another appropriate manner, but the costs may not exceed more than is provided for by the official amounts of the reimbursement of costs for the officers in the public sector (Art. 11 of the Rules).

Employees have the right to ask for reimbursement of salary compensation for absence from work for the reason of being a witness, expert, or interpreter. The same applies also for individual entrepreneurs and natural persons who pursue an activity or service as a profession (Art. 12 of the Rules).

Employees are paid with salary compensation by companies, institutions, and administrative and other state bodies where the witness, expert witness, or interpreter is employed, which in turn may require reimbursement of compensation to be paid for salaries from the court (Art. 13 of the Rules).

Loss of income of individual entrepreneurs and natural persons who pursue an activity or service as a profession is calculated upon free assessment, considering the person's lost time and the profession, who has the right to reimbursement and it is paid by the court (Art. 14 of the Rules).

The expert witness's remuneration for services provided is assessed according to special rules (Rules on court experts[205]), which determine the amount and the method for assessing the amount of remuneration. Besides the reimbursement of costs for travel, food and accommodation, the expert witness may request also for the reimbursement of material costs for analysis, measurements, investigations and other tasks needed to produce findings and opinion or valuation (Art. 45 of the Rules on court experts). The expert witness must submit at least one offer from a company that performs such a service, so the material costs could be calculated.

Rules on court experts include the rates upon which the remuneration is calculated.

To study the file the expert witness may request for:
1) up to 50 pages, 46 euros
2) 50 to 200 pages, 92 euros
3) 200 to 500 pages, 138 euros
4) 500 to 1000 pages, 230 euros
5) 1000 to 2000 pages 460 euros

For every additional 1,000 pages of study file beside the amount mentioned the expert may request an additional 350 euros.

[205] Pravilnik o sodnih izvedencih in sodnih cenilcih (Official Gazette of the RS, No. 88/10, 1/12, 35/13).

For the collection and study of additional documents, expert witnesses may request:
1) up to 100 pages, 46 euros
2) 100 to 200 pages, 92 euros
3) 200 to 300 pages, 138 euros
4) 300 to 600 pages 230 euros

For inspections or visits, the expert witness may request:
1) up to 1 hour, 46 euros
2) 1 to 3 hours, 92 euros
3) up to 5 hours, 138 euros
4) over 5 hours, 230 euros

For the findings and the opinion submitted in written form, the expert witness may requests:
1) less demanding, 184 euros
2) demanding, 276 euros
3) very demanding, 414 euros
4) extremely demanding, 459 euros

For the preparations for oral presentation of the findings and opinion, the expert witness may requests:
1) less demanding, 92 euros
2) demanding, 138 euros
3) very demanding, 207 euros
4) extremely demanding 230 euros

The expert witness may request for each half an hour started the amount of 35 euros when presenting the findings and opinion orally.

According to the Rules on court interpreters[206], interpreters have the right to request remuneration for their work.

To produce a written translation of the document, the interpreter may request for a single page:
1) translation from a foreign language into Slovenian, 25 euros
2) translation from Slovenian into a foreign language, 37 euros
3) translation from a foreign language into a foreign language, 41 euros

One page comprises 1500 characters without spaces. For oral translation the interpreter may request 35 euros for each half hour of the actual translation.

[206] Pravilnik o sodnih tolmačih (Official Gazette of the RS, No. 88/10, 1/12, 35/13).

3.7.1.1 Expenses Due to a Special Procedure or Technology Used in Accordance with the Provisions of Regulation 1206/2001

Regulation (EC) No 1206/20011 provides that if a court in a Member State (requesting court) asks the competent court of another Member State (requested court) to take evidence – for example, by examining a witness – the latter court is to fulfill the request in accordance with its national law. As regards the reimbursement of witness expenses by the requesting court, the regulation provides that fulfilling a request to take evidence is not to give rise to a claim for any reimbursement of taxes or costs.[207] Therefore, the requesting court can be obliged to provide reimbursement only if one of the exceptions laid down in the regulation is applicable. If the requested court so requires, the requesting court shall ensure the reimbursement without delay of:

- the fees paid to experts and interpreters;
- the costs incurred because of the request made by requesting court for the request to be fulfilled in accordance with a special procedure provided for in the law of a requesting court, or by the use of the means of communication technology (Art. 18 (2) Evidence Regulation).

A deposit or advance payment before executing the request may be asked by the requested court only where an expert opinion is required. In all other cases, a deposit or advance shall not be a condition for the execution of a request (Art. 18 (3) Evidence Regulation). In the cases foreseen in Art. 18 (2) of the Evidence Regulation the parties' duty to bear the fees or costs for the exception of the request is governed by the law of the requesting court. The liability for reimbursement of costs for evidence taking is that of the Member State where the court conducts the procedure and the creditor is the Member State of the requested court. If the requesting court is a Slovenian court Slovenian rules apply, according to which the party that makes a proposal for the execution of evidence must pay advance payment by order of the court. This means that the same Slovenian rules apply when the evidence is being taken by the rules of Evidence Regulation.

3.7.2 Language and Translation

Civil proceedings are conducted in the official language of the court (Art. 6. CPA). Slovenian courts operate in the Slovenian language. In the areas where Italian and Hungarian minorities live the court proceedings may also be conducted in these two official languages.

The Slovenian courts use professional court interpreters. Court interpreters are persons appointed for an unlimited time with the right and duty to interpret at main hearings and to interpret documents at the request of the court (par. 3 Art. 84 of the Courts Act[208]). The court interpreter is appointed by the minister competent for justice for translation of

[207] Judgment in Case C-283/09 Artur Weryński v Mediatel 4B spółka z o.o.

[208] Zakon o sodiščih, Official Gazette of the RS, No. 94/07 – official consolidated text, 45/08, 96/09, 86/10 – ZJNepS, 33/11, 75/12 – ZSPDSLS-A, 63/13.

the spoken and written word from or to a particular language and interpretation of language and sign language.

Parties and other participants have the right to use their own language when participating in oral procedural acts. If the proceedings are not conducted in the language of a party or of other persons involved in the proceedings, they may be afforded, upon a motion filed to this effect or when the court finds that they do not understand the Slovenian language, oral translation of statements made at the hearing and written translation of documents used as evidence.

The parties and other persons involved in the proceedings shall also be advised of their right to attend the oral proceedings in their own language by way of an interpreter. They may waive the right to translation by declaring that they understand the language in which the proceedings are being conducted (Art. 102 CPA).

The parties and other persons involved in the proceedings must file actions, appeals, and other pleadings in Slovenian or in the minority languages officially used by the court. If a party files a pleading in a language which is not used officially by the court, the court shall act in the same way as with incomplete pleadings (Art. 104 CPA). Upon ordering the correction of the pleadings, the court must specify a time period in which to do so. The court rejects the pleading if the party fails to correct it (par. 5 Art. 108 CPA).

According to Art. 226 of the CPA a document drawn up in a foreign language must be enclosed with a certified translation of the original. If the parties fail to submit the certified translation of the document the sanction would be that the court would not take this evidence.

For the cost of translation each party must advance payment for costs incurred by procedural acts performed or caused to be performed by them. The party losing the litigation must refund the costs incurred by the winning party (Art. 154 CPA).

There is no provision that the interpreter is automatically appointed when the requested court is taking evidence directly based on the Regulation. In these cases the laws of the Member state of the requested court apply.

3.8 Unlawful Evidence

Nowadays, with modern technology making it easier to access information and data, it is necessary to consider even more carefully the importance of the constitutionally ensured right to privacy on one hand and the right to access to justice and fair trial on the other. Regarding civil proceedings the question of inadmissibility of evidence will appear in connection with certain means of gaining information that could be used later in civil proceedings as evidence, as well as in connection with certain methods of taking evidence.

Illegally obtained evidence can be defined as evidence gained by a wide range of irregularities ranging from criminal offences to methods which merely exclude fair play.

In other words, we are referring to cases where the litigants break the law or act reprehensively in order to obtain evidence or background information which they hope may help their case in some way. In practice two types of improperly obtained evidence can be distinguished: The first is evidence technically discovered by unlawful behavior, such as pictures, videos, or recordings taken in violation of privacy. This evidence would not exist without the improper behavior of the party, since it was the only way of creating such evidence. The second includes documents gained by theft or other civil wrongs such as trespassing or theft. In these circumstances, the crime does not help to create the evidence, which is already in existence, but improper behavior is employed to procure these documents in order to produce them in court.

The question raised focuses on whether illegally obtained evidence implies procedural inadmissibility in a civil court.

In Slovenian civil procedure the parties have obligations to collect and propose evidence (the adversarial principle). But what if the party knowingly violates the rights of the opposite party with the purpose of ensuring itself the opportunity to obtain an advantage in evidentiary procedures and consequently to ensure itself success in litigation. The party referring to the fact must also give evidence that this fact exists. The court decides on the grounds of free assessment of evidence which evidence will be produced and which facts will the court count as proven.

According to Article 212 of the CPA each party shall state the facts and adduce the evidence upon which their claims are based and by means of which they contest the facts stated and evidence adduced by the opposing party. The court may decide to establish the facts which the parties have not stated and produce the evidence which they have not adduced when the course of hearing and production of evidence shows that the parties intend to perform dispositive acts which they are not entitled to perform (par. 3 Art. 3[209]). According to Article 213 of the CPA the court shall decide which evidence will be produced to determining the ultimate facts. The court may refuse to admit the proposed evidence if it proves a fact which is not relevant to the case or if the fact has already been proven or recognized by the opposite party, or if it is misused only to delay the proceedings. The court does not decide upon discretion.[210] The court is obliged to explain each decision for not taking certain evidence in evidence taking procedure.

[209] The court shall not permit the parties to perform any dispositive act: 1. which is not in conformity with mandatory norms, or 2. which is not in conformity with moral principles.
[210] A. Galič, Ustavno civilno procesno pravo: ustvana procesna jamstva, ustavna pritožba – meje preizkusa in postopek, GV Založba, Ljubljana, 2004, p. 288.

The Slovenian legal system does not recognize evidentiary rules[211] and consequently according to the CPA evidence obtained in an unlawful or unconstitutional way is not foreseen as inadmissible in civil litigation. However, the court shall obey the methodological guidance for assessing evidence[212] (Art. 8 CPA) and make a decision in each individual case separately if the evidence is to be used or not. If the evidence produced in respect of a particular fact does not induce a sufficient degree of persuasion (Art. 8), the court's conclusions on such fact shall be drawn pursuant to rules on the burden of proof (Art. 215 CPA). This generally means that the court decides to the detriment of the party who would benefit from the findings of such a fact. Therefore, the party will usually endeavor to ensure the availability of data in its own favor, even if the data are confidential.[213]

When the court decides whether to allow such evidence or not, it must consider which of the constitutionally guaranteed rights has greater importance (the proportionality principle). If we keep in mind the purpose of civil litigation, which is to provide a resolution to a dispute in such a way that is acceptable for parties and society, we must also consider the concept of privileges under CPA.

The Slovenian CPA does not include provisions on evidentiary prohibition or exclusion similar to criminal law. There are no explicit rules on on the question if illegally obtained evidence.

Legal theory[214] speaks in favor of the position that in the event that two constitutionally protected rights are in contradiction the court must consider which of the rights is stronger and needs protection. If a court does not allow such evidence to be processed, there could be a breach of adversarial principle, but if a court takes such evidence, this could lead to human rights violations, such as a violation of a constitutionally protected human right to protection of personal data and privacy.

The opinion of theory and jurisprudence is that in such cases the only solution is to use the so-called proportionality test in such a way that the following is assessed:
- whether a restriction on the right has an legitimate purpose,
- whether it is necessary and appropriate to ensure this rights,
- whether protection of one right outweighs the loss of the other.[215]

We can argue that the unlawfulness of the gained evidence may be established in other proceedings with all the consequences for the violator foreseen in these proceedings.

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[211] "ZPP does not recognize probative value of evidence and does not provide the exhaustive list of means of evidence that may be used in proceedings. Evidence represents everything that enables sensual perception". Judgment of the Supreme Court RS, no 27/2000, 28.6.2000.
[212] J. Zobec v L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., op. cit., vol. 1, p. 91.
[213] D. Wedam Lukić, Varstvo osebnih podatkov v civilnih sodnih postopkih, Podjetje in delo, 1996, vol. 5-6, p. 914-921.
[214] J. Zobec in L. Ude, A. Galič (ed.), op. cit., vol. 2, p. 341-343.
[215] The opinion of the Information Commissioner on the question of the illegaly obtained evidence, no. 0712-2/2009/950.

But this argument may also lead to situations when a party for the purpose of protecting a certain right will no longer choose the means for their acquisition, since any evidence, regardless of how it was obtained, would be just and admissible in civil proceedings. The other extreme is the possibility that in civil proceedings such evidence is treated the same as in criminal proceedings. But in civil proceedings we have two equal parties whose rights are in conflict, therefore, a complete prohibition of such evidence in civil proceedings cannot and should not be considered.

The exclusion of evidence is primarily the institution of criminal law.

The Slovenian civil procedure law does not regulate the possibility of excluding evidence which is also connected to the opinion of the majority of legal doctrine is that the list of evidence is not exclusive, because we cannot conclude from the numbering of the evidence in CPA that other evidence is inadmissible.[216] So, all evidence is admissible if it does not contradict the fundamental principles of civil procedure and Slovenian legal order. So the answers to mentioned questions should be sought within civil and constitutional law, as well as on the basis of internationally guaranteed human rights and fundamental freedoms.

There is no explicit legal provision on how to treat illegally obtained evidence. However Slovenian legal theory and case law has developed certain rules in this matter. The legal definition of illegally obtained evidence can only be found in criminal law but we cannot rely and summarize exclusively from the solutions in criminal procedure.[217]

As already mentioned, our CPA does not include a provision which would be comparable to the provision in the Criminal Procedure Act (Zakon o kazenskem postopku, hereinafter ZKP), according to which the court may not base its decision on evidence obtained in violation of constitutional human rights and fundamental freedoms, as well as on the evidence obtained through a breach of the provisions of criminal proceedings and for which the Criminal Procedure Act determines that a judgment cannot rely on them, or which have been obtained on the basis of such inadmissible evidence (Art. 18 ZKP). CPA also fails to set a numerus clausus of the means of evidence.

In our opinion it is necessary to distinguish between evidence for which procedural law determines that they are not permitted in a particular case (e.g. evidence by examination of a privileged witness) and between evidence which was unlawfully gained if its admission negatively influences the fairness of the trial. In the first example the main question is which evidence are admissible, while in the second example the question relates to the impact of their (un)admissibility.

The concept of privileges derives from their primary aim, which is to "protect certain relationships and interests in the world outside the courtroom that are deemed of

[216] J. Juhart, op. cit., p. 358.
[217] A. Galič, Ustavno civilno procesno pravo: ustvana procesna jamstva, ustavna pritožba – meje preizkusa in postopek, GV Založba, Ljubljana, 2004, p. 289.

sufficient importance to justify the costs imposed on the judicial process through the loss of useful evidence"[218]. The privileges are foreseen to protect confidential communications and relationships such as attorney-client, physician-patient, priest-repentant, and matrimonial communication and to prevent interference with marital relationships, such as marital testimonial privilege. Privileges to protect against disclosure of specific types of information also exist.

CPA distinguishes between witnesses who are in fact incapable of being a witness and those who are incapable because of legal obstacles.[219] Only those persons may be examined as witnesses who are able of giving data relevant as to facts to be established (Par. 2 Art. 229 CPA). The court is competent to decide if the person is capable of perceiving and consequently reporting on what they have perceived. Legally incapable witnesses are obliged to keep official or military secrets and they may not be examined as a witness as long as the competent authority releases them from such duty (Art. 230 CPA). The court should pay attention to this duty ex officio and should not allow such a witness to be examined, even if such a person were to willingly offer to be examined as a witness. If there is a violation of this duty and the court bases the judgment on such evidence this would influence on the legality of the judgment. A violation of this provision may constitute a relative violation of the procedure (par. 1 Art. 339 CPA).[220]

In contrast to those who cannot be a witness and those who may not be a witness, privileged witnesses are those who have the right to refuse to testify. Such privileged witnesses bear the decision if the confidentiality of the relationship or professional secret were to be kept or the party's right to judicial protection were to have priority. According to Article 231 of CPA a witness may refuse testimony:

1) on what the party has confessed to them as their commissioner;
2) on what the party or other person has confessed to them as their confessor;
3) on facts of which they have learnt as a lawyer or a doctor or in pursuit of other activity, if they are bound to protect the secrecy of what they learn in the practice of a legal or medical profession or in pursuit of other such activity. The stated persons shall be instructed by the presiding judge on their right to refuse to testify.

Because these examples represent the witness's right to take advantage of these privileges or not, unjustified disclosure of business secrets does not constitute a violation of procedural rules and the court may base its decision on such a testimony.[221]

A witness may not refuse to testify on the grounds of protection of a business secret if the disclosure of certain facts is to the benefit of the public or some other person, provided that such benefit outweighs the damage caused by disclosure of the secret (Art. 232 CPA).

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[218] R. J. Allen, R. B. Kuhns, E. Swift, D. S. Schwartz, Evidence: Text, Problems and Cases-Fourth edition; Aspen Publishers a Wolters Kluwer Business; New York, 2006, p. 787.
[219] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., op. cit., vol. 2, p. 442.
[220] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., op. cit., vol. 2, p. 443.
[221] J. Zobec in L. Ude, N. Betetto, A. Galič, V. Rijavec, et al., op. cit., vol. 2, p. 446.

A witness may refuse to answer a particular question for justified reasons, especially if, by answering, they might expose themselves, their relatives in a direct line, irrespective of removals, or in a lateral line up to three removals, or their spouse or extra-marital partner or an in-law up to two removals, regardless of whether the marriage has terminated or not, or their guardian or person under guardianship, or adopter or adoptee, to a serious disgrace, considerable financial loss, or criminal proceedings (Art. 233 CPA).

A witness shall be instructed by the presiding judge on their right to refuse to answer the question posed. If this duty of the court is not respected, this would constitute an essential breach of the procedural provisions. But the question is if the party may challenge this breach with an appeal. There are two opinions in legal theory. The first[222] generally argues that the appeal is not possible, because on the grounds of complete testimony the facts are found accurately and the judgment is correct. The purpose of the good to refuse to answer a specific question is an exclusive right of a witness, given only because of the protection of their interests and the interest of those close to the witness. It would be unreasonable to annul the judgment only because the witness was not instructed about their right.[223] On the other hand, the second opinion supports the position that in this case the relative breach of procedural provisions is given. If the court instructs the witness on this right, the judgment could be different, if the witness refuses to answer, the judgment delivered on the ground of the witness's testimony.[224]

According to case law the important question is whether the party may oppose the taking of evidence by examining a witness. The Supreme Court[225] has adopted the opinion that the party may oppose examination of the witness regarding the parties' conversation with other persons, in respect of which the party alone would have the right to refuse to testify. Otherwise, the right of a party to refuse testimony would be double-cross. In this case, one party called the other on the speaker-phone in the presence of the first party's attorney who taped the conversation, without the other party knowing that the conversation was being taped. The Supreme Court decided that in this case the evidence was not obtained illegally – with interference in privacy. In this opinion the court explained that generally there is no prohibition on the testimony of witnesses regarding the content of a conversation between two parties. But the party may oppose this testimony if the right to refuse to answer was double crossed.

The main decision was related to the admissibility of the evidence (witness) regarding the fact of the content of the parties' phone conversation.

Both the witness and party must speak the truth and both of them have the right to refuse to answer specific questions, if with the answer the party or witness might, commit serious embarrassment or considerable material damage or criminal prosecution

[222] Zuglia, cited in Zobec, op. cit., vol. 2, p. 451.
[223] Idem, p. 452.
[224] Ibidem.
[225] Decision of the Supreme court of RS, No. II Ips 80/98, 25.3.1999 and legal opinion announced at the session on 16.6.1999.

to themselves or to certain persons who are in close relationship, as is enumerated exhaustively in legislation.

Article 231 of CPA must be mentioned in relation hereto, because the witness was the plaintiff's attorney when they heard the content of the phone conversation. The provision foresees the privilege of the witness and not prohibition of testimony. The rules on the exceptions from the duty to testify are the expression of the recognition that some interests are more important than the interest to find the truth.[226]

But the argument of the Supreme Court in this case is questionable, because the provision in Article 233 CPA relates to the right of the witness to protect their own interests and the interests of those persons who are close to them as a witness. With this explanation in mind other persons are not protected by this provision and the witness has no right to refuse to testify for the protection of other persons.[227] Furthermore, the right to privacy over letters and e-mails is not violated if the addressee allows someone to read the letter.[228] Also, we cannot say that there is an unlawful interference with personal rights in the event a person to whom the party reveals the secret, then for the purpose of civil proceedings discloses this secret as a witness.[229]

The party may resist the taking of evidence which was obtained by a violation of personal rights and the performance of evidence would once again present violation of personal rights. But on the other hand, this party may not always resist examination of the witness about the information for which the party would have the right to refuse to answer, regardless of how the witness got this information.[230]

According to the Supreme Court's explanation[231] the audio recording should be treated the same as the written record about the conversation, irrespective of the method of record (handwritten, written by typewriter or computer). In each case, it is on one hand the original source of the writer's memory support, and is on the other hand additional evidence – as a support for the credibility of the witness's confession or statement. In this case the party called the opposite party from the attorneys' office where the attorney recorded the conversation. The first instance court did not allow evidence by hearing the attorney as a witness and listening to the audio recording. The Supreme Court has granted the revision as an extraordinary remedy and annulled the judgements of both

[226] D. W. Lukić, Varstvo osebnih podatkov v civilnih sodnih postopkih, Podjetje in delo, vol. 5-6/1996, p. 914-921.
[227] J. Zobec in L. Ude, A. Galič, Pravdni postopek: zakon s komnetarjem, 2nd book, GV založba, Ljubljana, 2006, p. 451.
[228] Decision of the Supreme court of RS, No. II Ips 80/98, 25.3.1999.
[229] For the taking of evidence gained through a violation of the right to privacy, special circumstances must exist, and this evidence should have special meaning for exercising constitutionally protected rights. In this case the court needs to consider the proportionality principle. Judgment of the Constitutional court of RS, No. Up 472/02, date 7.10.2004.
[230] J. Zobec in L. Ude, A. Galič, Pravdni postopek: zakon s komnetarjem, 2nd book, GV založba, Ljubljana, 2006, p. 451.
[231] Supreme court of Slovenia, opinion No. VS034787, 16.06.1999 and judgement of the Supreme court of Slovenia, No. Sodba II Ips 495/2001, 17.04.2002.

courts (first and appellate court) with the explanation that the first instance court should in a renewed procedure take such evidence. Namely, the Supreme Court did not see this evidence as a violation of the right to privacy (Art. 35 of the Constitution of RS).

Nonetheless the Constitutional Court[232] explained that recording of the phone conversation and the written summary of the conversation may not be considered equal. Notes of the conversation are a summary of what was heard and written according to the subjective judgement of the writer considering what needs to be written. The recording is authentically preserved word or voice which was taken from the person who pronounced this word. Audio recording gives the power over the person or personal good, as it makes a reply possible. If this is done without the knowledge of the affected person, than there is a direct intervention in the exclusive right of the person to dispose with their voice.

Additionally, the Constitutional Court explained that such intervention to the right to privacy may under the special conditions be acceptable, but special circumstances should exist for evidence obtained by violation of the right to privacy to be taken. Such evidence should have special meaning for the enforcement of this specific right, as protected by the Constitution. In such a case the deciding court must consider the principle of proportionality and carefully assess which right should get primacy over the other (par. 3 Art. 15 and 2 Constitution of the RS). However the decision of the Constitutional court left the question whether there has been a violation of the right to privacy or the right to privacy of correspondence and other means of communication open (Art. 37 of the Constitution). According to the opinion of the Constitutional court the latter is lex specialis in relation to general right to privacy.[233]

Article 22 of the Constitution of RS ensures the right to equal protection of rights before the court and relates to the right to a fair trial. The Constitutional Court determines two rights that result from this article, namely the right to an adversarial procedure and the right to the equal treatment of the parties.[234]

Form the stand point of the European court for human rights[235] the main element of the right to adversarial procedure is the right of the party to have knowledge of and comment on the observations filed or evidence adduced by the other party (right to be heard).

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[232] Up-472/02, 7.10. 2004.

[233] R. Zagradišnik, Nedopustno pridobljeni dokazi v civilnem pravdnem postopku – primerjalnopravni pregled sodne prakse in teorije, Pravnik, 2006, vol. 1-3, p. 162.

[234] A. Galič, Ustavno civilno procesno pravo; ustavna procesna jamstva, ustavna pritožba – meje preizkusa in postopek; GV založba, Ljubljana, 2004, p. 219.

[235] Ruiz Mateos versus Spain, A 262 cited in A. Galič, Pravica do kontradikotrnega postopka – ustavni vidik, Podjetje in delo, vol. 6-7/1999, p. 1169

There is a conflict of interest of the parties to protect their privacy and interest of the parties to collect evidence for the purpose of ensuring the judicial protection of rights.[236] The main concern in legal theory and case law about the stated relates to the question of where the limits of these rights stand and in which cases must the right to privacy yield to other constitutionally assured rights. Paragraphs 2 and 3 of Article 15 of Constitution of the Republic of Slovenia states that "The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. Human rights and fundamental freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution". This means that in the event of conflict between protection of right to privacy (Art. 35 of the Constitution), protection of the right to privacy of correspondence and other means of communication (Art. 37 of the Constitution), protection of the right to personal data (Art. 38 of the Constitution), and the right to be heard, which is also connected to the right to propose evidence, the balancing of rights within the proportionality principle will answer which right outweighs which. It comes to finding a balance between the right to evidence and the human rights of a person who has been affected by unlawfully obtained evidence. A proper balance is the basis of the decision that the taking of evidence is not admissible if it was obtained through a violation of human rights which would mean that the performance of such evidence in civil proceedings would result in repeated infringements of human rights.[237]

3.9 Relationship Between Regulation No 1206/2001 and Bilateral or Unilateral Agreements

The Regulation provides in Article 21 (1) that it shall, in relation to matters to which it applies, prevail over other provisions contained in bilateral or multilateral agreements or arrangements concluded by Member States and especially over the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, in relations between the Member States' party thereto. The Regulation does, however, not preclude Member States from maintaining or concluding agreements or arrangements between two or more of them to further facilitate the taking of evidence, provided that they are compatible with this Regulation (Art. 21 (2)).

As for the treaties notified[238] under paragraph 3 of Article 21 of the Regulation No 1206/2001, Slovenia has notified the following agreements.

Agreements or arrangements maintained between the Republic of Slovenia and Member States:

- Treaty of 16 December 1954 on mutual legal aid between the FPR Yugoslavia and Republic of Austria.

[236] V. Rijavec, Problem varstva osebnih podatkov v sodnih postopkih v zveti s procesnimi dejanji strank, Podjetje in delo, vol. 5-6/1996, p. 922.
[237] A. Galič, Ustavno civilno procesno pravo: ustvana procesna jamstva, ustavna pritožba – meje preizkusa in postopek, GV Založba, Ljubljana, 2004, p. 289.
[238] http://ec.europa.eu/justice_home/judicialatlascivil/html/pdf/manual_tev_sln.pdf.

- Agreement of 24 September 1971 on legal aid in civil and commercial matters between the SFR Yugoslavia and the Kingdom of Belgium.
- Agreement of 29 October 1969 on facilitating the use of Hague Convention relating to the civil procedure between the SFR Yugoslavia and the Republic of France.
- Convention of the 3 December 1960 on mutual legal aid in civil and administrative matters between the SFR Yugoslavia and the Republic of Italy.
- Convention of the 27 February 1936 on regulating mutual aid relating to procedure in civil and commercial matters pending or may be pending in front of the competent judicial authorities between the Kingdom of Yugoslavia and the United Kingdom.
- Treaty of 19 September 1984 on legal aid in civil and criminal matters between the SFR Yugoslavia and the Republic of Cyprus.
- Treaty of 20 January 1964 on regulating legal relations in civil, family and criminal matters between the SFR Yugoslavia and SR Czechoslovakia.
- Treaty of 7 March 1968 on mutual legal trafficking between the SFR Yugoslavia and PR Hungary and Treaty of 25 April 1986 on modifying the treaty of 7 March 1968 on mutual legal trafficking between the SFR Yugoslavia and PR Hungary.
- Treaty of 6 February 1960 on legal trafficking in civil and criminal matters between the FPR Yugoslavia and the PR Poland.

Additionally, Croatia has notified the European Commission that the Agreement between the Republic of Croatia and the Republic of Slovenia on Legal Assistance in Civil and Criminal Matters from February 7, 1994 will be maintained.

- Agreement with Austria: there is no need for authenticating the request, which can be submitted in one of the accepted languages, signed by a requesting authority (either in Slovenian or German). The same applies for attached documents. The request is granted according to the rules of the law of the requested court. The agreement makes the request in possible in a special form upon the request of the requesting court, if such a request is not contrary to the basic principles of the law of the country where the requested court is situated. The requested court may, if necessary, use the same coercive measures foreseen in the national law of the requested court, but coercive measures may not be used against the parties.
- Agreement with Belgium: a request for legal aid must be submitted with an official translation of the request in the language of the requested state (Slovenian; French, Dutch, German for Belgium), which must be authenticated by the sworn interpreter of the requesting state. The agreement also foresees the possibility that, besides the courts, the consular or diplomatic representatives may execute the request, if the request relates to the examination of their citizens. The agreement prohibits the use of coercive measures and this prohibition should be included in each invitation for processing the request.
- Agreement with France: a request for legal aid must be delivered through authorised bodies in each country (ministry of justice) to the competent court in requested state. The request must be submitted with an official translation thereof in the language of the requesting state, which must then be authenticated by the sworn interpreter of the requesting state. Besides the processing of the request by competent court, the consular or diplomatic representatives may conduct procedural actions directly and

without the use of coercive measures within the limits of their functions. Furthermore, the consular or diplomatic representatives may also examine their citizens directly and without the use of coercive measures.

- Agreement with Croatia: a request for legal aid must be submitted in the language of the state which is requesting legal aid. There is no obligation foreseen for the translation of the request to be enclosed and the answer to the request should afterwards be prepared in the language of the requested state. The request must include a description of the matter, data necessary for the procedure, and information on the parties and their representatives. The request is processed according to the law of the requested state. The requesting state may ask that the request is executed in a way and form according the wishes of the requesting state, if the request is not contrary to the law thereof. The requested state may reject the processing of the request if it opposes the law of the requested state, its sovereignty, or security. Additionally, documents issued by the court or an authorised body in one state need not be certified for use in the other state. A document issued in one state have the same probative value in the other state as in the state of origin.
- Convention with Italy: Communication regarding the processing of requests for legal aid must be done through the ministry of justice in both countries. The request is processed by the courts of one or more of the other countries. In specially justified cases of extreme necessity the courts may communicate directly. Besides processing the request by a competent court, the consular or diplomatic representatives may directly process requests for hearing their citizens. These requests are processed according to the law of the requested country. The requested state may reject the processing of the request if it is conflict with the sovereignty, security, or public order of this country. The persons who must be examined are called to appear before the court through usual administrative notification. If a notified person fails to appear, the court may use the coercive measures foreseen in the national law of their country. If there is an expressed request from requesting ministry, the requested ministry will, except in the cases where there are contrary provisions in the law of the country of the requested body:
  1) process the request in a special way;
  2) inform the requesting body regarding the day and place of the processing of the request, so the parties may be present when the request is fulfilled.

  The request must to be drawn up in the official language of the country of the requesting court and the cover letter in the official language of the country where the requested court is situated. In cases of extreme urgency the request may be drawn up in the official language of the country of the requesting court accompanied by an uncertified translation in the official language of the requested court. The request must contain indication of the issuing court, name, occupation, and address of the person, who needs to be examined, and the questions, which must be asked and facts that are necessary to be determined.
- Convention with United Kingdom: The judicial authority of the country of origin may, in accordance with the provisions of the law of their country, address himself by means of a Letter of Request to the competent authority of the country of the processing, requesting that such authority take evidence. The request shall be transmitted in England by a Slovenian diplomatic or consular representative to the

Supreme Court of Slovenia; in Slovenia by a British consular representative to the Ministry of Justice. The request shall be drawn up in the language of the country of processing or be accompanied by a translation into such language. Such a translation shall be certified or correct by a diplomatic or consular representative acting for the country of origin. The request shall state the nature of proceedings for which the evidence is required, giving all necessary information in regard thereto, the names of the parties thereto, and the names, descriptions, and addresses of the witnesses. The request shall also either (1) be accompanied by a list of interrogatories to be put to the witnesses, or, as the case may be, by a description of the document samples or other objects to be produced, identified or examined, and a translation thereof, certified as correct in the manner heretofore provided; or (2) shall request that the competent authority allow such questions to be asked viva voce as the parties or their representatives shall desire to ask. The competent authority of the country of execution shall give effect to the Letter of Request and obtain evidence required by the use of the same compulsory means and the procedure as are employed in the execution of the commission or order emanating from the authorities of their own country, unless the desire that some special procedure should be followed is expressed in the Letter of Request, such a special procedure shall be followed insofar as it is not incompatible with the law of the country of execution. The execution of the Letter of Request, which complies with the preceding provisions of the Convention, can be refused: (1) if the authenticity of the Letter of Request is not established; (2) If, in the country of execution, the execution of the Letter of Request in question does not fall within the functions of the judiciary; (3) If the contracting party in whose territory it is to be executed considers that sovereignty or safety would be compromised thereby. The evidence may also be taken, without any request to or the intervention of the authorities of the country of execution by a diplomatic or consular officer in that country acting for the country of origin appointed for this purpose by the court in that country. An officer so appointed to take evidence may request that the individuals named by the court appointing them appear before them and to give evidence. They may take all kinds of evidence which is not contrary to the law of the country of execution. The attendance and giving of evidence before any such officer shall be entirely voluntary and no measures of compulsion shall be employed. The evidence may be taken in accordance with procedure recognised by law of the country of origin, and the parties will have the right to be present in person or to be represented by any representatives who are competent to appear before the courts either of the country of origin or the country of execution.

- Treaty with Cyprus: For the purpose of requesting and rendering legal assistance, the Courts of Justice communicate though the following competent authorities: (a) For Slovenia the administrative authorities authorized to act in judicial matters; (b) For the Republic of Cyprus: The Ministry of the Republic of Cyprus. The request for legal assistance and all documents submitted by the Courts of Justice and the competent authorities shall be in one of the languages of the requesting country and shall be accompanied by a translation into one of the languages of the requested country. The content of the request is foreseen in Article 4 of the Agreement. The requested authority in rendering legal assistance shall apply the law of its State. The

requested authority may proceed in the manner specified in the request if such a manner does not conflict with the law of its State. Compliance with the request for legal assistance may be refused if the requested court deems that such compliance is in conflict with its fundamental legal principles or may prejudice or endanger its sovereignty or security.

- Treaty with Czech Republic: The requested body processes the request according to the law of the country. The requested authority may in accordance with the request of the requesting authority proceed in a way stated in the request.
- Treaty with Hungary: The courts in both countries communicate on the Slovenian side through administrative authorities competent for judiciary, on the Hungarian side through the Ministry of Justice. The communication shall be in the Slovenian or Hungarian language. According to the provisions of the Agreement, the request for legal aid is granted under the law of the requested court. If the requesting court sends a request requiring special form of the procedure, the request is granted only if it does not run afoul with the legislative principles of the requested court. In granting the request, the requested court shall use, if necessary, the same coercive means as provided to comply with a request for legal aid for domestic courts. Coercive means shall not apply in the case when the personal attendance of parties is needed. Compliance with the request for legal assistance may be refused if the requested court should deem that such compliance is in conflict with its fundamental legal principles or may prejudice or endanger its sovereignty or security.
- Treaty with Poland: The courts shall communicate on one side through the administrative bodies for judiciary in Slovenia and on the other through the Polish Ministry of Justice. The court shall use the Slovenian or Polish language. The request is granted according to the law of the requested country. The request of the requesting court, which includes the request to grant the request in a specific manner, shall be accepted only to the extent that is not contrary to the fundamental principles of the law of the requested country. The requested court when granting the request may use the same coercive measures as when granting the requests of domestic courts. Coercive means shall not apply when the personal attendance of parties is required. Compliance with the request for legal assistance may be refused if the requested court deems that such compliance may prejudice or endanger its sovereignty or security.

Part II – Synoptical Presentation

1 Synoptic Tables

1.1 Ordinary/Common Civil Procedure Timeline

Phase	Name of the Phase Name of the Phase in National Language	Responsible Subject	Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach	Rights (related only to Evidence) of the Responsible Subject
1.	Action Tožba	Claimant	The action shall contain a specified relief or remedy claimed in respect of the cause of action, the statement of facts constituting the cause of action, the statement of evidence proving these facts, and other particulars required in every pleading. Only documentary evidence quoted in the claim is expected to be enclosed. Parties are bound to state all facts, adduce evidence required to establish the truth of their statements, to produce declarations regarding the statements of opposing party and evidence adduced by the opposing party, no later than at the opening of the hearing session.	There is no obligation to disclose documents, which the party possesses and might support the case for the claimant opponent, defendant. There is no obligation to submit preliminary witness statements but the claimant must state the name and addresses of witnesses. Claimant must submit to the court documents adduced as evidence to support their statements. A document kept with a government body or other statutory authority and is inaccessible to a party, shall be procured by the court ex officio. Claimant has the right to ask the other party to produce evidence

				via court´s order
2.	Preparation of the main hearing – a preliminary examination of the action Priprave na glavno obravnavo – predhodni preizkus tožbe	Court	The court must establish whether the conditions for admissibility of the action are fulfilled. The court takes into consideration the procedural prerequisites: concerning jurisdiction, concerning the parties and concerning the subject matter. Upon the preliminary examination of the action, the judge has the right to render decrees referred to in Article 270, so the court may solve only preliminary procedural questions (e.g. on securing the evidence, on security for costs of proceedings; on advancement for costs of specific acts of procedure; on appointment of an expert); if the action is unintelligible, incomplete, or affected by any shortcomings with respect to the parties' capacity to sue, the statutory representation of a party, or to the right of the representative to commence a litigation, when a special permit is necessary for these purposes, or that a party is not represented by a person who may be an attorney, the court will send the action for the correction	The court has the right to call the party in writing to state their opinion in their written preparatory submission about certain facts or their evidence shall be completed, or to submit evidence in writing on which they have based their motion, and the party fails to comply, the party may at the opening hearing state such facts and produce such evidence only on the condition that they were without their fault unable to state them earlier, or that the court estimates that their admission will not prolong the settlement of the dispute. The party shall be informed of that consequence in the order. If a party submits to the court extensive documentary evidence, the court shall have the right to order the party to submit within a fixed term a summary in writing of the most significant statements and information in the attached documents and to indicate the numbers of the pages on which the statements, or information, are located in the submitted documents.

				The court shall thus have the right to take this measure in particular if the submitted documents are confusing because of their number or contents or if in view of the nature of the documents it is justifiably expected that the statements and information in their particular parts are only significant for establishment of the asserted facts. If the party fails to follow the court's instructions from the preceding paragraph, the evidence shall be deemed to have been withdrawn. A judge may deliver a judgment on the basis of acknowledgment, a judgment on the basis of relinquishment, a default judgment, and may accept a court settlement to be made on the record.
3.	The court sends the action to the defendant to make a defense plea within 30 days from delivery of the action – defense plea Odgovor na tožbo	Defendant	The defendant's plea must be explained as follows: - is the defendant opposing the plea claim as a whole or in part, and in which part; - the defense must be accompanied by the necessary documents and proposed evidence. If the claimant does not reply in time or the defense is not explained the court will deliver judgment by default.	There is no obligation to disclose documents, which the party possesses and might support the case for the opponent. There is no obligation to submit preliminary witness statements but the claimant must state the name and addresses of the witnesses. The defendant must submit to the court documents adduced as evidence to support their statements.

				The defendant has the right to ask the other party to produce evidence via the court's order. A document kept with a government body or other statutory authority and inaccessible to a party shall be procured by the court ex officio. During the preparations for the main hearing, parties may file pleadings in which they state the facts they intend to assert in the main hearing, as well as evidence they intend to adduce. The court has the right to make observations and to put questions in writing to the parties and requests from them to offer additional evidence. If a party does not respond to these instructions, such a party may be precluded from stating such evidence at a later stage of the procedure.
4.	Settlement hearing and court settlement Poravnalni narok	Court	A special stage in the procedure which follows the receipt of a reply or plea from the defendant. It is held prior to the trial and is not obligatory.	Any documents comprising concrete offers from the opposing party for settlement and submitted in negotiations or proceedings for settlement by agreement shall not be submitted as evidence in civil procedure proceedings (Article 309a CPA). The

				Slovenian CPA does not include rules for exclusion of illegal evidence, which means that there is no guarantee that the judge will not be acquainted with the settlement offer if the party acts against with the duty referred to in Article 309a CPA. If neither party comes to the settlement hearing, it shall be deemed that the claimant has withdrawn the action.
5.	Determination of the main hearing	Court	The main hearing shall be fixed by the presiding judge. The main hearing shall be fixed so as to allow the parties enough time to prepare for it; at least fifteen days shall pass from the receipt of summons by the parties to the date of the hearing.	The judge shall decide which witnesses and/or experts to summon to the hearing.
6.	Main hearing Glavna obravnava	Court	The judge needs to determine which facts are relevant to the case and which of them are in dispute. The judge issues an evidence decree (dokazni sklep) by which the judge decides which evidence with regard to relevant facts are to be taken. The judge has the duty to take an active role and to ask the parties questions and to allow them to supplement their evidence. If there is a misunderstanding regarding the legal grounds (material procedural guidance)	Parties have the right to submit preparatory submissions even without the court order. The preparatory submission shall be sent to the court early enough to be served on the opposing party prior to the hearing, so that the hearing need not be adjourned in order to ensure the right of the opposing party to be heard. The judge has a right to set binding time limits for the submission of the preparatory submissions with further comments and

			and the parties failed to state all the relevant facts and evidence supporting this legal ground, the judge has the duty to inform the parties and discuss this with them. The parties have the right to make comments to facts, evidence and legal grounds. Parties can state all facts and adduce evidence to produce declarations regarding the statements and evidence adduced by the opposing party, up until and including at the first session of the hearing. At later sessions the parties are allowed to present new facts and evidence if they were prevented from presenting them by reason beyond their control. If neither party comes to the first session of the hearing, it shall be deemed that the claimant has withdrawn the action.	clarifications.
7.	Deliberation and delivering the judgment Razglasitev in izdaja sodbe	Court	When the judge considers that the case in dispute has been examined to a sufficient degree so that it can be decided upon, the judge shall announce the conclusion of the main hearing. Only the judge who conducted the trial and was personally present at the taking of	The judge may decide to close the main hearing even if some additional documentary evidence or the record on evidence produced by the requested judge are left to be procured if the parties have waived the right to examine such evidence or that examination thereof is not considered

			evidence, may render the judgment (the principle of immediacy). Exceptions: a requested judge. If the judge has been changed, during the trial, the main hearing needs to start over. However, the judge may decide, upon hearing of opinion by the parties, not to repeat the examination of witnesses and experts or the view, but to read the records on the production of this evidence.	necessary.

References

Bibliography

Allen, R. J., Kuhns, R. B, Swift, E, Schwartz, D. S., Evidence: Text, Problems and Cases-Fourth edition; Aspen Publishers a Wolters Kluwer Business; New York, 2006, p. 787.

Bergant-Rakočevič, V., Varstvo uradne, vojaške in poslovne tajnosti v civilnem sodnem postopku, Podjetje in delo, 2011, vol. 6-7, p. 1476-1486.

Bergant-Rakočević, V., Materialno procesno vodstvo v pisnih fazah postopka in razmerje do prekluzije, Podjetje in delo, 2008, vol. 6-7, p. 1597-1606.

Betetto N., Predvidene novosti v ZPP glede dokaznega postopka, Podjetje in delo, vol. 6-7/2007, p. 1066-1077.

Betetto N., Introduction and particle cases on Council Regulation No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, The European Legal Forum, (E) 4-2006, 137-144, p. 139, available at: http://www.simons-law.com/library/pdf/e/680.pdf.

Bolta, J., Zavrnitev dokaznih predlogov v sodni praksi, Pravnik, vol. 9-10/2011.

Chorvat, J. T., E-Discovery and Electronic Evidence in the Courtroom, A Primer for Business Lawyers, volume 17, Number 1 September/October 2007.

Curreri, S. M., Defining Document in the Digital Landscape of Electronic Discovery, Loyola of Los Angeles Law Review, vol. 38/2005, p.15544.

Galič, A., Betetto, N., Evropsko civilno procesno pravo I; GV založba, Ljubljana, 2011, p. 40-41.

Galič, A., Inconsistency of Case Law and the Right to a Fair Trial, Procedural Human Rights and Acess to Jusrice in the World of Emergencies and Economic Crisis, in Public and Private Justice, course material, Dubrovnik, 2014, available at: alanuzelac.from.hr.

Galič, A., Praktični pogled na novi zakon o pravdnem postopku: Pravica do kontradiktornega postopka..., Podjetje in delo, 1999, vol. 6-7.

Galič, A., Pravica do kontradikotrnega postopka – ustavni vidik, Podjetje in delo, 6-7/1999, p. 1169

Galič, A., Slovenia: Civil procedure, International encyclopedia of laws, Suppl. 49, Kluwer Law International, Hague 2008.

Galič, A., Ustavno civilno procesno pravo: ustvana procesna jamstva, ustavna pritožba – meje preizkusa in postopek, GV Založba, Ljubljana, 2004.

Galič, A., Prve praktične izkušnje z novelo ZPP-D v postopku na pravi stopnji, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, 2009, p. 55-76.

Galič, A., O namenu prekluzij v pravdnem postopku, Odvetnik, 2013, vol. 60, p. 17-21.
Juhart, J., Civilno procesno pravo FLR Jugoslavije, Univerzitetna založba, Ljubljana, 1961.
Kavčič-Čolić, A., Metapodatki za trajno ohranjanje elektronskih virov, Knjižnica 54(2010), vol. 1-2.
Keresteš, T., Dokazno breme, Podjetje in delo, vol. 7/2012.
Morgan, C., Whitcomb, Historical Perspective of Digital Evidence: A forensic Scientists View, International Journal of Digital Evidence, vol. 1, Issue 1, 2002; available at: www.ijde.org.
Pavčnik, T., Dokazni standard, Podjetje in delo, vol. 7/2012.
Rijavec, V., Dokaz z izvedenci, Podjetje in delo, vol. 6-7/2012.
Rijavec, V., Problem varstva osebnih podatkov v sodnih postopkih v zvezi s procesnimi dejanji strank, Podjetje in delo, vol. 5-6/1996.
Rosenberg, L., Schwab, K. H., Gottwald, P., Zivilprozessrecht, 16. Edition, C.H. Beck, 2004.
Rüßmann, H., Electronic documents. Security and Authenticy in Kengyel, M. and Nemessányi, Z., Electronic Technology and Civil Procedure: New Paths to Justice from Around the World. Ius Gentium:Comparative Perspectives on Law and Justice: vol. 15 [Springer, Dorndrecht, Heidelberg, New York and London, 2012, XV, 329 p, ISBN 978-94-007-4071-6 (hardcover), ISBN 978-94-007-d072-3 (eBook)].
Šetinc Tekavc, M., Neskladje ZPP z Ustavo zaradi odsotnosti posebne ureditve za obravnavanje tajnih podatkov, Pravna praksa, vol. 1/2014.
Sever, M. Prekluzije glede uveljavljanja procesnih kršitev po noveli ZPP-D v sodni praksi, Pravosodni bilten, vol. 1/2011.
Thomas, H., Putzo, H., Ziviliprozessordnung (ZPO), Kommentar, C. H. Beck, 2002.
Triva, S., Dika, M.: Građansko parnično procesno pravo, Narodne novine, Zagreb, 2005.
Ude, L., Civilno procesno pravo, Uradni list RS, Ljubljana, 2002.
Ude, L., Betetto, N., Galič, A., Rijavec, V., et al, Pravdni postopek – zakon s komentarjem, vol. 1, GV založba, Ljubljana, 2005.
Ude, L., Betetto, N., Galič, A., Rijavec, V., et al, Pravdni postopek – zakon s komentarjem, vol. 2, GV založba, Ljubljana, 2006.
Ude, L., Betetto, N., Galič, A., Rijavec, V., et al, Pravdni postopek – zakon s komentarjem, vol. 3, GV založba, Ljubljana, 2009.
Von Hein, J., Drawing the line between Brussels I and the Evidence Regulation. Note on the Opinion of Advocate General Juliane Kokott in Case C-175/06 of 18 July 2007, The European Legal Forum (E) 1-2008, p. 34-37, available at: http://www.simons-law.com/library/pdf/e/883.pdf.
Wedam Lukić, D., Varstvo osebnih podatkov v civilnih sodnih postopkih, Podjetje in delo, vol. 5-6/1996, p. 914-921.
Wedam Lukić, D., Ustavnopravni vidiki izvajanja dokazov v pravdnem postopku, Podjetje in delo, vol. 7/2012, p. 1384-1393.
Zhang, B., Chen, H., Applications and Trends of Digital/Electronic Evidence in Chinese Litigation in Kengyel, M. and Nemessányi, Z., i, Electronic Technology and Civil Porcedure, Spinger, 2012, p. 305.

Sever, M., Prekluzije glede uveljavljanja procesnih kršitev po noveli ZPP-D v sodni praksi, Pravosodni bilten, vol. 1 (2011), p. 185-204.
Zagradišnik, R., Nedopustno pridobljeni dokazi v civilnem pravdnem postopku – primerjalnopravni pregled sodne prakse in teorije, Pravnik, 2006, vol. 1-3, p. 141-163.
Zobec, J., Dokazno breme v pravdnem postopku, Pravnik, vol. 6-9/96.

Internet sources and court decisions

European Commission, Cybex: The admissibility of electronic evidence in court, available at: https://www.itu.int/osg/csd/cybersecurity/WSIS/3rd_meeting_docs/contributions/libro_aeec_en.pdf.
Law reform Commission, Consultation paper: Documentary and electronic evidence, 2009, available at: http://www.lawreform.ie/_fileupload/consultation%20papers/cpDocumentaryandElectronicEvidence.pdf.
Permanent Bureau: Draft Practical Handbook on the operation of the evidence convention, Marc 2014, available at: http://www.hcch.net/upload/wop/2014/2014sc_pd01en.pdf.
Judgment of the ECJ of 28 April 2005, Case C – 104/03, St. Paul Dairy Industries NV vs. Unibel Exser BVBA, [2005] ECR, p. I-3481.
Case C-175/06, (2008) 8 Eur L F I-42.
Opinion of Advocate General J. Kokott, 18 July 2007, CJEU case, order of 27 September 2007, case C-175/06, Alessandro Tedesco, *CJEU Reports* 2007, I, p. 7929.

Decision of the Constitutional Court of RS, No. Up-472/02, 7.10. 2004.
Decision of the Constitutional Court of RS, No. Up-440/04, 23.03.2006.
Decision of the Constitutional Court of RS, No. U-I-134/10, 24.10.2014.
Decision of the Constitutional Court of RS, No. Sklep US Up-689/05, 31.01.2007.
Decision of the Constitutional Court of RS, No. Sklep US U-I-155/10, 06.07.2011.
Decision of the Constitutional Court of RS, No. U-I-164/09-13, 4.2.2010.
Decision of the Supreme Court of RS, No. Sodba II Ips 371/2004, 24.3.2005.
Decision of the Supreme Court of RS, No. VS4001673, 22.02.2011.
Decision of the Supreme Court of RS, No. Sodba II Ips 331/2005, 09.06.2005.
Decision of the Supreme Court of RS, opinion No. VS034787, 16.06.1999.
Decision of the Supreme Court of RS, No. Sodba II Ips 495/2001, 17.04.2002.
Decision of the Supreme Court of RS, No. Sklep II Ips 196/2011, 5.4.2012.
Decision of the Supreme Court of RS, No. Sodba I Ips 415/2007, 28.2.2008.
Decision of the Supreme Court of RS, No 27/2000, 28.6.2000.
Decision of the Supreme Court of RS, No. Sodba in sklep II Ips 14/2002, II Ips 400/2002, 09.10.2002.
Decision of the Supreme Court of RS, No. Sodba in sklep II Ips 755/2007 in II Ips 756/20079, 2010.
Decision of the Supreme Court of RS, No. Sklep II Ips 182/2013, 24.4.2014.
Decision of the Supreme Court of RS, No. II Ips 80/98, 25.3.1999 and legal opinion announced at the session on 16.6.1999.

Decision of the Supreme Court of RS, No. II Ips 80/98, 25.3.1999.
Decisions of the Supreme Court of RS, No II Ips 780/2006, II Ips 278/2004, II Ips 381/2009 and others.
Decision of the Higher Court of Ljubljana, No. VSL sklep I Cp 1224/2004, 6.11.2005.
Decision of the Higher Court of Ljubljana, No. VSL sodba I Cpg 1292/2011, 06.03.2012.
Decision of the Higher Court of Ljubljana, No. VSL sodba in sklep I Cp 3193/2013, 5.3.2014.
Decision of the Higher Court of Ljubljana, No. VSL sodba II Cp 2866/2013, 26.3.2014.
Decision of the Higher Court of Ljubljana, No. VSL sklep I Ip 152/2013, 23.01.2013.
Decision of the Higher Court of Ljubljana, No. VSL sodba I Cpg 708/2013, 21.11.2013.
Decision of the Higher Court of Ljubljana, No. VSL sodba I Cpg 280/2012, 16.4.2013.
Decision of the Higher Court of Ljubljana, No. VSL Sodba II Cp 710/2009, 14.7.2009.
Decision of the Higher Court of Ljubljana, No. VSL sodba I Cp 3490/2013, 2.4.2014.
Decision of the Higher Court Maribor, Sklep II Ips 302/99, 27.1.2000.
Decision of the Higher Court of Maribor, No. Sodba II Ips 244/2012, 27.02.2014 (in conection with the decision of Higher court Maribor, No. I Cp 1752/2011).
Decision of the Higher Court of Celje, No. VSC sodba Cp 1311/2006, 22.08.2007.

Case-based part

1.1) The requesting court asks your court to take evidence by use of video-conference.

If the court of another state asks a Slovenian court to take evidence by the use of videoconference, the Slovenian court will take the evidence in the requested manner. Pursuant to Slovenian law the taking of evidence by videoconference is not prohibited by law. The Slovenian Civil Procedure Act includes a legal basis for voice and video recording of the main hearings (Art. 125.a CPA). This means that the court has the discretion to decide if the hearing will be held by use of video-conference. The court may allow the use of video-conference, but the consent of both parties is required (Art. 114.a CPA). Namely, the court may give the initiative for the use of the video-conference, but must obtain the consent of the parties. If the requesting court is from a Member State of the EU, regulation 1206/2001 could be applied.

1.2) What if the requesting court is from a non-Member State for which no bilateral or multilateral treaty can be applied?

The Slovenian CPA states that Slovenian courts give legal aid to foreign courts in cases which are determined by international treaties and in cases when the principle of reciprocity applies (Art. 175 CPA). Domestic courts have jurisdiction only in the territory of their country, which is why official acts may not be performed in the territory of foreign country without the help of their courts.[239] Slovenian courts also offer legal aid outside the scope of obligations under the international treaties as a result of international courtesy. The requested country provides legal assistance to the requesting country with the expectation that it too will receive the necessary legal assistance when needed.[240] The CPA sets the reciprocity condition, which may be actual or formal.[241] In the given case, the Slovenian court will take evidence according to the provision of the domestic CPA. A Slovenian court may execute the request also according to the law of the requesting Non-Member State, if such a requested procedure is not contrary to the public order of RS (Art. 176 CPA). A request must be sent through diplomatic channels and drafted in Slovenian or with a certified translation enclosed.

The CPA also includes a provision which comprises the basis for the right to justice and the rules when the evidence is impossible to perform. Article 219 of the CPA is applicable also in cases when the evidence must be executed in a foreign country with

[239] V. Rijavec in L. Ude, A. Galič, Pravdni postopek: Zakon s komentarjem, 2nd book, 2006, p. 102.
[240] Idem, p. 104.
[241] Idem, p. 105.

which Slovenia does not have diplomatic relations or with which Slovenia does not have a bilateral agreement on legal aid. In these circumstances the court determines the deadline until the court waits for the evidence to be taken.

1.3) What if the requesting court is from Denmark?

With respect to Denmark, the Hague Convention on the taking of evidence abroad in civil or commercial matters applies. Regarding the taking of evidence by use of video-link, the Special Commission has confirmed that the use of video-links and similar technologies to assist the taking of evidence abroad is consistent with the current framework of the Hague Evidence Convention.[242]

2.) The requested court is taking evidence by hearing witnesses via VCF with the requesting court. The requesting court indicated that they would like to ask questions on their own. Since in some countries the parties cannot directly address witnesses, can the judge in the requesting country allow the parties to directly address the witnesses in the requested country? Answer this from the perspective of requested country!

The requested court processes the request in accordance with the law of its state, in the given case Slovenian law. Under Slovenian law the witness is firstly examined by judge. Parties may raise questions after the judge is finished with their questioning, but only with the court's permission. The court will not allow the question if a specific question raised from the parties includes how the witness must answer or such a question is not related to the matter in question. Under Art. 10 of Regulation 1206/2001 the requesting court may also call for the request to be processed in accordance with a special procedure provided by the law of its Member State. The requested court shall comply with such a requirement, unless this procedure is incompatible with the law of Member State of the requested court or by reason of major practical difficulties.

The requesting court should, in its request, inform the requested court that the parties will be present and that their participation is requested (par. 1 Art. 11 Evidence Regulation). The determination of the conditions for participation of the parties falls within its jurisdiction (par. 3 Art. 11 Evidence Regulation).

The requested court notifies the parties of the time when and the place where the proceedings will take place, as well as the conditions under which they may participate.

If the possibility for parties to participate and question witnesses is provided by the law of its State, the requested court may ask the parties and any their representatives to participate in the taking of evidence, irrespective of the request of the requesting court.

The requested court must process the request unless this is contrary to the basic procedural principles of its state or unless it causes major practical difficulties (par. 3 Art. 10 Evidence Regulation). If the parties according to domestic law may ask questions and examine the witness, the requested court may allow cross-examination of the witness.[243] A request for hearing a person shall not be granted when the witness

[242] Permanent Bureau: Draft Practical Handbook on the operation of the evidence convention, March 2014, available at: http://www.hcch.net/upload/wop/2014/2014sc_pd01en.pdf.

[243] Betetto, N., Introduction and particle cases on Council Regulation No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or

claims the right to refuse to give evidence or to be prohibited from giving evidence, under the law of the Member State of the requested court or under the law of the Member State of the requesting court, when such a right has been specified in the request, or, if need be, at the instance of the requested court, it has been confirmed by the requesting court (Par 1 Art. 14 Evidence Regulation).

3.) How would a judge in your country establish the identity of a person who is refusing to show their face on the basis of religious (or similar) customs?

Slovenian Civil Procedure Act (par. 3 Art. 239 CPA) stipulates that the judge shall establish the identity of the witness according to the basis of the general questions that would enable the identification of witnesses. Namely, the witness is asked for their name and surname, the name of the father, occupation, residence, place of birth, age, and relationship to the parties, which means that the judge could ask the witness to show their identification document (ID card). In the present case, it would be possible for another person to be called in order to establish the identity of the person who wishes not to have their identity revealed (or a female representative of the court could verify the identity) or with an additional control question. The CPA does not specifically address such situations. Furthermore, this issue has not been addressed in our case-law.

4.) What are the powers/duties of the requesting judge to intervene during the hearing by VCF in cases of violation of mandatory rules, public policy/ordre public or discipline in courtroom?

The regulation offers two ways of taking evidence across borders, namely actively or passively. When taking evidence with the legal help of the court of another Member State, the requested court processes the request for taking evidence according to the law of its Member State. We can say that the principle of immediacy is partially ensured by enabling the requesting court to inform the requested court that its representatives will be present and also requests their participation. According to the Regulation the request for participation may be given at any other appropriate time. The requested court determines the conditions under which the representatives from the requested court may participate. Nevertheless, the performance of taking of evidence depends upon the law of requested court, so the rule of lex fori applies. The requesting court should sustain from any intervention when the requested court is executing the request, but it is within the competence of the requesting court to assess according to the national procedural rules on how the violation affects the procedure.

Direct taking of evidence from the requesting court is a second way where the requesting court takes evidence according to the law of its state directly in another Member state but without the use of any coercive measures. The conduct of the procedural act in this case is in the hands of the requesting court. However, by this method the requesting court may execute only specific evidence and not the whole main hearing. In cases of violation the law of the requesting court will apply, but the competent body in another Member State may refuse the taking of evidence if the direct taking of evidence is contrary to the fundamental principles of law in its Member State.

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commercial matters, The European Legal Forum, (E) 4/2006, 137-144, p. 139, available at: http://www.simons-law.com/library/pdf/e/680.pdf.

In particular, the competent body may assign a court of its Member State to take part in the taking of evidence in order to ensure the proper application of the rules and the conditions that have been set out according to the law of its Member State.

4.1) What are the powers/duties of requested judge to intervene during the hearing by VCF in cases of violation of mandatory rules, public policy/ordre public or discipline in courtroom?

When taking evidence passively, the requested court processes the request by applying the law of its Member State. In case of violation the requested judge may intervene according to the domestic procedural rules. The use of coercive measures depends on the law of the requested court. But if the requesting court has requested that the request be processed in accordance with a special procedure provided for by the law of its Member State, the requested court may refuse to comply with the request if this procedure is incompatible with the law of its Member State.

When directly taking evidence, the requesting court takes evidence according to the law of its state directly in another Member State, but without the use of any coercive measures. As long as the requesting court is not employing coercive measures, the law of its Member state applies in cases of violations of mandatory rules, public policy or discipline in courtroom. The competent body of requested court may refuse taking of evidence, if the direct taking of evidence is contrary to the fundamental principles of law in its Member State. The requested court may take part in taking evidence. In this case the Regulation enables the requested court's intervention if the application of the rules and the conditions set out according to the law of its Member State are not properly applied by the requesting court (Art. 17 Regulation).

According to the Slovenian CPA the judge is in charged for maintaining order at the court hearings and for the dignity of the court (Art. 304 CPA).

The requested judge has the power to remove and/or fine anyone present at the court hearing who fails to comply with an order given by the court to ensure order, acts in an improper manner, or expresses contempt for the court or for other participants in the proceedings (Art. 304 CPA).

Further the court may remove from the proceedings a representative of a participant or a party. If the party is removed from the court room, the main hearing may be continued without the party's presence. If the person acting improperly is an attorney, the judge will additionally notify the Slovenian Bar Association that the attorney belongs to of such behaviour (par. 4 Art. 304 CPA).

In a situation where ordre public is violated by the requested court, the requesting judge's duty and powers to intervene through videoconferencing is limited by the requested court's responsibility to process the request.

5.) The witness mentions that they have some important documents or objects while testifying. Must the parties request such documents (or objects) to be included into evidence or can the judge do so at their own motion, or are there any preclusions applicable to such case?

According to the adversarial principle parties are responsible for adducing facts and they dominate in the process of gathering evidence or evidentiary material (Art. 7 CPA). The parties decide on what factual circumstances they base their claims on and what

evidence they present to prove the factual circumstances. If neither of the parties alleges specific facts or proposes any evidence, the court is obliged to consider that this fact does not exist (see Art. 212 CPA). The court may not on its own motion gather and propose evidence, except in cases provided by law (in family matters).

Under the Slovenian CPA parties can assert new facts and evidence until and including at the first session of the main hearing; at later hearings the parties are allowed to present new facts and evidence only if they were prevented from doing so by reasons beyond their control (Art. 286 CPA).

If party in the stated case was not aware that the witness has the document, the party must refer to this fact immediately in order for the court to consider this fact. If this fact is discovered at later hearings, the party must prove that they have, at no fault of their own, became aware of the fact in the moment when the witness made the statement.

According to Article 285 of the CPA the judge must ask questions and is in charge of ensuring that all the decisive facts are stated. Under substantive procedural guidance the court may furthermore see that the parties' statements regarding the decisive facts are supplemented and that the evidence relating to the parties' statements are proposed or supplemented. In accordance with their duty to actively manage the case the judge must invite the parties to amend and clarify their asserted facts and to enable them to offer evidence for their statements if the court considers that the existing evidence is insufficient.[244] Within material procedural guidance, the judge may demand that important facts and evidence be determined so the applicable substantive law is determined.[245]

6.) A person asks the court to secure evidence for a contemplated judicial proceeding. Is this possible?

Under Slovenian CPA it is possible to secure the evidence for a contemplated (or commenced) proceeding if there is a justified fear that the evidence later may not be taken or that it will be taken later be made more difficult (Art. 264 CPA). The person who will in the future become a party may request that the court secure the evidence.[246]

6.1) Would it be different if that request were made by the court in a different Member State under regulation 1206/2001? Answer from the perspective of the requesting and requested court!

According to the Regulation the request must be made to obtain evidence which is intended for use in judicial proceedings, either commenced or contemplated (par. 2 Art. 1 Regulation). But the Regulation does not give a specific answer for when the procedure is commenced or contemplated. If we rely on the provision that the evidence may also be used in contemplated proceedings, then the Regulation includes also court measures in relation to securing or protecting the claims. [247]

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[244] A. Galič, Civil procedure Law…, Kluwer Encyclopedia.

[245] See more ibidem; N. Betetto in L. Ude, A. Galič, Pravdni postopek: Zakon s komentarjem, 2nd book, 2006, p. 582-595.

[246] V. Rijavec in L. Ude, A. Galič, Pravdni postopek: Zakon s komentarjem, 2nd book, 2006, p. 531.

[247] N. Betetto in Evropsko civilno procesno pravo I; GV založba, Ljubljana, 2011, p. 40-41.

An important point for discussion concerns the relationship between Regulation 1206/2001 and the power to take protective measures under Regulation No 44/2001 and recast of Regulation No 1215/2012. A question which may cause difficulties within an area of interpretation is a problem of distinction between the preliminary taking of evidence prior to the bringing of civil proceedings and the application of a provisional or protective measure within the meaning of provisions of the Brussels I Regulation. The question is if a procedure for preserving evidence constitutes a provisional or protective measure within the meaning of the Brussels I Regulation rules.

In the Preamble of the recast the Regulation explains that "… the protective measures should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Regulation No 1206/2001" (see pt. 25 of Regulation No. 1215/2012). In St. Paul Diary Industries NV vs. Unibel Exser BVBA (Case C-104/03)[248] there was an application in the Netherlands to take a deposition there with a view to its use in the substantive proceedings in Belgium. The CJEU held that the request for a deposition was not a claim for provisional or protective measures. Namely, the case related to the Article 24 of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the Brussels Convention). The CJEU held that Article 24 had to be interpreted as meaning that a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determine whether it would be well-founded, and assess the relevance of evidence which might be adduced in that regard was not covered by the notion of "provisional, including protective, measures". In the stated judgement according to the CJEU's opinion the provision is of an exceptional character and should be interpreted strictly. The notion of provisional and protective measures is to be understood as referring to measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought from the court having jurisdiction as to the substance of the case. The notion includes measures which are intended to preserve a substantive claim in law, and does not include measures intended to preserve evidence. The purpose of the preliminary taking of evidence prior to the commencement of proceedings is different. The preliminary taking of evidence aims to establish, or determine, relevant factual circumstances which may be decisive for a future resolution of a dispute in issue. Preliminarily ordering the hearing of a witness aims at enabling the applicant to decide whether to bring a case, determine whether it would be well-founded, and assess the relevance of evidence which might be adduced in that regard if not covered by the notion of "provisional, including protective, measures".[249] According to the judgement the rules on evidence taking set out in Regulation 1206/2001 could be avoided if measures for taking evidence could be sought directly before a court not having jurisdiction as to the substance of the case just as provisional or protective measures.[250]

[248] Judgment of the ECJ of 28 April 2005, Case C – 104/03, St. Paul Dairy Industries NV vs. Unibel Exser BVBA, [2005] ECR, p. I-3481.
[249] Ibid.
[250] Ibid.

The CJEU's position in St. Paul Diary case was criticized and discussed in theory. Hein[251] has stressed in his paper the most significant positions of theory, namely:

- the procedure to secure the evidence under the Regulation No. 1206/2011 is regarded as considerably slower and more cumbersome than the granting of a protective or provisional measure under Article 31 of the Brussels I-Regulation;
- the general opinion regarding legal assistance between Member States is that the legal instruments in this area should not have an exclusive character.

Furthermore, the author has exposed different approaches to demarcation between Brussels I and the Evidence Regulation.[252] One opinion favors the right of interested party to choose between the application for a protective measure under the Brussels I Regulation (Article 31/ Article 35 recast) and the procedure under Evidence Regulation[253]. On the other hand, another approach gives priority to the Evidence Regulation but makes it possible if this path turns out to be ineffective to use Brussels I regime.[254]

A third approach discusses the option for domestic law to gives answers as to what the procedural character of measures for securing of evidence is; If domestic law lets parties apply for a protective or provisional measure, the party should apply the Brussels I; when domestic law provides specific procedures for preserving evidence, the procedure should be conducted under the Evidence Regulation[255].

Another approach exposes the importance of differentiation between substantive and procedural law. If domestic substantive law provides the right to demand the production and/or inspection of documents or other evidentiary material, the provision on protective measures under Brussels I Regulation should apply in the same way as it does with regard to other substantive claims, which leads to recognizable decision; On the contrary, procedural means for gathering and preserving evidence should fall under the Evidence Regulation.[256]

In the case Tedesco v Tomasoni Fittings SrL (Case C-175/06)[257] the request was made under the Regulation 44/2001 for the description of allegedly patent infringing product. On 21 March 2005 Alessandro Tedesco, took to the Tribunale civile de Genova a request for a 'descrizione' against the Italian company Tomasoni, established in Genoa, and the English company RWO Ltd., established in Essex, which seems to be the parent company or supplier of Tomasoni. This court then, on the basis of Regulation Nr. 1206/2001, sent a request for mutual judicial assistance to the competent authority in the United Kingdom (the 'Senior Master'), asking this authority to perform the 'descrizione' (measure to preserve), in accordance with Italian law, at RWO's UK premises. The 'descrizione' in the United Kingdom was not only directed against

[251] J. von Hein, Drawing the line between Brussels I and the Evidence Regulation. Note on the Opinion of Advocate General Juliane Kokott in Case C-175/06 of 18 July 2007, The European Legal Forum (E) 1-2008, p. 34-37, available at: http://www.simons-law.com/library/pdf/e/883.pdf.
[252] Ibidem, p. 35.
[253] Makowski cited in J.von Hein, ibidem.
[254] Nuyts cited in J. von Hein, ibidem.
[255] Hess/Zhou, cited in J. von Hein, ibidem.
[256] Hess/Zhou; Coester-Waltjen, cited in J. von Hein, ibidem.
[257] Case C-175/06, (2008) 8 Eur L F I-42.

RWO's products, but also its invoices, delivery notes, payment orders, commercial offer letters, publicity material, computer archive data, and customs documents. Since the 'Senior Master' refused to fulfil the request on the grounds that searching for and seizing goods and documents were not among the customary activities of its officers and that the operation to be carried out could not be executed within the context of mutual judicial assistance, the Italian court referred the matter to the CJEU for a preliminary ruling. In particular, it asked the Court to say whether the Italian 'descrizione' could be considered to constitute taking of evidence of the type that a court of one Member State may ask the court of another Member State to execute, pursuant to Regulation No. 1206/2001/EC on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. The case was withdrawn before the CJEU was able to deliver a judgement, but the Advocate General Kokott published an opinion[258]. In this opinion[259] the Advocate General gives explanation that two types of measures, provisional by nature, can be distinguished by reference to their aims. Namely, provisional or protective measures which aim to preserve the substantive claim in issue and to secure an execution of a judgment at a later time on one hand, and measures for the preservation of evidence which concern the establishing of facts of the case for the purposes of the future proceedings on the other.[260]

If a court in a different Member state asks a Slovenian court to secured evidence, the rules of the requested court will apply, namely the Slovenian provisions of CPA on securing evidence. But the Evidence Regulation foresees also the exception to the lex fori rule, where the procedural provision of the requesting court would apply upon special request (par. 3 Art. 10 Evidence Regulation). The requested court is obliged to fulfil such a request, except when it is runs contrary to the procedural rules of the country to which the requested court belongs or if the fulfilment of such a request were to pose greater practical problems.

6.2) Would it be different if the request comes from a Non-Member State?

In this case the Hague Evidence Convention will apply. In the context of obtaining evidence the Draft practical handbook on the operation of the Evidence Convention extends the notion of evidence also to measures for preserving evidence. This position is confirmed by the Explanatory Report[261], and is supported by commentary[262] and practice.[263]

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[258] Opinion of Advocate General J. Kokott, 18 July 2007, CJEU case, order of 27 September 2007, case C-175/06, Alessandro Tedesco, *CJEU Reports* 2007, I, p. 7929.

[259] It is, however, the section of her Opinion, headed Prohibition on pre-trial discovery, which is also of relevance. The Advocate General appears to have opened that section with a fairly clear view that the regulation does not apply to the conventional obtaining of pre-trial disclosure. See par. 68 of the Opinion.

[260] See ibidem, par. 80-92.

[261] The Explanatory Report notes (at par. 26 – see at http://www.hcch.net/upload/expl20e.pdf) that by providing for the obtaining of evidence for "contemplated" proceedings (Art. 1(2), discussed at A6.5(b)(ii)), the Convention authorises the use of a Letter of Request for the purposes of "perpetuation of testimony" under common law procedure (whereby testimony is taken of an aged, dying, or going witness), and the civil law procedures of "l'enquête ad futurum" (now known as "référé préventif ou probatoire", e.g., Art. 145 of the Code of Civil Procedure of

If a particular measure is not recognised in the Requested State, it may be requested as a "special method or procedure" (par. 2 Art. 9 Convention). Moreover, if the measure is outside the functions of the judiciary in the Requested State, the Letter of Request may be refused fulfilment (par. 1a Art. 12 Convention).

7.) A document is sent, but the party is already precluded from sending more documents. However, the judge is now acquainted with it and it is possibly creating prejudice. What are the consequences in your legal system?

The principle of free assessment of evidence applies to the evaluation of evidence. The free evaluation of evidence principle is a tool that provides the court with the methodology for evaluating evidence and deciding which of them will be count as proven and which will not be even taken or count as proven (see Art. 8 CPA).

There are no formal rules as to the assessment of evidence and the free evaluation of evidence means judges' freedom for a conscientious and careful evaluation of each piece of evidence separately and all together, and the success of the whole evidence-taking procedure.[264]

Slovenian law has no answer to the question of what the consequences are if a court has created a prejudice based on a document sent after the party is precluded from doing so and the evidence is not to be taken in consideration. The principle of free evaluation means that the postulate of conscientiousness of assessment of evidence includes moral category.[265]

8.) Person A calls person B, who puts Person A on speaker phone in the presence of person C. Will the testimony of person C be admissible as evidence? Would there be a difference if person C were a legal representative of person B?

If person C testifies about a conversation between persons A and B, this testimony would generally be admissible as evidence.

According to the Supreme Court's opinion, there is no general prohibition in civil proceedings for the witness to testify regarding what they know about the phone conversation between the parties, which witness listened to at the invitation of one party while the other was not aware that the conversation was also being listened to by someone else.[266]

France, whereby a court may take certain measures if there is a legitimate reason to preserve or establish evidence) and "Beweissicherungsverfahren" (now known as "Selbständiges Beweisverfahren", e.g., § 485(1) of the Code of Civil Procedure of Germany, whereby the examination of witnesses or inspection of documents or other property may be authorised where there is a risk that the evidence may be destroyed or otherwise become unusable).

[262] See, e.g., the opinion of AG Kokott in Tedesco v. RWO, par. 85 (confirming that the Evidence Regulation applies to measures for the preservation of evidence).

[263] At its meeting in 2009, the Special Commission noted the practice of States of applying the Convention to proceedings for the taking of evidence before the main proceedings have been instituted, and where there is a danger that evidence may be lost: C&R No. 47 of the 2009 SC.

[264] J. Zobec in L. Ude, A. Galič, Pravdni postopek: zakon s komentarjem, 1st book, Uradni list, GV založba, Ljubljana, 2005, p. 91.

[265] Ibidem.

[266] Supreme Court of RS, opinion No. VS034787, 16.06.1999.

In line with the Supreme Court's opinion, the opposing party may resist taking such evidence only if the party's right to refuse to answer a particular question for justified reasons, especially if, by answering, the party might exposed themselves, their relatives in direct line, irrespective of removals, or in a lateral line up to three removals, or their spouse or extra-marital partner, or an in-law up to two removals, regardless of whether the marriage has terminated or not, or their guardian or person under guardianship, or adopter or adoptee, to a serious disgrace, or considerable financial loss or criminal proceedings (Art. 233 CPA), would be maneuvered.[267]

If a party is unaware that the third party is listening, there is a question of privacy protection as a constitutionally protected human right (Art. 35 Constitution of Slovenia). The answer, however, should be additionally sought within civil procedure law and from the perspective of when in the civil procedure may the court refuse to take specific evidence for the reason of its illegality due to interference in privacy.

If person C is legal representative of person B, the following rules of CPA apply. A legal representative is considered as a privileged witness. Article 231 of CPA applies to authorised persons, religious confessors, attorneys, doctors, and other persons whose work demands keeping secrets. The privileged person is left with the decision of whether the confidentiality of the relationship or professional secret towards the other party is to be protected or whether the right to justice should get primacy.[268] An attorney may decline to give testimony if they have learned about the facts while practicing their profession, and then the obligation of maintaining confidentiality applies. For enforcing the privilege of professional secrecy two conditions are necessary, namely: the witness has learned the fact while practicing the profession and the witness must be committed to the duty to protect the secret. The attorney is not bound to secrecy only for those data which were entrusted to them by the client but also for data which came from other sources, as an authorised person or in some other function directly, or from third parties.[269] For someone who refers to the reason for privileged witness it is sufficient that they prove with probability that the relevant facts were learned when pursuing their professional occupation.[270]

The second condition is that the witness is bound by the duty to protect the secret. The attorney must preliminary evaluate if according to the code of attorney ethics or law the duty to protect the secret is foreseen. [271] It should be regarded that the court may base its decision also when such privileged witness has without authorisation revealed a secret.[272]

But if disclosure of the important facts is necessary for the public benefit or the benefit of someone else, such a witness may not refuse to testify on the grounds of professional secrecy (Art. 232 CPA).

The following explanation of the Supreme Court was constitutionally disputed in the above mentioned case: If the phone conversation is held between the contractual parties

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[267] Ibidem.
[268] J. Zobec, Pravdni postopek: zakon s komentarjem, 2nd book, p. 444.
[269] Triva, Dika, p. 520
[270] Ibid,p. 521.
[271] Under the Criminal Code of Slovenia the duty to protect professional secrets must be respected.
[272] Ibidem.

regarding a business matter (about the agreement or sale of the property), the parties could reasonably expect that the opposite party could enable that the conversation will be listened by other persons. Part of the general knowledge is that business partners, or contractual parties after the dispute has arose, would want to ensure evidential opportunities to prove the content of their business relationship if a dispute arises. So the expectation that such conversation a would not be followed by others should not be treated as reasonable, unless the confidentiality of the conversation is evident because of the interconnection of the business conversation with the strict privacy (erotic intimacy) content or is explicitly agreed or promised by both parties to the conversation simultaneously.[273]

8.1) If person B recorded the conversation, is such a recording admissible? Would there be a difference if person C had recorded the conversation?

The Slovenian CPA does not determine when some evidence is permitted and when is not. The court decides on the basis of free assessment of evidence which facts will be counted as proven (Art. 8 CPA). Regarding the types of evidence foreseen by CPA, the list is not exhaustive. The parties must adjudicate all facts on which their claim is based and propose the evidence for these facts to be proven (Art. 7 CPA). The CPA explicitly includes rules on witnesses, documents, experts, parties as witnesses, and inspection.

According to the Supreme Court's explanation[274] the audio recording should be treated the same as the written record about the conversation, irrespective of the method of record (handwritten, written by typewriter or computer). In each case, it is on one hand the original source of the writer's memory support, and is on the other hand additional evidence – as a support for the credibility of the witness's confession or statement. In this case the party called the opposite party from the attorneys' office where the attorney recorded the conversation. The first instance court did not allow evidence by hearing the attorney as a witness and listening to the audio recording. The Supreme Court has granted the revision as an extraordinary remedy and annulled the judgements of both courts (first and appellate court) with the explanation that the first instance court should in a renewed procedure take such evidence. Namely, the Supreme Court did not see this evidence as a violation of the right to privacy (Art. 35 of the Constitution of RS).

Nonetheless the Constitutional Court[275] ruled that the right to privacy was violated by both types of evidence. The court also explained that recording of the phone conversation and the written summary of the conversation may not be considered equal. Notes of the conversation are a summary of what was heard and written according to the subjective judgement of the writer considering what needs to be written. The recording is authentically preserved word or voice which was taken from the person who pronounced this word. Audio recording gives the power over the person or personal good, as it makes a reply possible. If this is done without the knowledge of the affected person, than there is a direct intervention in the exclusive right of the person to dispose with their voice.

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[273] Supreme Court of RS, opinion No. VS034787, 16.06.1999.
[274] Supreme Court of RS, opinion No. VS034787, 16.06.1999 and judgement of the Supreme court of RS, No. Sodba II Ips 495/2001, 17.04.2002.
[275] Up-472/02, 7.10. 2004.

Additionally, the Constitutional Court explained that such intervention to the right to privacy may under the special conditions be acceptable, but special circumstances should exist for evidence obtained by violation of the right to privacy to be taken. Such evidence should have special meaning for the enforcement of this specific right, as protected by the Constitution. In such a case the deciding court must consider the principle of proportionality and carefully assess which right should get primacy over the other (par. 3 Art. 15 and 2 Constitution of the RS).

There is no need for different assessments in the case when one or the other person pushes the button for recording of the conversation.

8.2) What would be the consequences of person A's consent to (a) being heard by speakerphone in the presence of person C; (b) being recorded by person B; or (c) being recorded by person C?

If party A gives consent to the presence of C or gives consent to the recording, such recording may be admitted. It would not make a difference whether the recording was done by B or C.

9.) Person A attaches a stealth recording device or software to person B's cell phone. Would the recordings be admissible as evidence?

The Higher court of Ljubljana[276] ruled (on the basis of the stated judgement of the Constitutional Court) that if the conversation is recorded without the knowledge of the affected person, such an action has intervened in the exclusive right of the person to dispose with their voice by themselves.

The Supreme Court[277] also stated that in a civil procedure evidence obtained in an unlawful way by unauthorized interception of conversation should as a rule[278] be inadmissible.

The legal reasoning for not allowing such evidence lies in the fact that in the case of secret audio recording the record was taken in violation of personal rights. If such evidence is performed at the main hearing with playing the track then the violation of personal rights would once again be conducted. In this case the personal right could outweigh the right to propose a piece of evidence and indirectly also the right of access to justice.[279]

9.1) Would it make a difference if person B's cell phone were registered as belonging to person A or would it make a difference if person B's cell phone were owned by B's employer A? Would it be different if person A explicitly restricted B's use of their cell phone to professional use?

It would not make a difference to the question of the recording's admissibility as evidence if B's phone was registered as belonging to their employer A or to some other

[276] Judgment of the Higher Court of Ljubljana, No. VSL sklep I Ip 152/2013, 23.01.2013.
[277] Decision of the Supreme Court of RS, No. VS4001673, 22.02.2011.
[278] Because it is possible that some other right outweighs the right to privacy (right to private property).
[279] A. Galič, Praktični pogled na novi zakon o pravdnem postopku: Pravica do kontradiktornega postopka..., Podjetje in delo, 1999, vol. 6-7, p. 1172.

person. Also it would have no effect on the admissibility if the employer had restricted the use of cell phone only to professional use.

10.) Person A steals from person B a letter written by person X. Can person A use such letter as evidence?

The answer depends on the use of the principle of proportionality. When two rights (the right to privacy and the right of access to court) are in conflict, both of them should be considered. If such evidence in the form of a stolen letter is not taken, this could result in a breach of the adversarial principle, but if such evidence is allowed by the court, the right to privacy or the right to protection of personal data could be in question. In such cases, the only solution is to use the so-called proportionality test in such a way that the assessment of whether a restriction on the right has a legitimate purpose, whether it is necessary and appropriate to for ensuring the right, and whether the protection of one right outweighs the loss of the other.

Nevertheless, if the content of the letter is not personal then if the court decides to take this evidence this would not constitute a new violation of human rights even though it was obtained with violation of the right to property.[280]

10.1) Would there be a difference if person A finds such letter by accident?

If a person finds such a letter by accident, the person has the obligation to try to find the owner of such a letter if the finder thinks that the owner lost the letter. If the finder does not try to return such a letter with the knowledge that the letter was lost, the court should decide regarding the principle of proportionality which right should be more protected over the other.

10.2) Would there be a difference if person A finds such letter in a garbage bin?

If such a letter was thrown out in explicitly obvious circumstances such that it was clear that the owner of the letter would no longer use such a letter, the letter could be admissible as evidence.

11.) What are the consequences of an accidental e-mail forwarding as to the admissibility of such correspondence as evidence? Would there be a difference if the forwarded e-mail contained a disclaimer interdicting its use by persons other than its proper addressee.

This case should probably be dealt with in the same way as accidentally obtained letters. If the e-mail contains personal data, the proportionality test should be applied. A disclaimer forbidding the addressee of a letter to disclose it would not give sole grounds for the court not to allow the letter.

11.1) Is the addressee of your correspondence able to use it as evidence if it contains a disclaimer banning its use for such purpose?

If an addressee is employed in the same organisation as the sender and there is a privacy policy about the content, this would constitute a business secret. The party who would be affected if such a correspondence were to be revealed should claim that this

[280] Ibidem.

evidence is a business secret. If the party claims that the data are regarded as a business secret, then this party is obligated to explain why such a fact is a business secret.[281] The court should examine the question of whether to allow such evidence on the basis of free assessment of evidence.

If there is no relationship between the sender and receiver of the e-mail, the court would have to decide which of the constitutionally protected rights will take precedence and need a higher level of protection. The free assessment of evidence means that the judge is obligated to assess each piece of evidence particularly and all the evidence together with a conscientious and careful assessment. So the ban does not give the court grounds not to allow such a letter as evidence.

12.) Person A took a polygraph test for the purpose of a police investigation. Are the results of such a test admissible in a civil case if presented by person A? What if the opposite party in the civil procedure suggests that the court obtain such results from the police or a criminal case?

According to the Slovenian Criminal Code polygraph tests are not allowed as evidence.

12.1) Would a self-ordered polygraph test by a certified commercial provider be admitted as evidence? Can such a certified commercial provider later be summoned to testify as a witness in a civil case about the test?

No, it would not be admitted as evidence. We could draw the analogy with private opinions about which academics or professionals from a particular area of expertise prepare upon the order of the party on substantive and procedural issues. Such opinions are then submitted to the court by parties. These opinions are not regarded as expert opinions but merely as a part of the parties' arguments.[282] If the opinion is prepared according to a party's order before the procedure starts and the opposing party objects to the opinion, then the court will consider such an opinion as a part of the party's arguments and not as evidence. Such an expert who prepared an opinion is not regarded as an expert acting as a court assistant, but is a helper to the party and consequently the provisions of CPA for experts do not apply.[283]

12.2) Company A performed a routine alcohol test on their employees. Would the results be admissible as evidence? Would it be different if performed by an authority for health and safety? Would it be different if performed by a third outsourced impartial certified person (e.g. medical personnel)? Would it be different if it was a polygraph test?

According to the Slovenian law that regulates safety and health measures at work place (Zakon o varnosti in zdravju pri delu (ZVZD-1))[284] the employer is authorised to demand a routine alcohol test from the worker if there is reasonable grounds for suspicion that the worker is drunk (Art. 5 ZVZD-1). The test shall be performed by an

[281] Decision of the Higher Court of Ljubljana, No. VSL sodba I Cpg 708/2013, 21.11.2013.
[282] V. Rijavec, Dokaz z izvedenci, Podjetje in delo, 2012, vol. 6-7.
[283] Decisions of Supreme Court of RS, No II Ips 780/2006, II Ips 278/2004, II Ips 381/2009 and others.
[284] Official Gazette of the RS, No. 43/11.

adequately qualified person. This evidence would be admissible if the test were performed the right way, according to the prescribed procedure and with the worker's consent. In this case such evidence would not violate the right to privacy. According to par. 3 of Article 15 of the Constitution of RS human rights shall be limited by the rights of others and in cases foreseen by the Constitution. Workers' right to privacy protection and personal rights is limited with the obligation of the employer to enable safety and health conditions for workers. The results of the test would be admissible if the test were performed by the employer according to the prescribed procedure and with the worker's consent. If the worker declines to take the test the employer may order the worker to give a blood sample at a hospital. If the worker still refuses to take this test the proper disciplinary procedures according to the Slovenian law on the employment relationship may be imposed on such a worker. However, the party may always propose the nomination of an expert as evidence on this subject.

It does not affect the admissibility whether the testing is done by health authorities or medical personnel.

13.) Would recordings of stealth CCTV at the workplace be admissible as evidence? Would it be different if it recorded video and audio? Would it be different if it were not stealth?

If the video surveillance is taken at the work place, the audio or video recording may be taken only in exceptional cases, when this is necessary for the safety of people or property or protection of secret data or a business secret and this aim could not be achieved by milder means. The video recording may be taken only for those rooms where the described interests must be protected. Also the employer must properly inform workers that they are being recorded (Art. 75 Personal data Protection Act – ZVOP-1). Stealth recording, disregarding the stated interest and procedure, would constitute an offence according to ZVOP-1 and a criminal act of unauthorised video recording according to Slovenian Criminal Code.

Workers have rights to privacy at their working place and the question of protection of privacy in the relationship of employer and worker must be treated as most important. Namely, this relationship represents a conflict between the interests of an employer who has the right to ownership over the means (also the right to surveillance) on one hand, and on the other hand the legitimate interest of the employed person, who rightfully expects certain degree of privacy, confidentiality, and partial independence.

Such a stealth recording would be admissible, but the court would, on the basis of free assessment of evidence, evaluate such evidence in terms of assessment of each piece of evidence separately and all evidence together within the framework of a proportionality test between different constitutionally ensured rights. There would be no difference if such a recording were audio or video.

If the recording is not stealth, then the workers are informed that they are being recorded and such a recording would be admissible at the court.

13.1) Would the rightful owner of legal CCTV recording be obliged to make such a recording available at the court's request in civil or commercial cases? Would the court be able even to ask for it?

Persons other than the parties may be ordered to submit documents only if such an obligation is imposed upon them by the law, or if the contents of a document to be submitted relate both to such a person and to the party adducing it as evidence. The third party has a right to give a statement on this matter, prior to the passing of a court decision ordering a third party to deliver a document (Art. 228 CPA).

If a third person denies the obligation to produce the document, the decision as to such obligation shall be given by the civil court. In this case the court may produce evidence to determine the truth of this assertion. This special proceeding may result in issuing the court decision, ordering the third party to deliver the document which is an enforcement title. In this procedure the party must prove that the third party is in possession of such a document and that this party is obliged to deliver it. The third party has the right to file an appeal against the court decision. The final decision may be enforced according the provision of Slovenian law on enforcement and security (Zakon o izvršbi in zavarovanju) only if the decision has become executable and the due date for volunteer submission of the document has expired.

14.) Are DNA tests coercively enforceable for family cases within your legal system? What about in other civil and commercial cases?

No, DNA tests may not be coercively enforced in family and other civil cases. However, if the party upon which the DNA test is proposed does not consent to this test, such party will be presumed to be the father.[285] According to Article 262 of the CPA there are no coercive measures allowed against the party for not appearing for the examination or testifying. However, the court decides considering all the circumstances what effect such an act of the party will have and what meaning it would have when assessing all the evidence.

15.) The requested court obtains evidence from a witness by coercive measures is not allowed in the requesting country. Would evidence be admissible (answer from the perspective of requesting country)? What if the requesting country asks for coercive measures to be applied against a witness which are not allowed in the requested country (answer from the perspective of requested country)?

There is a general opinion in theory that the requested court is not obliged to make assessment if the coercive measures are in line with the law of the requesting court. The use of coercive measures is evaluated upon the regulation in the law of the requested court. However, coercive measures against witness are allowed according to the Slovenian CPA. Although the requested court uses coercive measures which are not allowed to be used according to the law of the requesting court, the assessment of such evidence remains in the hands of the requested court.[286]

The rule of lex fori for coercive measures means that the requesting court may not impose the coercive measures foreseen in the law of the state of the requesting court.

[285] Decision of the Supreme Court of RS, No. Sodba II Ips 331/2005, 09.06.2005.
[286] N. Betetto in A. Galič, N. Betetto, Evropsko civilno procesno pravo, op. cit., p. 50.

Coercive measures according to the law of the state of the requesting court would not be applicable in the state of the requested court. However, the requested court remains authorised to assess what meaning should be attributed to such an act.

16.) A court in Member State A conducts criminal proceedings. The injured party claims damages on which the court decides within an adhesive procedure. In connection with the amount of property damage it is necessary to examine a witness in Member State B, where the injured party was employed prior to the occurrence of the damaging event. Does the concept of adhesive procedure exist in your legal system? If yes, can Regulation 1206/2001 be applied concerning the taking of this evidence? Answer from the perspective of Member State B!

Yes, the concept of the adhesive procedure does exist in Slovenian legal system. The adhesive procedure is a procedure affiliated to criminal procedure and for which the provision of CPA and the law of obligations apply. It would be possible to hear a witness in Slovenia according to Regulation 1206/2001, provided that the preconditions for the application of Regulation 1206/2001 are met.