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Evidence in Civil Law - Estonia

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Evidence in Civil Law - Estonia

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ABSTRACT Since Estonia regained its independence on 20 August 1991 Estonian civil procedure has been gradually developed from the civil procedure of Estonian SSR to the modern civil procedure rules in force today. The current code of civil procedure was adopted on 20 April 2005 and came into force in 1 January 2006. Since coming into force several changes have been made to the current code with significant changes coming into force on 1 January 2009. Estonian civil procedure is mainly based on the adversarial principle, except for some specific cases and proceedings on petition where the inquisitorial principle is used. Deriving from this the parties are in most cases free to decide on what evidence to submit and whether to submit evidence at all. While the court may ask the parties to submit evidence, they are not required to do so. The situation is different in cases based on the inquisitorial principle. Estonian civil procedure does not impose many restrictions as to the kind of evidence that can be submitted. Virtually anything that can be reproduced in some way may be submitted as documentary evidence and any person who has knowledge about the facts of the case may be heard as a witness. Even the parties may be heard under oath. The Estonian Code of Civil Procedure does not set out many rules on how to evaluate the evidence submitted. The basic rule is that the court has to assess the evidence impartially and as a whole and not give any preference to any particular piece of evidence.

KEYWORDS: • civil procedure • gathering of evidence • procedural costs • international civil procedure • private international law • procedural costs • Estonia

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Introduction

Since Estonia regained its independence on 20 August 1991 Estonian civil procedure has been gradually developed from the civil procedure of Estonian SSR to the modern civil procedure rules in force today.

Until 14 September 1993 Estonian civil procedure was regulated – with some alterations – by the civil procedure rules of Estonian SSR, which came into force on 1 January 1965.[2]

One of the most important changes in Estonian civil procedure was made on 15 September 1993 when a new code of civil procedure came into force. Significant changes to the code of civil procedure came into effect on 1 September 1998.[3]

The current code of civil procedure was adopted on 20 April 2005 and came into force in 1 January 2006. Since coming into force several changes have been made to the current code with significant changes coming into force on 1 January 2009.

Unfortunately there is not much scholarly work available about Estonian civil procedure. Thus the report is mainly based on the law and its preparatory work and relevant court practice.

[2] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 2.2. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).
[3] *Ibid.*

Contents

Fundamental Principles of Civil Procedure

1 Principle of Free Disposition of the Parties and Officiality Principle

Estonian Code of Civil Procedure[4] (Tsiviilkohtumenetluse seadustik, hereinafter **CCP**) is mainly based on the principle of free disposition of the parties, although in some particular cases the officiality principle is used.

1.1 Proceedings Based on an Action

In case of proceedings based on an action the CCP follows the principle of free disposition of the parties[5] as expressed in Sections 4, 5, 436 and 438 of the CCP. However in cases concerned with family matters[6], the court is not bound by the circumstances and evidence submitted by the parties (Section 436 (6) of the CCP).

The principle of free disposition of the parties is seen in the CCP as the parties' freedom to start the proceedings (including the right to decide against whom to start the proceedings) and to decide the scope of the proceedings (Section 4 (1) and (2) of the CCP)[7]. The court may adjudicate a case on its own motion only in cases specifically provided by the law (Section 4 (1) last sentence).

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[4] The English translation of the Code of Civil Procedure can be accessed at: https://www.riigiteataja.ee/en/eli/514022014002/consolide (accessed 18.03.2014).

[5] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

[6] Family matters are civil matters for the adjudication of actions the object of which is divorce; annulment of marriage; establishment of existence or absence of marriage; division of joint property or other claims arising from the proprietary relationship between the spouses; other claims arising from the marital relationship of a spouse filed against the other spouse; establishment of filiation or contestation of an entry concerning a parent in the birth registration of a child or in the population register.

[7] This has been confirmed several times in court practice. See Judgement of the Supreme Court of 29 May 2001 in Case No 3-2-1-82-01, part III; Judgement of the Supreme Court of 7 November 2001 in Case No 3-2-1-135-01, part IV; Judgement of the Supreme Court of 16 February 2005 in Case No 3-2-1-165-04, p 17; Judgement of the Supreme Court of 23 March 2005 in Case No 3-2-1-18-05, p 18; Judgement of the Supreme Court of 15 February 2006 in Case No 3-2-1-165-05, p 13; Judgement of the Supreme Court of 9 December 2009 in Case No 3-2-1-119-09, p 12, and Judgement of the Supreme Court of 13 January 2010 in Case No 3-2-1-149-09, p 14.

As one expression of the principle of free disposition of the parties it has for example been established in court practice that in cases where the plaintiff must be changed because the original plaintiff has passed away, the court will only continue the proceedings upon the new plaintiff's application. If the new plaintiff does not make an application for continuation of the proceedings within a reasonable time after the time that he finds out about the proceedings, the court should assume that the plaintiff has decided to discontinue the proceedings and end the matter.[8]

Section 5 (1) of the CCP provides that the court adjudicates the case based on the facts and applications submitted by the parties. Section 439 (1) of the CCP further states that the court is not allowed to exceed the claims submitted by the parties or to rule about a claim that has not been submitted by the parties. Thus the court is bound by the parties' claims and applications and cannot rule on claims or applications that the parties failed to submit.[9]

The parties have the power to freely decide what statements to make and what facts to submit to the court to support the statements (Section 5 (2) of the CCP).[10] The court does not find out the factual circumstances on its own and is confined with what the parties submit. In cases based on actions the court may collect evidence on its own motion only if specifically provided by law (Section 5 (3) of the CCP).

According to the CCP and court practice the court has some obligations with regard to the parties' claims. Section 392 (1) p 1 and 2 of the CCP provide that the court must ascertain what are the claims of the plaintiff and what objections the defendant has to these claims and what are the legal and factual statements of the parties regarding the claims.[11] However it has been established in the court practice that the court is not under obligation to explain to the parties what additional claims they might submit.[12]

The court also has an obligation to clearly state which claims the court adjudicates and which not. For example if the defendant lodges claims as an answer to the action, the court should explain to the defendant that claims can only be submitted in the form of

[8] Judgement of the Supreme Court of 17 March 2004 in Case No 3-2-1-20-04, p 24.
[9] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014); Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.
[10] Judgement of the Supreme Court of 15 February 2006 in Case No 3-2-1-165-05, p 13.
[11] Judgement of the Supreme Court of 22 December 2003 in Case No 3-2-1-146-03, p 16; Judgement of the Supreme Court of 20 December 2007 in Case No 3-2-1-121-07, p 15; Judgement of the Supreme Court of 10 June 2009 in Case No 3-2-1-66-09, p 11; Judgement of the Supreme Court of 9 December 2009 in Case No 3-2-1-119-09, p 12; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 8 April 2011 in Case No 3-2-1-171-10, p 12; Judgement of the Supreme Court of 16 May 2011 in Case No 3-2-1-34-11, p 10.
[12] Judgement of the Supreme Court of 10 June 2009 in Case No 3-2-1-66-09, p 11.

an action or a counter-action and thus the court shall not adjudicate the claims submitted in an answer to the action.[13]

As the Estonian civil procedure is based on the principle of *iura novit curia*, the courts are not bound by the legal reasoning of the parties (Sections 436 (7), 652 (8); 688 (2) of the CCP), although they are bound by the facts of the case. So the court is in principle free to apply the law based on the facts of the case as submitted by the parties. Legally qualifying the claims of the parties is the court's obligation.[14]

However in court practice some limitations to the court's freedom and obligation to apply the law have been imposed.

Firstly it has been established that the parties are in principle free to agree on the law applicable within the proceedings. This can be done also with the parties' actions, e.g. not contesting the fact that the court applies a certain law.[15] The court may apply the law chosen by the parties and is not under obligation to apply different law even if it is established later that the circumstances of the case would lead to the application of a different law.

Secondly, while it has been recognized in court practice that the court is free to apply the law, nevertheless if the court determines that the claims under the circumstances can equally be based on two different legal grounds, the court is under obligation to find out the opinion of the parties about the possible legal grounds. The court should also find out if the plaintiff excludes some of the legal grounds and whether the party would like the court to rule on the legal grounds in a particular order. If the party then decides to exclude some of the legal grounds, the court is not under obligation to rule on these legal grounds.[16]

Thirdly it has been established in court practice that the court's legal reasoning should not come as a surprise to the parties. If the court wishes to apply a legal rule that the parties have not brought forward, the court should draw the parties' attention to such possibility and allow the parties to make submissions in the light of such reasoning (this is derived from Sections 348 (1) – (3); 351; 392 (1) points 1 and 3; 400 (5); 401 (1) and 436 (4) of the CCP).[17] It has further been established in court practice that if the court's

[13] Judgement of the Supreme Court of 9 December 2009 in Case No 3-2-1-119-09, p 12.
[14] Judgement of the Supreme Court of 10 April 2013 in Case No 3-2-1-21-13, p 16; Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.
[15] Judgement of the Supreme Court of 16 February 2005 in Case No 3-2-1-165-04, pp 17-18.
[16] Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 8 April 2011 in Case No 3-2-1-171-10, p 12; Judgement of the Supreme Court of 23 May 2012 in Case No 3-2-1-53-12, p 13; Judgement of the Supreme Court of 10 April 2013 in Case No 3-2-1-21-13, p 17.
[17] Judgement of the Supreme Court of 5 January 2011 in Case No 3-2-1-116-10, p 40; Judgement of the Supreme Court of 22 February 2011 in Case No 3-2-1-153-10, p 16; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 4 May 2011 in Case No 3-2-1-29-11, p 12; Judgement of the Supreme Court of 15 June 2011 in Case No 3-2-1-51-11, p 27; Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-

new legal reasoning materially changes the parties' procedural position, the court is under obligation to discuss this with the parties and allow the parties to make additional statements and possibly submit additional evidence.[18]

As a general rule the parties have a right to freely submit applications and evidence in the proceedings. This right is restricted by certain time constraints and the relevance of the submitted evidence. According to Section 329 (1) of the CCP the parties are under obligation to file their petitions, applications, evidence and objections in the proceedings as early as possible depending on the stage of the proceedings and the need for the expeditious and just adjudication of the matter.[19]

The general rule as arising from Section 329 (1) of the CCP is that all petitions, applications, evidence and objections must normally be submitted in the pre-trial proceedings. The court has an obligation to fix a deadline within the pre-trial proceedings for submitting all petitions, applications, evidence or objections (Section 329 (4) of the CCP). The court is under no obligation to accept any petitions, applications, evidence or objections submitted late,[20] unless the party provides a good reason for the delay (Section 331 (1) of the CCP).

After the pre-trial proceedings it is only possible to file new petitions, applications, evidence and objections if there is a good reason for not filing them in the pre-trial proceedings (Section 329 (1) second sentence of the CCP).

Further it is provided I Sections 330 (3) and 331 (1) of the CCP that any petitions containing new circumstances or requests, likewise evidence submitted after the end of pre-trial proceedings or, in written proceedings after the expiry of the term for submission of applications, are accepted to the proceedings only if in the court's opinion, accepting it to the proceedings does not cause a delay in the adjudication of the matter or if the participant in the proceedings provides a good reason for the delay.

However, the courts have discretion to decide about what is a good reason for submitting the petitions, applications, evidence or objections after the time prescribed on Section 329 (1) of the CCP. In addition it derives from Section 331 (1) and has been confirmed in the court practice that the court has a wide discretion to decide about whether to accept petitions, applications, evidence or objections submitted late[21] and that in some circumstances the court should accept the parties' petitions, applications, evidence or objections even if they are submitted late.[22]

1-57-11, p 40, and Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

[18] Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

[19] Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.

[20] Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.

[21] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

[22] In judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11, it was stated that while normally the court has an obligation to legally qualify the claim and explain to

The court's discretion about accepting petitions, applications, evidence or objections submitted late is limited by the criteria set in Section 331 (1) of the CCP, namely that the late petitions, applications, evidence or objections can be accepted if:

- in the court's opinion, accepting it to the proceedings does not cause a delay in the adjudication of the matter or
- the party in the proceedings provides a good reason for the delay.

The court has the obligation to give reasons for accepting or not accepting the late petitions, applications, evidence or objections.[23] In case the court accepts any new petitions, applications, evidence or objections, it must give the parties reasonable time to give statements and objections about the newly accepted petition, application, evidence or objection and allow them to submit further evidence if necessary.[24]

Although there is no list of circumstances where the court should accept late petitions, applications, evidence or objections, the general opinion of the Supreme Court seems to be that if the new circumstances arising from the new petition, application, or objection or the new evidence submitted is important with regard to the correct adjudication of the case, they should be accepted, provided it does not delay the proceedings unreasonably. Also late petitions, applications, evidence or objections should be accepted if considering the circumstances of the proceedings they would not actually delay the proceedings at all.[25]

If a party does not agree with the court's decision to accept or not accept evidence, the party is entitled to file an objection to the court's activity (Section 333 of the CCP). The objection has to be filed immediately, i.e. by the end of the same court session if the violation took place at a court session or in the first procedural document submitted by the party after the violation took place (Section 333 (2) of the CCP). In case the party fails to file an objection, he cannot rely on the circumstances in the appeal submitted about the judgement (Section 333 (3) of the CCP).

In addition to the fact that the court is bound by the circumstances and evidence submitted by the parties, the principle of free disposition is also seen as the parties' right to decide on the termination of the proceedings.[26] This can be done either by a compromise (Section 430 of the CCP) or by admittance of the claim by the defendant

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the parties the possible qualifications in the pre-trial and thus allow parties to give additional statements and evidence in the pre-trial, the court must nevertheless accept petitions, applications, evidence or objections submitted late if that is necessary in order for the parties to have a possibility to submit their statements about the possible legal qualifications considered by the court.

[23] Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

[24] Judgement of the Supreme Court of 27 November 2013 in Case No 3-2-1-128-13, p 11.

[25] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

[26] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

(Section 440 of the CCP), by withdrawal of the action (Section 424 of the CCP) or by the discontinuation of the proceedings by the plaintiff (Section 431 of the CCP). Once the parties have decided to terminate or discontinue the proceedings, the court has no authority to render a decision in the case[27], but must terminate the proceedings by a ruling. The exception is that in family matters the court is not bound by the admittance of the claim (Section 440 (4) of the CCP) or a compromise (Section 430 (3) of the CCP).

The court is also not bound to accept the discontinuation of the claim if it has been submitted by the legal representative of a plaintiff who has no active civil procedural legal capacity if the discontinuance of the action is clearly contrary to his interests or where the discontinuance of the action would result in the violation of a significant public interest (Section 429 (4) of the CCP). The court can refuse to accept a compromise if it is contrary to good morals or the law, violates a significant public interest or if the conditions of the compromise cannot be enforced (Section 430 (3) of the CCP).

The principle of free disposition of the parties is also applied in cases where the parties appeal the judgement of the first instance in the second or third court instance. In this case the court is again confined to the applications and submissions of the parties and will only review the judgement as far as the parties have requested the court to review the legality of the judgement of the court of lower instance (Section 688 (1) CCP).[28] The parties can for example ask the appellate court to review the case with regard to one claim and not the other claims submitted in the court of first instance.[29] However there are some exceptions to this rule.

One exception to the principle of free disposition can be seen in the powers of the circuit court (court of second instance) in some cases to overturn the judgment of court of first instance regardless of the parties' positions. This is regulated in Section 656 (1) of the CCP, which states that the circuit court (court of second instance) will overturn the judgement of the first instance regardless of the parties' submissions in cases where:

- The principle of legal hearing or the public nature of the proceeding has been materially violated;
- The judgment concerns a person who was not summoned to court pursuant to the requirements of the law;
- The matter was adjudicated by an unlawful court panel, including a court panel containing a judge who should have removed him- or herself;
- A party was not represented by a person so entitled, and the party had not approved such representation in the proceeding;
- The judgment is not reasoned to a significant extent pursuant to the requirements of law and the circuit court is unable to correct such omission.

[27] *Ibid.*
[28] *Ibid.*
[29] Judgement of the Supreme Court of 13 January 2010 in Case No 3-2-1-149-09, p 14.

A similar exception is also available in the proceedings of the Supreme Court. Thus if the grounds referred to in the previous paragraph exist with regard to the judgements of court of first or second instance, the Supreme Court (court of third instance) may according to Section 692 (4) and (5) overturn the judgements of the courts of second and first instance regardless of the applications of the appeal in cassation.[30]

1.2 Proceedings on Petition

As a general rule proceedings based on petition can be initiated at the initiative of the court or based on a petition of an interested party or agency (Section 476 (1) of the CCP).

In cases prescribed by the law proceedings on petition are initiated on the basis of a petition of an entitled person or agency only (Section 476 (2) of the CCP).

In matters on petition, the court ascertains the facts and takes the necessary evidence on its own unless otherwise prescribed by law (Section 5 (1) of the CCP). The court is not bound by the petitions submitted by the participants in the proceeding or by any circumstances, and the evaluation by the participants in the proceeding of the circumstances (Section 477 (5) of the CCP).

If according to the law the matter on petition can only be initiated on the basis of a petition of an entitled person or agency, that person or agency is entitled to withdraw the petition the same way as an action in proceedings based on an action (Section 477 (6) of the CCP). In other cases the court decides on the termination of the proceedings.

In a matter on petition the court is bound to hear the participant in the proceedings at his/her request (Section 477 (4) of the CCP). It is provided in Section 477 (4) of the CCP that hearing the participant in the proceedings must be done orally and personally, but at the same time Section 477 (4) of the CCP allows the court wide discretion as to how the person is heard (telephone, written and electronic statements can be used).

2 The Adversarial and Inquisitorial Principle

In Estonia civil procedure proceedings based on an action follow the adversarial principle, with the exception[31] of family matters (as defined above in p 1.1), matters concerning the interests of children and maintenance matters. However according to Section 230 (2) of the CCP the court has the possibility to ask the parties to provide evidence. The proceedings on petition on the other hand are fully based on the inquisitorial principle.

The adversarial principle is provided in Section 5 (1) and (2) and Section 230 (1) and (2) of the CCP. According to these provisions the proceedings based on an action are conducted on the basis of the facts and petitions submitted by the parties and based on

[30] Judgement of the Supreme Court of 27 November 2013 in Case No 3-2-1-128-13, p 11.
[31] The exceptions are provided in Section 230 (3) and (4) of the CCP.

the claim submitted. The parties have equal rights and opportunities in substantiating their claims, and to refute or contest the submissions of the opposing party. A party has the obligation to prove the facts that his/her claims or objections are based on and is free to choose the facts to submit in order to substantiate the claim or objection thereof as well as the evidence intended to prove such facts.[32] Section 230 (2) of the CCP specifically provides that only the parties submit evidence in the proceedings, although the court may propose to the parties to submit evidence. If the party is unable to gather evidence on its own, he/she can ask the court to gather evidence (Section 236 (2) of the CCP). But the court is not permitted to gather evidence on its own motion.[33]

According to the court practice the adversarial principle is somewhat limited. It has been established that the court is under obligation to ascertain the claims and objection of the parties and if the claims are unclear to ask the plaintiff to clarify the claim. The court is also under obligation to explain to the parties what circumstances they need to prove. The court would also be required in such cases to propose to the parties to submit additional evidence.[34] However the court must accept the fact that the parties do not clarify their claim or submit additional evidence after the court has asked the parties to do so and the court cannot gather evidence on its own or order the parties to submit evidence.[35] In everyday practice, these rules are followed and many of the judges give quite detailed explanations to the parties about what they need to prove.

Arising from Sections 5(3) and 230 (3) of the CCP the adversarial principle does not apply in matrimonial matters, filiation matters, disputes related to the interests of children and in proceedings on petition, unless otherwise provided by the law. In the named matters the court is free to gather evidence on its own motion.[36]

It derives from Section 230 (4) and (5) of the CCP that the adversarial principle is also not fully applied in maintenance matters as the court may require that a party provide data and documents on his/her income and financial status and the court may make independent inquiries in order to ascertain these circumstances.

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[32] Judgement of the Supreme Court of 17 February 1999 in Case No 3-2-1-26-99; Judgement of the Supreme Court of 29 October 1999 in Case No 3-2-1-99-99; Judgement of the Supreme Court of 27 April 2001 in Case No 3-2-1-49-01, part IV; Judgement of the Supreme Court of 14 April 2004 in Case No 3-2-1-52-04, p 11; Judgement of the Supreme Court of 8 March 2005 in Case No 3-2-1-8-05, p 11; Judgement of the Supreme Court of 2 October 2008 in Case No 3-2-1-66-08, p 18; Judgement of the Supreme Court of 8 January 2014 in Case No 3-2-1-148-13, p 13.

[33] Judgement of the Supreme Court of 4 September 1997 in Case No 3-2-1-91-97.

[34] Judgement of the Supreme Court of 3 October 2007 in Case No 3-2-1-86-07, p 12; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

[35] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

[36] Judgement of the Supreme Court of 2 October 2008 in Case No 3-2-1-66-08, p 19; Judgement of the Supreme Court of 8 April 2009 in Case No 3-2-1-31-09, p 12; Judgement of the Supreme Court of 6 November 2013 in Case No 3-2-1-119-13, p 17.

3 Hearing of Both Parties Principle (*audiatur et alter pars*)

The principle of hearing of both parties has been reflected in the Estonian civil procedure. In different sources it has been identified under the heading of right to be heard[37], right to a legal hearing[38] and principle of the equality of the parties[39]. The principle of equal treatment is provided in Section 7 of the CCP. It states that in the administration of justice in civil matters, the parties and other persons are equal before the law and the court.

According to the drafters of the CCP this principle has been reflected in the CCP in the right of the parties to submit to the court factual and legal statements and on the other hand to give statements and make objections about the other parties' factual and legal positions.[40]

The principle also includes the principle that the judgement should only be based on the factual and legal circumstances that the court has turned the parties attention to and about which the parties have been allowed to give statements. The judgement should not come as a surprise to the parties and if it is needed the court should explain to the parties, in a neutral manner, the preconditions for application of the material law.[41]

In other sources the principle is explained as the right of the parties to make submissions[42] and the obligation of the court to base the judgement only on circumstances, facts and evidence about which the other party was able to make its statements.[43]

The principle is reflected in Section 5 (2) of the CCP, which states that the parties have equal rights and opportunities in substantiating their claims, and to refute or contest the submissions of the opposing party. The principle is further stated in Section 328 (1) of the CCP as the obligation of the court to grant a party an opportunity to respond to the applications and factual allegations of the opposing party unless otherwise provided by law.

As a refelection of the obligation of equal treatment of the parties it has been established in court practice that the court's legal reasoning should not come as a surprise to the

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[37] ERAÕIGUS. II osa. Abimaterjal kohtunike ja prokuröride järelkoolituse eraõiguse õppegrupile. Dr. Ole Krönert. Tsiviilkohtuniku töökoht, p 126.
[38] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).
[39] Kai Härmand. Tsiviilmenetlus, Tallinn 2003, p 8.
[40] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).
[41] *Ibid.*
[42] Kai Härmand. Tsiviilmenetlus, Tallinn 2003, p 8.
[43] ERAÕIGUS. II osa. Abimaterjal kohtunike ja prokuröride järelkoolituse eraõiguse õppegrupile. Dr. Ole Krönert. Tsiviilkohtuniku töökoht, p 126.

parties. If the court wishes to apply a legal rule that the parties have not brought forward, the court should draw the parties' attention to such possibility and allow the parties to make submissions in the light of such reasoning (this is derived from Sections 348 (1) – (3); 351; 392 (1) points 1 and 3; 400 (5); 401 (1) and 436 (4) of the CCP).[44] Further it has been established in the court practice that if the court's new legal reasoning materially changes the parties' procedural position, the court is under obligation to discuss this with the parties and allow the parties to make additional statements and possibly submit additional evidence.[45]

The CCP does not provide that the same decision should be made in the same or similar cases since previous court practice is not binding on the court (except that the judgement of a court of higher instance made in the same case is binding on the court of lower instance).

Section 363 (1) of the CCP requires that the action submitted by the plaintiff must include the following:

- Clearly expressed claim of the plaintiff (object of action);
- Factual circumstances which constitute the basis of the action (cause of action);
- Evidence in proof of the circumstances which constitute the cause of the action, and a specific reference to the facts which the plaintiff wants to prove with each piece of evidence;
- Whether or not the plaintiff agrees to the conduct of written proceedings in the matter or wishes the matter to be heard in a court session;
- The value of the action unless the action is directed at payment of a certain sum of money.

The defendant's answer to the action on the other hand must according to Section 394 of the CCP provide the following:

- Whether the defendant has any objections to the court's acceptance of the matter or whether there is reason to refuse to hear the action or to terminate the proceeding in the matter;
- Whether the defendant admits the action by approving the correctness of the claims filed against the defendant in the statement of claim;
- All the defendant's requests and allegations, and evidence in proof of each factual allegation;
- Whether the defendant wishes to file a counterclaim;
- The opinion of the defendant on how to divide the procedural expenses;

[44] Judgement of the Supreme Court of 5 January 2011 in Case No 3-2-1-116-10, p 40; Judgement of the Supreme Court of 22 February 2011 in Case No 3-2-1-153-10, p 16; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 4 May 2011 in Case No 3-2-1-29-11, p 12; Judgement of the Supreme Court of 15 June 2011 in Case No 3-2-1-51-11, p 27; Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40, and Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

[45] Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

- Whether the defendant agrees to the conduct of a written proceeding or wishes the matter to be heard in a court session;
- Whether the defendant considers it possible to settle the matter by way of compromise or in any other manner by an agreement.

Section 392 (1) of the CCP provides that in the pre-trial proceedings the court has the obligation to ascertain the following:

- The claims of the plaintiff and the positions of the participants in the proceedings in respect of the claims;
- The requests of the participants in the proceedings and where necessary, the positions of the other participants in the proceeding in respect of the requests;
- The factual and legal allegations of the participants in the proceedings concerning the claims which have been filed and allegations which have been made;
- Evidence to be provided by the participants in the proceedings in proof of their factual allegations and concerning the permissibility of the provided evidence;
- The possibility to settle the matter by way of compromise or in another manner by a ruling or in written proceedings;
- The participants in the proceedings and whether and how to summon them to a court session.

In order for the court to be able to determine what evidence the participants in the proceedings intend to submit or ask the court to gather, the court sets a deadline in the pre-trial proceedings for submitting evidence or for making an application for the gathering of evidence (Section 237 (1) of the CCP). After that deadline new evidence can be submitted or an application to gather evidence can be made only if that does not cause a delay in the adjudication of the matter or the participant in the proceeding provides a good reason for the delay (Section 331 (1) of the CCP).

So to sum up, the CCP provides that in the pre-trial proceedings the parties should submit all the factual circumstances they intend to submit for the trial as well as any evidence they intend to submit or ask the court to gather. The plaintiff must submit all its claims in the pre-trial proceedings. In the trial hearing new claims, new factual circumstances or new evidence can be submitted only in cases where there are good reasons for not submitting them earlier.

There are no exceptions to the right of the participants in the proceedings to submit evidence, provided that the deadlines for submitting evidence are met (Section 237 of the CCP) and that the evidence is relevant and the particular fact needs to be proven and the court does not find that there is enough evidence submitted about the fact already (Section 238 (1) of the CCP).

In case the right of the party to be heard is grossly violated, it is grounds for annulment of the judgement of the court of first instance by the court of second instance regardless of the reasoning of the appeal (Section 656 (1) of the CCP).

If the defendant fails to answer the action at the time fixed by the court, the court may satisfy the action by awarding a judgement by default to the extent specified by the statement of claim and legally justified by facts provided that the plaintiff does not object to a default judgement (Section 407 (1) of the CCP). In case of a default judgement, the defendant is deemed to have accepted the factual allegations made by the plaintiff (Section 407 (1) of the CCP). However if the plaintiff has consented to the rendering of a judgment by default but the action is not legally justified to the extent specified by the statement of claim and by facts, the court is under obligation to make a judgment whereby the court refuses to satisfy the action (Section 407 (6) of the CCP).

The court will not award a default judgement if (Section 407 (5) of the CCP):

- The term for responding to the action given to the defendant was clearly too short;
- The defendant was not informed of the consequences of failure to respond to the action;
- The defendant has requested the grant of state legal aid during the term for submitting a response in order to respond through an attorney;
- The action has been accepted incorrectly and, among other, if the matter does not fall within the jurisdiction of the court;
- The defendant has provided good reason for failure to respond to the action and substantiated it to the court.

In case neither party appears in a court session, including a preliminary hearing, the court may do the following (Section 408 of the CCP):

- Adjudicate on the merits of the matter;
- Refuse to hear the action;
- Suspend the proceeding; or
- Postpone the hearing of the matter.

If the plaintiff fails to appear in the court session, including a preliminary hearing, the court, at the request of the defendant who has appeared in the court session will (Section 409 (1) of the CCP):

- Refuse to hear the action;
- Adjudicate the matter based on admittance of the claim if the defendant admits the claim;
- Adjudicate on the merits of the matter;
- Postpone the hearing of the matter.

If the defendant fails to appear in the court session, including a preliminary hearing, the court, at the request of the plaintiff who has appeared in the court session, may render a judgment by default, adjudicate on the merits of the matter or postpone the hearing of the matter (Section 410 of the CCP).

A judgement by default cannot be appealed against, but the defendant may file a petition to set aside the default judgment (Section 420 of the CCP). The petition must be filed within 30 days as of service of the judgement of default to the defendant (Section

415 (2) of the CCP). If the petition was served on the defendant publically a petition may be filed within 30 days as of the day when the defendant found out about the judgement or about enforcement proceedings carried out based on the judgement (Section 415 (2) of the CCP).

Normally the defendant may file a petition to set aside a default judgment only if the defendant's failure to act, which constituted the basis for awarding the judgment by default, was due to a good reason (Section 415 (1) of the CCP). A good reason for failure to respond to an action or to appear in a court session and for failure to notify the court thereof is above all, a breakdown of transportation, unexpected illness of a party or unexpected serious illness of a person close to a party due to which the party failed to respond to the action or to appear in court and to send a representative to the court (Section 422 (1) of the CCP). This is however not a closed list and other good reasons may be brought forward in the petition.

The defendant can file a petition to set aside a default judgment regardless of whether a good reason existed if (Section 415 (1) of the CCP):

- In the case of failure to respond to an action, the action was served on the defendant or representative thereof in any other manner except by personal delivery against a signature or electronically;
- In the case of failure to appear in a court session, the summons was served on the defendant or representative thereof in any other manner except by personal delivery against a signature or delivery in a court session;
- Pursuant to law, the default judgment could not have been made.

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

In the explanatory memorandum to the CCP it has been said that the principle of orality in its "pure form" is unpractical and uneffective given the needs of the contemporary world as well as the developments in the communications systems. Thus it was the intent of the drafters of the CCP to put emphasis on the thorough preparation of the oral hearing. The explanatory memorandum also states that while the CCP retains the possibility to hold oral preliminary hearings, the preliminary procedure should normally be conducted in writing.[46]

These principles have been reflected in the provisions of the CCP. It derives from Sections 334 – 336 of the CCP that the action containing the plaintiff's claims must be submitted either in writing or in electronic form. If the action is submitted in electronic form only, it has to be digitally signed by the person submitting it.[47] Section 394 (1) of

[46] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

[47] Digital signature has been used in Estonia since 2002 when Estonia started to issue ID cards with digital certificates used for identification and digital signing. Since 2007 the Mobile ID service has been provided, which enables identification and digital signing of documents

the CCP provides that the defendant is under obligation to submit a written answer to the action. According to Sections 335 and 336 of the CCP the answer can be submitted in electronic form. Section 395 of the CCP however gives the court the possibility to allow the defendant to answer the action in oral form if the court finds that this will help to adjudicate the matter more swiftly.

According to Section 376 (3) if the plaintiff wishes to amend the action – i.e. amend the ground for the action (the factual circumstances) or the object of the action (the claims) – this will have to be done in written form. In several cases the Supreme Court has said that amending the main factual circumstances of the action or substantially altering the claims cannot be done in oral form at the court session but should be done in writing. Amendments made orally will have to be dismissed by the court.[48] However adding some factual circumstances or altering the wording of the claims without actually changing the substance of the claims cannot be regarded as amending the action and thus can be made in oral form.[49]

The court of first instance is bound to adjudicate the case at an oral hearing unless

- The parties agree to a written procedure (Section 403 (1) of the CCP) or
- If the value of the action does not exceed an amount which corresponds to 3,200 euros on the main claim and to 6,400 euros together with collateral claims, the court decides to adjudicate the matter in written form (Section 404 (1) of the CCP).

The circuit court (court of second instance) may adjudicate the matter in written form unless one of the parties has required that a court session be held (Section 647 (1) of the CCP), but the court can hold a court session on its own motion if it deems it necessary (Section 647 (2) of the CCP).

The Supreme Court is not bound to hold a court session and can adjudicate the matter in written proceedings regardless of the parties' positions (Section 685 of the CCP).

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similarily to the ID card. Since 2011 the Mobile ID digital certificates have been issued by the state (previously they were issued by privately owned companies). Today much of civil proceedings are carried out electronically using the digital signature. For professional representatives of the parties (incl. attorneys), notaries, bailiffs, bankruptcy trustees, state and local government agencies the use of electronic means for communication with the court is compulsory and written documents can only be submitted if there is a good reason for not submitting them electronically (Section 336 (5) of the CCP).

[48] Judgement of the Supreme Court of 28 May 2008 in Case No 3-2-1-48-08, p 14; Judgement of the Supreme Court of 10 June 2008 in Case No 3-2-1-46-08, p 15; Judgement of the Supreme Court of 5 November 2008 in Case No 3-2-1-82-08, p 12; Judgement of the Supreme Court of 21 April 2009 in Case No 3-2-1-11-09, p 11; Judgement of the Supreme Court of 9 December 2009 in Case No 3-2-1-119-09, p 12; Judgement of the Supreme Court of 7 April 2010 in Case No 3-2-1-18-10, p 10.

[49] Judgement of the Supreme Court of 10 June 2008 in Case No 3-2-1-46-08, p 15.

In case the court adjudicates the matter in oral proceedings, Section 392 (2) of the CCP provides that the court is bound to prepare the matter in pre-trial proceedings thoroughly enough to be able to adjudicate the matter without interruptions in one court session.

In pre-trial proceedings the court does not have the obligation to hold a court session, although the court may do so if it allows for a better preparation of the case for the main hearing (Section 398 (1) of the CCP). The CCP requires that the pre-trial hearing should be immediately followed by the main hearing unless the court finds that the circumstances of the case are not clear enough (Section 398 (2) of the CCP). In the latter case the court will do what is necessary to prepare the main hearing and fix the time of the main hearing (Section 398 (3) of the CCP).

According to the author's personal experience as an attorney-at-law participating day to day in several litigations, the actual practice of the courts is somewhat different from what the intent of the drafters of the CCP was. In most of the litigations the court of first instance holds at least one, but often more than one, pre-trial hearing and it is usually held separate from the main hearing unless the circumstances of the case are very clear (which is rarely the case). However, the courts do prefer that the parties submit their positions in written form rather than orally at the hearing and thus the written part of the proceedings usually prevails in practice.

5 Principle of Directness

The principle of directness has been identified as one of the basic principles of Estonian civil procedure.[50] This principle is said to be reflected in two ideas:

- The fact that the court of first instance directly examines the evidence and in certain cases also the circuit court (court of second instance) has the power to examine the evidence; and
- That the judge or the panel that conducted the proceedings will also render the judgement.[51]

The principle of direct examination of evidence has been reflected in Sections 243, 652 (1) – (6) and (9) of the CCP.

Section 243 (1) of the CCP provides the general principle that the court examines evidence directly and evaluates evidence upon making a decision. According to Section 243 (2) and (3) the evidence is examined at a court session and all the participants in the proceedings are allowed to take part in that hearing. The evidence is examined in the order as provided by the court after the court has heard the opinions of the participants in the proceedings. Section 243 (4) and (5) provide that the absence of a participant of the proceedings at the court session does not prevent the court from examining evidence, but if the party later substantiates to the court that he/she had a good reason to

[50] Kai Härmand. Tsiviilmenetlus, Tallinn 2003, p 8; ERAÕIGUS. II osa. Abimaterjal kohtunike ja prokuröride järelkoolituse eraõiguse õppegrupile. Dr. Ole Krönert. Tsiviilkohtuniku töökoht, p 127.
[51] *Ibid.*

be absent from the court proceedings and that his/her absence has caused the gathered or examined evidence to be materially incomplete, the court may order a new or additional examination of the evidence.

In case evidence has to be taken outside of the territorial jurisdiction of the court conducting proceedings in a matter, the court may make a ruling for performance of a procedural act by a court within the territorial jurisdiction of which the evidence can be taken (Section 239 (1) of the CCP). In case evidence is taken by another court, the minutes of the procedural act will be made public at a court session of the court hearing the matter and parties may submit their opinions about the minutes (Section 243 (4) of the CCP).

In the circuit court (court of second instance) the examination of evidence takes place and thus the principle of direct examination is applied only in cases where the circuit court finds that the court of first instance has wrongfully failed to accept evidence or wrongly established the factual circumstances based on the evidence or materially breached the procedural law in the process of evaluation of evidence.

Section 652 (3) of the CCP provides that the circuit court (court of second instance) establishes circumstances not established and evaluates evidence not evaluated in a judgment of a court of first instance only if:

- The circumstance which was relied on or the evidence which was submitted has been disregarded without basis;
- The circumstance or evidence could not be submitted earlier due to a material violation of a provision of procedural law or for another good reason, including for the reason that the circumstance or evidence was created or became known or available to the party only after adjudication of the matter by the court of first instance.

It derives from Section 652 (5) of the CCP that the circuit court gathers and examines evidence only if a party contests a fact established, based on the evaluation of such evidence, in the judgment of the court of first instance, or contests the procedure for establishment of such fact due to a material violation of procedural provisions, and the circuit court deems new examination of the evidence necessary.

However the possibility of a party to rely on the material violation of procedural provisions is limited by Section 652 (6) of the CCP according to which the party cannot rely on the fact that the court of first instance violated a provision of procedural law, unless the party has filed an objection to it on time in the court of first instance.[52]

[52] It derives from Section 333 (2) of the CCP that a party must file an objection to the activity of the court at the latest at the end of the court session where the violation took place, or in the first procedural document submitted to the court after the violation took place, provided that the participant in the proceeding was aware or should have been aware of the terror.

6 Principle of Public Hearing

The principle of public hearing has been identified as one of the basic principles of Estonian civil procedure.[53] The principle is understood to mean that in principle the proceedings are public, unless the public interest directed at the protection of the private sphere of the participants is larger than the public interest directed at maintaining public control over the judiciary reflected in the principle of public proceedings.[54]

The principle of public hearing is reflected in Section 37 (1) of the CCP, which states that the court hearing of a matter is public unless otherwise prescribed by law. Section 37 (2) of the CCP sets out exceptions to this principle, stating that the court has the right to prohibit a person who has expressed contempt for the court and, in order to protect the interests of a minor, to prohibit the minor from attending a public hearing of a matter.

The possibilities for the court to remove persons from a court session due to misconduct are further specified by Section 45 (1) of the CCP, which states that the court may remove a participant in proceedings or his/her representative or adviser, or a witness, expert, interpreter, translator or another person present in the hearing who fails to comply with an order given to ensure order in the court session, acts in an improper manner in the court session or expresses contempt for the court or for other participants in the proceedings.

With regard to the representatives or advisors of a participant in the proceedings the court has further grounds for removal. The court may remove the representative or adviser of a participant in the proceeding or to prohibit the person from making statements if the representative or adviser is not able to act in the court in accordance with the requirements, including due to inadequate language proficiency, or, in the course of the court proceeding, has shown himself or herself as dishonest, incompetent or irresponsible, or if the person has, in bad faith, obstructed the just and expeditious hearing of the matter at the minimum possible cost or has repeatedly failed to comply with the orders of the court (Section 45 (2) of the CCP).

Section 44 of the CCP provides grounds for the court to limit the number of persons present in a court session if the courtroom is overcrowded and this interferes with the hearing of the matter. Again this is directed at allowing the court to ensure order at the court session.

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[53] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014); Kai Härmand. Tsiviilmenetlus, Tallinn 2003, p 8; ERAÕIGUS. II osa. Abimaterjal kohtunike ja prokuröride järelkoolituse eraõiguse õppegrupile. Dr. Ole Krönert. Tsiviilkohtuniku töökoht, p 127.

[54] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

The CCP imposes some limitations to the recording and transmission of court sessions. According to Section 42 (1) of the CCP taking notes is always allowed in court sessions provided that it does not interfere with the court session. The court session may be photographed or filmed, and audio recordings, radio, television or other broadcasts may be made in the court session only with the prior consent of the court.[55]

It is possible in Estonia for the civil proceedings to be declared closed. This can however only be made under the grounds specifically provided by the CCP. The grounds for declaring the proceedings closed are as follows:

- The protection of national security or public order and above all, for the protection of a state secret or classified information of a foreign state or information intended for internal use;
- The protection of the life, health or freedom of a participant in proceedings, witness or other person;
- The protection of the private life of a participant in proceedings, witness or other person unless the interest of public proceeding exceeds the interest of protection of private life;
- To maintain the confidentiality of adoption;
- In the interests of a minor or a mentally handicapped person and above all, for hearing such persons;
- To protect a business secret or other similar secret unless the interest of public proceeding exceeds the interest of protection of the secret;
- Hearing a person obligated by law to protect the secrecy of private life of persons or business secrets if the person is entitled by law to disclose such secrets in the course of proceedings;
- The protection of the confidentiality of messages transmitted by post, telegraph, telephone or other commonly used means;
- The objective administration of justice would be clearly compromised in public proceedings;
- The possibility to convince the parties to terminate the proceeding by a compromise or resolve the dispute in another manner is higher in closed proceedings.

The court is allowed to declare the proceedings closed either upon the application of a participant in the proceedings or on its own motion (Section 38 (1) of the CCP).

Once the proceedings are declared closed normally only the participants in the proceedings and their representatives or advisers are allowed to participate in the court sessions. However according to Section 39 of the CCP the court may without the consent of the participants in the proceedings permit a person who has justified interest in participating in a court session or whose presence at the session is clearly in the interests of administration of justice to be present at a closed court session. Anyone

[55] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

present at a closed court session is under obligation to keep secret anything they learned at the court session or in documents presented to the court as far as it is necessary to protect the right or interest protected by the court by declaring the proceedings closed.

Another exception to the principle of public hearing is provided in Section 479 (1) of the CCP concering the proceedings on petition, which states that the court rulings made in the proceedings on petition are generally not public unless otherwise provided by law.

7 Pre-Trial Discovery

Pre-trial discovery is possible in Estonia pursuant to Chapter 26 of the CCP. The purpose of pre-trail discovery can be either safeguarding evidence or establishment of facts.[56]

According to Section 244 (1) of the CCP pre-trial taking of evidence may be organised by a court ruling:

- During court proceedings at the request of a party or
- Upon a good reason before proceedings are initiated if (i) the opposing party agrees to this or (ii) if it can be presumed that evidence could be lost or (iii) using the evidence afterwards could involve difficulties.

Section 244 (1) second sentence also provides that in intellectual property matters the court can initiate pre-trial taking of evidence in order to safeguard evidence if a person substantiates that the copyright and related rights, or industrial property rights thereof have been infringed, or that a danger of infringement exists.

In the pre-trial discovery the court may organise inspections, hear witnesses, order expert assessments and conduct other procedural acts in order to take evidence (Section 244 (2) of the CCP).

Section 244 (3) of the CCP further specifies that before the beginning of court proceedings the court may order expert assessment as part of the pre-trial discovery where a person has a legal interest in the establishment of:

- The state of a person or the condition or value of an object;
- The reason for damage or defect of an object;
- The costs or measures for elimination of damage or correction of defects of an object.

It derives from Section 244 (4) of the CCP that the purpose of the expert assessment prior to court proceedings allowed pursuant to Section 244 (3) of the CCP is the prevention of a judicial dispute.

[56] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.5, part V. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

If the objective of the pre-trial discovery is to secure evidence, the court may order measures according to the provisions applicable to securing an action (Sections 377 – 391 of the CCP).

Normally the opposing party is notified about the pre-trial discovery in a way that allows the party to make its objections and submissions about the taking of evidence (Section 248 (3) of the CCP). However if the pre-trial discovery is conducted in order to secure the evidence in an intellectual property case, the court may take the necessary measures without informing the opposing party if the delay could result in irreparable damage to the applicant or if the evidence could otherwise be destroyed or lost (Section 248 (4) of the CCP). In this case the opposing party is notified about the measures immediately after they have been taken (Section 248 (4) of the CCP). The opposing party will also have the option to request from the court the substitution or cancellation of a measure for safeguarding evidence if the measure was wrongly taken and to appeal the rulings with which evidence was secured (Section 248 (5) of the CCP).

The CCP allows pre-trial discovery in situations where the opposing party is unknown. In such cases the applicant must give good reasons why he/she cannot specify the opposing party (Section 248 (1) of the CCP) and the court may appoint an attorney to protect the interests of the unknown opposing party (Section 248 (2) of the CCP).

The evidence gathered in the pre-trial discovery can be used in the same way as evidence gathered in the main proceedings (Section 249 (1) of the CCP). However if the opposing party did not participate in the court session of the pre-trial taking of evidence or in the performance of another procedural act, relying on the outcome of pre-trial taking of evidence is not permitted if the opposing party had not been summoned to the court session or the performance of such other procedural act in a timely manner or the rights of the opposing party were materially violated in the pre-trial taking of evidence due to another reason and the opposing party contests the evidence on such grounds (Section 249 (2) of the CCP).

The CCP does not provide for an obligation for the applicant to start main proceedings after the pre-trial discovery, except if the object of the pre-trial proceedings was to secure evidence. In the latter instance an action must be submitted within the time fixed by the court, which cannot be longer than 1 month as of the taking of the measures (Section 247 (2) of the CCP). If the action is not submitted within the deadline, the measures will be cancelled (Section 247 (2) of the CCP).

According to Section 250 of the CCP the party who applied for initiation of pre-trial taking of evidence shall compensate for the damage caused to the other party if:

- A court decision on refusal to satisfy or hear the action enters into force, or if the proceedings in the matter are terminated on any other grounds except due to the approval of the compromise of the parties;
- It becomes evident that no grounds for pre-trial taking of evidence existed at the time of initiating the pre-trial taking of evidence; or

– The acts performed in the course of pre-trial taking of evidence carried out prior to filing the action are annulled on the grounds that the action was not filed on time.

General Principles of Evidence Taking

1 Free Assessment of Evidence

Estonian civil procedure is based on the principle of free assessment of evidence. This principle is provided in Section 232 (1) and (2) of the CCP, which state that the court evaluates all evidence pursuant to law from all perspectives, thoroughly and objectively and decides, according to the conscience of the court, whether or not an argument presented by a participant in proceedings is proven. No evidence has predetermined weight for a court.

However the parties are allowed to make agreements regarding evidence (section 230 (1) of the CCP). For example the parties may agree that a certain fact has to be proven by certain kind of evidence or that certain evidence will have a certain weight in the proceedings. If the parties have made such agreements, the court must take them into account (Section 232 (1) and (2) of the CCP).

The CCP also provides an exception from the free assessment of evidence. The exception is provided in Section 232 (3) of the CCP and it states that upon establishment of a disputed fact, the court is bound by the opinion provided by a qualified person appointed by agreement of the parties if:

- The dispute is related to an agreement entered into in the course of the economic or professional activities of both parties, and
- No circumstances exist for removing the qualified person acting as an expert from the proceeding, and
- The qualified person was appointed according to an agreement without giving any preference to either of the parties, and
- The opinion of the qualified person is obviously not incorrect.

The CCP does not provide any formal rules for the assessment of evidence except for the obligation to assess evidence form all sides, fully and objectively according to the conscience of the court and without giving any pre-determined weight to any of the evidence, unless otherwise agreed by the parties (Section 232 of the CCP). There is no methodological guidance for judges to apply the free assessment of evidence.

2 Relevance of Material Truth

In Estonia the proceedings based on an action are covered by the principle of formal truth, except for some specific cases like family cases and filiation cases where the court is not bound by the factual circumstances submitted by the parties and must establish the material truth.

The principle of formal truth is expressed in the CCP in that the court is bound by the factual circumstances submitted by the parties and may not base the judgement on circumstances not brough forward by the parties (Sections 5 (1) and 436 (4) of the CCP). Also if a party does not make any objections to factual circumstances alleged by the other party, the court is bound to accept these circumstances as proven even if the court is convinced of the contrary.[57]

At the same time Section 328 (1) of the CCP provides an obligation for participants in proceedings to disclose to the court only factual circumstances that are true. This should ensure that the parties are only submitting truthful information in the proceedings. However there is no consequence for failing to submit truthful circumstances except that if the party is not able to prove the circumstances or the other party proves that the circumstances are not true, the court will not take the circumstances into account.

Proceedings on petition on the other hand are covered by the principle of material truth and the court is not bound by the circumstanes brought forward by the participants in the proceedings and is bound to find out the material truth (Section 477 (5) of the CCP).

[57] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

Evidence in General

In Estonian civil procedure evidence is considered to be any information which is in a procedural form provided by law and on the basis of which the court ascertains the existence or lack of facts on which the claims and objections of the parties are based and other facts relevant to the just adjudication of the matter (Section 229 (1) of the CCP).

Section 232 (2) of the CCP provides the basic principle for evaluation of evidence in Estonian civil procedure, stating that no evidence has predetermined weight for a court, unless otherwise agreed by the parties. Thus as a general rule the courts should not give preference to any particular type of evidence. This does not of course mean that the court could not give preference to some specific evidence in a particular case if as a result of the court's assessment that the evidence seems to the court more reliable than other evidence. But the court should not automatically prefer a particular kind of evidence to other evidence.

According to the CCP each fact can be established by any form of evidence allowed by the law and the court is according to Section 232 (1) and (2) under obligation to evaluate all evidence as a whole pursuant to law and from all perspectives, thoroughly and objectively, without giving any predetermined weight to any specific evidence.

However Section 232 (3) of the CCP provides one exception to the principle of free assessment of evidence. It states that the court is bound by the opinion provided by a qualified person appointed by an agreement of the parties, if:

- The dispute is related to an agreement entered into in the course of the economic or professional activities of both parties, and
- No circumstances exist for removing the qualified person acting as an expert from the proceeding, and
- The qualified person was appointed according to an agreement without giving any preference to either of the parties, and
- The opinion of the qualified person is not obviously incorrect.

Section 230 (1) of the CCP further provides that unless otherwise provided by law the parties may agree on the nature of evidence whereby a certain fact may be proved. So for example the parties might agree that a certain fact can be established by written evidence only. Such an agreement would be valid and the court must abide by it unless a law specifically forbids such an agreement.

The CCP does not explicitly provide a minimum standard of proof. According to Section 232 (1) of the CCP the court evaluates all evidence pursuant to law from all perspectives, thoroughly and objectively and decides, according to the conscience of the court, whether or not an argument presented by a participant in a proceeding is proven considering, among other, any agreements between the parties concerning the provision of evidence. Thus the main standard of proof is whether according to the conscience of the court a fact has been established by the proof or not, which gives the court a wide discretion to decide whether under the particular circumstances a fact has been established by the proof or not.

Section 229 (2) of the CCP provides a list of the types of evidence that can be used in civil proceedings. It states that evidence may be:

- The testimony of a witness,
- Statements of participants in a proceeding given under oath,
- Documentary evidence,
- Physical evidence,
- Inspection or
- An expert opinion.

In case of proceedings based on action the list is closed, but is proceedings on petition the court may also deem other means of proof, including a statement of a participant in the proceeding which is not given under oath, to be sufficient in order to prove the facts (Section 229 (2) of the CCP).

However, because the definition of documentary evidence as provided in Section 272 of the CCP is wide, almost anything that can be documented in some form may be used as evidence. According to Section 272 of the CCP documentary evidence can be either a written document or other document or similar data medium which is recorded by way of photography, video, audio, electronic or other data recording, which contains information on facts relevant to the adjudication of a matter and which can be submitted in a court session in a perceptible form. Official and personal correspondence and opinions of persons with specific expertise submitted to the court by participants in the proceeding are also deemed to be documents.

The CCP does not provide any means of evidence that would be excluded from the possible modes of proof.

Judicial and administrative decisions can be used as documentary evidence in civil proceedings (Section 272 (2) of the CCP) and they are evaluated by the court together with all other evidence. Judicial and administrative decisions do not have a special standing in civil procedings and circumstances ascertained in these decisions would still have to be proven (although judicial and administrative decisions can be one of the evidence proving the facts). The only exception is if the establishment of a fact has been the object of court proceedings and the court has determined the fact in the resolution of the judgement.

The fact that the notion of documentary evidence is wide has also been confirmed in court practice. It has for example been found that evidence gathered, documents issued and judgement made in criminal proceedings or misdemeanour procedure[58] and judgements made in administrative cases[59] can be used as documentary evidence in civil proceedings. In the recent Supreme Court practice it has even been established that statements given in writing by third parties can be used as documentary evidence[60] (with this the Supreme Court has changed its earlier view that statements of third parties can be gathered only by hearing them as witnesses[61]).

Parties' statements can be used as evidence in civil proceedings provided that the statements have been given under oath (Section 229 (2) of the CCP). If the statements have not been given under oath, they do not constitute evidence within the meaning of the CCP.[62]

Parties are heard under oath in the proceedings under the same conditions as witnesses unless a provision of law provides otherwise (Section 269 (1) of the CCP). The CCP does not include any restrictions as to what facts the parties can testify nor are there any special rules about how the evidence gathered through parties' testimony should be evaluated.

As a rule minors and adults with restricted active legal capacity cannot be heard under oath. Instead their legal representative(s) will be heard (Section 271 (1) of the CCP).

However, in case of adults with restricted active legal capacity the possibility to hear the party depends on whether the restriction on legal capacity includes a restriction as to the use of civil procedure rights or not. If the civil procedure rights have not been restricted, the party can be heard (Section 202 (2) and 271 (1) of the CCP).

Another exception regarding minors and adults with restricted active legal capacity is that they can be heard by the court without taking the oath concerning a fact directly related to his/her action or which was the object of his/her direct experience if the court deems it reasonable under the circumstances (Section 271 (2) of the CCP).

There are 4 cases where a party can be heard under oath:

1. A party who has not been able to prove, by any other evidence, a fact which needs to be proven by him or her or who has not provided any other evidence,

[58] Judgement of the Supreme Court of 28 November 2006 in Case No 3-2-1-105-06, p 10; Judgement of the Supreme Court of 11 May 2005 in Case No 3-2-1-41-05, p 25; Judgement of the Supreme Court of 2 November 2011 in Case No 3-2-1-91-11, p 10; Judgement of the Supreme Court of 12 June 2012 in Case No 3-2-1-72-12, p 13; Judgement of the Supreme Court of 17 December 2012 in Case No 3-2-1-161-12, p 14.
[59] Judgement of the Supreme Court of 27 October 2009 in Case No 3-2-1-100-08, p 21.
[60] Judgement of the Supreme Court of 5 April 2006 in Case No 3-2-1-17-06, p 13; Judgement of the Supreme Court of 12 October 2011 in Case No 3-2-1-74-11, p 26.
[61] Judgement of the Supreme Court of 5 December 2001 in Case No 3-2-1-145-01, part IV.
[62] Judgement of the Supreme Court of 1 November 2006 in Case No 3-2-1-91-06, p 15.

has the right to request the hearing of the opposing party or a third person under oath in order to prove the fact (Section 267 (1) of the CCP);
2. The court may hear under oath a party required to provide evidence concerning a disputed fact if one party requests it and the other party agrees (Section 268 of the CCP);
3. The court may hear a party under oath at its own initiative if the party required to provide evidence wishes to give statements under oath, but the opposing party does not agree with it (Section 268^1 (1) of the CCP);
4. Regardless of the parties' requests and the division of the burden of proof, the court may at its own initiative hear under oath either or both parties if on the basis of the earlier proceedings and the evidence provided and taken the court is not able to form a position on the truth of a stated fact subject to be proven (Section 268^1 (1) of the CCP).

The CCP does not impose an obligation on a party to give statements under oath nor does it provide a list of admissibile grounds for refusal to take the oath or to give statements under oath. There is also no penalty for a party who refuses to give statements under oath.

However if a party refuses to take the oath or to give statements under oath or refuses to make a statement concerning such refusal, the court may deem the fact stated by the opposing party to be proven, taking into account among other things the reasoning for the refusal to take the oath or to give statements (Section 270 (1) of the CCP). If a party fails to appear in the court session set for his/her hearing under oath without a good reason, the court may deem that he/she has refused to give statements (Section 270 (2) of the CCP), which could bring about the abovementioned results.

The party prior to giving statements must take an oath, where he/she undertakes to disclose the whole truth about the matter without concealing, adding or changing anything (Section 269 (2) of the CCP). The penalty for perjury is either a pecuniary punishment or up to 3 years' imprisonment (Section 320 (1) of the Penal Code[63]) and if perjury involves fraudulent creation of evidence, the penalty ranges from a pecuniary punishment up to 5 years' imprisonment (Section 320 (2) of the Penal Code).

Altough the wording of Section 230 (1) of the CCP states that in proceedings based on an action each party must prove the factual circumstances that his/her claims or objections are based on, the CCP does not actually impose a general obligation on the parties to provide evidence. The purpose of Section 230 (1) is simply to provide the burden of proof. Generally the only consequence of not providing evidence is that the factual circumstances that the claim or obligation is based on are not proven. The court may ask the parties to provide evidence (Section 230 (2) of the CCP), but cannot impose an obligation on a party to do so.

[63] The English translation of the Penal Code can be accessed at: https://www.riigiteataja.ee/en/eli/527022014002/consolide (last accessed 18.03.2014).

However in maintenance matters the court may require that a party provide data and documents on his/her income and financial status (Section 230 (4) of the CCP). Still there is no actualy penalty for the party who fails to provide the required information and documents. The only result for not providing all the required documents and data is that the court may make independent inquiries in order to ascertain the party's income and financial status (Section 230 (5) of the CCP).

In cases where the court is taking evidence either as a result of an application of a party or on its own initiative (in matrimonial matters, filiation matters, disputes related to the interests of a child or proceedings on petition) the court may require a person (including a party) to submit documentary evidence or information at his/her possession (Section 279 (1) and (2) of the CCP). If the person fails to submit the document or information without a reason, the court may impose a fine on the person (Section 279 (3) of the CCP). Section 283 (2) of the CCP provides that if a party fails to perform the obligation to submit a document to the court or the court is convinced after hearing the opposing party that the party has not looked for the document carefully, the court may approve the transcript of the document submitted to the court by the person providing the evidence. If no transcript of the document has been presented, the court may deem the statements concerning the nature and content of the unsubmitted document made by the person who requested the evidence to be proven.

Third parties are generally required to submit information or documentary or physical evidence or appear at a court hearing as witnesses and to allow the performance of an inspection if it is so required by the court (Sections 254, 279 (3), 286, 292 of the CCP). The court may fine a person for not complying with the court's order (Sections 279 (3), 286, 292 (2) of the CCP). In case of witnesses the court can fine a witness for not attending the court hearing or order compelled attendance (Section 266 (1) of the CCP). If the witness fails to testify the court can fine the witness or impose a detention of up to 14 days (Section 266 (2) of the CCP).

General Rule on the Burden of Proof

The general rule on burden of proof in cases based on an action is provided in Section 230 (1) of the CCP. It states that each party shall prove the facts on which the claims and objections of the party are based, unless otherwise provided by law[64]. However it also states that the parties may agree on a division of the burden of proof different from that, which is provided by law, and agree on the nature of the evidence whereby a certain fact may be proved, unless the law specifically forbids such agreements.

This above-mentioned burden of proof does not apply in matrimonial matters, filiation matters, disputes related to the interests of children and in proceedings on petition. In the mentioned cases the court has the obligation to ascertain the facts and take the necessary evidence (Sections 230 (2) and 5 (3) of the CCP).[65] In such matters the court does not need any special reasons for collecting evidence on its own initiative. The decision of whether to collect evidence on its own initiative or not is up to the court.

The CCP does not explicitly provide standards of proof. According to Section 232 (1) of the CCP the court evaluates all evidence pursuant to law from all perspectives, thoroughly and objectively and decides, according to the conscience of the court, whether or not an argument presented by a participant in a proceeding is proven considering, among others, any agreements between the parties concerning the provision of evidence. Thus the main standard of proof is whether according to the conscience of the court a fact has been established by the proof or not, which gives the court a wide discretion to decide whether under the particular circumstances a fact has been established by the proof or not.

The CCP excludes some facts from the burden of proof. The exceptions are provided in Section 231 of the CCP according to which a party is not under obligation to prove a fact if:

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[64] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 13; Judgement of the Supreme Court of 9 November 2009 in Case No 3-2-1-106-09, p 14; Judgement of the Supreme Court of 29 May 2012 in Case No 3-2-1-64-12, p 16; Judgement of the Supreme Court of 8 January 2013 in Case No 3-2-1-173-12, p 16.

[65] Judgement of the Supreme Court of 2 October 2008 in Case No 3-2-1-66-08, p 18; Judgement of the Supreme Court of 8 April 2009 in Case No 3-2-1-31-09, p 12; Judgement of the Supreme Court of 6 November 2013 in Case No 3-2-1-119-13, p 15.

- The court deems the fact to be a matter of common knowledge, i.e. a fact concerning which reliable information is available from sources outside the proceedings (Section 231 (1) of the CCP); or
- The opposing party unconditionally and expressly agrees to the factual circumstance either by means of a written statement addressed to the court or by a statement made in a court session where such agreement is entered in the minutes (Section 231 (2) of the CCP).[66]

Once a party has admitted to a fact, the admittance can only be taken back with the consent of the opposing party or if the party withdrawing the admittance proves that the allegation concerning the existence or absence of a fact which was admitted is incorrect and that the admittance was caused by an incorrect understanding of the fact (Section 231 (3) of the CCP).

Section 231 (4) of the CCP further provides that admittance of a fact is presumed until the opposing party expressly contests the allegation made concerning the fact or the party's intent to contest becomes evident from any other statements made thereby. Thus if a party fails to contest a factual circumstance, he/she is presumed to have admitted to it.

However in practice, the courts have been quite hesitant to presume admittance due to non-contestation of the factual circumstances alleged by the other party and have emphasised the importance of express and unconditional nature of the admittance and the need to make sure that non-contestation was the conscious choice of the party (by for example asking for the party's opinion about the factual circumstance).[67]

There is also one exception to the rules of admittance provided in Section 231 (2) of the CCP. It states that in matrimonial and filiation matters the court is not bound by the admittance, but only evaluates the admittance together with other evidence.

Estonian civil procedure is based on the principle of *iura novit curia*. Thus the courts are not bound by the legal reasoning of the parties (Sections 436 (7), 652 (8); 688 (2) of the CCP), although they are bound by the facts of the case. So in principle the court is

[66] Judgement of the Supreme Court of 5 December 2007 in Case No 3-2-1-109-07, p 27; Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 15; Judgement of the Supreme Court of 23 September 2008 in Case No 3-2-1-72-08, p 12; Judgement of the Supreme Court of 17 June 2009 in Case No 3-2-1-73-09, p 13; Judgement of the Supreme Court of 1 July 2009 in Case No 3-2-1-72-09, p 12; Judgement of the Supreme Court of 16 December 2009 in Case No 3-2-1-133-09, p 11; Judgement of the Supreme Court of 21 June 2011 in Case No 3-2-1-55-11, p 11; Judgement of the Supreme Court of 4 January 2012 in Case No 3-2-1-129-11, p 12.

[67] Judgement of the Supreme Court of 1 July 2009 in Case No 3-2-1-72-09, p 12; Judgement of the Supreme Court of 21 June 2011 in Case No 3-2-1-55-11, p 11; Judgement of the Supreme Court of 4 January 2012 in Case No 3-2-1-129-11, p 12; Judgement of the Supreme Court of 29 May 2013 in Case No 3-2-1-42-13, p 11.

free to apply the law based on the facts of the case as submitted by the parties. It is the court's obligation to legally qualify the claims of the parties.[68]

However in court practice some limitations to the court's freedom and obligation to apply the law have been imposed.

Firstly it has been established in court practice that the parties are in principle free to agree on the law applicable within the proceedings. The admittance can also be done with the parties' actions, e.g. not contesting the fact that the court applies a certain law.[69] Thus the court may apply the law chosen by the parties and is not under obligation to apply different law even if it is established later that the circumstances of the case would lead to the application of a different law.

Secondly, while it has been recognized in the court practice that the court is free to apply the law, if the court determines that the claims under the circumstances can equally be based on two different legal grounds, the court is under obligation to find out the opinion of the parties about the possible legal grounds. The court should also find out if the plaintiff excludes some of the legal grounds and whether the party would like the court to rule on the legal gorunds in a particular order. If the party then decides to exclude some of the legal grounds, the court is not under obligation to rule on these legal grounds.[70]

Thirdly it has been established in court practice that the court's legal reasoning should not come as a surprise to the parties. If the court wishes to apply a legal rule that the parties have not brought forward, the court should draw the parties' attention to such possibility and allow the parties to make submissions in the light of such reasoning (this is derived from Sections 348 (1) – (3); 351; 392 (1) points 1 and 3; 400 (5); 401 (1) and 436 (4) of the CCP).[71] Further it has been established in the court practice that if the court's new legal reasoning materially changes the parties' procedural position, the court is under obligation to discuss this with the parties and allow the parties to make additional statements and possibly submit additional evidence.[72]

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[68] Judgement of the Supreme Court of 10 April 2013 in Case No 3-2-1-21-13, p 16; Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.
[69] Judgement of the Supreme Court of 16 February 2005 in Case No 3-2-1-165-04, pp 17-18.
[70] Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 8 April 2011 in Case No 3-2-1-171-10, p 12; Judgement of the Supreme Court of 23 May 2012 in Case No 3-2-1-53-12, p 13; Judgement of the Supreme Court of 10 April 2013 in Case No 3-2-1-21-13, p 17.
[71] Judgement of the Supreme Court of 5 January 2011 in Case No 3-2-1-116-10, p 40; Judgement of the Supreme Court of 22 February 2011 in Case No 3-2-1-153-10, p 16; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 4 May 2011 in Case No 3-2-1-29-11, p 12; Judgement of the Supreme Court of 15 June 2011 in Case No 3-2-1-51-11, p 27; Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40 and Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.
[72] Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

The parties have the power to freely decide what statements to make and what facts to submit to the court to support the statements (Section 5 (2) of the CCP).[73] The court does not find out the factual circumstances on its own and is confined with what the parties submit. In cases based on actions the court may collect evidence on its own motion only if specifically provided by law (Section 5 (3) of the CCP).

According to the CCP and court practice the court has some obligations with regard to the parties' claims. CCP Section 392 (1) p 1 and 2 provide that the court must ascertain what are the claims of the plaintiff and what objections the defendant has to these claims and what are the legal and factual statements of the parties regarding the claims. If the claims or objections are unclear the court is under obligation to ask the party to clarify the claim or objections. The court is also under obligation to explain to the parties what circumstances they need to prove and in some cases the court must propose to the parties to submit additional evidence.[74] These obligations have been confirmed several times in the court practice.[75]

However it has also been established in the court practice that the court is not under obligation to explain to the parties what additional claims they might submit.[76] Also the court must accept the fact that the parties do not clarify their claims or objections or submit additional evidence even after the court has asked the parties to do so and the court cannot gather evidence on its own or order the parties to submit evidence.[77] The only consequence of not submitting additional evidence is that the facts alleged by the party might not be deemed proven.

The general rule as arising from Section 329 (1) of the CCP is that all petitions, applications, evidence and objections must normally be submitted in the pre-trial proceedings. However the court may fix a deadline within the pre-trial proceedings for submitting all petitions, applications, evidence or objections (Section 329 (4) of the CCP). The court is under no obligation to accept any petitions, applications, evidence or objections submitted late,[78] unless the party provides good reason for the delay (Section 331 (1) of the CCP).

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[73] Judgement of the Supreme Court of 15 February 2006 in Case No 3-2-1-165-05, p 13.

[74] Judgement of the Supreme Court of 3 October 2007 in Case No 3-2-1-86-07, p 12; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 9 January 2013 in Case No 3-2-1-166-12, p 15.

[75] Judgement of the Supreme Court of 22 December 2003 in Case No 3-2-1-146-03, p 16; Judgement of the Supreme Court of 20 December 2007 in Case No 3-2-1-121-07, p 15; Judgement of the Supreme Court of 10 June 2009 in Case No 3-2-1-66-09, p 11; Judgement of the Supreme Court of 9 December 2009 in Case No 3-2-1-119-09, p 12; Judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11; Judgement of the Supreme Court of 8 April 2011 in Case No 3-2-1-171-10, p 12; Judgement of the Supreme Court of 16 May 2011 in Case No 3-2-1-34-11, p 10.

[76] Judgement of the Supreme Court of 10 June 2009 in Case No 3-2-1-66-09, p 11.

[77] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.1, part I. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

[78] Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.

After the pre-trial proceedings it is only possible to file new petitions, applications, evidence and objections if there is a good reason for not filing them in the pre-trial proceedings (Section 329 (1) second sentence of the CCP).

Further it is provided in Sections 330 (3) and 331 (1) of the CCP that any petitions containing new circumstances or requests, likewise evidence submitted after the end of pre-trial proceedings or, in written proceedings, after the expiry of the term for submission of applications are accepted to the proceedings only if in the court's opinion, accepting it to the proceedings does not cause a delay in the adjudication of the matter or if the participant in the proceedings provides a good reason for the delay.

However, the courts have discretion to decide about what is a good reason for submitting the petitions, applications, evidence or objections after the time prescribed on Section 329 (1) of the CCP. In addition it derives from Section 331 (1) and has been confirmed in the court practice that the court has a wide discretion to decide about whether to accept petitions, applications, evidence or objections submitted late[79] and that in some circumstances the court should accept the parties' petitions, applications, evidence or objections even if they are submitted late.[80]

The court's discretion about accepting petitions, applications, evidence or objections submitted late is limited by the criteria set in Section 331 (1) of the CCP, namely that the late petitions, applications, evidence or objections can be accepted if:

- In the court's opinion, accepting it to the proceedings does not cause a delay in the adjudication of the matter or
- The party in the proceedings provides a good reason for the delay.

The court has the obligation to give reasons for accepting or not accepting the late petitions, applications, evidence or objections.[81] In case the court accepts the any new petitions, applications, evidence or objections, it must give the parties reasonable time to give statements and objections about the newly accepted petition, application, evidence or objection and allow them to submit further evidence if necessary.[82]

Although there is no list of circumstances where the court should accept late petitions, applications, evidence or objections, the general opinion of the Supreme Court seems to be that if the new circumstances arising from the new petition, application, or objection

[79] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

[80] In judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11, it was stated that while normally the court has an obligation to legally qualify the claim and explain to the parties the possible qualifications in the pre-trial and thus allow parties to give additional statements and evidence in the pre-trial, the court must nevertheless accept petitions, applications, evidence or objections submitted late if that is necessary in order for the parties to have a possibility to submit their statements about the possible legal qualifications considered by the court.

[81] Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

[82] Judgement of the Supreme Court of 27 November 2013 in Case No 3-2-1-128-13, p 11.

or the new evidence submitted is important with regard to the correct adjudication of the case, they should be accepted, provided it does not delay the proceedings unreasonably. Also late petitions, applications, evidence or objections should be accepted if considering the circumstances of the proceedings they would not actually delay the proceedings at all.[83]

If a party does not agree with the court's decision to accept or not accept evidence, the party is entitled to file an objection to the court's activity (Section 333 of the CCP). The objection has to be filed immediately, i.e. by the end of the same court session if the violation took place at a court session or in the first procedural document submitted by the party after the violation took place (Section 333 (2) of the CCP). In case the party fails to file an objection, he/she cannot rely on the circumstances in the appeal submitted about the judgement (Section 333 (3) of the CCP).

According to Section 236 (2) of the CCP if a participant in proceedings is unable to provide evidence, he/she may request the taking of the evidence by the court. If a participant in the proceedings requests the taking of evidence, he/she must substantiate which facts relevant to the matter he/she wishes to prove by the requested taking of evidence and set out any information which enables the taking of evidence (Section 236 (3) of the CCP). The taking of evidence is organised by a court ruling (Section 239 (1) of the CCP).

Section 279 (1) of the CCP provides that a person in possession of documentary evidence or information requested by the court shall be under obligation to submit the document or information to court. It derives from Section 286 of the CCP that the same applies for physical evidence.

If a person who is in possession of a document, information or physical required by the court fails to submit it without a reason, the court may impose a fine of up to 3200 euros on the person (Sections 279 (3) and 46 (1) of the CCP), provided that the person has been warned about the possibility to impose a fine (Section 46 (2) of the CCP). Paying the fine will not free the person from the obligation to submit the document, information or physical evidence and if the person does not fulfil the obligation despite the fine, the court may impose the fine repeatedly until the obligation is fulfilled (Section 46 (3) of the CCP).

Section 283 (2) of the CCP further provides that if a party fails to perform the obligation to submit a document to the court or the court is convinced after hearing the party that the party has not looked for the document carefully, the court may approve a transcript of the document submitted to the court by the person requesting the evidence or if no transcript of the document has been presented, the court may deem the statements concerning the nature and content of the unsubmitted document made by the person, who requested the evidence, to be proven.

[83] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

Written Evidence

The definition of documentary evidence in Estonian civil procedure as provided in Section 272 of the CCP is wide. Thus almost anything that can be documented in some form may be used as documentary evidence.

According to Section 272 of the CCP documentary evidence can be either a written document or other document or similar data medium which is recorded by way of photography, video, audio, electronic or other data recording, which contains information on facts relevant to the adjudication of a matter and which can be submitted in a court session in a perceptible form. Official and personal correspondence, judgements in other cases and opinions of persons with specific expertise submitted to the court by participants in the proceeding are also deemed to be documents. Private documents are regarded as evidence and there are no special rules regarding the evaluation of private documents. Thus private documents are evaluated together with other evidence without giving any particular weight to them. This is also true in case the other party contests the document.

The fact that the notion of documentary evidence is wide has also been confirmed in court practice. It has for example been found that evidence gathered, documents issued and judgement made in criminal proceedings or misdemeanour procedure[84] and judgements made in administrative cases[85] can be used as documentary evidence in civil proceedings. In the recent Supreme Court practice it has even been established that statements given in writing by third parties can be used as documentary evidence[86] (with this the Supreme Court has changed its earlier view that statements of third parties can be gathered only by hearing them as witnesses[87]).

It already derives from the definition of documentary evidence as provided in Section 272 of the CCP that electronic documents can be submitted to court. In everyday

[84] Judgement of the Supreme Court of 28 November 2006 in Case No 3-2-1-105-06, p 10; Judgement of the Supreme Court of 11 May 2005 in Case No 3-2-1-41-05, p 25; Judgement of the Supreme Court of 2 November 2011 in Case No 3-2-1-91-11, p 10; Judgement of the Supreme Court of 12 June 2012 in Case No 3-2-1-72-12, p 13; Judgement of the Supreme Court of 17 December 2012 in Case No 3-2-1-161-12, p 14.
[85] Judgement of the Supreme Court of 27 October 2009 in Case No 3-2-1-100-08, p 21.
[86] Judgement of the Supreme Court of 5 April 2006 in Case No 3-2-1-17-06, p 13; Judgement of the Supreme Court of 12 October 2011 in Case No 3-2-1-74-11, p 26.
[87] Judgement of the Supreme Court of 5 December 2001 in Case No 3-2-1-145-01, part IV.

practice and given that much of the civil procedure in Estonia is conducted electronically documents are often submitted to the court electronically (either as digitally signed electronic documents or electronic copies of written documents) and courts also send documents to the participants in the proceedings electronically.

Section 273 (1) of the CCP provides that a document can be submitted to the court either as an original or as a copy. According to Section 273 (5) if a copy of a document is submitted, the court can require the party to submit the original or substantiate why the original cannot be submitted. If the party does not follow the court's requirement, the court will have to decide the evidential power of the copy. Section 274 of the CCP further provides that electronic documents are submitted to the court in the form of printouts or are transmitted electronically in a format, which permits examination and safe storage thereof in the information system of the court.

According to Section 80 (1) and (2) of General Part of the Civil Code Act[88] a transaction in electronic format is deemed to be equal to a transaction in written format unless otherwise provided by law. A transaction is in electronic format, if:

- It is entered into in a format enabling repeated reproduction and
- It contains the names of the persons entering into the transaction and
- It is electronically signed by the persons entering into the transaction.

These provisions also apply in civil procedure in the context of documentary evidence. Section 336 (1) of the CCP provides that documents, which must be in written form, may also be submitted to the court electronically if the court is able to make printouts and copies of the submitted document. A document shall bear the digital signature of the sender or be transmitted in another similar secure manner, which enables the sender to be identified. Thus an electronic document that meets the above criteria is considered equal to written documents.

In fact Section 336 (5) of the CCP requires that professional representatives of the parties (incl. attorneys), notaries, bailiffs, bankruptcy trustees, state and local government agencies use only electronic means to communicate with the court and for them it is only possible to submit written documents if there is a good reason for not submitting them electronically.

Digital signature has been used in Estonia since 2002 when Estonia started to issue ID cards with digital certificates used for identification and digital signing. Since 2007 the Mobile ID service has been provided, which enables identification and digital signing of documents by mobile phone similarily to the ID card. As of 2011 the Mobile ID digital certificates have been issued by the state (previously they were issued by private companies).

[88] The English translation of the General Part of the Civil Code Act can be accessed at: https://www.riigiteataja.ee/en/eli/530102013019/consolide (last accessed 18.03.2014).

The legal ground for digital signature arises from Digital Signatures Act[89], which has been in force since 15 December 2000. As mentioned above, according to Section 80 of the General Part of the Civil Code Act electronic form is considered equal to written form. Thus electronic documents have the same probative value as written documents.

The CCP does not provide presumptions to the correctness of certain documents nor does it make any difference between different categories of documents. Section 232 (1) provides the general rule that all evidence is evaluated by the court pursuant to law from all perspectives, thoroughly and objectively and Section 277 of the CCP allows the contestation of the authenticity of any documents (if there are any doubts).

However Section 277 (3) does provide a slight difference in the contestation of the authenticity of electronic documents. It provides that an electronic document bearing a digital signature may be contested only by substantiating the circumstances, which give reason to presume that the holder of the digital signature has not prepared the document. The same also applies to electronic documents prepared in any other secure manner, enabling establishment of the person who prepared the document and the time it was prepared.

If the authenticity of a document has been contested, the court may, upon making the judgment, disregard such document or exclude it from among the evidence by a ruling. The court may order expert assessment or require submission of other evidence in order to clarify whether a document has been falsified (Section 277 (4) of the CCP).

According to Section 236 (2) of the CCP if a participant in proceedings is unable to provide evidence, he/she may request the taking of the evidence by the court. The possibility to requests that the court require submission of a document by another person is specifically provided on Section 278 of the CCP.

In case the court finds the request to take evidence reasoned, the court shall require the person (including a party) to submit documentary evidence or information at his/her possession and also fix a date by which the documents or information will have to be submitted and the place and means by which it has to be submitted (Section 279 of the CCP). In practice the documents will normally be submitted either electronically or in printed version and the court will make the documents and information available to the parties either via e-mail, electronic proceedings information system or serve a printed copy of the documents to the parties.

If a person who is in possession of a document or information required by the court fails to submit it without a reason, the court may impose a fine of up to 3200 euros on the person (Sections 279 (3) and 46 (1) of the CCP), provided that the person has been warned about the possibility to impose a fine (Section 46 (2) of the CCP). Paying the fine will not free the person from the obligation to submit the document or information

[89] The English translation of the Digital Signatures Act can be accessed at: https://www.riigiteataja.ee/en/eli/530102013080/consolide (last accessed 18.03.2014).

and if the person does not fulfil the obligation despite the fine, the court may impose the fine repeatedly until the obligation is fulfilled (Section 46 (3) of the CCP).

Section 283 (2) of the CCP further provides that if a party fails to perform the obligation to submit a document to the court or the court is convinced after hearing the party that the party has not looked for the document carefully, the court may approve a transcript of the document submitted to the court by the person requesting the evidence or if no transcript of the document has been presented, the court may deem the statements concerning the nature and content of the unsubmitted document made by the person, who requested the evidence, to be proven.

Section 243 (1) of the CCP requires the court to directly assess the evidence (including documentary evidence). However there is not obligation to fully read documentary evidence at the hearing.

Witnesses

According to Section 251 (1) of the CCP any person who may be aware of facts relevant to a matter may be heard as a witness unless the person is a participant in the proceedings or a representative of a participant in the proceedings in this matter.

The CCP provides that the witness is summoned to the hearing by the court (Section 252 of the CCP), although in the author's experience it is also quite common in practice that the parties organise the appearance of witnesses without being summoned by the court.

Once the court has summoned a person as a witness, he/she is required to appear in court and give truthful testimony before the court with regard to the facts known to him/her (Section 254 of the CCP). However there are exceptions where the witness is not allowed to testify or where he/she can refuse to testify.

Section 256 (1) of the CCP provides for an absolute prohibition to hear or question ministers of a religious association registered in Estonia or any support staff thereof with regard to circumstances confided to them in the context of spiritual care. This rule is stated as an absolute prohibition without any exceptions.

In addition Section 256 (2) of the CCP provides a list of persons, who cannot be heard or questioned as witnesses without the consent of the person in whose interests a duty to maintain confidentiality has been imposed. This prohibition to hear or question as witnesses also applies to any support staff working for these persons (Section 256 (3) of the CCP). The persons covered by this prohibition are:

- Representatives in civil or administrative matters, counsels in criminal or misdemeanour matters and notaries with regard to facts which have become known to them in the performance of their professional duties;
- Doctors, pharmacists or other health care providers, with regard to facts which a patient has confided to them, including facts related to the descent, artificial insemination, family or health of a person;
- Other persons who, due to their occupation or professional or economic activities, have been confided information, which the persons are obliged to keep confidential pursuant to law.

In case of privileges provided in Section 256 of the CCP, the CCP does not provide any exceptions to these privileges. This is in line with other legislation. E.g. in case of

attorneys Section 45 of the Bar Association Act requires the attorneys as well as other employees of an attorney's office to keep any information regarding the client confidential unless the client allows the information to be published. There are only 3 exceptions to this rule: (i) confidential information may be provided to the Board of the Bar Association in a supervisory case; (ii) to the Bar Association's court of honour in a disciplinary matter and (iii) the attorney may apply from the Chairman of the administrative court an excemption from the obligation to keep a secret in order to prevent a criminal offence in the first degree. Thus according to the Bar Association Act there would be no possibility for an attorney to testify in a civil matter unless the client gives permission to do so.

The CCP also provided situations where persons summoned as witnesses can refuse to testify.

Firstly Section 257 (1) of the CCP provides a list of persons close to the parties who can refuse to testify. These persons are:

- The descendants and ascendants of the plaintiff or defendant;
- A sister, stepsister, brother or stepbrother of the plaintiff or defendant, or a person who is or has been married to a sister, stepsister, brother or stepbrother of the plaintiff or defendant;
- A step parent or foster parent or a step child or foster child of the plaintiff or defendant;
- An adoptive parent or an adopted child of the plaintiff or defendant;
- The spouse of or a person permanently living together with the plaintiff or defendant, and the parents of the spouse or person, even if the marriage or permanent cohabitation has ended.

The right to refuse to testify does not however apply where the testimony concernes:

- The performance and content of a transaction which he/she was invited to witness;
- The birth or death of a family member;
- A fact related to a proprietary relationship which arises from a relationship under family law;
- An act related to the disputed legal relationship which the witness himself or herself performed as the legal predecessor or representative of a party.

Secondly Section 257 (2) of the CCP provides a privilege against self-incrimination as well as privilege against incrimination of persons close to the witness (as listed above). The privilege is limited only to a situation where the testimony may lay blame on the witness or a person close to him/her for the commission of a criminal offence or a misdemeanour.

Thridly a witness may refuse to give testimony concerning facts covered by the State Secrets and Classified Information of Foreign States Act (Section 257 (3) of the CCP). In other words, the witness does not have to give statements that would reveal state secrets or classified information of foreign states.

And fourthly there is an exception for persons processing information for journalistic purposes (including journalists and any other person who comes in contact with the journalistic source). It provides that these persons may refuse to give testimony concerning facts, which enables to identify the person who has provided the information for journaslistic purposes (Section 257 (4) and (5) of the CCP).

The CCP does not provide any further grounds for refusing to testify and thus in all other situations the witnesses are compelled to testify.

If the witness finds that he/she has grounds to refuse to testify, he/she must present the facts on the basis of which he/she refuses to testify no later than at the court session prescribed for his/her questioning and also substantiate such facts to the court (Section 259 (1) of the CCP).
Should the witness give advance notice of his/her refusal to testify, he/she need not appear in the court session prescribed for giving the testimony (Section 259 (2) of the CCP).

In case the court receives the witness' petition not to testify, the court will ask the participants in the proceedings to submit their opinions thereof and will then decide by a ruling whether the refusal is justified (Section 259 (2) and (3) of the CCP). If the refusal is not justified, the court will require the witness to testify. The witness has the right to file an appeal against such ruling (Section 259 (3) of the CCP). In case the refusal of the witness is based on the protection of state secrets or classified information of foreign states, the court will ask the agency in possession of the state secret or classified information of foreign states to conform classification of the facts as state secret or classified information of foreign states. If the agency does not confirm this or does not respond within 20 days, the witness is required to testify (Section 259 (4) of the CCP).

The witness usually testifies orally at a court hearing (Sections 251 (1) and 252 of the CCP), but the court may use the record of hearing the same witness in other court proceedings, if this clearly simplifies the proceedings and the court may be presumed to be able to evaluate the record to a necessary extent without directly interrogating the witness (Section 251 (2) of the CCP).

The court also has an option to take the testimony in written form if appearing before the court is unreasonably cumbersome to the witness and, taking account of the contents of the questions and the personal characteristics of the witness, giving written testimony is, in the court's opinion, sufficient for providing proof (Section 253 (1) of the CCP). However even in case of a written testimony the court may summon the witness to a court session in order to give an oral testimony (Section 253 (5) of the CCP).

The witness can also be heard in a procedural conference held via technical equipment allowing the witness to be at a different place (Section 350 (1) and (2) of the CCP) and in some circumstances by telephone (Section 350 (3) of the CCP). The possibility of the participants in proceedings to ask questions from the witness must be ensured.

The witness is not required to take an oath before giving the testimony, but the court explains to the witness prior to giving the testimony the obligation of the witness to tell the truth and the grounds for refusing to testify (Section 262 (1) of the CCP). The court also cautions a witness of at least 14 years of age against refusal to give testimony without a legal basis and giving knowingly false testimony and the witness confirms this by signing the court minutes or the text of the caution (Section 262 (2) of the CCP). The court explains to the witness the possible punishment for refusing to give testimony as well as for perjury.

Accoring to Section 318 of the Penal Code unjustified refusal by a witness to give testimony in civil court proceedings is punishable by a pecuniary punishment or up to one year of imprisonment.

A witness who knowingly gives false testimony in civil court proceedings may be punished by a pecuniary punishment or up to 3 years' imprisonment (Section 320 (1) of the Penal Code). If it also involves fraudulent creation of evidence the punishment will be either a pecuniary punishment or up to 5 years’ imprisonment (Section 320 (2) of the Penal Code).

When hearing a witness, participants in proceedings have the right to pose questions to the witness, which are necessary in their opinion in order to adjudicate the matter or establish the witness's connection to the matter (Section 262 (5) of the CCP). The questions are posed through the court, but the court may allow the participant to pose questions directly (Section 262 (5) of the CCP), which in practice is very common.

The witness will first be questioned by the participant in proceedings who applied for the summoning of the witness and thereafter by other participants in the proceedings (Section 262 (6) of the CCP). A witness summoned at the initiative of the court is questioned first by the plaintiff (Section 262 (6) of the CCP).

The court has the right to exclude leading questions and questions which are not relevant to the matter as well as the questions which are posed in order to reveal new facts which have not yet been presented to the court and repeated questions (Section 262 (7) of the CCP). The court also has the right to pose additional questions during the entire questioning in order to clarify or supplement the testimony or to establish the basis for the witness's knowledge (Section 262 (8) of the CCP).

If the witness gives his/her testimony in writing, the participants in proceedings may submit written questions to the witness through the court, who determines which questions the witness is requested to answer (Section 253 (3) of the CCP).

The court has an obligation prior to the witness giving his/her statements to establish the identity of the witness and find out his/her area of activity, education, residence, connection to the matter and relationships with the participants in the proceeding (Section 262 (1) of the CCP). The methods of establishing the identity if the witness or finding out the other information are not specified in the CCP. In practice an ID-card,

passport or driver's licence is used to identify the witness. The other data is collected according to the witness' statements.

Cross-examination is not in contradiction with the usual procedural policy of Estonia as the procedure of questioning a witness provided in the CCP is built on the principle that the witness is firstly questioned by the party who applied for the witness and after that by the other party. The court may ask questions at any time. In practice after both of the parties have examined the witness, each party may ask additional questions if needed.

Taking of Evidence

The basic principle as stated in Section 5 (2) of the CCP is that the parties may choose the evidence intended for proof of facts submitted by it (except in proceedings on petition, matrimonial matters, filiation matters, maintenance matters and in disputes related to the interests of children where the court may take evidence on its own as stated in Section 230 (3) and (4) of the CCP). This principle is further stated in Section 230 (1) that lays down the obligation of each party to prove the facts on which the claims and objections of the party are based.

Thus it is up to the parties to decide when and what evidence to submit (Section 236 (1) of the CCP) and it is the party's obligation to organise the presenting of the evidence to court. If the party is not able to submit evidence on its own, it may ask the court to take evidence (Section 236 (2) of the CCP). In any case the court will decide whether to accept the evidence presented to it or to take the evidence.

If a party wishes the court to hear witnesses or carry out expert assessments or hear a party under oath, the court will summon the witnesses and experts to the court session (Sections 252 and 303 (2) of the CCP) and parties can ask questions from the witness or expert only through the court (Sections 262 (5) and 298 (1) of the CCP), who ultimately decides whether a question can be asked or not (Sections 262 (7), (8) and 298 (1) of the CCP).

The parties' right to submit evidence is mostly restricted by certain time constraints and the relevance of the submitted evidence. According to Section 329 (1) of the CCP the parties are under obligation to submit evidence in the proceedings as early as possible depending on the stage of the proceedings and the need for the expeditious and just adjudication of the matter.[90]

The general rule as arising from Section 329 (1) of the CCP is that all evidence must normally be submitted in the pre-trial proceedings. However the court may fix a deadline within the pre-trial proceedings for submitting all evidence (Section 329 (4) of the CCP).

The court is under no obligation to accept any evidence submitted late,[91] unless the party provides good reason for the delay (Section 331 (1) of the CCP).

[90] Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.
[91] Judgement of the Supreme Court of 20 June 2011 in Case No 3-2-1-57-11, p 40.

After the pre-trial proceedings it is only possible to submit new evidence if there is a good reason for not submitting them in the pre-trial proceedings (Section 329 (1) second sentence of the CCP).
Further it is provided in Sections 330 (3) and 331 (1) of the CCP that any petitions containing new evidence or requests to take evidence submitted after the end of pre-trial proceedings or, in written proceedings, after the expiry of the term for submission of applications are accepted to the proceedings only if in the court's opinion, accepting it to the proceedings does not cause a delay in the adjudication of the matter or if the participant in the proceedings provides a good reason for the delay.

However, the courts have discretion to decide what is a good reason for submitting the evidence after the time prescribed on Section 329 (1) of the CCP. In addition it derives from Section 331 (1) and has been confirmed in the court practice that the court has a wide discretion to decide about whether to accept evidence submitted late[92] and that in some circumstances the court should accept the parties' evidence even if they are submitted late.[93]

The court has the obligation to give reasons for accepting or refusing to accept the late evidence.[94] In case the court accepts any new evidence, it must give the parties reasonable time to give statements and objections about the newly accepted evidence and allow them to submit further evidence if necessary.[95]

Although there is no list of circumstances where the court should accept late evidence, the general opinion of the Supreme Court seems to be that if the new circumstances arising from the new evidence submitted is important with regard to the correct adjudication of the case, they should be accepted, provided it does not delay the proceedings unreasonably. Also evidence should be accepted if considering the circumstances of the proceedings they would not actually delay the proceedings at all.[96]

The court also has the discretion to decide whether to accept the evidence submitted based on the relevance of the evidence. This principle is stated in Section 238 (1) of the CCP, which provides that the court accepts or organises the taking of and considers, in adjudicating a matter, only evidence, which has relevance to the matter. While it is up to

[92] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.
[93] In judgement of the Supreme Court of 9 March 2011 in Case No 3-2-1-169-10, p 11 it was stated that while normally the court has an obligation to legally qualify the claim and explain to the parties the possible qualifications in the pre-trial and thus allow parties to give additional statements and evidence in the pre-trial, the court must nevertheless accept petitions, applications, evidence or objections submitted late if that is necessary in order for the parties to have a possibility to submit their statements about the possible legal qualifications considered by the court.
[94] Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.
[95] Judgement of the Supreme Court of 27 November 2013 in Case No 3-2-1-128-13, p 11.
[96] Judgement of the Supreme Court of 6 February 2008 in Case No 3-2-1-137-07, p 12; Judgement of the Supreme Court of 28 September 2009 in Case No 3-2-1-76-09, p 12.

the court to ultimately decide whether the evidence is relevant, Section 238 (1) provides two situations where relevance of the evidence can be denied. These situations are if:

- The fact proven need not be proved, including situations where the fact is not disputed;
- Enough evidence has already been provided, in the opinion of the court, in proof of the fact.

However, the above list in not conclusive and the court is free to decide whether the evidence is relevant or not on a case-by-case basis.

In addition to the possibility to assess the relevance of the evidence, the CCP provides a number of specific cases where the court can refuse the evidence.

Section 238 (2) of the CCP provides that if pursuant to law or based on an agreement between the parties, a fact must be proven by evidence of a certain type or form, the fact shall not be proved by evidence of another type or form. If this is the case, the court can refuse evidence that does not meet the criteria.

Further section 238 (3) of the CCP provides a list of cases where the court may (although the court is not compelled to) refuse evidence. According to this list the court may refuse to accept or take evidence if:

- The evidence has been obtained by a criminal offence or unlawful violation of a fundamental right;
- The evidence is not accessible and, above all, if the witness's data or location of a document is unknown, or if the relevance of the evidence is disproportionate to the time necessary for taking the evidence or other difficulties related thereto;
- The evidence is not provided or the request for taking the evidence is not made in a timely manner;
- The need for providing or taking evidence is not substantiated;
- The participant in the proceeding requesting the taking of evidence fails to make an advance payment demanded by the court in order to cover the costs incurred upon the taking of evidence.

In any case the court refuses to accept or take evidence, the court is under obligation to make a reasoned ruling (Section 238 (4) of the CCP). The ruling may not be appealed against (Section 660 (1) and 238 (4) of the CCP), but the party is entitled to file an objection to the court's activity (Section 333 of the CCP). The objection has to be filed immediately, i.e. by the end of the same court session if the violation took place at a court session or in the first procedural document submitted by the party after the violation took place (Section 333 (2) of the CCP). In case the party fails to file an objection, he cannot rely on the circumstances in the appeal submitted about the judgement (Section 333 (3) of the CCP).

The general principle in the CCP is that all facts have to be proven in the same proceedings, except for facts that have been acknowledged by the resolution of a

previous judgement.[97] Judgements in other proceedings can however be used as evidence and will be evaluated together with other evidence (Section 272 (2) of the CCP).

There are no special rules in the CCP regarding the situation when a fact has been established in other court proceedings. Thus the court will have to evaluate the judgement of the other proceedings together with other evidence and decide whether additional evidence can be submitted about a fact. The general rule is that the court may refuse to take evidence if the court finds that enough evidence to prove a fact has already been submitted (Section 238 (1) 2 of the CCP).

If a participant in proceedings asks the court to take evidence, he/she will have to specify which facts relevant to the matter he/she wishes to prove by requesting the taking of evidence and also provide any information which enables the taking of evidence (Section 236 (3) of the CCP). In case of documentary evidence it is further specified in the CCP that if a person requests that the court require the submission of a document by another person, the person must describe such document and its content in the request and set out the reason why he/she believes the document to be in the possession of such person (Section 278 of the CCP). The same applies to physical evidence (Section 286 of the CCP).

According to Section 244 (1) of the CCP it is possible for the court upon application from a party to organise pre-trial taking of evidence if it is necessary to secure the evidence. The pre-trial taking of evidence is possible both during the civil proceedings or, if there are good grounds for it, before the start of the civil proceedings. The CCP does not provide what are good grounds to organise pre-trial securing of evidence and it is up to the court to decide whether there is enough justification why the evidence has to be secured before the trial and cannot be done after submitting an action to the court.

1 The Hearing

Section 243 (1) of the CCP provides that the court examines evidence directly and evaluates evidence upon making a decision. Evidence is as a general rule examined at a court hearing in the sequence as determined by the court after hearing the opinions of the participants in the proceedings (Section 243 (2) of the CCP).

The participants in the proceedings have the right to attend the examination of evidence in court sessions, although absence of a participant in the proceedings, who has been duly summoned to court, does not prevent the examination of the evidence unless the court rules otherwise (Section 243 (3) of the CCP).

The court may order new or additional examination of evidence at the request of a participant in the proceedings if he/she was absent from the court session in which the

[97] Draft Legislation 208 SE I. Code of Civil Procedure. Explanatory Memorandum, p 3, 2.1.5, part V. Available: http://www.riigikogu.ee/?op=emsplain2&content_type=text/html&page=mgetdoc&itemid=033370012 (accessed 18 March 2014).

evidence was examined because of a good reason and due to his/her absence the evidence taken or examined is materially incomplete (Section 243 (4) of the CCP).

Evidence is usually taken by the judge presiding over the case (Section 239 (1) of the CCP). If evidence has to be taken outside of the territorial jurisdiction of the court conducting proceedings in a matter, the court may make a ruling for performance of a procedural act by a court within the territorial jurisdiction of which the evidence can be taken (Section 239 (1) of the CCP). There are no further limits to taking of the evidence by another court.

If evidence is taken by another court, the minutes of the procedural act will be made public at a court session of the court and parties may submit their opinions about the minutes (Section 243 (4) of the CCP).

Generally Estonian law does not allow new evidence to be taken after the court session has ended. However Section 437 p 1 of the CCP allows the court to make a ruling to rehear a matter if the court establishes that an error was made in the proceedings that is material to deciding the matter and this error can be corrected. So in exceptional circumstances it would be possible to rehear the matter and take additional evidence in the course of rehearing of the matter.

Estonian law does not make a distinction between direct and indirect evidence. According to the principle of free assessment of evidence all evidence is evaluated objectively and thoroughly without giving any pre-determined weight to any particular evidence (Section 232 (1) and (2) of the CCP).

Estonian law allows a court session to be held as a procedural conference, where the participants in the proceedings or their representatives or advisors are in another place during the court session and are able to perform procedural acts in real time (Section 350 (1) of the CCP). It is also possible to hear witnesses and expert witnesses not present at the court session in this manner provided that the participants in the proceedings are able to pose questions to the witness or expert witness (Section 350 (2) of the CCP).

As a general rule a court session in the form of a procedural conference must be organised in a way that the right of every participant in the proceedings to file petitions and applications and to formulate positions on the petitions and applications of other participants in the proceedings is guaranteed in a technically secure manner and the conditions of the court session in respect of the real time transmission of image and sound from the participant in the proceedings not present in court premises to the court and vice versa must be technically secure (Section 350 (3) of the CCP). However as an exception, with the consent of the parties and the witness, it is possible to hear the witness via telephone (Section 350 (3) of the CCP).

2 Witnesses

The CCP provides that the witness is summoned to the hearing by the court (Section 252 of the CCP), although in the author's experience it is also quite common in practice that the parties organise the appearance of witnesses without being summoned by the court.

The witness is summoned by serving the summons on him/her. A summons must contain at least the following information:

- The participants in the proceeding and the object of the dispute;
- The matter in which the person is to be heard;
- An order to appear at the time and place indicated in the summons in order to give testimony;
- A warning that coercive measures provided by law will be applied if the witness fails to appear for the hearing.

The parties do not have to submit to the court a written statement, although it would be possible to do that.[98] The CCP does not provide any regulation on the preparation of the witnesses, but there is no prohibition to meet the witness beforehand and discuss the testimony.

Witnesses are not required to take an oath, but the court explains to the witness prior to giving the testimony the obligation of the witness to tell the truth and the grounds for refusing to testify (Section 262 (1) of the CCP). The court also cautions a witness of at least 14 years of age against refusal to give testimony without a legal basis and giving knowingly false testimony and the witness confirms that he/she has been cautioned by signing the court minutes or the text of the caution (Section 262 (2) of the CCP). The court also explains to the witness the possible punishment for refusing to give testimony as well as for perjury.

Witnesses are heard individually and a witness who has not been heard may not be present in the courtroom during the hearing of the matter (Section 260 (1) of the CCP). A witness who has been heard will stay in the courtroom until the end of the hearing of the matter unless the court gives the witness permission to leave earlier (Section 260 (1). In practice however the court usually gives the witness a choice to either stay or leave the hearing.

The CCP does not regulate the preparation of witnesses before the hearing. Preparation of witnesses is not required, but it is generally allowed for the parties to meet witnesses before the hearing and to discuss the case. The witnesse has the obligation to give a testimony (unless one of the grounds to refuse testimony provided in Sections 256 – 257 of the CCP applies) and to tell the truth (Section 254 of the CCP).

[98] Judgement of the Supreme Court of 5 April 2006 in Case No 3-2-1-17-06, p 13; Judgement of the Supreme Court of 12 October 2011 in Case No 3-2-1-74-11, p 26.

3 Experts

In Estonia expert opinions can only be delivered by experts appointed by the court (Section 293 (1) of the CCP). The parties may also present written opinions of other specialists or experts, but these can only be taken into account as documentary evidence (specialist's opinion; Section 272 (2) of the CCP). Specialists or experts not appointed by the court could also be heard as witnesses, but they would in such case be regarded as normal witnesses and not as experts, meaning that they could only testify about factual circumstances known to them and would not be able to give their expert opinion.

The court must usually choose the expert from the list of certified experts (Section 294 (2) of the CCP), but if no certified experts are available to conduct the particular expert assessment, the court may choose a forensic expert working at a state forensic institution or other specialist with required knowledge and experience (Section 294 (1) of the CCP).

The court may ask the parties to name persons suitable to conduct the expert assessment (Section 294 (3) of the CCP). The decision on who to appoint as expert is made by the court, unless the parties agree on the expert (Section 294 (4) of the CCP). It is also possible for the court to appoint a forensic institution or another person conducting expert assessments as expert and leave the decision on appointment of a specific expert to the institution or person (Section 294 (6) of the CCP).

The court has the possibility to appoint additional experts or substitute appointed experts (Section 294 (5) of the CCP). If the delivered expert opinion is ambiguous, contradictory or insufficient and cannot be corrected by additional questions, the court has the right to order a reassessment. A reassessment is assigned to the same expert or another expert (Section 304 (1) of the CCP).

Experts appointed by the court generally give an expert opinion in writing, although it can also be presented orally or upon the expert's agreement also in other form (Section 301 (1) of the CCP). The expert opinion is disclosed at the court session (Section 303 (1) of the CCP).

If the expert has given his/her opinion in writing, the court may summon him/her to the court session (Section 303 (2) of the CCP). If one of the parties requests that the expert be present at the court session, the court is compelled to summon the expert (Section 303 (2) of the CCP). The expert is under obligation to appear in court and give a truthwul and reasoned opinion in the questions that he/she has been asked (Section 303 (4) of the CCP).

The expert witness is heard according to the same rules as witnesses unless otherwise provided by the CCP (Section 303 (5) of the CCP).

After the expert opinion has been examined at the court hearing, the parties are allowed to ask the expert questions intended to clarify the opinion (Section 303 (3) of the CCP).

The court has the power to exclude questions which are irrelevant or beyond the competence of the expert (Section 303 (3) of the CCP).

The CCP provides as a general principle that unless the parties have agreed otherwise court evaluates all evidence as a whole from all perspectives, thoroughly and objectively without giving any predetermined weight to any particular evidence (Section 232 (1) and (2) of the CCP). Expert opinions are no exceptions to the general rule and thus any expert opinion given in the proceedings will be assessed as one of the evidence and has the same weight as any other evidence.

Costs and Language

1 Costs

According to Section 138 (1) of the CCP the procedural costs are divided into two: (i) legal costs and (ii) extra-judicial costs incurred by a participant in proceedings.

Legal costs are state fees and securities paid by the parties and costs related to the adjudication of the matter, which consist of (Sections 138 (3) and 143 of the CCP):

- Costs related to witnesses, experts, interpreters and translators as well as the costs of persons not participating in the proceeding incurred in connection with examinations to be compensated for pursuant to the Forensic Examination Act;
- Costs related to obtaining documentary evidence and physical evidence;
- Costs related to inspection, including necessary travel expenses incurred by the court;
- Cost of service and sending of procedural documents through a bailiff or in a foreign state or on or to extra-territorial citizens of the Republic of Estonia;
- Costs of issuing procedural documents; and
- Costs related to the determination of the value of the civil matter.

Witnesses in civil proceedings are entitled to the payment of a witness fee and compensation for travel costs as well as other costs related to the proceedings, including cost of accommodation and meals (Sections 152, 156 and 157 of the CCP).

The purpose of the witness fee is to compensate the witness for loss of income as a result of testifying (Section 152 (1) of the CCP). The witness fee is calculated based on the gross hourly income of the witness and the hourly fee is paid for each working hour that the witness is missing from work (section 152 (2) of the CCP). However a minimum and maximum hourly witness fee has been fixed based on the minimum hourly wage set in Estonia (Section 152 (3) of the CCP). The witness fee actually paid to the witness will range between the minimum and maximum fee. If the witness does not lose any income as a result of testifying or he/she has no income, the witness will be paid the minimum fee (Section 152 (4) of the CCP). If the income of the witness is above the maximum fee, he/she will be paid the maximum fee.

The minimum hourly witness fee is the minimum hourly wage as set in Estonia and the maximum is 10 times the minimum hourly wage (Section 152 (3) of the CCP and

Section 7 (3) of 22 December 2005 Regulation of the Government No 322). In 2014 the minimum hourly witness fee was 2.13 euros and the maximum fee is 21.30 euros. In 2015 the fees are 2.34 and 23.40 euros respectively.

Witness fee can also be paid if the witness answers questions in writing (Section 152 (1) of the CCP). In this case the witness fee is paid based on the number of pages (one page is 1,800 alphabetic characters). The minimum fee for one page is the minimum hourly wage as set in Estonia and the maximum is 10 times the minimum hourly wage (Section 152 (3) of the CCP and Section 7 (4) and (5) of 22 December 2005 Regulation of the Government No 322).

The witness fee can exceptionally be higher than the maximum fee if the witness is resident abroad and if in his/her state of residence such compensation or fee is usual and the person's participation in the proceedings is absolutely necessary (Section 154 of the CCP).

In addition to the fee, the witness can apply for compensation of costs for transport, accommodation and meals (Sections 156 and 157 of the CCP). Neither the CCP nor 22 December 2005 Regulation of the Government No 322 – which further regulates the compensation of costs to experts, witnesses, etc. – gives any specifications about how the transportation and accommodation costs should be calculated or set any boundries except that the transport costs have to be reasonable (Section 156 of the CCP). The transportation and accommodation costs are compensated according to documents submitted by the witness.

The cost of meals is regulated by 22 December 2005 Regulation of the Government No 322. Section 3 (1) of this regulation provides that meals are covered by daily allowance paid according to the same procedure as provided under Section 13 (3) 1) of Income Tax Act. However this referral to the Income Tax Act does not make it clear what is the amount of daily allowance. The reason is that while Section 13 (3) 1) of Income Tax Act provides that a daily allowance of up to 32 euros per day is free of income tax, the Government has enacted 2 Regulations based on this same provision of Income Tax Act. Both of these Regulations provide the basis of the payment of daily allowance and other costs realated to official or business travel. One of the Regulations – the 19 December 2012 Government Regulation No 112 – applies to government officials and it provides in Section 4 (1) that the daily allowance is 32 euros per day. The other regulations – the 25 June 2009 Government Regulation No 110 – applies to all employees (except for government officials) and it provides in Section 3 that the minimum daily allowance is 22.37 euros per day. Thus it is not clear from the legal acts whether the daily allowance payable to witnesses is 22.37 or 32 euros per day.

The witness fee is paid and costs are compensated only upon request by the witness (Section 160 (1) of the CCP). The witness will forfeit its claim of fee and costs if he/she does not submit the claim to the court who has summoned him/her within 3 months after he/she last participated in the proceedings (Section 160 (2) of the CCP). The court has an obligation to inform the witness of the deadline for obtaining witness fee and

compensation of costs and the fact that the witness will lose its right if he/she does not submit the application on time (Section 160 (1) of the CCP).

The payment of a fee and compensation for costs of an expert and for interpreters is similar to the payment of fees and costs to the witness, with some exceptions.

According to 153 (1) of the CCP the maximum fee payable to an expert or interpreter is 50 times the minimum hourly wage, i.e. in 2014 it was 106,50 euros and in 2015 it is 117 euros.

However Section 4 (1) of the 22 December 2005 Regulation of the Government No 322 specifies that the hourly fee payable to an expert ranges between 10 and 40 time the minimum hourly wage, i.e. in 2014 between 23.10 euros and 92.40 euros and in 2015 between 23.40 and 93.60 euros. The court has discretion to decide on the payable expert fee within these limits taking into account the expert's qualification, the complexity of the expert assessment and unavoidable costs incurred by the expert in connection with the expert assessment (Section 153 (3) of the CCP).

The expert may apply for compensation for costs of expert assessment up to 20% of the total expert fee (Section 155 of the CCP). In addition the expert can also apply for transportation, accommodation and meals costs under the same conditions as a witness.

There is also one exception where the expert fee and possible transportation costs are fixed. This exception applies to psychiatric and psychiatric-psychological complex assessements. In these cases the expert fee is 255 euros per participating expert (Section 5^2 (1) of the 22 December 2005 Regulation of the Government No 322). If the expert assessment is carried out as an in-patient assessment, a further fee of up to 57.50 euros per day may be charged (Section 5^2 (2) of the 22 December 2005 Regulation of the Government No 322). The transportation costs of the experts in such cases are also limited and these costs may only be charged if the assessed person is more than 50 km away from the expert. The transportation costs will be compendated at a rate of 0.25 euros per kilometer, but no more than 63.90 euros per assessment.

The expert fee can exceptionally be higher than the maximum fee if the expert is resident abroad and if in his/her state of residence such compensation or fee is usual and the expert's participation in the proceeding is absolutely necessary (Section 154 of the CCP).

Fee for a translator is only payable if the translator is not hired by the court. According to Section 6 of 22 December 2005 Regulation of the Government No 32 the fee of the translator in case of oral translation ranges from 2 times the minimum hourly wage up to 40 times the minimum hourly wage, i.e. in 2014 between 4.26 euros and 92.40 euros and in 2015 between 4.68 and 93.60 euros and in case of written translation it is 20 times the minimum hourly wage per page (1,800 characters including spaces), i.e. in 2014 it is 42.60 euros and in 2015 it is 46.80 euros.

The translator can also apply for transportation, accommodation and meals costs under the same conditions as a witness.

Experts and translators are paid only upon request and the court may fix for them a deadline of at least 30 days to apply for the fee and costs (Section 160 (1) and (3) of the CCP). If the application is not made within the deadline set by the court and if no deadline has been set within 1 year as of the time when the claim arose, the expert or witness will lose the right to the fee and payment of costs (Section 160 (4) of the CCP).

According to Section 15 (4) of the CCP the requesting court is not bound to pay any costs as a result of the request, but the requested court will inform the requesting court about the amount of costs and these costs will be considered as procedural costs in the main proceedings. Section 15 (6) of the CCP provides that in case the requesting court is a court in the EU, the CCP is applied as far as Regulation 1206/2001 does not provide otherwise.

The general rule as provided in Section 148 (1) of the CCP is that costs of taking evidence will have to be paid in advance by the party who requests that the evidence be taken. If the costs are not paid in advance, the court can refuse to take evidence (Section 148 (3) of the CCP). However Section 148 (1) of the CCP leaves the court some room to decide otherwise.

In case both parties apply for taking of the same evidence or if the court hears a witness or expert or conducts an inspection *ex officio*, the costs will have to be paid in advance by both of the parties in equal amounts (Section 148 (1) of the CCP).

This advance payment of costs is only temporary, as ultimately the costs will have to be paid by the party who is bound to bear the costs of the proceedings. In cases based on an action the general rule is that costs of proceedings are borne by the party against whom the court decides (Section 162 (1) of the CCP), except in matrimonial and filiation matters where the general rule is that parties cover their own procedural costs (Section 164 (1) of the CCP). In proceedings on petition, the costs are usually borne by the party in whose interest the decision is made.

2 Language and Translation

Court proceedings in Estonia are conducted in the Estonian language (Section 32 (1) of the CCP). All documents will have to be submitted in the Estonian language or supplemented with a translation and documentary evidence in a foreign language will also have to be supplemented by a translation into Estonian language, unless the translation would be unreasonable and other participants in the proceedings have no objections to the lack of translation (Section 33 (1) of the CCP).

The CCP does not include special provisions about the involvement of a translator in the proceedings for a witness. But Section 32 (2) of the CCP provides that the statements of a witness given in a foreign language are recorded in the minutes in

Estonian, although the court may record them in the original language supplemented by a translation if this is necessary in order to precisely record the content of the statements. It derives from this provision that if the witness gives his/her statement in a foreign language, it has to be translated.

There is no general requirement that the translations would have to be made by a certified translator or be authenticated by a notary, although the court may require it (Section 33 (2) of the CCP). The court also has an option to caution the translator that he/she bears liability for a knowingly false translation (Section 33 (2) of the CCP).

It is possible to involve a translator in the proceedings if (i) a participant in the proceedings is not proficient in Estonian and (ii) he/she does not have a representative in the proceedings (Section 34 (1) of the CCP). The translator can be included either upon an application by the participant in the proceedings or upon court's own initiative (Section 34 (1) of the CCP). The CCP specifically provides that a translator cannot be involved in the proceedings for a contractual representative of a participant in the proceedings or for an adviser (Section 34 (5) of the CCP).

In Estonia courts of first and second instance employ translators, whose services can be used in civil proceedings. However the court does not have an obligation to ensure a translator, except in proceedings for placement of a person in a closed institution and in proceedings for establishment of guardianship for a person where a translator has to be ensured (Section 34 (4) of the CCP).

The CCP does not include any provisions about who has to ensure a translator for the witness, although analogy with documentary evidence would allow to assume that this obligation lies with the participant in the proceedings who applies for the hearing of the witness.

As there is no regulation in the CCP regarding ensuring a translator for the witness, there is also no regulation dealing with the situation where the witness renounces the right to interpretation. However, since in principle all evidence has to be presented in the Estonian language or translated into Estonian, it would only be possible for the witness to renounce translation if the witness has a good enough knowledge of the Estonian language so that he/she is able to give his/her testimony in Estonian.

If one of the participants in the proceedings needs a translator and the court is unable to include a translator immediately, the court will require the participant to find a translator or a representative proficient in Estonian (Section 34 (2) of the CCP). If a participant in the proceedings does not find a translator, that will not exclude the possibility to adjudicate the matter.

The costs of translation are included in the procedural costs and they will according to the general rule be borne by the party against whom the court decides (Section 162 (1) of the CCP), except in matrimonial and filiation matters where the general rule is that

parties cover their own procedural costs (Section 164 (1) of the CCP). In proceedings on petition, the costs are usually borne by the party in whose interest the decision is made.

The CCP does not include any provisions requiring the court to appoint an interpreter when the requested court is taking evidence directly using VCF.

Unlawful Evidence

Estonian law does not provide for any restrictions as to the use of unlawful (illegal) evidence. The only norm that regulates unlawfully obtained evidence is Section 238 (3) of the CCP. It provides that the court may refuse to accept evidence if the evidence has been obtained by a criminal offence or unlawful violation of a fundamental right. However the court has no obligation to refuse such evidence and may accept it despite the violations.

Section 238 (3) of the CCP does not specify any specific fundamental rights that it is designed to protect nor does it specify any particular criminal offence that would give ground to refuse the evidence. Thus it can be concluded that committing any criminal offence or unlawfully violating any fundamental right while obtaining the evidence may give ground to refuse the evidence. However there is not court practice in this matter nor can any further information be obtained from the preparartory materials of the CCP.

Regulation No 1206/2001

Estonia has a bi-lateral treaty of mutual assistance in civil, labour and criminal matters with Poland (applicable since 8 February 2000) and a multilateral treaty of mutual legal assistance and legal relationship with Latvia and Lithuania (applicable since 3 April 1994).

These treaties are in line with Regulation 1206/2001 and do not include anything that would help further facilitate the taking of evidence. Thus they do not fall under Article 21 (2) of Regulation 1206/2001.

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