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Evidence in Civil Law - Czech Republic

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JIŘÍ VALDHANS, DAVID SEHNÁLEK, PETR LAVICKÝ

ABSTRACT The aim of this monograph is to describe and analyse the Czech regulation of evidence taking in its complexity and entirety. Since the monograph is primarily destined for foreign lawyers, not only the legal regulation but also its reflection by the Czech legal theory as well as judicial practice is examined. Thus, the added value of this publication is that it not only describes the legal regulation itself, but also demonstrates on numerous case law produced by Constitutional Court and Supreme Court its real functioning in daily judicial practice. This allows better understanding of how the whole system of evidence taking in the Czech civil procedure works.

The publication offers an extensive summary and analysis of regulation of the Czech civil procedure related to the evidence taking. In order to ensure such complex approach, the first part of the monograph is dedicated to fundamental and general principles of the Czech civil procedure which are crucial for the regulation of various aspects of evidence taking.

Since the concept of evidence may be different in various jurisdictions, the monograph also examines the value and importance of evidence in the Czech law as well as principles and standards of its collection and subsequent judicial evaluation. Due to the existing differences in various jurisdictions, special attention is dedicated especially to the written evidence and to the role and importance of experts and witnesses in judicial proceedings. The recent judicial practice often has to deal with foreign elements (foreign witness, document in foreign language etc.) in judicial proceedings. For this reason the publication also examines various aspects of translation and interpretation in Czech judicial proceedings.

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The attention is dedicated also to costs of proceedings. Covered are the principles on which the payment of costs is based as well as rules governing which party and to which extent will bear them. Last chapter examines the concept of “illegally obtained evidence” and “illegal evidence” in the Czech civil procedure. Thus, the focus is put on rules regulating which evidence is according to the Czech Civil Procedure Code as interpreted by Czech highest courts permissible in civil procedure.

KEYWORDS: • civil procedure • principle • free disposition • officiality • equal treatment • orality • directness • concentration • fact • evidence • collection • assessment • evaluation • incompleteness • unlawfu • proof • non-liquet • public • private • authenticity • accuracy • witness • examination • testimony • hearing • expert • cost • language • translation • interpretation • claim • counterclaim • settlement • appeal • pre-trial • court • guidance

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Part I

1 Fundamental Principles of Civil Procedure²

The Czech Civil procedure is controlled by several basic principles which carry out important role both in adoption of legislation and interpretation and application of legal instruments. They affect the organisation and the structure of judiciary, proceedings and procedural position of the parties. Some of them are embodied in the legal regulations as the Constitution, the Charter of Fundamental Rights and Freedoms or others, some of them are not regulated explicitly but are undoubtedly presented in procedural legal institutes' adjustment³. We address the particular principles closely, first with principles in general, then with principles connected with evidence in a separate chapter.

1.1 Principle of Free Disposition of the Parties and Officiality Principle

The principle of “free disposition” (i.e. the principle that the parties have conduct over the proceedings) is not expressly stipulated in Czech civil procedure. This is not to say that Czech law does not recognise it. Both said principles are enshrined in Czech law and manifest themselves very clearly in individual legal concepts. In standard contentious civil procedure, the parties to the dispute, rather than the court, must take the initiative. This concept is based on the premise of legal interest in the sense that he who defends his legal interest should take the initiative. Article 36 of the Charter, Section 5 of the Courts and Judges Act and Section 3 of the Code of Civil Procedure are all clear manifestations of this concept, all of them stipulating that everyone may claim court protection of his right that has been threatened or violated. Section 12 of the new Civil Code is phrased in similar terms as it stipulates that anyone who feels that his rights have been prejudiced may claim the protection from a body exercising public authority. The principle of “free disposition” has implications in terms of the parties' conduct over the proceedings as well as their subject. Its individual manifestations can be found in the parties' procedural acts by which the exercise their conduct over the procedure, which include the statement of claim (action), its change and withdrawal, a counterclaim, court settlement, appeal, action for a new trial, action for the nullity of a judgement, application for appellate review, application for distraint, etc.

² Main source for this chapter is Alena Winterová et al. *Civilní právo procesní* (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 59-82.

³ Alena Winterová et al. *Civilní právo procesní* (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 59.

The “officiality” principle (i.e. the principle that the judge has conduct over the procedure), on the other hand, governs most non-contentious proceedings in Czech civil procedure. In such proceedings, protection is also afforded to other than purely private interests of the parties. This type of proceedings has been the subject of a separate law – Act No. 292/2013 Coll., on special court proceedings – since 2013 (before the Act was adopted, they were regulated within the Code of Civil Procedure). The above-cited Act lists the following proceedings among non-contentious proceedings:

- a) on aid measures and in matters of legal capacity,
- b) in matters of absent persons and deaths,
- c) on consent to an interference with integrity,
- d) in matters of permissibility of admission or holding persons in institutions,
- e) on certain aspects relating to legal entities and the trust,
- f) probate proceedings,
- f) on deposits,
- h) on redemption of instruments,
- i) in matters of the capital market,
- j) on preliminary consent to investigation in matters of protection of competition,
- k) on replacing the consent of a representative of an autonomous chamber to inspection of instruments (documents),
- l) on the performance of obligations under an interim measure of the European Court of Human Rights,
- m) in matters of employee elections,
- n) on judicial sale of mortgaged and pledged assets,
- o) on prohibition to sell the rights attached to participating securities,
- p) in marital and partnership matters,
- q) in the matter of protection against domestic violence,
- r) on determination and denial of parenthood,
- s) in adoption matters,
- t) in matters of care for minors by the court,
- u) in some enforcement matters.

Under Section 13 of the Special Court Proceedings Act, proceedings may be initiated even without an application (*ex officio*), through a resolution (unless the law stipulates that proceedings can only be initiated on application), where the court’s duty is to initiate the proceedings without delay after having ascertained facts decisive for the proceedings which are specified in the Act. If non-contentious proceedings that may also be initiated *ex officio* are initiated based on an application in a specific case, the court is not bound by that application and may declare a withdrawal of the application ineffective if the preconditions for initiating the proceedings in the absence of an application are met. Nevertheless, the principle of “free disposition” becomes relevant in the initiation of certain non-contentious proceedings and determination of their subject because they can be initiated only on application and the court is bound by their subject. From among those listed above, these include, e.g., proceedings under subpar. g) to o), as well as divorce proceedings which belong among the proceedings specified under subpar. p).

The “officiality” principle can be considered to manifest itself in some procedural acts in civil procedure that are conferred on the State attorney’s office. In accordance with the Special Court Proceedings Act, the State attorney is authorised to lodge an application to initiate proceedings in selected matters of care for minors by the court, protection against domestic violence, legal capacity, declaring a person dead, declaration of the permissibility of admitting persons to social services facilities or holding them in such facilities. The same authorisation is vested in the State attorney under Act No. 2/1991 Coll., on collective bargaining, in proceedings on declaring a strike and layoff unlawful; under Act No. 283/1993 Coll., on State attorney’s office, in proceedings on declaring a contract on transfer of ownership invalid in cases where provisions limiting the freedom of the parties were not respected at the time of execution of the contract; under Act No. 218/2003 Coll., on liability of young persons for offences and on justice in youth matters and amending certain laws (the Act on Justice in Youth Matters), in respect of imposing measures on children under 15 years of age who have committed an act which is otherwise an offence; under Act No. 109/2002 Coll., on the exercise of institutional care or protective care in school facilities and on preventative training care in educational facilities and amending certain other laws, in proceedings on supervision over compliance with legal regulations in the exercise of institutional or protective care, as well as under Act No. 90/2012 Coll., on companies and cooperatives (the Corporations Act), in proceedings on dissolution of a corporation with liquidation. Furthermore, the State attorney’s office may lodge an action for declaring a judgment null and void under the Code of Civil Procedure in matters in which the law permits the office to intervene or to lodge an application to initiate proceedings.

Under the Special Court Proceedings Act, the State attorney’s office may intervene in proceedings that have been initiated in adoption matters to the extent that a decision is to be made on whether the parents’ consent to adoption is required; in matters of care for minors by the court in terms of the imposing a special measure in a child’s upbringing, institutional care, suspension, limitation or deprivation of parental responsibility or its exercise, and determination of the date of birth; in matters of protection against domestic violence, legal capacity, declaring a person dead, determination of the date of death; in matters of declaring permissibility of admitting persons to a healthcare institution or holding them therein, or inadmissibility of holding persons in social services facilities; on the redemption of instruments; and on some matters related to legal entities.

Under Act No. 182/2006 Coll., on insolvency and manners of resolving insolvency, the State attorney’s office may intervene in insolvency proceedings including a moratorium and incidental disputes. Act No. 304/2013 Coll., on public registers of legal and natural persons, enables intervention in proceedings that have been initiated in matters of a public register (i.e. the Register of Associations, Register of Foundations, Register of Institutions, Register of Associations of Unit Owners, Commercial Register and Register of Generally Beneficial Companies). The Supreme State Attorney’s Office may intervene in proceedings initiated before the Supreme Court on recognition of final foreign decisions in matters of divorce, legal separation, declaring a marriage null and

void and determination of whether a marriage exists or not in cases where at least one of the parties to the proceedings is a Czech Republic national (Act No. 91/2012 Coll.).

In this respect, we consider it necessary to point out that certain procedural acts by which the parties exercise their conduct over the proceedings can be replaced by legal fiction – despite the case-law of the Constitutional Court (for example, Pl. ÚS 42/08 and Pl. ÚS 19/09), according to which a procedural act may not constitute the contents of legal fiction because this would violate the principle of “free disposition” and hence the constitutionally protected principle of autonomy of will. This includes the fiction of acknowledgement of a claim in the sense of Section 114b (5) of the Code of Civil Procedure (the defendant fails to provide a statement on a claim at the court’s request without a serious reason), Section 114c (6) of the Code of Civil Procedure (the defendant fails to appear at a pre-trial hearing despite having been summoned properly and in due time and despite the action has been duly delivered to him and the defendant fails to excuse himself in due time and for an important reason) and the fiction of withdrawal of a claim (action) in the sense of Section 114c (7) of the Code of Civil Procedure (the plaintiff fails to appear at a pre-trial hearing despite having been summoned properly and in due time, where the plaintiff failed to excuse himself in due time for an important reason and was advised of this consequence in the summons)⁴.

1.1.1 The Scope of Authority of the Court to Adjudicate the Civil Case

In adjudicating a dispute, the court is bound by the findings of fact at the time of promulgation of the judgement, i.e. it is obliged to take into account everything that was found in the course of the proceedings. The forms of relief sought play an important role in making the decision. The judgement, or its operative part, is to answer the question of whether or not the claim raised by the plaintiff is justified. At the same time, in accordance with Section 152 (2), the judgement must provide a ruling on the case at hand in its entirety. Where proceedings were initiated on application, the scope of the case is left to be delimited by the parties through the forms of relief claimed in the action; the delimitation tends to be more general in proceedings initiated ex officio.⁵ Czech law recognises two exemptions from the duty to render a decision on the entire subject of the proceedings, namely partial and interim judgement laid down in Section 152 (2).

In addition to the duty to render a decision on the entire subject of the proceedings, the court essentially may not grant a relief exceeding or other than sought (see Section 153 (2)). Once again, however, there are two exemptions from this rule. The first one is related to proceedings that may be initiated even without an application; it is stipulated in Section 26 of the Special Court Proceedings Act that the court may exceed the parties’ motions and grant a different or more extensive relief than that which they sought. The second exemption applies in a situation where a certain specific manner of

⁴ For more details, see Petr Lavický, Zmeškání účastníka a fikce dispozičních procesních úkonů. Právní fórum, ročník 6, č. 10. (2009).

⁵ See Alena Winterová et al. Civilní právo procesní (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 74.

settlement of the relationship between the parties follows from a legal rule (for example, in relation to the cancellation of co-ownership and the ensuing settlement).

1.1.2 Limitations of Introduction of New Facts and Evidence Exist in the Czech Legal System

Czech contentious civil procedure limits the possibility of bringing new allegations of facts and adducing new evidence. Czech civil law is based on the elements of concentration of proceedings. Czech jurisprudence distinguishes between statutory and judicial concentration of proceedings. The latter has been cancelled in its original form and what remains of it shall be discussed below. The elementary level of statutory concentration follows from the principle of incomplete appeal and is regulated in Section 205a, according to which facts and evidence can only be brought before the court of first instance. The court of second instance disregards new facts or evidence when hearing an appeal against a decision *in rem* in contentious proceedings, with the exception of exhaustively listed situations. These are facts and evidence that:

- a) are related to the conditions of the proceedings, the court's jurisdiction *ratione materiae*, exclusion of a judge (lay judge) or composition of the court;
- b) are brought forward in order to demonstrate that defects occurred in the proceedings which could result in an incorrect adjudication of the case;
- c) are brought forward in order to question the trustworthiness of the means of evidence on which the ruling of the court of first instance relies;
- d) are brought forward in order to comply with the duty to allege all facts relevant for adjudication of the case or the duty to adduce evidence provided that the appellant was unsuccessful in the case due to failure to comply with one of the aforementioned duties and that the appellant was not properly advised under Section 118a (1) to (3);
- e) the appellant was not properly advised under Section 119a (1) (authors' note: advice that all relevant facts must be indicated and evidence identified before a decision is pronounced in the case);
- f) occurred (arose) after the decision of the court of first instance was pronounced (rendered).

Concentration of proceedings is further confirmed in Section 118b, according to which it is permissible, in situations where a pre-trial hearing is held, to indicate decisive facts and identify evidence until the pre-trial hearing is completed; otherwise, this is possible until the end of the first hearing *in rem* or until expiry of the time limit provided to the parties for supplementing their statements of fact relevant for the case at hand. The court may take into consideration any facts asserted and evidence identified at a later date only if they are presented to question trustworthiness of the evidence taken after the pre-trial hearing, and in absence of the latter, after the first hearing, or facts and means of evidence which a party could not submit in due time other than through his fault, as well as facts and evidence which the parties submitted after one of them was requested to supplement decisive facts.

Residues of the judicial concentration of proceedings can be found in the possibilities of determining time limits for the supplementation of statements of fact decisive for the

case in the sense of Section 114c (4) and 118b (1). These time limits are prescription periods by their nature.⁶ An exception applies where a party to the proceedings is not advised of the consequences of a failure to comply with such a request.

On the other hand, a situation in which the applicant changes his claim (action) is not an exception to the foregoing. Quite to the contrary, with an additional party joining the proceedings or a party being replaced, the impacts as described above arise upon termination of the first hearing which was ordered after the joining or replacement, and the parties must be advised of this fact in the summons (see Section 118b (2)).

Concentration of proceedings is not applicable in a non-contentious dispute because under Section 20 (2) of the Special Court Proceedings Act, a party may indicate decisive facts and identify evidence until the decision is rendered or pronounced. The right of a party to indicate new facts and evidence in appellate proceedings is not affected in any manner whatsoever.

1.1.3 The Extent to Which the Court is Bound by the Parties Submissions Regarding the Means of Evidence

Under Czech law, the parties are the ones who have the duty to identify the evidence they rely on in their allegations. The court subsequently decides which of the evidence adduced shall be taken. Nevertheless, in accordance with Section 120 (2), the court may also take evidence other than adduced by the parties in cases where such evidence is required for ascertaining the facts of the case and where they follow from the contents of the file. Although the law explicitly stipulates that the court may take such evidence, the settled interpretation is that the court must, in fact, do so.⁷ This applies where such evidence is taken based on certain allegations of a party (based on contents of the file), but the party did not itself move the court to take it. Thus, it is not possible to take any evidence that does not follow from the parties' procedural acts or gradual evaluation of the case, i.e. the court does not search for evidence.

1.2 The Adversarial and Inquisitorial Principle

Both these principles are present in Czech procedural law. While not explicitly identified by these names in the legislation, they are indisputably enshrined. The facts of the case are ascertained to the same extent as contended by the parties and using evidence identified by them. The *idem est non esse aut non probari* principle applies. The relevant party (the plaintiff) has the duty to make allegations and to adduce evidence, or in other words, bears the burden of allegation and the burden of proof, which ensues from the concept that he who wishes to achieve protection of his right must prove it, or one making a claim must make allegations which correspond to the factual elements of a legal rule which is in his favour. In contrast, the defendant is to

⁶ Petr Lavický, *Způsoby a limity urychlování civilního řízení soudního*, In Petr Lavický, *Současnost a perspektivy českého civilního procesu*, Brno: Masarykova univerzita, 2014, p. 35-46.

⁷ Ludvík David, *ASPI commentary*, Prague: Wolters Kluwer.

dispute allegations which are untrue or incomplete⁸. Czech contentious civil procedure is built around the above principle, i.e. the adversarial principle following from Section 120 (1). However, the discretion of the parties is limited, as indicated in paragraph 1.1.4, as a result of significant statutory “concentration” of proceedings.

On the other hand, special court proceedings are governed by the inquisitorial principle – in accordance with Section 21, evidence taken by the court to ascertain the facts of the case may also include evidence other than that adduced by the parties. Thus, the responsibility for clarifying the facts of the case is borne by the court and this fact in no way prevents the parties to the proceedings from identifying their respective means of evidence.

1.2.1 The Role of a Judge in the Czech Procedural Law in Sence of the Concept of Substantive and Procedural Guidance of Proceedings

Both formal and material conduct (guidance) of proceedings are present in Czech procedure. The court’s duty of overall organisation of the proceedings is derived from the concept of formal conduct of the trial. After the proceedings are initiated, the judge examines whether the preconditions for the proceedings have been met (otherwise, he discontinues the proceedings if any shortcoming found cannot be remedied). If said preconditions are met, he prepares the hearing so that the case can usually be adjudicated in a single hearing. This is related, amongst other things, to the judge’s authorisation to request that the parties supplement their allegations, to appoint an expert, to ensure that necessary evidence is taken and to take other appropriate measures. He fixes hearings and summons the parties to participate in them. See Section 114 of the Code of Civil Procedure and Section 115 *et seq.* of the Code of Civil Procedure on the conduct of proceedings.

Material conduct of the trial comprises steps aimed at clarifying the facts of the case, i.e. collection of evidence, and classifying and evaluating the same. This is also related to the court’s duty to provide advice and explanation. If the parties’ submissions of facts or evidence adduced are incomplete, the court is obliged to request the parties to supplement them. The same applies in a situation where the need for supplementing the submissions of facts or evidence adduced follows from the judge’s differing legal opinion on the matter (Section 118a of the Code of Civil Procedure). However, further means are available to the court in terms of ascertaining the facts of the case. In accordance with Section 120 (2) of the Code of Civil Procedure, even without a party’s motion, the court may also take evidence other than adduced by the parties in cases where such evidence is required for ascertaining the facts of the case and where such evidence follows from the contents of the file.

As mentioned above, these concepts are intertwined through the entire Czech civil procedure: Thus, for example, the possibility of taking evidence which has not been

⁸ Petr Lavický, *Způsoby a limity urychlování civilního řízení soudního*, In Petr Lavický, *Současnost a perspektivy českého civilního procesu*, Brno: Masarykova univerzita, 2014, p. 35-46.

adduced is applicable not only in first-instance proceedings but also in appellate proceedings. It is obviously not applicable in appellate review proceedings before the Supreme Court; these are no longer concerned with clarifying the facts of the case but aim merely to examine whether the legal assessment of the facts of the case as ascertained by the court of first or second instance was correct. On the contrary any facts submitted and evidence adduced after expiry of the prescription periods (in terms of the reference: “preclusion”) (see the above explanation on Section 118b of the Code of Civil Procedure) cannot be taken into consideration unless one of the exemptions stipulated by law is applicable.

1.3 Hearing of Both Parties Principle (*audiatur et alter pars*) – Contradictory Principle

The right of both parties to be heard is a display of equal treatment of parties to a civil procedure. The principle of equal treatment is enshrined in Czech procedural law. The equal positions of the parties are explicitly stipulated in Article 96 of the Constitution, in Art. 37 (3) of the Charter of Fundamental Rights and Freedoms and in Section 18 of the Code of Civil Procedure. All the above provisions guarantee that the parties to the proceedings have equal positions and equal possibilities in exercising their rights.

Equal treatment of the parties can have a wide range of manifestations. It is explicitly provided that, for example, the parties have the right to use their mother tongues at the hearing (the right to an interpreter at hearings pursuant to Art. 37 (4) of the Charter of Fundamental Rights and Freedoms and Section 18 (2) of the Code of Civil Procedure, where the latter is phrased as not limited to hearings but rather to proceedings as such. According to ruling of the Supreme Court R 21/1986, the costs of an interpreter are covered by the State – they cannot be charged to a party to the proceedings. In its Art. 37 (2), the Charter of Fundamental Rights and Freedoms stipulates the right to legal assistance before courts without limiting this right to criminal proceedings. Consequently, it can be deemed to also apply to civil proceedings, where if the party concerned is exempted from payment of the judicial fee, the costs of legal assistance would again be paid by the State, in accordance with Section 30 of the Code of Civil Procedure. The right to be advised of procedural rights and duties pursuant to Section 5 of the Code of Civil Procedure can also be considered⁹ to be a display of equal treatment of the parties.

1.3.1 Preparatory Acts Parties May do Before the Hearing

A party to proceedings has the duty to make allegations and to adduce evidence, or the burdens related thereto. Evidence is taken during the hearing, and the court must summon the parties to the hearing. In accordance with Section 123 of the Code of Civil Procedure, the parties have the right to express their opinion on evidence adduced and all evidence that has been taken. Wherever appropriate, some other court may be requested to take evidence. As an alternative, the presiding judge may take evidence

⁹ Alena Winterová et al. *Civilní právo procesní* (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 68.

outside a hearing. Technical equipment transmitting images and sound can also be used for taking evidence (Section 122 (2) of the Code of Civil Procedure). Nevertheless, the parties have the right to be present when evidence is taken.

Cases where a preliminary injunction is issued, where the presiding judge makes a decision on an application for a preliminary injunction without hearing the parties (Section 75 (3) of the Code of Civil Procedure) and where a payment order is issued can all be regarded as exemptions from the above. However, appropriate means are available in all the above cases – see paragraph 1.3.2. After a preliminary injunction has been issued, the party concerned may appeal against the resolution on the preliminary injunction or lodge a petition for cancelling the preliminary injunction. A protest may be lodged against a payment order within a period of fifteen days.

1.3.2 Right to Equal Treatment (The Same Decision in the Same Cases)

This principle is expressly regulated by the new Civil Code in Section 13, according to which anyone seeking legal protection may reasonably expect that his legal case will be decided similarly to another legal case that has already been decided and that coincides with his legal case in essential aspects. This means, according to the explanatory report, that the regulation of private law is based on the concept of partnership between the legislature and the judge. The authors of the new Civil Code go as far as to state in the explanatory report that the judge is the lawmaker (this concept has so far been denied in the Czech legislation – the judge applied law without forming it). Section 13 establishes legitimate expectation of an identical decision in typologically identical cases save for a situation where duly substantiated circumstances arise which lead to a deviation from the existing decision-making practice.

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

The possibility of rendering a judgement by default pursuant to Section 153b of the Code of Civil Procedure is a classical consequence of passivity of a party in the proceedings. The following are the prerequisites for rendering a judgement by default:

- the defendant fails to appear at the hearing despite a summons having been duly delivered to him (10 days in advance by personal delivery) and advised of the consequences of such failure;
- the plaintiff appears at the hearing and proposes that a judgement by default be rendered;
- court settlement can be approved in the given case in the sense of Section 99 (1) and (2) of the Code of Civil Procedure;
- the judgement must be declaratory (a judgement by default cannot be rendered if it should establish, change or terminate the legal relationship between the parties).

In addition to this, we also pointed out, in the closing part of paragraph 1.1.1, the controversial approach to passivity of the parties to the proceedings through the fiction of the procedural acts of acknowledgement of a claim and withdrawal of a claim (i.e.

acts by which the parties exercise their conduct over the procedure). In this respect, we refer to the aforementioned analysis.

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

The principle of orality is known to Czech civil procedure; this principle is not applicable to the entire proceedings but merely to hearings. It is even a constitutional principle – see Art. 96 (2) of the Constitution. In addition to this, it is also stipulated in Section 6 (1) of the Courts and Judges Act. It also follows from this principle that besides written pleadings, anything presented to the court orally is also considered relevant. This is the reason why hearings begin with the parties' submissions of facts – see Section 118 (1). It is no violation of this principle if a party refers to its written pleading. If a party is not present at a hearing, the presiding judge reads or presents the contents of the pleading.

1.4.1 The Oral and Written Form of Procedural Acts

In Czech judicial procedure, the procedural acts of parties may be taken in any form whatsoever unless the law expressly prescribes a specific form – see Section 41 of the Code of Civil Procedure. In practice, written pleading is the most common form, where a hard copy or electronic copy delivered through the public data network or by fax are considered to be written form. In accordance with Section 42 (2), a pleading made by fax or in electronic form must be supplemented within 3 days by submitting the original counterpart or a written pleading with an identical wording. This is not required for a pleading in electronic form signed by recognised electronic signature or a pleading in electronic form under the special regulation, namely Act No. 300/2008 Coll., on electronic acts, personal numbers and authorised conversion of documents. The aforementioned Act regulates, amongst other things, the submission of documents by natural persons, natural persons operating a business and legal entities through data boxes as well as the entire information system of data boxes. Acts made through data boxes have the same effects as acts made in writing and signed.

Neither of the two forms, oral and written, markedly prevails in Czech procedural law. As mentioned above, pleadings are typically made in writing, following which a hearing is ordered where the parties' claims are presented orally. It is therefore possible to say that these principles are combined in Czech procedural law.

1.5 Principle of Directness

A differentiation is made between the principle of directness in objective and subjective sense. The principle of directness in objective sense means that when evidence is taken, the court uses means of evidence that lead to the most direct understanding of the facts of the case. For example, if there is a witness who perceived an event to be examined in the proceedings by his own senses, the court will hear that witness rather than one who has only hearsay (indirect) knowledge of the event. The principle of directness in

subjective sense means that the court may only take into consideration evidence it has taken and the latter is the only evidence which the court may evaluate. In literature, the principle of directness is taken to mean that the court is in a direct and personal contact with the parties to the proceedings.

If the principle of directness is understood in the latter sense, an exception to the requirement for a personal contact between the court and the party applies in cases where the party is represented by a proxy in the proceedings. In that case, the party is not required to appear at the hearing in person and its proxy acts on its behalf. Even where a party is represented by legal counsel, the court may decide that the party shall appear if the court wishes to hear it directly.

There are no other exceptions to the principle of directness in the objective and subjective sense as described above. The principle of directness is also applicable, for example, to appellate proceedings, where the court may not evaluate a certain piece of evidence differently unless it has taken such evidence again; thus, for example, the court may not draw conclusions from the testimony of a witness that would differ from the conclusions drawn by the court of first instance without hearing the witness again. For more on this, see paragraph 1.5.6. below. The jurisprudence of civil courts was inclined not to apply this procedure to documentary evidence. However, the case-law of the Constitutional Court considers that the principle of directness also applies to documentary evidence.

1.5.1 Appellate Courts and Taking Evidence

Appellate courts may take evidence. Nevertheless, the scope of such evidence is limited in that the facts of the case should always be evaluated by the court of first instance. Therefore, if it becomes evident in proceedings before an appellate court that the evidence taken should be supplemented to a major degree or that no evidence has been taken as yet in relation to a fact which is to be demonstrated, the appellate court sets the judgement of the first-instance court aside and refers the case back to the court of first instance for further proceedings. See Sections 213 (4), 219a (2) of the Code of Civil Procedure.

1.5.2 The Extent to What the Appellate Courts Allowed to Evaluate Evidence

Appeal is an ordinary remedy. As already mentioned, it is impossible to put forth new facts and identify new evidence in second-instance proceedings, with the exception of the situations set forth in Section 205a of the Code of Civil Procedure (amongst other things, facts or evidence that occurred after the promulgation of the ruling of the court of first instance). Thus, in this respect, Czech law follows the concept of an incomplete appellate regime (as opposed to cassation). However, under Section 213 of the Code of Civil Procedure, an appellate court is not bound by the facts of the case as ascertained by the court of first instance and is authorised to take evidence again. The appellate court may evaluate evidence differently from the court of first instance, but only if the given piece of evidence is taken again. If there are any doubts regarding the procedure

of the court of first instance, the appellate court has the duty to take evidence again. The appellate court may supplement evidence with evidence not taken before only based on the applicable exemptions from the “concentration” principle (see above), namely Section 205a, 205b and 211a of the Code of Civil Procedure. In addition, it is limited by the fact that it may not do so if the process of taking of such supplemented evidence would be too extensive or be concerned with a fact in respect of which no evidence has so far been taken or the evidence taken was absolutely inadequate. In this respect, there is an obvious intention to prevent the appellate court from becoming, in actual fact, a court of first instance (ASPI commentary).

1.6 Principle of Public Hearing

This is a constitutional principle in Czech law – see Art. 96 (2) of the Constitution and Art. 38 (2) of the Charter of Fundamental Rights and Freedoms. Both of the above legal rules refer to proceedings. In contrast, Section 6 (1) of the Courts and Judges Act and Section 116 (1) refer to a public hearing.

The principle of public hearing is enshrined in the guarantee of independence, impartiality and legal procedure of courts. Notwithstanding possible exceptions to this principle, the judgement must always be promulgated publicly (Section 6 (2) of the Courts and Judges Act).

As a rule, the principle applies in all matters except following. Exceptions are set forth in Section 116 of the Code of Civil Procedure, according to which the public may be excluded from a hearing or a part thereof only if hearing the case publicly would jeopardise classified information protected by a special law (Act No. 412/2005 Coll., on protection of classified information and security qualification), trade secrets, an important interest of the parties or morality. Nevertheless, certain individual may be allowed to participate even if the public has been excluded. Such persons must be advised of their duty to maintain confidentiality. Access to hearings may also be denied to minors and individuals with respect to whom there is a concern that they could disrupt the hearing. A special regulation of image and sound transmissions and visual recording in the course of court hearings is contained in Section 6 (3) of the Courts and Judges Act. Prior consent of the court is required for such acts. The court only needs to be aware of the fact that an audio recording is being made (its prior consent is not required).

In non-contentious court proceedings, hearings within the proceedings on replacing the consent of a representative of the Czech Bar Association to inspection of instruments (Section 337 of the Special Court Proceedings Act) and hearings within the proceedings on adoption are non-public if the court has satisfied an application for secrecy of adoption lodged by the adoptive parent or the adopted child (Section 444 of the Special Court Proceedings Act).

1.7 Independence and Impartiality of Courts and Judges

The principle of independence of courts in the institutional sense is enshrined in Article 81 of the Constitution, according to which judicial authority is exercised by independent courts in the name of the Republic. Independence of judges is a requirement following from Article 82 of the Constitution, which stipulates that judges shall be independent in the performance of their office and nobody may jeopardise their impartiality. Similarly, Art. 36 (1) of the Charter of Fundamental Rights and Freedoms stipulates the requirement for independent and impartial courts. The contents of impartiality are stipulated in Section 79 of the Courts and Judges Act, according to which judges are independent in exercising their office and are bound only by the law (author's supplement: judges are also bound by international treaties that have become part of the Czech legislation in accordance with Article 95 of the Constitution). The above provision also prohibits anybody to disturb and jeopardise the independence and impartiality of judges and lay judges. A guarantee of their independence can also be seen in the fact that they are appointed by the President of the Czech Republic in perpetuity (for 10 years in the case of the judges of the Constitutional Court), where a judge may be removed from his/her office only by an independent disciplinary body.

1.8 Principle of Statutory Court and Statutory Judge

This principle applies at several levels. First, courts are established by law, second, the law determines the competence of courts in relevant (civil and criminal) codes of procedure, and third, the division of work at individual courts is given by the schedule of work issued for a calendar year by the presiding judge after discussing it with the judicial board. The schedule of work is publicly accessible.

1.9 Principle of Procedural Economy

Under this principle, court proceedings, i.e. the protection of rights, are to be conducted speedily, effectively and without unnecessary costs. The time aspect is accentuated in Art. 38 (2) of the Charter of Fundamental Rights and Freedoms, as well as in Section 100 of the Code of Civil Procedure; effectiveness, together with speed, is also mentioned in Section 6 of the Code of Civil Procedure.

2 General Principles of Evidence Taking¹⁰

2.1 Free Assessment of Evidence

Czech civil process is based on the principle of free evaluation of evidence, which is explicitly stipulated in Section 132 of the Code of Civil Procedure. The judge evaluates evidence freely, according to his discretion and internal belief, each piece of evidence individually and all evidence in mutual context. In doing so, the judge must carefully consider everything that was found during the proceedings, including what the parties

¹⁰ Main source for this chapter is Alena Winterová et al. *Civilní právo procesní* (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 59-82.

stated. This principle is a display of respect for the judge's abilities and judgment. At the same time, all means that can be used to ascertain the facts of the case can serve as evidence. A non-exhaustive list of means of evidence is contained in Section 125 of the Code of Civil Procedure. Under Section 136, the judge's consideration can be used to a limited extent if the amount of claims can be ascertained only with disproportionate difficulties or cannot be ascertained at all (for example, in the case of appropriate satisfaction for intangible damage).

The principle of free evaluation of evidence applies exclusively to the evaluation of veracity or credibility of evidence. This includes, for example, expert reports. On the other hand, the principle is not applicable to evaluation of the weight of any piece of evidence in the sense of its relevance for clarifying the facts of the case. Weight evaluation is a matter of legal assessment rather than free evaluation of evidence in the sense of its veracity. Similarly, free evaluation is not applicable to evaluation of legality of the manner in which evidence was obtained.

The court is in no way bound by the parties' proposals in evaluation of evidence. The same is true of identified means of evidence because under Section 120 (2), the court may take evidence other than adduced by the parties. For more details, see paragraph 1.1.3. The only indication of such rules is the determination of strength of a public instrument as evidence pursuant to Section 134 of the Code of Civil Procedure, according to which instruments issued by the courts of the Czech Republic or other governmental authorities within the scope of their powers, as well as instruments that are declared public by special regulations, attest to the fact that they constitute an order or declaration of the authority that issued the instrument and, unless proven otherwise, also to the veracity of the fact which is certified or confirmed therein.

2.2 Relevance of Material Truth

This principle is not expressly regulated in Czech civil procedure, but is apparent in the overall design of the system of dispute resolution. The principle of material truth operates in that civil procedure is designed to make it possible to ascertain the actual facts of the case. There are no formal obstacles to this process. However, it cannot be expected that the goal is to ascertain the entire truth – this would be unrealistic. Consequently, what matters is not the true state of facts in all cases but the possibility of ascertaining the true state of facts without formal obstacles. Jurisprudence associates material truth with objective truth which the court attempts (and should attempt) to ascertain and use as a basis for its decision.

A party has the duty to make allegations and to adduce evidence, or the burdens related thereto. There is a certain degree of controversy in the understanding of the veracity duty. Czech civil procedure does not expressly impose the veracity duty on parties to proceedings. The duty was historically stipulated in Czech law; nevertheless, it was eliminated, at least formally, as a result of a series of amendments. However, this conclusion is entirely unacceptable as it would allow the parties to state untrue facts or deny true facts. According to literature, a violation of the veracity duty is penalised

especially in the sphere of free evaluation of evidence. Any violation of the veracity duty may diminish trustworthiness of the submissions of facts by the respective party and can ultimately result in a lost dispute.¹¹ The parties need not indicate facts that adversely affect their honour or could have criminal-law consequences for the party concerned. However, this limitation is not expressly specified in Czech civil procedure.

Taking into account the temporal aspects, parties can bring forward new facts and adduce evidence only before the court of first instance. The court of second instance disregards new facts or evidence with the exception of situations which are exhaustively listed (a complete list of such situation is provided in paragraph 1.1.2). In addition, facts can be submitted and evidence adduced in the first-instance proceedings only until the pre-trial hearing is closed (if any), or until the end of the first hearing *in rem* (for more details, see paragraph 1.1.2).

3 Evidence in General

3.1 Principle of Free Evaluation of Evidence

The Czech procedural law does not distinguish among various manners of taking evidence, but rather among various means of evidence. Nonetheless, no means of evidence is attributed a greater probative value than any other means of evidence. Statutory rules containing any such provision would violate the principle of free evaluation of evidence. In accordance with the principle of free evaluation of evidence, the Code of Civil Procedure imposes no duty on the judge to attribute a greater value to certain means of evidence than to any other means of evidence. The court evaluates the individual pieces of evidence taken according to its free discretion and in their mutual context, taking account of all the facts ascertained in the proceedings. The court may only evaluate evidence it has taken itself. Consequently, the court may not refuse examination of a witness on the grounds that the court considers the witness's testimony *a priori* unreliable due to his or her close relationship with a party to the proceedings. The court must examine such a witness unless there are other grounds justifying refusal to take such evidence (for example, where the examination concerns an irrelevant fact or a fact that, while being relevant, has already been proven by other means). Subsequently, the court takes account of the risk of distortion of the witness testimony due to the witness's close relationship with one of the parties in evaluating the credibility of the witness's testimony.

The principle of free evaluation of evidence also applies to evaluation of expert reports. Naturally, the court cannot assess the factual accuracy of expert reports since it lacks the necessary expertise; however, the court can evaluate the persuasiveness and completeness of a report (i.e. whether it gives answers to all questions asked), its logical justification and the consistency of the report's conclusions with other evidence taken.

¹¹ For details, see Petr Lavický, Eva Dobrovolná, Radovan Dávid, Miloslav Hrdlička, Radim Chalupa and Tereza Pondikasová, *Moderní civilní process*, Brno: Masarykova univerzita, 2014.

Similarly to the laws of other jurisdictions, the Czech civil procedure applies statutory rebuttable presumptions in evidence taking. These are especially important where private or public instruments (documents) are taken as evidence, and their authenticity or accuracy is presumed subject to certain conditions. However, this certainly does not mean that documentary evidence has automatically greater value than other means of evidence. The only effect is that the party against whom the presumption is invoked must contest the basis of the presumption or prove that the opposite to what is presumed is true.

Sometimes it is noted that the probative value of public instruments is a remnant of a legal theory of evidence-taking.¹² However, this opinion cannot be considered convincing for the reasons stated in the previous answer. Therefore rules concerning evaluation of public documents cannot be regarded as rules restricting the principle of free evaluation of evidence.

Civil procedure code sometimes obliges the courts to use certain means when taking evidence. For example, in proceedings on legal capacity, the court must in all cases appoint an expert to examine the person whose legal capacity is to be restricted. In proceedings on issuing a payment order under a bill of exchange (as well as a promissory note), the plaintiff must submit the bill of exchange, etc. In certain cases, the duty to use any specific means when taking evidence is derived from established case-law rather than stipulated by the law. For example, where the court is to factually divide a plot of land in proceedings on cancellation and settlement of joint property ownership, the court must in each case appoint an expert to delimit the boundaries.

3.2 Standard of Proof

The Code of Civil Procedure does not expressly stipulate to what degree the judge must be convinced that a certain submission of facts is true. The general provisions of the Code of Civil Procedure, which perceive the purpose of civil court proceedings in the protection of (subjective) rights and consequently emphasise reliable establishment of the facts of the case (Sections 1 and 6 of the Code of Civil Procedure) indicate that the Czech civil procedure is governed by the principle of subjective proof standards. Certain fact can only be considered proven if the judge considers the fact to be virtually certain, based on his free personal belief. Both the theory and practice deny that hundred-percent certainty in mathematical or statistical terms would be required since such a degree of certainty is only rarely achievable; more precisely, absolute certainty is not required since that would be beyond human abilities.¹³ If such a requirement were imposed, most decisions would be based on the rules of burden of proof, rather than on the facts of the case ascertained through evidence-taking.¹⁴ Consequently, it suffices if

¹² Vilém Steiner, *Občanské právo procesní v praxi soudů* (Civil procedure law in courts' practice). Orbis: Prague, 1958, p. 89.

¹³ Josef Macur, *Postmodernismus a zjišťování skutkového stavu v civilním soudním řízení* (Postmodernism and Establishing Facts in Civil Procedure). Brno: MU, 2001, p. 134, 145.

¹⁴ Josef Macur, *Důkazní břemeno v civilním soudním řízení* (Burden of proof in civil procedure). Brno: Masarykova univerzita, 1995, p. 107.

the judge becomes convinced with virtual certainty that a certain allegation is true, i.e. where the judge's belief excludes any reasonable doubts as to the existence or non-existence of the fact that is to be proven.¹⁵ It can be said, that a high degree of probability corresponding to virtual certainty is sufficient. If the judge is not convinced that a party's allegation of fact is true to the degree of virtual certainty, the fact cannot be considered proven.¹⁶ This criterion is also cited in several court rulings (for example, we refer to recent ruling of the Supreme Court File No. 28 Cdo 3459/2013 of 8 January 2014, where the court states as follows: "It is not required that the truth be established with absolute certainty, but rather with a great degree of probability of the relevant facts neighbouring on virtual certainty").

The Constitutional Court of the Czech Republic, apparently influenced by the objective theories of proof standards, ruled in its recent judgement File No. I. ÚS 173/13 of 20 August 2014 that "a fair balance between conflicting legitimate interests will best be achieved by setting high degree of probability as a criterion for proving that a person enjoying full legal capacity acted under a mental disorder preventing the person from performing legal acts". Considering that the conclusion is inconsistent with the current conclusions derived both in theory and practice, it is mostly considered absolutely incorrect and erroneous and it can be expected that the Constitutional Court will abandon it in its future rulings. Consequently, such an isolated opinion cannot lead to the conclusion that the subjective approach to the proof standard, which emphasises the judge's belief to the degree of virtual certainty, has been abandoned and that a high level of probability should suffice.

Nonetheless, in certain cases, the Code of Civil Procedure does not require full evidence and accepts if the given facts have merely been documented. For example, for ordering a preliminary injunction, it is sufficient if the relevant facts have been documented (Section 75c (1) of the Code of Civil Procedure). Contrary to full evidence which requires the judge to be convinced to the degree of virtual certainty, predominant probability suffices where facts are to be documented.

3.3 Means of Proof

3.3.1 List of Means of Proof

The Code of Civil Procedure first expressly lists the individual means of evidence in Section 125 and explicitly defines the means of evidence in the subsequent provisions. The expressly listed means of evidence include examination of witnesses; expert report; documentary evidence; inspection; and examination of a party. Nonetheless, the list is not exhaustive. Section 125 of the Code of Civil Procedure itself conceives the list as non-exhaustive as said provision stipulates that any means allowing the establishment of

¹⁵ Josef Macur, *Postmodernismus a zjišťování skutkového stavu v civilním soudním řízení* (Postmodernism and Establishing Facts in Civil Procedure). Brno: MU, 2001, p. 148.

¹⁶ See Josef Macur, *Postmodernismus a zjišťování skutkového stavu v civilním soudním řízení* (Postmodernism and Establishing Facts in Civil Procedure). Brno: MU, 2001, in particular pp. 145-155 and 169-171.

the facts of the case can be used as evidence. Accordingly, evidence may be taken using photographs, audio and visual recordings, confrontation of examined persons or means of evidence otherwise typical in criminal procedure (for example, re-enactment of the harmful event may be used as evidence in a dispute on compensation for damage caused by a traffic accident). Given that the Code of Civil Procedure does not provide for these additional means of evidence, it naturally does not prescribe the manner of taking this evidence. In such a case, the judge must use his discretion and conduct the process of taking evidence.

3.3.2 Restriction of Means of Proof

The general rule holds that evidence must be taken so as to prevent any violation of a non-disclosure duty or protection of classified information (Section 124 of the Code of Civil Procedure). This means that, for example, an attorney-at-law or tax adviser may not be examined as a witness as to circumstances covered by his non-disclosure duty towards his client unless this duty on the part of the attorney-at-law or tax adviser is waived. Similarly, medical documentation cannot be used as evidence without the patient's consent.

The general prohibition is supplemented by certain specific prohibitions applicable to the individual means of evidence.

For example, a party to proceedings cannot be examined as a witness (Section 126 (1) of the Code of Civil Procedure). Similarly, a person holding the office of governing body or member of the governing body of a legal entity may only be examined as a party (Section 126 (4) of the Code of Civil Procedure). For example, an executive director of a limited liability company can only be examined as a party and not as a witness.

Examination of parties is one of the expressly listed means of evidence (Section 131 of the Code of Civil Procedure). However, its use is subject to two conditions. Firstly, taking of such evidence can only be ordered where the fact to be proven cannot be proven by any other means. This means that evidence in the form of examination of a party is subsidiary to other means of evidence. Secondly, the party to be examined must give its consent. This condition was discussed and approved as compliant with the Constitution by the Constitutional Court in its judgement File No. Pl. ÚS 37/03.

3.3.3 Examination of a Party

Examination of a party is listed as one of the means of evidence in Section 131 of the Code of Civil Procedure. Nevertheless, distinction must be made between such examination and submissions of facts by a party to the proceedings. While submissions of facts are intended for a party to submit allegations of facts in the proceedings, evidence by means of examination of a party is not intended to produce new submissions, but rather to prove the accuracy of previous submissions of facts. The court shall order examination of a party as evidence only where the party lacks evidence

(i.e. where the fact that is to be proven by the examination cannot be proven by any other means) and only if the party to be examined gives its consent. Where both preconditions are met, the court orders that this evidence be taken. In such a case, the party is obliged to appear in person and give true and complete testimony. A party may be examined on any relevant fact. However, unlike a witness, the party does not testify under the penalty of perjury. The examination itself is carried out similarly to examination of a witness; consequently, the party being examined must be prepared to answer truly and fully potential questions posed by the adversary. As mentioned above, the penalty of perjury (where the testimony is found to be false) is subject to procedural – rather than criminal – law, which means that the court shall take account of this fact in evaluating other evidence taken.

Evaluation of a testimony given by a party to the proceedings is governed by the same rules as evaluation of other results of evidence-taking.

The Czech procedural law does not envisage testimony under oath, neither by parties, nor by witnesses.

3.3.4 Proof of Rights Arising Out of a Cheque or Bill of Exchange

The Code of Civil Procedure provides for a payment order based on a bill of exchange (cheque) in Section 175. The court may only issue such an order if the plaintiff has submitted the original counterpart of the bill of exchange or the cheque and there are no reasons to doubt its authenticity. The bill of exchange or cheque can only be replaced with a court resolution on redemption thereof.

3.4 Duty to Deliver Evidence

In contentious proceedings, each party to the proceedings must allege and prove the facts covered by the burden of proof borne by that party. The party must designate and specify the evidence adduced with adequate certainty so that it is clear what facts are to be proven by the evidence and so that the court is able to procure the evidence (e.g. the identity of the witness to be summoned or specification of the file to be requested by the court from a specific authority, etc.). Where an instrument (document) or thing in the possession of a party is to be taken as evidence, the party must produce it to the court. There is an opinion in practice that compliance with this duty can be enforced by imposing a procedural fine.¹⁷ However, such procedure is doubtful since only “purely procedural”, rather than proprietary, penalty may be imposed in case of a party’s failure to produce an instrument it has in its possession that is to prove facts covered by the burden of proof borne by the party. The only consequence of the party’s omission can thus lie in the fact that the party will not be able to prove the relevant fact and will thus worsen its own prospects to succeed in the dispute.

¹⁷ Jaroslav Bureš, in Ljubomír Drápal, Jaroslav Bureš, a kol. *Občanský soudní řád I, Komentář* (Civil Procedure Code I, Commentary). Prague: C. H. Beck, 2009, p. 904.

The situation is more complex where the party to the proceedings that bears the burden of proof alleges a certain fact but cannot prove the fact by any means other than by using an instrument in the other party's possession. Procedural literature¹⁸ advocates a solution where the court imposes on the party that does not bear the burden of proof the duty to provide explanation within which the party must produce the instrument. This only applies on the condition that the party bearing the burden of proof objectively cannot prove the alleged fact by any other means and the adversary is able to produce the instrument without any inconvenience. Non-compliance with the explanation duty can only be penalised within evaluation of evidence; where it can be assumed that the party failed to submit the instrument because it could prove the accuracy of the adversary's allegations, the court may conclude, in the framework of free evaluation of evidence, that the facts submitted by the party bearing the burden of proof are true.

Third parties must produce an instrument or thing they have in their possession. Compliance with this duty can be enforced by imposing a procedural fine.

4 General Rule on the Burden of Proof

4.1 Non-Liquet Situation

Similar to the legal systems of other Central European jurisdictions, the Czech jurisprudence draws a distinction between subjective and objective burden of proof. Subjective burden of proof is a procedural burden in the true sense of the word since it reflects the stimulating function attributed to burdens of proof in general. Subjective burden of proof determines which party has to take steps to prove certain facts, i.e. which party is to adduce evidence to prove the facts. Accordingly, this type of burden is called a burden of "conducting evidence". Objective burden of proof applies in the event of *non liquet* and determines which party is to bear negative consequences of a failure to prove a certain fact.

The law adopts two approaches to events of *non liquet*. The law either expressly stipulates which party bears the negative consequences of a failure to prove a certain fact or, much more frequently, does not stipulate any explicit provisions.

Explicit determination of the party which bears the negative consequences of a failure to prove a certain fact is quite exceptional. Nonetheless, where the law stipulates such a rule, there is no room for further deliberations and the court must assess the consequences of the event of *non liquet* in accordance with the rule.

As an example of such a provision, we refer to Section 916 of the Civil Code:

"If, in proceedings on determination of a parent's duty to maintain and support his child or another ancestor's duty to maintain and support a minor child who has not yet

¹⁸ See Josef Macur, *Kompenzace informačního deficitu procesní strany v soudním sporu*. Brno: Masarykova univerzita, 2000; Josef Macur, *Vysvětlovací povinnost strany nezátížené důkazním břemenem v civilním soudním řízení (Explanatory duty in the civil proceedings)*. *Právní rozhledy*, 2000, č. 5, p. 200.

acquired full legal capacity, a person obliged to provide maintenance and support fails to duly prove to the court his income by producing all instruments and other underlying documents allowing the assessment of his financial standing or to allow the court to ascertain other facts required for its decision by making available data protected under a special legal regulation, it holds that the average monthly income of the given person equals twenty-five times the minimum subsistence allowance for an individual under a special legal regulation.”

Where explicit provisions are lacking, Rosenberg’s **normative theory** applies. The Supreme Court expressly adopts the normative theory in its case-law (resolution File No. 22 Cdo 3108/2010 of 26 February 2013).

4.2 Exemptions from the Burden of Proof

Pursuant to Section 121 of the Code of Civil Procedure, facts that are generally known or that the court learned from its official activities, as well as legal regulations published or announced in the Collection of Laws need not be proven (see section 4.3).

Where a certain fact is presumed based on a rebuttable presumption, the court considers the fact proven unless the opposite is revealed in the proceedings (Section 133 of the Code of Civil Procedure). Accordingly, facts covered by a statutory presumption are not proven through evidence-taking. Nonetheless, the factual basis for applicability of the given presumption must be proven.

The Code of Civil Procedure envisages situations where the basis of a claim has been proven beyond any doubt, but the amount of the claim can only be determined with unreasonable difficulties or even cannot be determined at all. In such a case, the law allows the court to its discretion to determine the amount of such claim (Section 136 of the Code of Civil Procedure).

Finally, distinction must be drawn between contentious proceedings, governed by the adversarial principle, and non-contentious proceedings, governed by the inquisitorial principle. While in non-contentious proceedings, the court must take evidence to prove certain fact even where the parties agree on its existence or non-existence, as appropriate, contentious proceedings require that evidence be taken only to prove facts that are disputed between the parties (Sections 6 and 120 (3) of the Code of Civil Procedure).

4.3 Principle *iura novit curia*

The principle *iura novit curia* also applies in Czech law. It means that the court is supposed to know the applicable laws. The principle is reflected in Section 121 of the Code of Civil Procedure, which stipulates that legal regulations published or announced in the Collection of Laws of the Czech Republic are not subject to the burden of proof. Nevertheless, this rule cannot be interpreted literally; otherwise, the principle of *iura novit curia* would not apply to legal regulations that form part of Czech law but were

published earlier in the former Czechoslovak Collection of Laws (i.e. before the breakdown of the federal republic in the end of 1992).¹⁹ Accordingly, not only the legal regulations published in the current Collection of Laws, but also legal regulations published in the former collections are not subject to the burden of proof. The same applies to international treaties, which are currently published in the Collection of International treaties, rather than in the Collection of Laws.

On the contrary, the cited provision does not apply to regulations that are neither published nor announced in the said collections. These include legal regulations of lesser legal strength, such as municipal decrees. Under the former legislation, the jurisprudence inferred that the principle of *iura novit curia* did not apply to foreign laws. Consequently, the contents and existence of such legislation was subject to the burden of proof in the proceedings (for example, the Supreme Court stated in its opinion R 26/1987 that the court was competent to appoint an expert in the area of legal relations with foreign jurisdictions, request information from the Ministry of Justice or impose on a party the duty to produce the wording of the foreign legislation on which it relied). However, new regulations governing private international law and procedural law came into effect on 1 January 2014 in the framework of the recodification of private law. Section 23 of Act No. 91/2012 Coll., on private international law, stipulates that “unless other provisions hereof indicate otherwise, foreign laws applicable under this Act shall be applied even without a motion and in the same manner in the relevant jurisdiction”. The cited Act further imposes an express duty on the court to ascertain the contents of foreign laws *ex officio* even without a motion and adopt all necessary measures to ascertain the foreign laws. It follows from the above that under the currently applicable legislation, the court, while not being required to know foreign law, must acquaint itself *ex officio* with its content and apply the law in the same manner as a foreign court would do.

4.4 Statements of Parties

Under Section 114a (2)(a) of the Code of Civil Procedure, in the pre-trial phase, the court may request the plaintiff to submit his written statement on the case and documentary evidence on which the plaintiff relies. Similar request may be addressed to the defendant under Section 114b of the Code of Civil Procedure. The said provisions allow the court, instead of issuing a request under Section 114a (2)(a) of the Code of Civil Procedure, to request the defendant to submit his written statement and either acknowledge the claim to the full extent or describe the relevant facts and adduce the documentary evidence on which he relies in its defence or identify evidence in support of its allegations. In terms of its contents, said request is identical to that issued under Section 114a (2)(a). Nonetheless, the essential difference lies in the consequences, should the defendant fail to respond to the request. Under Section 114b (5) of the Code of Civil Procedure, if the defendant fails to provide his statement in due time without serious reasons or notify the court of any obstacles preventing the defendant from doing so, it holds that the defendant has acknowledged the claim enforced against him through

¹⁹ See Alena Winterová et al. *Civilní právo procesní* (Civil procedure law). 7th edition. Prague: Linde, 2014, p. 226-227.

the action. Accordingly, the defendant's inactivity gives rise to a fiction of acknowledgement of the claim and the court issues a judgement on acknowledgement (Section 153a (3) of the Code of Civil Procedure). The fiction of acknowledgement of a claim is often criticised on the grounds that acts whereby a party exercises its conduct over the case ("disposition") cannot be the subject of a fiction; on the contrary, a party should be free to decide whether or not to perform any such act. If the legislator wished to associate certain consequences with a party's failure to respond to the court's request, the legislator should have applied the concept of judgement by default, which is also used in other jurisdictions and is based on entirely different assumptions than a judgement based on fictitious acknowledgement of a claim.²⁰

4.5 Incompleteness of Submissions of Facts or Proposed Evidence

If the submissions of facts or the evidence adduced are incomplete, the court must advise the parties accordingly and issue directions for the parties to supplement their submissions of fact or evidence adduced. The Code of Civil Procedure contains more detailed provisions in this respect in Section 118a: the first paragraph concerns incomplete submissions of fact; the second paragraph concerns a situation where the necessity to make additional submissions of fact or adduce further evidence arises from the judge's different opinion; and the third paragraph provides for a situation where the party's submissions of facts are complete but the party failed to adduce evidence in support of all the disputed facts. While the wording of Section 118a of the Code of Civil Procedure refers to the court's duty to provide advice during a hearing, the described procedure applies, in fact, to the proceedings as a whole. Indeed, if a party loses a case due to incomplete submissions of facts or evidence adduced without having been requested by the court to provide additional submissions or evidence, the resulting decision is a surprising (unpredictable) court decision violating the right to fair trial.

To this problem see, e.g., judgement of the Constitutional Court File No. I. ÚS 2014/10 of 7 April 2011, or judgement of the same court File No. I.ÚS 2482/13 of 26 May 2014: „32. Violating the right to a fair trial may also consist in issuing a so-called surprising decision by a higher instance court, which means a decision which could not be anticipated on the basis of established facts (Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). This takes place, in particular, when one party to the proceedings submits argument A, the second party to the proceedings submits argument B, and the first instance court identifies with one of the parties; nevertheless, the appellate court holds, without any warning, on the basis of argument C (by either a quashing or upholding decision, or a decision overturning the first instance court decision), without pointing out the possibility of any such arguments to the parties. In the event that the higher instance court adopts a different legal view than the one that served as the basis for the decision of the first instance court, it must, in principle, allow the parties to the proceedings to submit a statement on the new legal view or possibly to

²⁰ Josef Macur, Rozsudek na základě fikce uznání nároku podle § 114b OSŘ (Judgement based on fictitious acknowledgement of a claim pursuant to § 114b CPC). *Bulletin advokacie*, 2002, č. 2, p. 28-36. Petr Lavický, Zmeškání účastníka a fikce dispozičních procesních úkonů (Omission of party and fiction of dispositional procedural acts). *Právní fórum*, 2009, č. 10, p. 401-413.

furnish evidence that was not relevant in relation to the existing legal view (see Judgment file reference II. ÚS 1835/12, issued on 5 September 2012 or Judgment file reference II. ÚS 4160/12, issued on 23 April 2013). Above all, this applies when (as mentioned above) the higher instance court applies a legal view which was not held by either party or by the first instance court and thus was not presented in the case at hand. In this respect, it also needs to be pointed out that it is inadmissible, in principle, that the appellate court, wishing to derogate from the evidence assessment as performed by the first instance court, assesses such evidence differently without reiterating it [see Judgment file reference ÚS 3725/10, issued on 3 August 2011 (N 139/62 SbNU 175); or the ECHR Judgment in the case of C. v. Finland issued on 9 May 2006, No. 18249/02, paragraph 67 I association with paragraphs 57-58]. On the other hand, it needs to be pointed out that not every decision of the appellate court derogating from the first instance court decision is a surprising decision. The fact that the appellate court may assess the matter differently from the first instance court is not surprising on its own; in fact, it is an inherent element of the appellate proceedings. As a result, other circumstances (see above) are essential to be able to speak of a surprising decision.“

4.6 Deadline for Submitting New Facts and Adducing Evidence

As mentioned above, if it is revealed in the proceedings that a party has failed to adduce evidence in support of all its disputed allegations, the court has the duty, under Section 118a (3) of the Code of Civil Procedure, to request the party to identify such evidence without undue delay and to advise the party of the possible consequences of non-compliance with the request. The negative consequence lies in losing the case. Where a party fails to adduce evidence to prove a fact covered by its burden of proof, such a fact might remain non-clarified (*non liquet* situation) and the court consequently renders a decision against the party, based on the rules of burden of proof.

The deadline for submitting new facts and adducing evidence in contentious proceedings is stipulated, in general, in Section 118b of the Code of Civil Procedure. The deadline varies, depending on whether or not the proceedings included a pre-trial hearing (Section 114c of the Code of Civil Procedure). Where a pre-trial hearing was held in the case, new facts must be submitted and evidence adduced at the latest by the end of the hearing or expiry of the time limit set by the court, as appropriate. This means that the parties may no longer submit new facts or adduce evidence at the first hearing held in the case unless one of statutory exemptions applies. New facts and evidence are only permissible in the following cases:

- Where they aim to cast doubts as to the credibility of certain means of evidence already taken;
- Where they arose only after the pre-trial hearing;
- Where the party was unable to submit them without any fault on its part.

Where no pre-trial hearing was held, new facts may be submitted and evidence adduced by the end of the first hearing or expiry of a time limit set by the court, as appropriate. The same exemptions where new facts and evidence are permitted as those specified above apply in this case (the only difference being that the second exemption refers to

facts and evidence that occurred or arose only after the first, rather than pre-trial, hearing).

In both cases, new facts or evidence are also permitted if submitted by a party at request of the court issued under Section 118a (1) to (3). Indeed, it would be absurd if the court could request the parties to provide additional submissions of facts and adduce additional evidence and subsequently disregard such facts and evidence on the grounds that a pre-trial hearing, or the first hearing, as appropriate, has already been held.

The provisions stipulating the prescription periods, after expiry of which no new facts or evidence are permitted, is considered extremely inadequate both in theory and in practice. The essential issue lies in the fact that the provisions prevent full and accurate clarification of the facts of the case. The provisions apply automatically irrespective of the state or complexity of the proceedings and whether or not additional submissions of facts or evidence adduced will affect the length of the proceedings. In practice, various ways of circumventing the legal provisions are sought. This accurately illustrates the state of Czech civil procedure: a judge who strives to fully and accurately clarify the facts of the case has to find ways to avoid the rules laid down by the Code of Civil Procedure.

4.7 Collection of Evidence by the Court on its Own Initiative

Section 120 (2) of the Code of Civil Procedure authorises the court to take, *ex officio*, evidence that has not been adduced by the parties. This authorisation is not limited to certain types of proceedings, but is rather applicable generally. The only prerequisite for its application is the requirement that the facts that are to be thus proven must follow from the contents of the file. This follows from the adversarial principle; the court is not competent to take evidence *ex officio* concerning any facts that none of the parties has alleged and that have not been revealed during the proceedings either.

Non-contentious proceedings are basically governed by the inquisitorial principle. Naturally, in the latter proceedings, the court plays a greater role than in contentious proceedings. Pursuant to Sections 20 (1) and 21 of the Special Court Proceedings Act, the court has the duty to ascertain all facts relevant for its decision in such cases, without being limited by the facts alleged or evidence adduced by the parties.

5 Written Evidence

5.1 Concept of a Document in Czech Legal System

The Czech legislation does not define the notion of “instrument” (document). Instruments (or deeds) are generally any documents that provide certain information and are embodied in a movable medium that can be submitted to the court, typically on

paper.²¹ If the given document cannot be submitted to the court because of its form, the evidence in question will not be taken by means of an instrument, but rather by inspection.

A video or audio recording is not deemed an instrument (document) within the aforesaid meaning. However, given that any means that can serve to establish the facts of the case can be used as evidence pursuant to Section 125 of the Code of Civil Procedure, nothing prevents the court from taking a video or audio recording as evidence in civil proceedings. Since the Code of Civil Procedure stipulates no procedure for taking such evidence, the last sentence of Section 125 of the Code of Civil Procedure will apply and the method of taking evidence will be determined by the court.

An instrument is a document in tangible form. Documents in intangible form are mentioned in Section 3026 (1) of the Civil Code, which stipulates that if permitted by the nature of the document, the provisions of the Civil Code on instruments also apply analogously to other documents regardless of their form. Based on that provision, the rules of taking evidence by means of public instruments and private instruments also apply to electronic documents.

Besides the case described above where the original document is in electronic form, there are, of course, cases where the original has the form of an instrument and only its copy is electronic. If the document was transferred from physical to electronic form in the manner prescribed by Act No. 300/2008 Coll., on electronic acts and authorised conversion of documents, according to Section 22 of the Act, its electronic form has the same legal effects as the physical original. Said provision also explicitly states that if a document is to be presented to the court in physical form, especially with a view to being used as an underlying document for the court ruling, this duty is fulfilled by presenting its electronic conversion.

Signature of electronic documents is regulated by Act No. 227/2000 Coll., on electronic signature. The Act conceives electronic signature as data in electronic form that are attached to or logically connected with a data message and serve as a method of unambiguous verification of identity of the person who attached the signature in respect of the data message. Furthermore, the legislation differentiates among guaranteed electronic signature, electronic mark and recognised electronic signature.

Guaranteed electronic signature is an electronic signature that complies with the following requirements:

- it is unambiguously connected with the person attaching the signature;
- it enables identification of the person attaching the signature in respect of the data message;

²¹ Alena Winterová et al. *Civilní právo procesní (Civil procedure law)*. 7th edition. Prague: Linde, 2014, p. 240; David, L. in David, L. – Ištváněk, F. – Javůrková, N. – Kasíková, M. – Lavický, P. et al. *Občanský soudní řád. Komentář (Civil procedure code. Commentary)*. Prague: Wolters Kluwer, 2009, p. 589; Fiala, J. in Handl, V. – Rubeš, J. *Občanský soudní řád (Civil procedure code. Commentary). Komentář*. Praha: Panorama, 1985, p. 597.

- it was created and attached to the data message by means that the person attaching the signature can keep under his/her exclusive control;
- it is attached to the data message to which it pertains in such a manner that any subsequent modification of data can be determined.

Electronic mark means data in electronic form that are attached to or logically connected with a data message and comply with the following requirements:

- they are unambiguously connected with the person attaching the signature and enable his/her identification by means of a qualified system certificate;
- they were created and attached to the data message by means intended for the creation of electronic marks that the person marking the message can keep under his/her exclusive control;
- they are attached to the data message to which they pertain in such a manner that any subsequent modification of data can be determined.

Recognised electronic signature means:

- a guaranteed electronic signature based on a qualified certificate issued by an accredited certification services provider and containing data enabling unambiguous identification of the person attaching the signature;
- a guaranteed electronic signature based on a qualified certificate issued by a certification services provider established outside the territory of the Czech Republic if the qualified certificate was issued within a service entered in the list of credible certification services as a service for the provision of which the certification services provider is accredited or a service supervised based on EU regulations.

5.2 Authenticity and Accuracy of Documents

Where instruments are taken as evidence, they must be evaluated as to their authenticity and accuracy. An instrument is authentic if it originates from the person specified therein as its issuer. Otherwise, it is a non-authentic, falsified instrument. Accuracy means the correctness of contents. An instrument is accurate if its contents correspond to reality.

The application of presumptions of authenticity and accuracy differs depending on whether the instrument in question is a public or private instrument. For more details in this respect, see next chapter.

5.3 Public and Private Documents

Differentiation between private and public instruments, as well as the related procedural consequences, has always been provided primarily by the Code of Civil Procedure (cf., in particular, its Section 134). However, since the new Civil Code entered into effect, this matter has also been regulated by Sections 565 to 569 of the Civil Code. The explanatory report on the new Civil Code notes that these provisions of public law have no real significance for private legal relationships. The rules contained in Sections 565

to 569 of the Civil Code are therefore intended to specify the effects of private and public instruments in private relationships among individuals. However, in spite of the legislature's intention, only the last of Sections 565 to 569 applies to the legal effects of private and public instruments in private-law relationships. The remaining provisions are concerned with evidence-taking and, therefore, are not substantive but rather procedural in nature. The rules embodied in Sections 565 to 568 of the new Civil Code are thus applicable in the process of taking evidence by means of instruments (documents) in civil court proceedings. In this sense, they serve as an addition to Section 134 of the Code of Civil Procedure, which deals only very briefly with the probative value of instruments and the related presumptions. However, in systemic terms, it is highly inappropriate that such rules are contained in the Civil Code rather than in the Code of Civil Procedure.

In respect of certain cases, the Civil Code stipulates statutory rebuttable presumptions of authenticity and accuracy of documents. The Code distinguishes, in this respect, whether the instrument at hand is a public or private instrument and whether the instrument has been signed or not. In addition, certain presumptions of fact also apply where instruments are taken as evidence.

Public instruments are primarily instruments issued by public authorities within the limits of their powers. A public authority is a legislative notion introduced by Section 12 of the Civil Code to describe authorities exercising public powers. Public powers may be exercised not only by governmental authorities, but also by bodies of local and regional government. The law may also delegate the exercise of public powers on private individuals and legal entities. An instrument will have the nature of a public instrument only if it is a result of an exercise of public power. Consequently, if the State, acting through the competent organisational component, enters into a private contract, the instrument in which the wording of that contract is incorporated will not have the nature of a public instrument because the instrument in question is not a result of an exercise of public power. Another feature of a public instrument lies in the fact that it was issued by a public authority within the limits of its powers. If such limits are exceeded, the document will not only not be a public instrument, but the act in question will also be considered as if not taken; a lack of powers renders the given act null and void (non-existent). Finally, a public instrument must not be vitiated by defects as a result of which it is deemed not to be a public instrument. Along with lacking powers, an act of a public authority may also be rendered null and void (non-existent), e.g., by clear inherent contradiction in the given decision or by the fact that the performance ordered is factually or legally impossible. Public instruments are thus, for example, decisions of courts or administrative authorities, records of hearings, etc. For further examples of public instruments, see below the section concerning case-law.

An instrument is also a public instrument if so denoted by the law. This is true, e.g., of a driving license pursuant to Section 103 (1) of Act No. 361/2000 Coll., on road traffic, of school certificates, diplomas and vocational certificates pursuant to Section 28 (7) of Act No. 561/2004 Coll., on schools, of university diplomas and attachments thereto pursuant to Section 57 (7) of Act No. 111/1998 Coll., on institutes of higher learning,

and of some of the most frequent public instruments, i.e. notarial deeds and their counterparts, extracts from notarial deeds and authentication deeds (Section 6 of the Notarial Code).

Private instruments are all instruments that cannot be classified as public instruments.

The Civil Code provides separately for the presumptions of authenticity and accuracy for “certifying public instruments” (Section 568 (1) of the Civil Code) and for public instruments attesting to a manifestation of will (Section 568 (2) of the Civil Code).

By virtue of “certifying public instruments”, their issuer confirms that a certain fact occurred or an act was taken in his presence. Such public instruments include especially notarial deeds pursuant to Section 79 (2) of the Notarial Code, whereby the notary certifies certain facts and states of affairs, such as payment of a debt or the status of real estate, if they can serve to prove certain claims in court proceedings or proceedings before some other public authority and if the given facts occurred in the notary’s presence or if the notary has assured himself of the given state of affairs.

In Section 568 (1) – similar to Section 134 of the Code of Civil Procedure – the Civil Code stipulates that where a fact is confirmed in a public instrument, this constitutes, with respect to any person, a full proof that the instrument originates from the body or person that created it, a full proof of the time of drafting the instrument, as well as of a fact which the originator of the public instrument confirmed as having occurred or having been performed in his presence, until the contrary is proved. This phrase – as to the authenticity of an instrument – is, however, considered imprecise, because – literally taken – it would mean that even in doubt, the court would have to consider it authentic unless and until the opposite is proven.²² The court must always have the opportunity to examine whether a public instrument is authentic, i.e. whether it originates from the person specified therein as its issuer.

Where a public instrument is authentic, the information on the time when it was created and about the facts that are certified by the public instrument is then presumed accurate. The given instrument can be deprived of its probative value only if the opposite is proven.

Public instruments attesting to a manifestation of will of the given person in making a legal act include primarily notarial deeds on legal acts pursuant to Section 62 *et seq.* of the Notarial Code, such as a contract, agreement on modification of the community property of spouses or acknowledgement of a debt incorporated in a notarial deed. If such an instrument is to have the consequences envisaged in Section 568 (2) of the Civil Code, it must be executed (signed). If these conditions are met (the public instrument attests to a manifestation of the will of the given person in making a legal act, the instrument is executed (signed) or the signature is replaced in a manner stipulated by the law), the instrument serves as full proof of the given manifestation of will *vis-à-vis*

²² Fiala, J. in Handl, V. – Rubeš, J. *Občanský soudní řád* (Civil procedure code. Commentary). Komentář. Praha: Panorama, 1985, p. 616.

anyone. A public instrument thus proves that the person making the relevant act, who executed (signed) the instrument or whose signature was replaced, did actually manifest the will that is incorporated in the instrument.

Section 568 (2) of the Civil Code is not phrased as a rebuttable presumption. It might therefore be argued that this rule could be deemed a non-rebuttable presumption where proof to the contrary is not permissible. Such a conclusion cannot stand. Linguistic interpretation serves merely as initial indication of the contents of a legal norm that is communicated through the wording of the given legal regulation. Consequently, the actual contents of the legal norm in question cannot be determined merely by linguistic interpretation, and other methods of interpretation must also be used. Historical, teleological or systematic interpretation does not in any way support the conclusion that Section 568 (2) of the Civil Code should be considered a non-rebuttable presumption. The explanatory report, sense and purpose of the law and, all the more so, the other provisions concerning private and public instruments do not point in this direction. With regard to Section 134 of the Code of Civil Procedure, too, this is a presumption that is rebuttable by proof to the contrary.

In respect of taking evidence based on private instruments, the Civil Code stipulates, in the first sentence of its Section 565, that anyone who relies on a private instrument must prove that it is authentic and accurate. However, this rule is substantially modified, on the one hand, by the second sentence of the same provision, concerning executed instruments, and on the other hand, by Section 566, pertaining to private instruments that are not executed (signed).

Where a private instrument has also been executed by the counterparty (or its legal predecessors set out in Section 565 of the Civil Code), the Civil Code stipulates a rebuttable presumption that, by executing (signing) the instrument, the counterparty acknowledged it as authentic and accurate. However, there is no presumption of authenticity of the signature itself and, if needed, its authenticity will have to be proven by the one who relies on the private instrument. If authenticity of the signature is not questioned or if it has been proven, it is assumed based on general experience that the instrument originates from the person who executed it and also that the contents of the executed instrument correspond to reality. Consequently, the party against whom the rebuttable statutory presumption is aimed must go beyond formal denial of its authenticity or correctness if it wants to deprive the instrument of its probative value. It must disprove the presumption by proving the contrary, i.e. must allege and prove, to the degree of virtual certainty, that the instrument does not originate from this party or that its contents are not accurate. The given party will thus, e.g., have to allege and prove that a certain article of a contract was later modified or that the contents of the written contract were later modified by an oral amendment (see Section 564 of the Civil Code). Statutory rebuttable presumptions pertain only to the text that is above the signature, not below it.

Private instruments that are not executed are – other than instruments concerning legal facts occurring during usual operation of an enterprise (Section 566 (2) of the Civil

Code) – not subject to any presumptions of acknowledgement of authenticity or accuracy. If the authenticity of a non-executed private instrument is questioned in proceedings, the party that offered the instrument as evidence must prove its authenticity, i.e. that it originates from the alleged person. The adversary, who does not bear the burden of proof, can merely deny the authenticity of the instrument and need not provide a proof to the contrary. If the party who bears the burden of proof provides a proof of authenticity of a non-executed private instrument, this does not, in itself, trigger the presumption of acknowledgement of accuracy of its contents. Indeed, according to the second sentence of Section 565 of the Civil Code, this presumption applies only to instruments that have been executed (signed). Therefore, if a non-executed private instrument has been proven authentic, the one who relies on the instrument will have to prove its accuracy if denied by the adversary.

Instruments concerning legal facts occurring in usual operation of an enterprise (Section 566 (2) of the Civil Code) include receipts and various other confirmations, invoices, warranty certificates, seller's confirmation of acceptance of goods for warranty repair, confirmation of acceptance of a thing for storage, etc. If these documents are relied on by the other party, the statutory rebuttable presumption of their accuracy, i.e. correctness of their contents, including the date of issue, will apply. If the buyer presents a receipt issued by the seller as a proof of purchase of the relevant goods and compliance with the warranty period, it will be assumed that the data in the receipt are accurate and the receipt was issued on the date specified therein. The opposite would have to be asserted and proven by the seller who issued the receipt. This statutory rebuttable presumption applies not only to instruments related to usual operation of an enterprise that were signed, but also to those that do not contain signature. The said rebuttable presumption pertains only to the accuracy of a private instrument related to usual operation of the enterprise, not to its authenticity. Should its authenticity be questioned, it will have to be proven by the one who refers to it against its alleged issuer.

5.4 Taking of Written Evidence

An instrument is taken as evidence in that the judge reads the instrument or its part or explains its contents, or – where such a procedure appears sufficient – presents it to the parties for inspection (Section 129 (1) of the Code of Civil Procedure).

If any of the parties moves the court to take certain documentary evidence, it must produce the given instrument to the court if it is at its disposal. If not, it must identify the instrument so that it is clear what instrument is referred to and from whom the court should request it. The court's procedure in this respect is governed by Section 129 (2) of the Code of Civil Procedure, which enables the judge to order the person who has an instrument that needs to be taken as evidence to produce the instrument, or to obtain it himself from some other court, authority or person. This duty to produce evidence applies not only to third parties, but also to the parties to the dispute. The duty to produce evidence has its limits, too; for example, a party to the dispute or a third party

cannot be requested to produce a certain instrument if this would be contrary to its non-disclosure duty or if the given party could incriminate itself or its close relatives.²³

If one of the parties moves the court to take as evidence an instrument that it has at its disposal, it must produce the instrument to the court. The court will invite this party to produce the instrument only if it moves to take such evidence, but fails to produce it. If it fails to produce the instrument in spite of the court's invitation, it runs the risk of not proving a decisive fact in respect of which it bears the burden of proof.

Original instruments need not be produced, copies will suffice. If the court has doubts as to authenticity of a copy, it will order the given party to produce the original.

6 Witnesses

6.1 Obligation to Testify

In Section 126 (1), the Code of Civil Procedure stipulates the obligation of anyone to testify. It applies in principle that anyone who is not a party to the proceedings must appear before the court based on a summons and testify as a witness. The witness must testify the truth and must not conceal any facts. Perjury is a criminal offence pursuant to Section 346 of the Criminal Code (Act No. 40/2009 Coll.). The witness must always be advised of the criminal consequences of perjury before the judge proceeds with his/her examination.

The Code of Civil Procedure does not provide the possibility of putting a witness under oath.

A witness may refuse to testify if he or she would thereby incriminate himself or herself or a close relative. It is up to the court to decide whether such refusal is justified (Section 126 (1) of the Code of Civil Procedure).

Similarly, a witness cannot be examined as to circumstances in respect of which (s)he has a non-disclosure duty (Section 124 of the Code of Civil Procedure), e.g. that of an attorney-at-law, priest, physician, etc. In that case, examination would only be possible if this non-disclosure duty was waived by the relevant authority or the one who benefits from this witness's duty.

In its judgement dated 4 December 1997, File No. III. ÚS 149/97, the Constitutional Court ruled: "The right vested in a witness by the Constitution to refuse testimony on the grounds of possible incrimination of the witness or persons listed by the law is not (unlike the grounds consisting in family or similar relations) absolute; absolute in the sense that the right to refuse a testimony should apply to the testimony as a whole. If the law (Section 101 (2) second subparagraph of the Code of Criminal Procedure, Section

²³ See David, L. in David – Ištvanek – Javůrková – Kasíková – Lavický: Občanský soudní řád. Komentář. I. díl. (Code of Civil Procedure. Commentary. Part I.). Prague: Wolters Kluwer, 2009, p. 590.

126 (3) first subparagraph of the Code of Civil Procedure) requires that the witness be given the opportunity at the beginning of his examination to spontaneously state, without interruption, what he knows about the case at hand, he is thus simultaneously enabled to neglect in his testimony anything that he considers (based on a statutory ground) dangerous for himself (and for persons listed by the law); only if he is given more detailed or additional questions, he may refuse to answer them. The criteria of justification of refusal to testify are highly flexible and may considerably vary in case-law and they can thus not be exhaustively transformed into a general (interpretation) rule; however, it must always apply that, in considerations regarding the justification of such refusal, the witness refusing testimony cannot be forced to provide information that might, given its specificity, create a situation where the witness's fundamental right guaranteed by the Constitution (Art. 37 (1) of the Charter of Fundamental Rights and Freedoms) would be impaired or even merely jeopardised. The prohibition of self-incrimination in each individual case must be construed based on the individual provisions and conditions under which testimony (or its part) is being refused, while placing clear emphasis on its constitutional prohibition, which must be preferred in case of its potential conflict with other interests.”

The Supreme Court further elaborated on this train of thought in its ruling of 25 September 2012, File No. 22 Cdo 859/2012: “The right to refuse testimony does not apply to its entire subject (the facts being proven) if a certain part on which the witness can testify without danger of self-incrimination can be severed. Whether this is so depends on the complexity of the subject of testimony, on whether there are any mutual links among its potential parts and what these links are, and on the potential relationship of the witness to the subject of the testimony. The same factors, together with the nature of the facts to be proven, predetermine the level of detail of the explanation by which the refusal to testify is to be justified. It is important in this respect whether the facts being proven can form the merits of a criminal offence. “However, the witness may not be required, especially if he refuses to testify due to possible incrimination of himself or close relatives (Section 100 (2)), to provide such a detailed justification that the provision in question would be deprived of its practical sense and the witness would be forced to disclose what the law authorises him to conceal (Šámal P. *et al.*, *Trestní řád (Criminal Code)*, 6th edition, Prague: C. H. Beck 2008, p. 882).”

It is possible that almost no explanation will be possible in view of possible self-incrimination. This could be so, e.g., if an apparent witness to a certain harmful consequence was to explain its cause; the only thing that he could probably rely on in refusing his testimony would be precisely an admission that he caused the harmful consequence.

The law authorises the court to decide whether such refusal is justified. Consequently, the court must consider, based on general experience, what relationship the witness could have to the fact to be proven or what role he might play in the history of facts being proven, and assess the relevant likelihood. In view of the “prohibition of self-incrimination” emphasised by the Constitutional Court, the court should exercise self-restraint in this respect and rule in favour of the witness in case of doubt.”

6.2 Summoning Witnesses

It is up to the court, not the parties, to summon witnesses. The parties are supposed merely to move the court to hear a witness and identify the person who is to be thus examined as a witness. Of course, this does not prevent the court from summoning a certain person as a witness even without a motion. In non-contentious proceedings, it may do so without any limitation; in contentious proceedings, such a step is subject to the conditions following from Section 120 (2).

6.3 Who Can be a Witness

Only a person other than the court and parties to the proceedings may testify as witness. Similarly, a person who is the governing body of a legal entity cannot testify as witness; examination of such a person is subject to rules analogous to the ones applicable to examination of a party (Section 131 of the Code of Civil Procedure) rather than of a witness (Section 126 of the Code of Civil Procedure). Apart from these cases, the ability to testify is only limited in terms of whether the given person is capable of disclosing to the court what (s)he perceived through his/her senses. Testimony may be provided by little children or persons suffering from a physical or mental handicap preventing them from thoroughly perceiving a certain fact or disclosing to the court what they perceived. Should there be any doubt as to whether or not a certain person can testify as witness, the court should assure itself by asking the given persons certain questions before the examination starts whether they are capable of perceiving and disclosing what they perceived. If a person summoned is not capable of testifying, the court will refrain from examining him/her.²⁴

6.4 Non-Disclosure Duty

There is a difference between classified information and a non-disclosure duty stipulated by the law or the State. Classified information is governed by Act No. 412/2005 Coll., on protection of classified information and security qualification. Pursuant to Section 2 (a) of the Act, classified information is information that could harm the interests of the Czech Republic or could be unfavourable for such an interest if disclosed or abused and that is simultaneously included in the list of classified information. A witness may not testify on classified information unless the competent authority waived his/her non-disclosure duty. Such waiver can be denied in cases where this could cause an extraordinarily serious or serious harm to the interests of the Czech Republic or endanger human life or health (Section 63 (8) of Act No. 412/2005 Coll.). Even if the non-disclosure duty is waived, the court may take certain measures to modify the usual course of the proceedings. In particular, it must be pointed out that a threat to secrecy of classified information is a reason for excluding the public pursuant to Section 116 (2) of the Code of Civil Procedure.

²⁴ Fiala, J. in Handl – Rubeš: Občanský soudní řád. Komentář. I. díl. (Code of Civil Procedure. Commentary. Part I.). Prague: Panorama, 1985, p. 575.

A non-disclosure duty stipulated by the law or acknowledged by the State is borne, e.g., by a judge, attorney-at-law, notary, expert or interpreter, mediator, arbitrator, health service provider, etc.

According to Section 126 (4) of the Code of Civil Procedure, an individual who is the governing body of a legal entity or a member of such a governing body may be examined in proceedings to which this legal entity is party, not as a witness, but rather as a party pursuant to Section 131 of the Code of Civil Procedure. Evidence in the form of examination of a party can be ordered by the court pursuant to Section 131 of the Code of Civil Procedure if the fact to be proved cannot be demonstrated otherwise (this means of evidence is therefore subsidiary) and, at the same time, if the party that is to be examined agrees. Consequently, an individual who is the governing body of a member of the governing body may prevent his or her examination simply by not granting consent to this method of taking evidence. The reasons for possible refusal of testimony by a witness are not relevant in this case.

If an individual who is the governing body or a member of the governing body agrees with his/her examination or if anyone else is to be examined as a witness, the further steps will be conditional on whether or not such persons have undertaken in their mutual agreement with the given entrepreneur to maintain confidentiality of business secrets. If such an obligation to maintain confidentiality (non-disclosure obligation) exists, they may be examined as to circumstances subject to the non-disclosure obligation only if the entrepreneur has waived this obligation. If they are not bound to maintain confidentiality, evidence may also be taken in this form in respect of circumstances constituting business secrets. However, the Code of Civil Procedure also protects business secrets in that the public may be excluded on the grounds of a potential threat to business secrets; if the court admits individual persons to the hearing, it will advise them that they are obliged to maintain confidentiality of any business secrets they learn.

In its judgement dated 27 September 2005, File No. I. ÚS 394/04, the Constitutional Court stated that the “need to protect information sources is so strong that many journalists feel to be bound by professional codes of conduct that require non-disclosure of their source. Many journalists actually rely on these codes, also in court hearings, if they are ordered to reveal the identity of their source. Nonetheless, there are certain situations where the journalists’ interests and the right of the public to information will collide with interests of more or less powerful individuals or institutions. Such a conflict often relates to the questions of judiciary, usually when the given information is – or may be – relevant for criminal or civil proceedings. In that case, it is up to the Constitutional Court to assess such a conflict using the proportionality test and decide whether the public interest in revealing the source of the journalist’s information is so strong in the given case that it overweighs even the constitutional right to freedom of speech, comprising also the derived right of the media to conceal the source of information.” Consequently, the proportionality test must be taken in each specific case to determine whether or not a public interest overweighs the journalist’s interest in concealing his source of information.

Act No. 3/2002 Coll., on churches and religious societies, allows priests to maintain the seal of confession, but only under certain conditions. Primarily, the priest must belong to a registered church or religious society that meets the prerequisites for being authorised to exercise special rights. The special authorisation to maintain the seal of confession or an analogous right can only be granted to a registered church or religious society if such a duty has been part of the doctrine of the church or religious society for at least 50 years (see Sections 7 and 11 of the cited Act). Under these preconditions, the seal of confession will also be respected in civil court proceedings unless the one who confessed waived the seal.

Health service provider and its health-care professionals are obliged to maintain confidentiality of all facts they learn in relation to the provision of health services. Disclosure of data or other facts is not considered breach of the statutory non-disclosure duty if this duty is waived by the patient or his/her legal representative and if the relevant information or facts are disclosed within the scope of such waiver (Section 51 (1) and (2) of Act No. 372/2011 Coll., on health services). Consequently, if the patient does not waive the physician's non-disclosure duty, no facts that the physician learnt in the provision of health services can serve as evidence. There is one significant exemption to the above, embodied in Section 51 (3) of the Act: Disclosure of information or other facts by the provider is not considered breach of the statutory non-disclosure duty provided that such disclosure is made to an extent necessary for the protection of the provider's own rights, *inter alia*, in civil proceedings or is addressed to a court or other authority, and that the proceedings before the court or other authority are concerned with a dispute between the provider, or its employee, and a patient or other person exercising rights to damages or protection of personal rights in relation to the provision of health services; in this respect, the provider may also submit to a court-appointed expert, expert institute, chamber or expert chosen by the provider a copy of the patient's medical file with a view to preparation of an expert report requested by the defence or a party in civil court proceedings.

Pursuant to Section 21 of Act No. 85/1996 Coll., on the legal profession, an attorney-at-law is obliged to maintain confidentiality of all facts that (s)he learns in relation to the provision of the legal services. This non-disclosure duty of an attorney may only be waived by the client or, after his death or termination, the client's legal successor; if the client has several legal successors, such waiver requires joint statement by all the client's legal successors. Waiver of the attorney's non-disclosure duty by the client or legal successor(s) must be made in writing and must be addressed to the attorney; in court proceedings, it may also be made orally into a protocol. However, even after that, the attorney must maintain confidentiality if the circumstances of the case clearly indicate that the client or legal successor waived this duty under pressure or duress. An attorney-at-law is not bound by the non-disclosure duty to an extent necessary for proceedings before a court or some other authority if the proceedings are concerned with a dispute between the attorney and the client or legal successor.

The legislation imposes a non-disclosure duty not only on attorneys-at-law, but also on other legal professions. The following non-disclosure duties should be mentioned, in particular:

- Even after expiry of the office of judge, a judge must maintain confidentiality of all facts learnt by the judge in connection with the discharge of his/her office unless (s)he is relieved from this obligation by a special regulation or a person authorised thereto. The judge's non-disclosure duty may be waived on serious grounds by the president of the court; for the president of a district court, by the president of the relevant regional court, for the president of a regional court, by the president of the relevant superior court, and for the president of a superior court, by the President of the Supreme Court. The non-disclosure duty of the President of the Supreme Court may be waived for serious reasons by the President of the Republic (Section 81 of Act No. 6/2002 Coll., on courts and judges).
- A State attorney must maintain confidentiality of facts learnt by the attorney in connection with the discharge of his/her office, also after termination of the office of State attorney. Unless a special regulation stipulates otherwise, the State attorney's non-disclosure duty may be waived on serious grounds by the Supreme State Attorney; the latter's non-disclosure duty may be waived by the Minister of Justice (Section 25 of Act No. 283/1993 Coll., on State attorney's office).
- A notary is obliged to maintain confidentiality of all facts learnt by the notary in relation to notary's activities or other activities and that may pertain to justified interests of persons listed in Section 56 (1) of the Notarial Code (a party to a legal act on which a notarial deed was drawn up; the one whose declaration or decision was certified; the one whose signature was authenticated; the one who requested certification of a legally important fact; the client, in other cases). These persons are the only ones who may waive the notary's non-disclosure duty. A notary is not bound by the non-disclosure duty to an extent necessary for proceedings before a court or some other authority if the proceedings are concerned with a dispute between the notary and the person who may waive the notary's non-disclosure duty.

As to other persons bound to maintain confidentiality, one can mention court distrainers (Section 31 of the Dstraint Rules), arbitrators (Section 6 of Act No. 216/1994 Coll., on arbitral proceedings and enforcement of arbitral awards); mediators (Section 9 of Act No. 202/2012 Coll., on mediation) and tax advisers (Section 6 (9) of Act No. 523/1992 Coll., on tax advice and the Chamber of Tax Advisers of the Czech Republic).

6.5 Examination of Witness

The procedure in examination of a witness is governed by Section 126 (2) and (3) of the Code of Civil Procedure. At the beginning of the examination, the court ascertains the identity of the witness and circumstances that could affect his/her credibility (e.g. a relationship to any of the parties). Furthermore, the court advises the witness of the importance of the witness testimony, of his/her rights and obligations (including advice

on the duty to testify truth and not to conceal anything, as well as the right to refuse testimony or the right to witness fee) and of the criminal consequences of perjury. The court then asks the witness to describe everything that (s)he knows about the subject of his/her testimony. The witness is then asked questions, first by the judge. If the case is heard by a chamber, questions are asked first by the presiding judge and then by the other members of the chamber. Questions may also be asked by experts and, of course, by the parties. The parties always have the right to be present to witness examination, regardless of whether the examination takes place at a hearing, which is usual, or is carried out by a requested court. A question asked by a party or expert will not be admitted by the presiding judge only if the question is unrelated to the subject of examination or if it indicates the answer, or if it is misleading by pretending unproven or untrue facts; if a recording is not being made of the testimony, the presiding judge shall always state the reasons for not admitting a certain question in the record of the hearing.

The Code of Civil Procedure does not provide for cross-examination, but it does not exclude this option. Given that all means that can contribute to establishing the facts can serve as evidence, even a civil court might undertake cross-examination. However, this is certainly not a common practice in the Czech Republic.

7 Taking of Evidence

The aspects of evidence taking in civil procedure are regulated in Section 120 et seq. of the Czech Code of Civil Procedure. The relevant provisions aim to ensure that the courts render correct rulings that are fair and lawful. This is only possible based on objective findings, which must simultaneously be relevant in relation to the cases at hand. The process of evidence taking is formally enshrined in Czech legislation and no other than the standard court procedure is admissible. In this respect, the Czech law is based on the dominant role of the court in evidence taking. Indeed, it is up to the court to obtain findings of fact and make subsequent evaluation of these findings and the court is the only one to decide whether a certain fact can be deemed proven.

In view of the aforesaid objective of evidence taking, the relevant Czech legislation is structured so as not to prevent attainment of that objective. However, the above is not completely true. By way of exemption, proceedings may be “concentrated” with a view to ensuring expedient and economic procedure; in that case, the process of evidence taking may be limited. Nonetheless, the Czech laws do not comprise any rules stipulating in which phase of the proceedings a given piece of evidence may be adduced or identified. It is primary up to the parties to move at an appropriate time in the proceedings for taking of evidence that is necessary to establish the facts of the case and that supports their respective assertions.²⁵ They will consider in this respect especially

²⁵ This is a right, but also a duty, of a party following from Section 120 (1) of the Code of Civil Procedure – the parties are obliged to identify evidence to prove their assertions. The court has a corresponding duty pursuant to Section 5 of the Code of Civil Procedure to advise the parties of the duty to produce evidence – see the ruling of the Supreme Court of 30 May 2002, in Case No

whether it is at all suitable for them to identify a certain piece of evidence and, if so, at which stage of the proceedings it would be tactical for them to do so. Procedural law does not prevent such tactics, subject to the exemption mentioned above. Indeed, the parties may normally adduce new evidence at any time during the proceedings provided that they do so before the presiding judge announces the decision in rem. In non-contentious proceedings, the role of the parties is weakened by the fact that the court may also take evidence based on its own investigations, i.e. without motion.²⁶ It is not limited in time and may thus do so at any time during the proceedings if that proves necessary. For the sake of completeness, we add that the option to take evidence which has not been adduced is also exceptionally available in contentious proceedings under the conditions stipulated by Section 120 (2) of the Code of Civil Procedure.^{27, 28}

The option of “concentrating” the proceedings has been mentioned above. This instrument may be used in contentious proceedings provided that the court advises the parties of the consequences. Within “concentration”, the court sets the latest point when the parties may adduce new evidence, which logically must precede the decision in rem.²⁹ If proceedings are “concentrated”, new evidence may only be identified until the end of the pre-trial hearing (Section 114c of the Code of Civil Procedure) and, in cases where a pre-trial hearing is not held, only until the end of the first hearing,³⁰ or by the deadline set for the parties to adduce evidence or comply with other procedural duties.³¹ Any evidence identified later is disregarded. Concentration is not possible in non-contentious proceedings. New evidence can thus be adduced during the entire proceedings.

The above specifies the latest point in time when new evidence may be adduced. However, it must also be determined since when evidence may be adduced and subsequently taken. In principle, evidence may be adduced and taken after the

22 Cdo 1418/2000, in Polišenská, P. *Přehled judikatury ve věcech dokazování (Overview of Case-law on Taking Evidence)*. Wolter Kluwer ČR. 2010. p. 50.

²⁶ Breach of this duty may result in insufficient evidence which is at variance with the right to a fair trial.

²⁷ In cases where this is necessary to determine the facts of the case and the existence of such evidence follows from the contents of the file.

²⁸ Failure to take evidence under the conditions of Section 120 (2) of the Code of Civil Procedure may warrant later pleas in an application for appellate review – see the ruling of the Supreme Court of 3 October 2002, in Case No 22 Cdo 684/2002, in Polišenská, P. *Přehled judikatury ve věcech dokazování (Overview of Case-law on Taking Evidence)*. Wolter Kluwer ČR. 2010. p. 45.

²⁹ See Section 119a (1) of the Code of Civil Procedure.

³⁰ The aforesaid also applies to evidence other than adduced by the parties pursuant to Section 120 (2) of the Code of Civil Procedure – see the ruling of the Supreme Court of 27 March 2008, in Case No 29 Odo 1538/2006, in Polišenská, P. *Přehled judikatury ve věcech dokazování (Overview of Case-law on Taking Evidence)*. Wolters Kluwer ČR. 2010. p. 75.

³¹ The court may take into consideration any facts asserted and evidence identified at a later date only if they are presented to question trustworthiness of the evidence taken after the pre-trial hearing, and in absence of the latter, after the first hearing, or facts and means of evidence which a party could not submit in due time other than through his fault, as well as facts and evidence which the parties submitted after one of them was requested to supplement decisive facts.

proceedings have been initiated. Only if there is a concern that it will not be possible to take a certain piece of evidence that is likely to be significant for the envisaged proceedings³² at a later date or that this would only be possible with great difficulties, certain evidence may also be secured on a party's motion before the proceedings are initiated.³³ In special cases, a certain piece of evidence may also be secured by means of a notarial or distrainer's deed attesting to the history of facts or current state of affairs.

Evidence is usually presented to the court by the parties if they have such evidence in their possession. Otherwise, it is up to the court to obtain the evidence where it has been identified.³⁴ In respect of documentary evidence, the person who has the relevant instrument required as evidence may be required to present it (duty to produce evidence). The court also may (and sometimes must) itself commission an expert report. Persons other than the parties may be summoned to the court and required to testify as witnesses. It also applies that everyone is obliged to disclose to the court free of charge any facts that are significant for the proceedings and decision. The aforesaid duties do not apply if the given person might incriminate himself or his close relatives or if his non-disclosure duty was inadmissibly breached in this way.³⁵

It is up to the court to assess which evidence will be taken. The court is thus not obliged to take all evidence adduced by the parties. Evidence will thus not be taken if its aim is to prove asserted legal facts which are not legally relevant³⁶ or if the evidence in question is clearly incapable of proving the asserted fact.³⁷ Evidence also need not be taken if it would be redundant.³⁸ However, the court may not refuse to take evidence adduced if a decisive fact has not been proven otherwise.³⁹ Nonetheless, the court must provide proper reasons for any decision refusing to take evidence adduced by a party. Similarly, the court must deal with a situation where it took certain evidence but did not infer any findings from it in the judgement.⁴⁰

Information obtained from other proceedings may also be relevant for the court. Czech procedural law reflects this fact in Section 135 of the Code of Civil Procedure, according to which a civil court is bound by decisions of other authorities that a criminal offence,⁴¹ infraction or other administrative offence has been committed and

³² That means that this instrument cannot be used by a party e.g. solely to obtain information for other court or enforcement proceedings, see the red commentary on page 345.

³³ See Section 78 of the Code of Civil Procedure.

³⁴ However, if the court despite all due effort is not able to obtain such evidence, it is the party which has identified this evidence, who bears the consequences since it is he/she who bears the burden of proof. See Svoboda K. *Nové instituty českého civilního procesu (New Institutes of the Czech Civil Procedure)*. Wolters Kluwer ČR. 2012. p. 68 – 69.

³⁵ Code of Civil Procedure, p. 588.

³⁶ See the ruling of the Supreme Court of 15 September 2005, in Case No 30 Cdo 749/2005.

³⁷ See the ruling of the Supreme Court of 7 August 2005, in Case No 21 Cdo 408/2003.

³⁸ See the ruling of the Constitutional Court of 29 June 2004, in Case No III.ÚS 569/03.

³⁹ See the ruling of the Supreme Court of 23 February 1997, in Case No 2 Cdon 1183/1996, p. 65.

⁴⁰ See the ruling of the Supreme Court of 21 February 2006, in Case No 29 Odo 246/2006, p. 96.

⁴¹ In contrast, a civil court might not be bound, e.g., by acquittal and may decide itself whether or not a certain unlawful act was committed. See ruling of the Supreme Court 21 Cdo 2368/98, See

who committed it, as well as by decisions on personal status except for decisions made in summary proceedings. However, it must be noted that there is a difference if a civil court makes a direct decision in a criminal or administrative case as compared to a situation where it merely makes certain conclusions concerning a criminal or administrative case for subsequent assessment in rem. While the civil court lacks jurisdiction for the former,⁴² it can make its own assessment in the latter case.^{43, 44} Civil courts are not limited in other cases than mentioned above and may assess them themselves. However, if such a question has already been resolved by a competent authority, the court shall use the decision as a basis. However, this logically must be a decision that is binding directly on the parties and not on someone else.⁴⁵

7.1 The Hearing

Based on the general rule comprised in Section 122 (1) of the Code of Civil Procedure, the court takes evidence at a hearing. The legislation thus reflects the principles of oral and direct hearings. However, where purposeful and in line with the principle of procedural economy, the court may request some other court to take evidence and evidence may also be taken (based on authorisation by the presiding judge) outside a hearing. Given the development of modern technology, the Czech Code of Civil Procedure also explicitly envisages the possibility of taking evidence using technical equipment transmitting images and sound. In view of the principle of technological neutrality, the Code of Civil Procedure does not specify any system that should be used in that case. The parties have the right to be present in evidence taking, even if it is performed outside the court. Its results must always be announced at a hearing.

By way of exemption from the above-described procedure, a case may be heard without a hearing.⁴⁶ In that case, evidence is taken in a different way, where the court infers all the findings of fact based on instruments presented by the parties and based on facts that form common ground between them. However, this method may only be used with consent of the parties or if they waive the right to have the case heard and, of course, if the decisive facts following from the file are clear.⁴⁷

David L., Ištváněk F., Javůrková N., Kasíková M., Lavický P. a kolektiv, Občanský soudní řád. Komentář. I. díl. (*Code of Civil Procedure. Commentary. I. part*). 2009. Wolters Kluwer ČR, p. 610.

⁴² See the Code of Civil Procedure.

⁴³ However, it may also await the result of proceedings in a criminal or administrative case. In that case, it will stay the proceedings.

⁴⁴ The answer on such preliminary question cannot however constitute *res iudicata* and can be mentioned only in the reasoning part of the judgement. See Winterová A., Macková A. a kol. *Civilní právo procesní – část. první: řízení nalézací (Civil Procedure Law – first part: Finding Procedure)*. 7 aktualizované vydání. Linde Praha. 2014. p. 231.

⁴⁵ Such a decision may only be binding on the court if it deals with a preliminary question related to legal relationships that have already been resolved between the parties to the proceedings by a final decision. See ruling the ruling of the Supreme Court of 24 May 2001, in Case No 22 Cdo 311/2001.

⁴⁶ See Section 115a of the Code of Civil Procedure.

⁴⁷ See the ruling of the Supreme Court of 31 January 2008, in Case No 29 Odo 164/2006.

The key principle governing the process of evidence taking is the aforesaid principle of direct hearing, which implies that the court may only make findings of fact obtained based on evidence that the court has itself taken.

Before the hearing ends, the court must advise the parties that all the decisive facts must be asserted and evidence identified before the court announces its decision in rem. The parties are thus able to supplement the evidence. If they do not adduce new evidence after having been invited to do so, the presiding judge will invite them to make their final statements. New evidence may no longer be adduced within closing arguments. New evidence can thus only be adduced in appellate proceedings. However, this is limited in contentious proceedings by the system of “incomplete appellate procedure”. A “fully-fledged appellate procedure” is only used in non-contentious proceedings.

7.2 Witnesses

In Czech civil procedure, witnesses are summoned by the court and everyone has the duty to testify. This duty is waived only if one could incriminate himself or his close relatives in criminal terms by providing a testimony. Summons are served primarily in writing (in paper form or electronically to the data box and, in urgent cases, by telephone or fax). A person may also be summoned orally if present at the hearing. If the person summoned does not obey, he may be brought to the court (if the witness has been advised of this option) or penalised by a procedural fine. Written summons include specification of the case, and of the place, time and subject of the proceedings or some other act, and also the statement that the summoned person shall appear as a witness, and which documents and pieces of evidence this person should bring with him.

The parties need not submit a written statement to the court before a witness is examined. Witnesses also do not take oath. However, they must be advised by the presiding judge of the possible criminal consequences of perjury.

A witness should not be present at the hearing before his examination. Nonetheless, the Czech civil procedure does not provide any rules directly preventing the parties from contacting witnesses. Witnesses are examined individually. They should first speak themselves; after that any necessary questions are posed by the court and, subsequently, by the parties. Inadmissible (suggestive and captious) questions are excluded; however, a legal basis is missing in this respect.

7.3 Expert Witnesses

Under the Czech laws, where a court decision depends on assessment of facts requiring expert knowledge, the court must request an expert opinion from a public authority. Where such a procedure is not sufficient in view of the complexity of the question or where there are doubts as to the accuracy of the expert opinion provided, the court must appoint an expert. This duty also applies if the judge himself has the necessary expert knowledge. This does not prevent the parties from presenting their own expert reports in advance; if such a report has all the requisites stipulated by law and contains the

expert's clause indicating that he is aware of the consequences of providing an untrue expert report, it is equivalent to a report commissioned by the court. Questions are given to the expert directly by the court; where an expert report has been drawn up on request of a party in the manner described above as second, the questions are posed by the party itself. Nonetheless, the court may summon an expert to a hearing and ask additional questions. Review expert reports are also often commissioned to verify the conclusions of an expert that are questioned by one of the parties.

The court chooses among experts entered in lists kept by regional courts where they have their respective domicile. A central list is kept by the Ministry of Justice. These experts usually draw up their reports in writing. Nonetheless, the law prefers oral form. The court must exactly specify the expert's task and provide the necessary collaboration as regards materials, underlying documents and co-operation with third parties. The parties can provide a written statement on an expert report and present their own questions during an oral hearing, if required.

The court may evaluate an expert report as any other piece of evidence (the principle of free evaluation of evidence). Nonetheless, an expert report differs from other means of evidence in that the court is not authorised to evaluate the report in substantive terms (i.e. within the scope of the expert's expertise) and thus reconsider the expert's conclusions. Any potential concerns about material correctness of an expert report can thus only be dealt with by means of additional questions or commissioning a new, review report.

The costs of an expert report are usually borne by the party that does not succeed in the case. The court may also already require during the proceedings that an advance on the costs of the report be paid by the party that moves for taking an expert report as evidence or in whose interests the report is being drawn up.

8 Costs and Language

8.1 Costs

The Czech civil procedure grants payment of costs to a party only if they were incurred in relation to the proceedings. Any costs expended before the proceedings are thus excluded, even if they related to the resolution of the dispute in broader context.⁴⁸ The Czech concept of payment of costs is based on its two main functions – punitive and preventive. Payment of costs is then based on the principle of success in the case⁴⁹

⁴⁸ However, this does not apply without exceptions. The case-law has inferred the possibility of claiming the payment of costs incurred before the commencement of the proceedings provided that the costs were expended in direct relation to the relevant proceedings. See the judgement of the Supreme Court of the Czech Republic of 28 December 1983, File No. 3 Cz 69/1983, in Polišenská, P. *Přehled judikatury ve věcech nákladů řízení (Overview of Case-law on Payment of Costs)*. Wolter Kluwer ČR. 2001. p. 194.

⁴⁹ According to Section 150 of the Code of Civil Procedure, the court need not grant payment of costs even if the given party is successful in the case if there are reasons deserving special

(typical especially of contentious proceedings) and culpability (typical of both contentious and non-contentious proceedings). The entitlement to payment of costs arises on the basis of a final decision.⁵⁰ Culpability means a breach of procedural duties that may be committed not only by the parties, but also by their representatives, experts, witnesses and others.

A non-exhaustive list of costs is given in Section 137 of the Code of Civil Procedure, which mentions cash expenditures of the parties and their representatives, including the judicial fee; profits lost by the parties and their representatives; costs of taking evidence; interpreter's fee; compensation for value added tax; fee for representation and fee for a mediator under the Mediation Act in respect of the initial meeting with a mediator ordered by the court. The Czech legislation does not contain any special provisions regarding special types of procedural expenses that must be paid by the requesting court due to special procedure or technology in accordance with provisions of Regulation 1206/2001. If legal assistance is provided in cross-border disputes, the costs of legal assistance are paid by the State. The law nonetheless enables a domestic or foreign entity to claim the costs and this applies to costs incurred both in the Czech Republic and abroad.

Under the Czech legislation, experts have the right to compensation for cash expenses (travel expenditures, compensation for lost salary, costs of material used, etc.) and a fee (expert fee). The specific amount is determined by a special regulation and the related implementing regulations.⁵¹ The expert's fee is based on the complexity and degree of professional knowledge required to draw up the expert report, where the scope of the report is exactly defined by law. In especially difficult cases, the fee may be increased by a certain percentage. In contrast, the fee may be decreased if the quality of the report is insufficient or the report is delivered late. The rules for determining interpreters' fees are analogous to those applicable to experts.

The Czech civil procedure contains no special rules of determining who ultimately pays the costs of an expert report. The general rules concerning payment of the costs of proceedings will thus apply. Moreover, under the conditions stipulated in Section 141 of the Code of Civil Procedure, the court may impose on one of the parties the duty to provide an advance on the costs of taking evidence before the evidence (including an expert report) is taken, depending on the anticipated amount of the costs.⁵² The court

attention or if the party refuses, without a serious reason, to participate in the initial meeting with a mediator ordered by the court. This could be the case, for example, if a party is successful in a dispute because the court satisfies its claim, but in fact caused the dispute by its own breach. See, e.g., resolution of the Constitutional Court of 30 January 2007, in Case No I. ÚS 780/2006.

⁵⁰ See the ruling of the Supreme Court of 27 September 2007, in Case No 29 Cdo 238/2007.

⁵¹ We would like to emphasize that expert's fees under the Czech law are generally low. See Bělohlávek A., Hótová, R. *Znalci v mezinárodním prostředí – v soudním řízení civilním a trestním, v rozhodčím řízení a investičních sporech. (Experts in International Environment – In Civil and Criminal Court Proceedings, in Arbitration and in Investment Disputes)*. C.H.BECK. 2011. p. 43. Note 53.

⁵² The duty to provide an advance will not be imposed if the given party's duty to pay judicial fees is waived. According to Section 138 of the Code of Civil Procedure, the court must

cannot exercise its own discretion in this respect – an advance must always be required if it can be justifiably anticipated that the relevant costs will arise.⁵³ Any potential costs exceeding the provided advance are paid by the State, which may then have the right to claim reimbursement from the parties.

8.2 Language and Translation

Proceedings before Czech courts are held in the Czech language. However, according to Section 18 (2) of the Code of Civil Procedure, any party that does not speak Czech has the right to deal with the court in its mother tongue. This right includes the possibility of making all pleadings, providing explanations and testifying in the party's own language (other than Czech). Furthermore, such a party has the right to have written documents translated into its own language. In these cases, an interpreter is appointed by a court order. The order may be contested by an appeal. The parties to the proceedings may also raise objections and provide their statement on the interpreter. In practice, an interpreter is not appointed for parties who speak Slovak, as they understand Czech language.⁵⁴ The costs of interpreting are always borne by the State.⁵⁵ Consequently, the legislation governing Czech civil procedure does not enable the State to pass the costs on the parties to the proceedings, as usual in respect of other costs.⁵⁶ It thus follows from the above that the position of a foreigner, or more specifically a person not speaking Czech, is comparable in Czech civil procedure to the position of a party fluent in Czech.

Interpreting may only be provided by a person registered in the list of interpreters kept by regional courts. However, this does not apply in absolute terms as there are exemptions applicable in cases where an interpreter for the given language is formally

determine whether this is the case before it imposes this duty. See the ruling of the Supreme Court of 13 March 2001, in Case No 30 Cdo 131/2001.

⁵³ The fact alone that a party has failed to provide an advance on the costs of evidence in spite of the court order is not a reason for the court to refuse to take evidence that is required to establish the facts of the case. See the ruling of the Supreme Court of 26 November 2002, in Case No 21 Cdo 426/2002. The relevant order is enforceable and the decision on payment of the costs can thus be enforced until the final decision ending the proceedings is issued. If such enforcement is unsuccessful, the costs are paid by the State. See the opinion of the civil division of the former Supreme Court of the Czech Socialist Republic of 29 February 1984, Cpj 88/82.

⁵⁴ There are some exemptions due to the significant differences in certain terms (words) used in civil procedure in Czech and Slovak language or because of differences in some terms used in the phase of evidence taking. See Drápal L., Bureš J. a kol. *Občanský soudní řád I. § 1 až 200za. Komentář (Civil Procedure Code. I. § 1 – 200za)*. Praha: C.H.BECK, 2009. p. 98.

⁵⁵ Such conclusion is also supported by the Czech case law and expert literature. See for example the ruling R 21/1986 – NS in Case No 1 Cz 15/84 in Drápal L., Bureš J. a kol. *Občanský soudní řád I. § 1 až 200za. Komentář (Civil Procedure Code. I. § 1 – 200za)*. Praha: C.H.BECK, 2009. p. 101.

⁵⁶ However, this does not apply without exceptions. The Regional Court in České Budějovice has inferred that where an executive director of a Czech legal person is a foreigner, the Czech Republic shall not bear the costs of interpreting. See the judgement of the Regional Court in České Budějovice of 30 August 2005, in Case No 22 Co 1241/2005, in Polišenská, P. *Přehled judikatury ve věcech nákladů řízení (Overview of Case-law on Payment of Costs)*. Wolter Kluwer ČR. 2001. p. 194.

or practically unavailable or if services of a registered (sworn) interpreter would entail unreasonable costs. For the sake of completeness, we add that the same exemption also applies to experts.

There are no special rules for interpreting where VCF is utilised. The general provisions thus apply.

9 Unlawful Evidence

According to Section 125 of the Czech Code of Civil Procedure, all means that can be used to ascertain the facts of the case can serve as evidence. The said provision is neutral in terms of technology and thus also allows the use of contemporary means of evidence, e.g. in the form of photographs and audio and video recordings made by mobile devices. However, practical use of such devices is questionable, as these recordings are often made without the knowledge of the person concerned or even against his will.

Interpretation of Section 125 of the Czech Code of Civil Procedure is thus subject to certain limitations that may follow from other provisions of the law (protection of personal rights) and from rights guaranteed by the Constitution (prohibition of arbitrariness, principle of equal arms and right to a fair trial).⁵⁷ Both legal theory and case-law of general courts, as well as of the Constitutional Court, have indeed inferred certain limitations.

The Czech legislation does not distinguish between “illegally obtained evidence” and “illegal evidence”. Both these terms are, in fact, used without distinction. However, the Czech Constitutional court had identified two different kinds of illegally obtained evidence in its case-law:

- a) Any evidence would not be permissible if it is not examined in accordance with procedural norms or if it circumvents them.
- b) Any evidence would not be permissible if it was obtained under such circumstances that are against the law and under which rights of another persons have been infringed.⁵⁸

The distinction between the two is that in second case the court has not infringed any procedural rules and of course, such breach was not caused by the court itself.

In respect of the former situation, the Constitutional Court has noted that certain means can be used as evidence only if it serves to establish and clarify actual state of affairs, if it is envisaged by the relevant rules of procedure and if it is actually taken according to

⁵⁷ See Vrcha, P. *Odůvodnění civilního rozsudku (Reasoning of the Civil Procedure Judgement)* Leges. 2010. p. 36.

⁵⁸ For examples of Czech case law related to the matter see David L., Ištváněk F., Javůrková N., Kasíková M., Lavický P. a kolektiv, *Občanský soudní řád. Komentář. I. díl. (Code of Civil Procedure. Commentary. I. part)*. 2009. Wolters Kluwer ČR, p. 577.

such rules.⁵⁹ An example of the latter would be a situation where the court takes evidence, e.g., by means of reading a transcript of telephone calls in spite of explicit disagreement of one of the parties to that call. In that case, the Constitutional Court has inferred an infringement on the fundamental right to protection of a message communicated by telephone pursuant to Article 13 of the Czech Charter of Fundamental Rights and Freedoms and also on the fundamental right to fair trial according to Art. 36 (1) of the Charter. Such evidence would therefore be considered inadmissible.⁶⁰ Nonetheless, professional literature⁶¹ notes that, in contrast, such evidence would not be deemed inadmissible in absence of any interference with a personal expression.⁶²

⁵⁹ See ruling of the Constitutional Court of 1 November 2001 in Case No III.ÚS 190/01.

⁶⁰ See ruling of the Constitutional Court of 13 September 2006 in Case No I.ÚS 191/05. As a matter of fact, the Constitutional Court also stated in that case that the actual acquisition of a sound recording poses no problems in legal terms, because there is general awareness of the fact that a telephone call can be recorded by the other party. Consequently, if the caller makes the call in spite of this fact, the Constitutional Court infers that the caller thus also implicitly agrees with the potential recording of the telephone call. However, this does not mean that the recording could then be used as evidence in civil procedure without consent of the affected party.

⁶¹ See Vošmiková, Helena, Krabec, Martin: K použití zvukového záznamu jako důkazu v civilním soudním řízení (*On Use of Sound Recordings as Evidence in Civil Court Procedure*). Available: <http://www.elaw.cz/clanek/k-pouziti-zvukoveho-zaznamu-jako-dukazu-v-civilnim-soudnim-rizeni> (accessed 18.06.2015).

⁶² See ruling of the Supreme Court of 11 May 2005, in Case No 30 Cdo 64/2004.

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
1	Application	Claimant	<p>Application has to fulfill the requirements prescribed by the law:</p> <ul style="list-style-type: none"> - Parties - Description of facts - Indication of evidence - Petit <p>In case anything of mentioned above is missing, court invites the claimant to remove the defect and stipulates deadline. If claimant fails and court is not able to proceed because of this defect, the application is rejected.</p>
2	Preliminary procedures	Court	<p>The court can order a preliminary procedure on claimant's request, both before or after the claim is filed. The reason to order a preliminary procedure is the need of interim regulation of situation between parties or the threat of future execution limitations (injunction, court orders not to dispose with real estate, duty to pay maintenance of minimum amount).</p>
3	Examining of conditions for proceedings and payment of court fee	Court	<p>Next to application without faults, also the fulfilment of procedural conditions (jurisdiction etc.) is required together with the payment of court fee (unless claimant does not have to pay it).</p>
4	Preparatory stage for hearing	Court	<p>Subsequent court activities relate to preparation of proceedings on merits. Court</p>

			can use both written communication with parties or meetings within so-called preparatory stage. At this moment, court discovers defendant's opinion, tries to reach a court settlement, identifies facts which need to be clarified (contradictory facts which are necessary to adjudicate the claim) and means of evidence.
5	Hearing	Court	Main part of the hearing is to perform evidence. Afterwards the court issues the judgement.
6	Appeal	Parties	Parties can appeal against the first instance judgment. The decision given on the appeal may be contested by another appeal. Conditions to lodge the appeal in accordance with the Civil Procedure Code have to be fulfilled in both cases.

1.2 Basics about Legal Interpretation in Czech Legal System

The only provision with interpretation rules is the Civil Code (§ 2). Czech legal literature considers it superfluous and not successful (it stresses the subjective theological interpretation too much). In general it is said that the legal interpretation should not be bound by the law while this interpretation rule has to be interpreted too.

Above mentioned provision is applicable only for substantive rules. There is no explicit provision for interpretation of procedural rules.

1.3 Functional Comparison

Legal Regulation Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	National law applies only if international treaties or EU Regulation is not applicable. Typically lex fori is used so the Czech court needs to observe the law of requested state. Czech court contacts requested judicial authority via Ministry of	Hearing of witnesses is a typical part of bilateral treaties on legal aid. The request via central authorities is necessary. Court proceed according lex fori, is enabled to proceed according to the law of requested court unless it conflicts lex fori.	Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters provides for three methods of the taking evidence (including hearing of witnesses): - Letter of Request sent to the Central Authority, which forwards it to the	The Regulation is based on the principle of decentralisation, i.e. communication between the requesting court and the requested court. Mutual communication between courts in the Member States is to take place directly, without the need for any

	Justice (subsequent process depends on diplomatic rules).		competent authority for execution, - Inquiries by diplomatic officers, consular agents, and - Inquiries by (specially appointed) commissioners. The key mechanism is the letter of request which is sent by the judicial authority in the state of origin to the central authority in the state of execution either directly or through its issuing authority (typically the central authority of the state in question).	further assistance. Regulation contains a deadline for the execution of a request, specifically not more than 90 days after receipt. For ease of communication, the Regulation provides for the use of forms for the individual acts. Courts proceed in accordance to lex fori. The requesting court can make a request for a procedure under its laws, and this procedure may be refused only if it is incompatible with the law of the State of execution or by reason of major practical difficulties.
Hearing of Witnesses by Videoconferencing with Direct Asking of Questions	Using of videoconference is possible. Not all Czech courts are equipped (videoconference devices is available on all regional courts, during 2015 all district courts should be equipped with videoconference devices).	No explicit provision. Courts proceed according to lex fori which means that using of videoconference is possible.	No explicit provision. Support provided in 2003 Conclusions and Recommendations of the Special Commission in that no provision of the Hague Convention prevents the use of modern means of communication.	Regulation expressly mentions that videoconferences and teleconferences should be enabled or encouraged both in respect of requests (Article 10(4)) and for the direct taking of evidence (Article 17(4)).
Direct Hearing of Witnesses by Requesting Court in Requested Country	No provision	Usually no provision. The treaties with GB (applicable for Canada, New Zealand and some of Commonwealth countries) and with Ukraine enable direct hearing of witnesses by diplomatic and consular authorities of requesting	Direct hearing of witnesses is possible only by diplomatic officers and consular agents only with respect to nationals of their home state, without coercion and only if they are authorised to do so under the laws of their State. If the State of execution	Direct hearing of witnesses is possible according to the Regulation. This method, applicable only on a voluntary basis, strengthens the position of the Central Body, which must give its consent to this procedure. It will not grant it when

		country on the territory of requested country but without the possibility to use coercive measures.	does not stipulate this, its consent is not required for this procedure. To the contrary, consent is required if evidence is to be taken with respect to a national of the State of execution or a third country. However, the State of execution may declare that permission is not required. A similar approach is used in respect of evidence taken by commissioners.	the direct taking of evidence requested is contrary to fundamental principles of law in a Member State, which corresponds to the public policy concept.
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Legal Regulation Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	Czech court proceed in accordance with lex fori (Czech law). May proceed in accordance with law of requested court if it does not conflict Czech public order.	In accordance with bilateral treaties lex fori is used. Also the law of requesting court may be used unless it conflicts lex fori.	Czech court proceed in accordance with lex fori as if the evidence was being taken for the purpose of domestic proceedings. Hague Convention also allows for making a request for the use of a special method of procedure corresponding to the law of the State of origin. The request can be rejected only if the given method or procedure is incompatible with the internal law of the State of execution or its performance is impossible by reason of its	Courts proceed in accordance to lex fori. The requesting court can make a request for a procedure under its laws, and this procedure may be refused only if it is incompatible with the law of the State of execution or by reason of major practical difficulties. Coercive measures in accordance with lex fori may be used.

			internal practice and procedure or by reason of practical difficulties.	
Hearing of Witnesses by Videoconferencing with Direct Asking of Questions	Using of videoconference is possible. Not all Czech courts are equipped (videoconference devices is available on all regional courts, during 2015 all district courts should be equipped with videoconference devices).	No explicit provision. Courts proceed according to lex fori which means that using of videoconference is possible.	Czech court will enable the use of videoconference device. Communication with technical staff of the requesting court is needed, pilot run is realized with weekly advance.	Explicit provision. Videoconferencing is enabled.
Direct Hearing of Witnesses by Requesting Court in Requested Country	No provision.	Usually no provision. The treaties with GB (applicable for Canada, New Zealand and some of Commonwealth countries) and with Ukrajine enable direct hearing of witnesses by diplomatic and consular authorities of requesting country on the territory of requested country but without the possibility to use coercive measures.	No explicit provision. Requesting court has the right to be present at the hearing.	Direct hearing is recognized by the Regulation with Central Body (Ministry of Justice) consent. It will not grant it when the direct taking of evidence requested is contrary to fundamental principles of law in a Member State, which corresponds to the public policy concept.

References

Table of cases

Supreme Court, 26. 2. 2013, sp. zn. 22 Cdo 3108/2010
Supreme Court, 25. 9. 2012, sp. zn. 22 Cdo 859/2012
Supreme Court, 8. 1. 2014, sp. zn. 28 Cdo 3459/2013
Supreme Court, 26. 06. 2014, sp. zn. 21 Cdo 2682/2013
Supreme Court opinion, R 26/1987
Constitutional Court, 4. 12. 1997, sp. zn. III. ÚS 149/97
Constitutional Court, 11. 1. 2005, sp. zn. Pl. ÚS 37/03
Constitutional Court, 27. 9. 2005, sp. zn. I. ÚS 394/04
Constitutional Court, 7. 4. 2011, sp. zn. I. ÚS 2014/10
Constitutional Court, 20. 8. 2014, sp. zn. I. ÚS 173/13

Bibliography

Boura, F. Dokazování podle občanského soudního řádu (Taking of evidence according to Civil procedure code). Praha, 1954
David, L., Ištváněk, F., Javůrková, N., Kasíková, M. Lavický, P. et al. Občanský soudní řád. Komentář. I. a II. díl (Civil Procedure Code. Commentary. I. and II. Part). Prague: Wolters Kluwer ČR, a. s., 2009
Drápal, L., Bureš, J. et al. Občanský soudní řád I, II. Komentář (Civil Procedure Code I, II. Commentary). Prague: C. H. Beck, 2009
Fiala, J. Důkaz zavinění v občanském soudním řízení (Proof of fault in civil proceedings). Praha: Academia, 1965
Fiala, J. a kol. Problémy dokazování – Pojem důkazu ve smyslu procesním (The concept of proof in procedural sense). Stát a právo 13. Praha: Academia, 1967
Lavický, P. Důkazní břemeno a dokazování výše nároku (Burden of proof and proving of amount). Právní fórum, Praha: Wolters Kluwer, a. s., 2012, roč. 9, č. 11, s. 488 – 492
Lavický, P. Občanský zákoník I. Obecná část. (§ 1 až § 654). Komentář (Civil code I. General part. Commentary). Praha: C. H. Beck, 2014
Macur, J. Břemeno substancování v civilním soudním řízení („Substantiierungslast“ in civil proceedings). Bulletin advokacie, 1999, č. 6-7, s. 7
Macur, J. Civilní proces a zásada projednací (Civil procedure and adversarial principle). Bulletin advokacie, 1997, č. 1, s. 13

- Macur, J. Dokazování a důkazní břemeno v civilním soudním řízení (Taking of evidence and burden of proof in civil proceedings). *Právo a podnikání*, 1994, č. 12, s. 13
- Macur, J. Dokazování a procesní odpovědnost v občanském soudním řízení (Taking of evidence and procedural responsibility in civil proceedings). Brno: UJEP, 1984
- Macur, J. Důkaz výsledkem účastníka v civilním soudním řízení (Examination of party in civil proceedings). *Časopis pro právní vědu a praxi*, 2001, č. 4, s. 358
- Macur, J. Důkazní břemeno a teorie uplatňování pravděpodobnosti při hodnocení důkazů v civilním soudním řízení (Burden of proof and theory of probability). *Právník*, 1995, č. 4, s. 347
- Macur, J. Důkazní břemeno v civilním soudním řízení (Burden of proof in civil proceedings). Brno: MU, 1995
- Macur, J. Dělení důkazního břemena v civilním soudním sporu (Division of burden of proof in civil proceedings). Brno: MU, 1996
- Macur, J. Hodnocení přednesů stran zastoupených advokátem v civilním soudním řízení (Evaluation of submissions of represented parties). *Bulletin advokacie*, 1996, č. 4, s. 8
- Macur, J. K predbežným otázkám v civilním konaní (Preliminary questions in civil proceedings). *Právní obzor*, 1969, s. 53
- Macur, J. K problematice určitosti důkazního návrhu v civilním soudním řízení (Certainty of evidence proposal in civil proceedings). *Bulletin advokacie*, 2000, č. 4, s. 19
- Macur, J. K základním otázkám nauky o důkazním břemenu v civilním soudním řízení (The basic questions of doctrine of burden of proof). *Právník*, 1995, s. 642
- Macur, J. Kompenzace informačního deficitu procesní strany v civilním soudním sporu (Compensation of information deficit of a party in civil proceedings). Brno: MU, 2000
- Macur, J. Některé teoretické otázky dokazování v občanském soudním řízení (Some theoretical questions of taking of evidence in civil proceedings). In: *Sborník prací učitelů právnické fakulty v Brně. Sv. 14*. Brno: UJEP, 1987, s. 7
- Macur, J. Postmodernismus a zjišťování skutkového stavu v civilním soudním řízení (Postmodernism and finding of facts in civil proceedings). Brno: MU, 2001
- Macur, J. Povinnost pravdivosti v civilním soudním řízení (Obligation of truthfulness in civil proceedings). *Právo a podnikání*, 1995, č. 11, s. 26
- Macur, J. Povinnost pravdivosti a její legislativní úprava v civilním soudním řádu (Obligation of truthfulness and its legal regulation in the Civil procedure code). *Právní rozhledy*, 1999, č. 4, s. 172
- Macur, J. Povinnost tvrzení a vysvětlovací povinnost procesních stran v civilním soudním řízení (Submissions of parties and explanatory duty in civil proceedings). *Právo a podnikání*, 1995, č. 9, s. 10
- Macur, J. Právní a skutkové domněnky při dokazování listinou v civilním soudním řízení (Legal and factual presumptions connected with documents in civil proceedings). *Právní rozhledy*, 2001, č. 2, s. 60
- Macur, J. Princip kontradiktornosti v občanském soudním řízení (Principle of two parties in civil proceedings). *Právní obzor*, 1973, č. 1

- Macur, J. Substancování skutkových přednesů stran v civilním soudním řízení (Certainty of parties submissions in civil proceedings). *Právní rozhledy*, 1998, č. 9, s. 433
- Macur, J. Vysvětlovací povinnost strany nezatížené důkazním břemenem v civilním soudním řízení (A duty to explain of a party unloaded by the burden of proof). *Právní rozhledy*, 2000, č. 5, s. 200
- Macur, J. Vyšetřovací důkaz v civilním soudním řízení (Discovery evidence in civil proceedings). *Právní rozhledy*, 2000, č. 2, s. 46
- Macur, J. Význam shodných tvrzení procesních stran pro zjištění skutkového stavu v civilním soudním řízení (The meaning of identical submissions of parties in civil proceedings). *Právní rozhledy*, 1997, č. 2, s. 49
- Macur, J. Zájem stran na vysvětlení skutkového stavu v civilním soudním řízení (Parties interest to determine the facts in civil proceedings). *Bulletin advokacie*, 1999, č. 2, s. 10
- Macur, J. Základní otázky zjišťování skutkového stavu v civilním soudním řízení (Basic questions of taking evidence in civil proceedings). *Právo a podnikání*, 1997, č. 1, s. 14, č. 2, s. 12
- Macur, J. Základní povinnosti procesních stran v občanském soudním řízení (The basic obligations of parties in civil proceedings). *Bulletin advokacie*, 1990, č. 1, s. 14
- Macur, J. Zásada pojednací v civilním soudním řízení (Adversarial principle in civil proceedings). Brno: MU, 1997
- Mikulcová, L. Povinnost tvrzení a důkazní povinnost po novele občanského soudního řádu (Submissions of parties and burden of proof after amendment of the Civil procedure code). *Právní rozhledy*, 2003, č. 9, s. 467
- Mikulcová, L. Nesporná tvrzení v civilním soudním řízení (Uncontested submissions in civil proceedings). *Právní rozhledy*, 2004, č. 13, s. 504
- Nypl, M. Může nebo musí v civilním sporném řízení provádět soud nenavržené důkazy, jsou-li potřebné ke zjištění skutkového stavu? (§ 120 odst. 3 o. s. ř.) (Is the court obliged to examine evidence which the parties did not suggest?) *Právní praxe*, 1994, č. 3, s. 142
- Štajgr, F. Materiální pravda v občanském soudním řízení (Substantive truth in civil proceedings). Praha, 1954
- Štajgr, F. Důkaz civilního práva (A proof of foreign law). *Acta Universitatis Carolinae-Iuridica*, 1964, s. 97