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Evidence in Civil Law - Hungary

Author:  
**Viktória Harsági**

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Author: Viktória Harsági

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**Evidence in Civil Law – Hungary**

**Viktória Harsági**



# Evidence in Civil Law – Hungary

VIKTÓRIA HARSÁGI

**ABSTRACT** After a brief historical introduction, the short monograph reviews the system of evidence in Hungarian civil proceedings, approaching the topic from the aspect of the basic principles. Following changes in the role of material truth, it presents alterations in the interpretation of and re-interpretation of the notion of the principle of free disposition of the parties. Then it deals with the following basic principles and their relation to evidence: principle of orality, principle of directness, principle of public hearing, principle of equality of arms, right to be heard, ensuring the use of one's mother tongue, principle of procedural economy, the proper (bona fide) conduct of the lawsuit, principle of adversarial hearing, principle of the freedom of proof. After examining the questions of admissibility of evidence and burden of proof, it discusses particular means of evidence, the taking of evidence, the preliminary taking of evidence, costs of evidence, the question of unlawful evidence, and finally, the cross-border taking of evidence.

**KEYWORDS:** • civil procedure law • Hungary • principles • evidence • cross-border cases • judicial cooperation

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CORRESPONDENCE ADDRESS: Viktória Harsági, Ph. D., Professor, Pázmány Péter Catholic University, Faculty of Law and Political Science, Szentkirály str. 28-30, 1088 Budapest, Hungary, email: harsagi.viktoria@jak.ppke.hu.

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## **Prof. Dr. Viktória Harsági**

**Author Biography** Viktória Harsági is professor and head of department of Civil Procedure Law of the Pázmány Péter Catholic University and lecturer at the Andrásy Gyula German Speaking University in Budapest. She studied Law at the University of Miskolc (1999) and obtained in 2005 her PhD with the thesis “The Influence of Harmonisation of Law and Technical Development on Documentary Evidence”. As a visiting research fellow at predoctoral level she spent a full academic year at the Johannes Gutenberg Universität Mainz (2002-2003, DAAD-scholarship), at postdoctoral level two months at the Universität Basel (2011, von Caemmerer scholarship) a month in Vienna (2012, Institut für Zivilverfahrensrecht, ÖAD-scholarship) three months at the University of Cambridge, Clare College (Eötvös Scholarship). She is the member of the International Association of Procedural Law, editor of the Pázmány Law Review. She is a member of the Working Group on Access to Information and Evidence of the project ELI–UNIDROIT Transnational Principles of Civil Procedure and is/was involved in several other international research projects. Prof. Harsági is the leader of the „working group on parties to the action and the collective redress mechanisms”, that has been active in the codification process of the new Hungarian Code of Civil Procedure since 2013. Her main fields of research are the international and comparative civil procedure law.

## **Foreword**

For approximately two decades following the democratic transition efforts to carry out a re-codification of the Hungarian Code of Civil Procedure – in the same way as had been done in the case of many other areas of law – were not crowned with success. During this period several comprehensive and minor amendments were made to the Act, out of which – in the area of evidence – the most remarkable are: the reinterpretation of fundamental principles, the modernization of documentary evidence, the introduction of rules of witness protection and the repeated revision of the rules of expert evidence. On the whole, the amendments to the Code of Civil Procedure did not ensure the renewal of civil proceedings based on a unified concept. Thus, by 2013 it had become obvious that there was a need for elaborating the rules of a new Code of Civil Procedure, so codification working committees started their operation, in the work of which the author of the present volume has also been actively participating. Hopefully, in a few years a new modern Act will be born that will be able to fully meet the requirements of our era.

The Author







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## Part I

### 1 Introduction

As far as the historical development of Hungarian procedural law is concerned, one cannot speak of organic development similar to that of Western-European legal systems, the line of development has broken at several points; Hungarian civil procedural law has gone through numerous changes in model. The process lacks evenness and continuity. Started processes of development have often been discontinued so as to give way to the influence of another trend.<sup>2</sup> On the whole it may be stated that the foundation was constituted by Western cultural influence, all other influences have become layered on this including, for example, the ideology of the socialist era and the effects of present-day globalisation. Therefore, one has to do with a strange multi-layer culture and, through it, legal culture, which is born on the border of legal cultures. It is a civil procedural system based on the civil law system, and more specifically, on German-Austrian civil procedural law, which still bears on it some marks of the socialist heritage. The code of civil procedure of German-Austrian roots hallmarked by the name of Sándor Plósz from 1911 was *replaced in 1952 by an Act of “socialist spirit”* based on the Soviet-Russian Code of Civil Procedure of 1923. Act III of 1952 (Hungarian Code of Civil Procedure – hereinafter: HCCP) is still effective, although it has gone through eleven greater amendments and more than sixty other modifications in the past sixty years. Since the democratic political transformation, it has repeatedly become characterised by Western orientation; the approximation of the legal system to Western cultures (in a lot of cases to European Community law) began as early as the 1990s.<sup>3</sup>

Therefore, for someone wishing to learn about, interpret and apply the Hungarian CCP it is important to bear in mind that its text being in effect today contains numerous norms having developed in the most varied time planes. Thus, *the effective text of the HCCP cannot be regarded truly homogeneous* either ideologically or linguistically.

In the 1990s the legislator made an attempt at renewing the Code of Civil Procedure of 1952 – through repeated amendments – in accordance with new objectives and

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<sup>2</sup> Magyary, Géza: Magyar perjogi reformmozgalmak. In: Összegyűjtött dolgozatai, Magyar Tudományos Akadémia, Budapest, 1942, 15. p.

<sup>3</sup> For more detail, see: Harsági, Viktória: "Downstream or Up the Stream" – Influence of Different Legal Cultures on Hungarian Civil Procedure Law. In: Maleshin, Dmitry (ed.): Civil Procedure in Cross-cultural Dialogue: Eurasia Context, Statut Publishing House, Moscow, 2012, 278. p.

principles. It is still raised as an unanswered question whether by this method (in other words, by “filling the old bag with new wine”) one succeeded or could possibly succeed in adjusting to the frames of the rule of law a code of civil procedure, the original conception and text of which (although modified several times) had been formulated within the frames of a dictatorial system and in accordance with the ideology of that system. The *codification of a new code of civil procedure started in the summer of 2013*, setting as one of its aims the creation of an Act based on a unified conception that would meet the requirements of the era. The codification process is expected to take three to four years.

## 2 Fundamental Principles of Hungarian Civil Procedure

The majority of basic principles of civil procedure are contained in Chapter One of the Hungarian Code of Civil Procedure bearing the title “Fundamental Principles”. From the multitude of basic principles, of which it has never been possible to prepare an official catalogue, some are not included in the HCCP (e.g. the court’s monopoly of justice, equality before the court), while others (e.g. oral hearing, directness) are specified not in Chapter One, but in other parts of the HCCP.

### 2.1 Relevance of Material Truth

The Soviet influence was most strongly manifested in the *basic principles* of the Act of 1952, the legislator adopted the text of the Soviet Code of Civil Procedure almost word for word.<sup>4</sup> The approach of Soviet civil procedure was characterised by the “cult of basic principles”, therefore, the importance of basic principles increased greatly because they conveyed the dominant ideology of the era. The court’s monopoly of justice was implemented paradoxically, the notion of judicial independence was reinterpreted. The court was not bound by the claim submitted by the parties; the predominance of the judge could be seen. The principle of party control was also implemented restrictedly: the court, the prosecution and state authorities had a strong right of initiative, the principle of adversarial hearing was pushed to the background in favour of ex officio proceedings, the aim of the Soviet action was the revelation of “objective truth”. “The typically paternalistic formulation of the Act made it obvious that it was solely the authority of the court to decide about the equitable interests of the parties. [...] they included the social interest (e.g. the protection of collective property) as well.”<sup>5</sup> The regulation required that the court should not be satisfied with the facts and evidence presented by the parties but should take all measures laid down by the Act in order to reveal the true circumstances of the case. Basically, in the HCCP of 1952 one may observe a large increase in the power of the judge at the expense of the parties’ right to disposition. The Act divided the right of disposition over the lawsuit between the

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<sup>4</sup> Kengyel, Miklós: Die Entstehungsgeschichte der fünfzigjährigen ungarischen Zivilprozeßordnung. In: Nakamura/Fasching/Gaul/Georgiades (eds.): Festschrift für Kostas E. Beys dem Rechtsdenker in attischer Dialektik. Ant. N. Sakkoulas Verlag, Eunomia Verlag, Athen 2003, 718. p.

<sup>5</sup> Kengyel, Miklós: A bírói hatalom és a felek rendelkezési joga a polgári perben. Osiris, Budapest, 2003, 277–278. p.

parties, the court and the prosecutor. As a result of this, the traditional principle of party control became illusory, since all procedural acts of the parties came under the control of the court (and the prosecutor).<sup>6</sup>

By the modification of the principle of party control and the principle of adversarial hearing, the sixth Amendment Act (1995) *changed the relationship between the court and the parties* essentially. In accordance with Decision № 1/1994 (I.7.) AB of the Constitutional Court, it has become a general principle that the court is bound by the petitions and statements presented by the parties; deviation from them is permitted only in cases defined by the Act. Besides the change in the purpose of civil action, “the dimming of the judge’s role” was considered by academic literature as the other essential element of the change in model between 1995 and 2000. One of the main achievements of the reform of 1995 was constituted by the reformulation of the principle of party control.<sup>7</sup> The Act also provided the obligation to supply facts and evidence with a new basis. It restricted the possibility to take evidence *ex officio* to the narrow range defined by the Act. By this it endeavoured to ensure the full implementation of the principle of adversarial hearing, which did not constitute a return to the regulation followed by the HCCP of 1911, but to the model followed by the liberal codes of civil procedure of the 19<sup>th</sup> century, which defines it as the exclusive task of the parties to prove the facts required for deciding the lawsuit. However, the legislator made no modification to the regulation relating to the purpose of the lawsuit, therefore, the obligation of the court to endeavour to reveal the truth remained. This task cannot be carried out without the possibility of ordering the taking of evidence *ex officio*. This conflict was eventually resolved by the legislator as a result of the re-regulation of the purpose of the lawsuit in 1999. Following the modification of § 1 of the HCCP, the purpose of the lawsuit is no longer to reveal the truth but to ensure the impartial resolution of legal disputes in court proceedings (basically in accordance with the requirement of due process laid down by Article 6 of the European Convention on Human Rights).<sup>8</sup>

The aim of the Act is laid down in § 1 of the Code. Pursuant to this, the purpose of the act is to ensure an unbiased judicial forum for resolving the legal disputes of natural and other persons relating to their property and personal rights by way of enforcing the principles laid down in the first chapter.

## 2.2 Principle of Free Disposition of the Parties and Officiality Principle

The court shall initiate proceedings in connection with civil disputes when so requested. Such request (unless otherwise provided for by law) may only be submitted by a party to the dispute. The requests and legal statements made by the parties shall be binding upon the court. The court shall take into consideration the requests and statements made

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<sup>6</sup> Kengyel, Miklós: Changes in the Model of Hungarian Civil Procedure Law. In: Jakab, András / Takács, Péter / Tatham, Allan F.: *The Transformation of Hungarian Legal Order 1985–2005*. Kluwer, Alphen aan den Rijn, 2007, 353–354. p.

<sup>7</sup> Kengyel: *op. cit.* (see fn. 5.) 358–360. p.

<sup>8</sup> Harsági: *op. cit.* (see fn. 2.) 286. p.

by the parties according to their content, rather than their formal arrangement. A request for the performance of taking of evidence, or the court's decision ordering the taking of evidence shall not be binding upon the court. The court shall not order the taking of evidence, or the performance of taking of evidence if already ordered (seeking additional evidence or repeating the procedure), if deemed unnecessary for rendering a decision in the dispute. The court must forego the ordering of taking of evidence, if the party has submitted the request for the performance of taking of evidence in delay for reasons within his control, or if the request is presented contrary to good faith [§ 3 (1)-(2), (4) HCCP].

When analysing the content of the principle of party control, two elements must be emphasized. Beyond doubt, its most important manifestation is the *initiation of the legal action* itself, in which the party's control prevails. According to the modern conception of civil procedure, this means that "the court should provide legal protection only if so requested by the party, but in that case, the court is by all means obliged to provide this protection".<sup>9</sup> The right to initiate legal action is granted to the person concerned in the legal dispute (the holder of the substantive right). However, some exceptions may be found to this rule, namely, when the substantive claimant and the procedural claimant are different persons.<sup>10</sup> Based on statutory authorization, for example, the prosecutor (see: § 9 HCCP) or some organization (e.g. the guardianship authority) may also be entitled to initiate legal action. Besides the principle that legal proceedings may be commenced only at the parties' request pursuant to the above, mention should also be made of the *principle of the court being bound by the parties' request*, which is, in fact, a result of a negative approach to the principle of party control. Since, according to the principle of party control, the parties' autonomy extends not only to their right to initiate legal action, but also to the fact that the court is obliged to carry out certain procedural acts based on the request of the party – even in the ongoing proceedings.

A basic *principle the content of which contrasts* with that of the principle of party control is the *principle of officiality (ex officio proceedings)*, which is rarely afforded a role in modern codes of civil procedure. The principle of ex officio proceedings prevails, for example, in the following situations. Pursuant to § 78 (2) of the HCCP, the court shall decide ex officio as to the bearing of court costs, unless the successful party asked the court not to adopt a decision concerning the bearing of court costs. Pursuant to § 153 (3) of the HCCP, in an action for child maintenance, if deemed necessary, the court may adopt a decision of its own motion for awarding temporary support payments, etc.

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<sup>9</sup> Magyary Géza / Nizsalovszky Endre: A magyar polgári perjog. Franklin, Budapest 1924. 229. p.

<sup>10</sup> For more detail, see: Kengyel, Miklós / Harsági, Viktória: Hungary – Civil Law. in Eliantonio, Mariolina / Backes, Chris W. / van Rhee, Cornelius Hendric / Spronken, Taru / Berlee, Anna (eds.): Standing up for Your Right(s) in Europe. A Comparative Study on Legal Standing (*Locus Standi*) before the EU and Member State Courts. Intersentia, Cambridge – Antwerp – Portland, 2013, 326. p.



### 2.3 Principle of Orality

Although the principle of orality, a characteristic principle of modern codes of civil procedure, is not specified in Chapter One of the HCCP, an overview of the whole code in general and of some individual provisions in particular reveals that the Hungarian regulation is also basically founded on orality. “However, the principle of orality is *neither absolute nor exclusive*. Apart from orality, the *written form* may also be encountered with an auxiliary character. Where the written form is prescribed by the Act primarily for reasons of expediency, it is possible to carry out the given procedural act also orally.”<sup>11</sup>

§ 94 (1) of the HCCP permits a legally unrepresented party to have his oral request preceding the initiation of the legal action recorded before any district court or the court having jurisdiction over the legal action. Under Subsection (4), oral applications relating to ongoing proceedings – unless the law provides to the contrary – may be recorded before the court seised of the case or the district court having jurisdiction based on the party’s domicile or place of work.

Whether the principle of orality prevails may be established upon considering the extent to which the evidence that may be relied upon by the court to make its decision is constituted by *oral presentations given at the trial*.

### 2.4 Principle of Directness

The statement formulated concerning the principle of orality also applies to the principle of directness, namely, that although it is not declared in Chapter One, its presence may be inferred from individual provisions of the HCCP and it plays a decisive role. In practice the *principle of directness* has the greatest importance during the taking of evidence, rendering it possible for the judge to receive a personal impression. The central value of the principle of directness results not only from its interaction with the principles of public hearing and orality, but also from its complementary role connected with the principle of the freedom of proof. However, it has a “tense relationship” with the principle of procedural economy and the principle of concentration, the latter of which is not mentioned in the contemporary science of Hungarian civil procedure, but it is emphasized by some foreign laws (e.g. the Austrian law of procedure).

The court may *found* its decision only *on facts directly perceived by it and on evidence concluded from the means of evidence directly examined by it*. At the same time, this direct perception “presupposes that the means of evidence should be put before the court in such a way that its perception through the senses would be possible for the court.”<sup>12</sup>

The principle of directness is overridden in the Act in some cases for reasons of procedural economy.

<sup>11</sup> Kengyel Miklós: A magyar polgári eljárásjog, Osiris, Budapest 2005. 88. p.

<sup>12</sup> Magyar Gyéza: A magyar polgári peres eljárás alaptanai. Franklin, Budapest 1898. 237. p.

## 2.5 Principle of Public Hearing

The court shall adjudge civil cases in public hearing (unless otherwise prescribed by law). Out of the acts carried out by the court seised with the case, only the *hearing may take place in public*. At first instance it is obligatory to hold a hearing in each case. At second instance a hearing is held only if there is an appeal against the judgment. The venue of the hearing is the official courtroom of the court as a general rule, but not in every case [Cf. §126 (2) HCCP]. The public is made up of the audience. The presiding judge may remove from the public persons under the age of 18. If a person present in the courtroom disturbs the order repeatedly or causes a serious disturbance, he may be ordered to leave or may be removed from the courtroom [§134 (4) HCCP]. The court may declare the hearing on the whole or certain sections of the hearing closed from the public, where it is deemed absolutely necessary for the protection of classified information, trade secrets or any other information that is rendered confidential by specific other legislation. The court may shut out the public for reasons of morality, for the protection of minors, or upon the party's request if justified with a view to protecting the party's personal rights. For example, in case of legal actions relating to legal status, the public may be excluded from the hearing at the party's request – even if the conditions laid down in § 5 are not met. The court is obliged to advise the parties of this fact [See: § 284 (1) HCCP].

With regard to the rules relating to witness protection incorporated into the HCCP by Act XXX of 2008, Section 5 has been supplemented by a sentence: In particularly justified cases the court may bar the public from the hearing when examining witnesses with a view to keeping the witness's data confidential, and holding the hearing in closed session is absolutely necessary for the protection of the life and safety of the witness and his family. The court shall deliver its decision publicly. [§ 5 (2) HCCP] In accordance with the reasoning attached to the Act, restricting the publicity of the hearing may be justified where the witness's life or physical integrity would become endangered as a result of his or her testimony. Otherwise, the confidential handling of the witness's data by the court would be to no avail if the witness could be recognized by anyone at the public hearing.

## 2.6 Principle of Equality of Arms, Right to be Heard

Important elements of the principle of equality of arms can already be found in Point 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and promulgated in Hungary by Act XXXI of 1993, which declares the “right to a fair trial” and provides the following: “In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” It is the *impartiality of the judge* – appearing as a key notion in the quoted Article as well as in §1 of the HCCP defining the purpose of legal action – that may guarantee the parties' equality of arms in the ongoing proceedings. However, on examining the parties' equality of arms in a broader sense, one will necessarily come to the conclusion that already prior to the moment of the initiation of the legal action there

may arise factors (mainly of financial nature) that act against the realization of such equality.

The *general information obligation* was abolished by the Amendment Act of 1995, which restricted the provision of information to rights and obligations arising under the lawsuit, with reference to the fact that a comprehensive information obligation would bring too much officiality into the proceedings and the court cannot, apart from the resolution of the legal dispute, be expected to act instead of the parties in their interest. Since, on the one hand, this would increase the workload of the court to an extraordinary extent, and on the other hand, it might violate the equal rights of the parties. According to the reasoning attached to the Amendment Act of 1999 (Act CX of 1999), which modified the HCCP and further limited the court's information obligation, the impartiality of court proceedings excludes the trial judge's possibility to provide interpretative information to one of the parties about the contents of substantive legal rules. Therefore, the Act restricts the right to information granted to the party not represented by legal counsel to procedural rights and obligations accrued by the proceedings [see: §7 (2) HCCP]. One may mention as an exception that with regard to some procedural acts the court is obliged to provide information within the range defined by the law even to parties represented by legal counsel [see: § 3 (3), § 220 (3) HCCP].

§ 3(3) of the HCCP lays down an obligation for the court – for the purpose of deciding the dispute – to inform the parties in advance about the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure. In a given lawsuit, this general obligation may be performed only in a specific and individualized way on the basis of the right being enforced and the facts cited as a ground for it. According to the Supreme Court, when meeting its information obligation toward the party acting in person, the court – by pointing out the facts playing a significant role in the legal dispute – ensures a possibility for the party to enforce his right, then, it is in connection with these facts that the court specifies the required means of proof, and explains why and in what form they are needed to enable the proving party to comply with his or her obligation. It is not sufficient to provide general, formal information; information must be adjusted to the individual circumstances of the given case.<sup>13</sup>

Judicial practice views the characteristics of the court's restricted information obligation in the following way. In order to comply with its information obligation, the court must ensure, by pointing out the facts playing a significant role in the legal dispute, – without presenting the content of the rules of substantive law – that the party can enforce his or her right, especially if the party emphasizes that he or she has little knowledge of the law.<sup>14</sup>

The parties' equality of arms is also served by the *adversarial character* of the legal proceedings. Although the principle of adversarial hearing is not laid down expressly in

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<sup>13</sup> See *Bírósági Határozatok*, 2007, № 123.

<sup>14</sup> See *Bírósági Határozatok*, 2005, № 74.

Chapter One of the HCCP, § 3 (6) of the HCCP provides that the court shall take measures to enable the parties to have access to all requests submitted during the proceedings, including all legal statements and documents presented to the court, and to make their opinion known within the deadline prescribed by law.

It is clear from the reasoning attached to the amendment of 1999 that the court cannot refuse to grant the opposing party the possibility to inspect even documents treated confidentially in a given case. The above regulation reveals that the adversarial nature of proceedings does not always render the personal hearing of the parties obligatory; instead, a greater emphasis is laid on ensuring them the possibility of making a statement. The personal hearing of the parties with an obligatory character is given more emphasis in the case of legal actions relating to personal status.

Impartiality alone (which also suggests a certain level of passivity) is not always proved sufficient to realize a genuine equality of arms. Therefore subsequent amendments have also afforded more room to more active modes of promoting “access to justice” and, through it, equality of arms. These modes have found expression in § 7 of the HCCP. The court – In the cases prescribed by law – shall provide assistance upon request to promote the party’s access to justice with a view to protecting his rights and lawful interests. The court is required to inform the party – if not represented by a legal counsel – concerning his rights and obligations accrued by the proceedings, and on the availability of the option to appoint a public defender. The court – in the cases and in the manner prescribed by law – may authorize complete or partial exemption from court costs to the party upon request, or from providing advance payments for court costs. Thus Subsection (1) concerns the *ensuring of the right of access to justice*. This provision – in conjunction with other rules of the HCCP [e.g. § 94 (1)] – endeavours to ensure the parties’ equality of arms at a stage of the procedure when the legal action has not commenced yet. The essence of this provision lies in assisting the would-be claimant in need of help with the initiation of proceedings. The other means which is aimed at ensuring equality of arms and which falls within the range of positive discrimination is the exemption from costs, or the institution of *legal aid*, the detailed rules of which are contained in Act LXXX of 2003.

## **2.7 Ensuring the Use of One’s Mother Tongue**

Pursuant to § 6 of the HCCP, court proceedings are conducted in the Hungarian language. No one may suffer any disadvantage for not understanding the Hungarian language. During court proceedings – to the extent provided for by international agreement – everyone shall be entitled to use their native language, or the language of their region or nationality. The court is required to use an interpreter where necessary for the implementation of the above mentioned principles. “Everyone” is to be interpreted meaning that, apart from the members of the court and the person keeping the records of the hearing, all other persons participating in the legal action are entitled to use their mother tongue, which may be different from the Hungarian language. These persons are entitled to this right even if they have a good command of the Hungarian language. However, the main purpose of this provision is to place the person not

speaking Hungarian in an equal position with regard to communication with the person who can speak Hungarian. A means of achieving this aim is the use of an *interpreter* (see § 184 HCCP). Pursuant to the cited section, if any person who is to be heard in the action does not speak the Hungarian language, and no member of the acting court has sufficient fluency in the language he understands, an interpreter shall be used during the hearing. The Act provides that the provisions of law pertaining to experts shall apply to interpreters as well.

The *right to use one's mother tongue* regulated by §6 of the HCCP has been modified in several aspects in the past two decades. By acceding to the European Charter for Regional or Minority Languages signed in Strasbourg on 5 November 1992 – and promulgated in Hungary by Act XL of 1999 – Hungary has undertaken, among others, *to allow documents and evidence to be produced in the regional or minority languages*, if necessary by the use of interpreters and translations. This form of use of a different language cannot result in additional costs for the party. This is guaranteed by the modified § 78 (4) of the HCCP, pursuant to which these costs shall be advanced and borne by the State. However, in cases not falling within the scope of the right to use one's mother tongue, in accordance with § 191 (6) of the HCCP, the court may order, where appropriate, the party to attach a certified or non-certified translation of any document made out in a language other than Hungarian. The text has been modified again since 1 January 2012, because Act CLXXIX of 2011 provided for changes in effective regulations in order to adjust them to the new notion of “nationality” introduced by the Fundamental Law.

## **2.8 The Principle of Procedural Economy**

Pursuant to § 2 of the HCCP, the court shall seek to ensure the parties' right to the adjudication of their legal dispute, to the fair conduct of the lawsuit and its conclusion within a reasonable time. A reasonable time-frame for the conclusion of litigation shall be determined in due consideration of the subject matter and nature of the dispute, as well as the unique circumstances of the proceedings. Where a party is found to have contributed to the prolongation of the proceedings through his actions and/or omissions, such party cannot rely on the closure of the proceedings within a reasonable time-frame. In the event of non-compliance with the above mentioned obligation of the court, the party affected may seek reasonable compensation for damages – maintaining the violation of his fundamental rights –, provided that such impairment of a right cannot be remedied by way of redress procedures. The court shall hear such cases in priority proceedings. If the said impairment of a right cannot be directly attributed to any person acting on the court's behalf, it shall not preclude the award of damages.

With regard to the court's tasks, § 2 (1) emphasizes *fair trial* and the *conclusion of the legal action within a reasonable time*. Both principles may be traced back to the same international document, the *Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950* (Article 6, point 1). The European Court of Human Rights has dealt with the interpretation of the notions laid down in the above paragraph numerous times. In its judgments, the court has,

understandably, refrained from “setting any norm with regard to the optimal duration of the individual procedures”, but a common characteristic of its decisions is that “they apply a rigorous standard when considering the conduct of authorities, their failure to take or their delaying with taking the necessary measures to ensure the fast resolution of proceedings”.<sup>15</sup> It may also be concluded from the relevant judgments of the European Court of Human Rights that “it is never the duration of proceedings alone, but also the carrying out of the individual procedural acts at the appropriate time and the need for these acts, based on which it may be decided whether the duration of the lawsuit has exceeded the reasonable time frames, and naturally, the Court also has regard to the parties’ conduct during the proceedings”. The above judgments regard those situations hardly acceptable where the prolongation of the lawsuit is caused by the excessive workload of the courts. In this case they consider it a task of the individual states to build up their regulation relating to the administration of justice in such a way so as to enable the courts to conclude even the increased number of cases within a “reasonable time”.<sup>16</sup>

The European Court of Human Rights – in its judgment passed in the case of Tóth v. Hungary on 30 March 2004 – draws attention to the fact that “employment disputes generally require particular diligence on the part of the domestic courts”. In the given case, having regard to the overall length involved and in particular to the lack of any hearings for three years and two months in the first proceedings, for which the domestic courts were responsible, the European Court of Human Rights concluded that the applicant’s cases had not been terminated within a reasonable time. The case seems a rather outrageous example, since by that time proceedings had been going on for eight years and nine months in one case of the applicant and for six years and four months in his other case.

Enforcing a claim for damages with reference to the *court’s liability for damages caused within its jurisdiction* has been possible in cases initiated following 1 January 2003. This liability for damage is not a special type of liability for non-pecuniary damage, in other words, it is not a variant form of § 349 (3) of the Civil Code, but a possibility created by § 349 (3), namely, the creation of a type of sui generis liability. In this type of liability obligation, the obligee is the party and the obligor is the “court”. The cause of the damage is the violation of any one (or several) of the three obligations contained in §2 (1) of the HCCP, while the subject-matter of the claim is constituted by “damages providing equitable compensation”. It seems that the legislator – although his idea found a complicated expression – envisaged strict liability, being independent of fault. However, the court is not strictly liable for the wrong if it could have been remedied in the appeal procedure. It is also considered the injured party’s own fault if he himself has contributed to the prolongation of the lawsuit.

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<sup>15</sup> Kőrös András: A polgári per „ésszerű időn belüli” elbírálásának követelménye az Európai Emberi Jogi Bíróság gyakorlatában. *Bírósági Határozatok* 1992/6, 479. p.

<sup>16</sup> Bán Tamás: Az európai emberi jogi egyezmény várható hatása a magyar bíróságok ítélezésére (Prognózisok) *Bírósági Határozatok*, 1992/3, 226-227. p.

## **2.9 The Proper (bona fide) Conduct of the Lawsuit**

The court shall ascertain that the parties and other litigants exercise their rights under the principle of due course of the law and discharge their obligations stemming from the litigation. The court shall take measures to prevent any and all procedures, acts and actions which contradict the principle of exercise of rights in good faith, such as efforts taken to delay the proceedings or that may lead to delays. The court shall apprise the parties to exercise their legal rights in good faith, including the consequences applicable for litigating in bad faith.

The court shall impose a financial penalty upon the party or any counsel, who – whether deliberately or as a result of gross negligence: a) presented any facts to the case that later proved to be false or untrue, or denied any facts pertaining to the case, that later proved to be true, b) suppressed any evidence that was evidently significant as to the outcome of the litigation, or c) presented any evidence that was clearly unfounded, during the hearing or in any document relating to the case. The court shall impose a financial penalty upon any party (counsel), and other litigants for making a statement in delay without justification, or for their failure to make the statement in spite of being so notified, hence delaying the conclusion of the proceedings.

The court shall impose a financial penalty upon any party (counsel) for delaying legal actions without justification, for any failure to meet a deadline, or for causing unnecessary expenses any other way, in addition to ordering the party in question to pay for such expenses on the strength of law – regardless of whether the court’s decision is for or against the party in question –, and shall have powers to impose other legal sanctions as well [§ 8 (1)-(5) HCCP].

## **2.10 The Principle of Adversarial Hearing**

By Amendment VI to the HCCP (Act LX of 1995), not only the principle of party control, but also the principle of *adversarial hearing* has become fully implemented. The amendment has put the taking of evidence in civil proceedings on a new footing by setting it as its objective to enforce the principle of adversarial hearing and by restricting ex officio procedural acts, formerly characterised by a strong presence in the law of evidence, to a narrow, strictly defined field. According to the argumentation contained in the reasoning attached to the Act, the essence of the amendment lies in increasing the responsibility of the individual. Here, a certain type of conceptual unity is established between the two basic principles, since having regard to their relatedness, it is impossible to treat them separately. Nor does academic legal literature make a sharp distinction between the two principles: “the parties’ right to disposition extends also to their producing the evidence for the case: evidence may be taken by the court only at the parties’ request and to the extent defined by the parties, unless the ex officio taking of evidence is permitted by the law. The right to dispose over evidence – with regard to its

importance – is embodied in a separate basic principle, namely, the principle of adversarial hearing.”<sup>17</sup>

§ 3 (3) of the HCCP lays down that unless otherwise provided for by law, the responsibility for producing evidence for the purposes of litigation lies with the parties. The legal consequences relating to the omission of lodging a request for the performance of taking of evidence, or if such request is presented in delay, moreover, if the taking of evidence has failed shall – unless otherwise prescribed by law – fall upon the party required to produce evidence. For the purpose of deciding the dispute, the court shall inform the parties in advance concerning the facts for which the taking of evidence is required, the burden of proof, and also on the consequences of any failure of the evidentiary procedure. The court’s information obligation as contained in the last sentence of §3 (3) of the HCCP applies also to the situation where the parties are represented by legal counsel.

Therefore, the principle of adversarial hearing – in spite of its misleading designation – dealing with the distribution of tasks between the parties and the court during the evidentiary procedure, *imposes the obligation to produce evidence on the parties*. This, on the one hand, means the definition of the frames of the evidentiary procedure by pointing out the facts requiring proof, and on the other hand, it means that the means of proof must be produced by the parties. As a matter of fact, the former constitutes a borderline between the principles of party control and adversarial hearing. The evidentiary process may be evaluated as “teamwork” between the court and the parties, during which, in accordance with the principle of adversarial hearing – applied as a general rule – it is the parties who provide the frames of the evidentiary procedure and “supply” the court with the means of proof. Thus, it is the parties that have the burden of initiative basically. On the other hand, the court – not being bound by the motions for the taking of evidence – selecting on the basis of their relevance, directs evidentiary acts into the appropriate channel, thereby influencing their direction.

Facts of relevance that are indispensable for the resolution of the lawsuit are mostly related to the substantive right. The standard for their relevance is their connection with the substantive right sought to be enforced. This is what the court has to take into consideration when, with a view to promoting aspects of procedural economy, within the scope of its power under § 133 of the HCCP to determine how the hearing should proceed, it prevents the taking of evidence at the trial from extending to facts irrelevant from the aspect of the resolution of the case.<sup>18</sup> In a given case the court decides about the taking of evidence motioned for by considering whether it would be to the purpose.<sup>19</sup> Setting aside the motion for the taking of evidence alone does not constitute a violation of procedural rules. A violation takes place where the court fails to take

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<sup>17</sup> Kengyel: op. cit. (see fn 10) 79. p.

<sup>18</sup> Kengyel Miklós: Polgári eljárásjog II. Pécs, 1995, 83. p.

<sup>19</sup> Németh János: Alapvető elvek. In Németh János (szerk.): A Polgári perrendtartás magyarázata. Közgazdasági és Jogi Könyvkiadó, Budapest, 1999, 67. p.



evidence that is relevant for the resolution of the lawsuit and, therefore, the court delivers an unfounded judgment.<sup>20</sup>

It is the counterpart of the principle of adversarial hearing, namely, the *inquisitorial principle*, which serves as a basis for such solutions in procedural law where this task is partially or wholly taken over by the court. The principle of adversarial hearing is not implemented in a clear form in Hungarian civil procedure either, therefore, in a narrow range one may also find examples for the possibility of the ex officio taking of evidence. However, since the Amendment Act of 1995 abolished the earlier general authorization relating to the ex officio taking of evidence, since the amendment the court has been entitled to order the taking of evidence ex officio only based on special authorization to this effect. Therefore, it may occur only in an exceptional case that the court takes over this initiative role during the taking of evidence in civil proceedings: the court may order the taking of evidence of its own motion if it is permitted by the law [§ 164 (2) HCCP]. In the absence of the party's express motion for the taking of evidence, the court does not take evidence ex officio. This may take place only if it is expressly permitted by legislation (Court Decisions, BH 1999.565).

For example, the court is given *special statutory authorization to order the taking of evidence of its own motion* in the following situations:

- The court shall take measures, at the party's request, to obtain any document from another court, authority, notary public or body, if such document cannot be released to the party directly. [§ 192 (1) HCCP],
- The court may – if deemed necessary – contact the issuer of the document of its own motion, so as to invoke a statement as to the authenticity of the document. [§ 195 (7) HCCP],
- The authenticity of the signature on a private document or the text itself may be verified – in cases of doubt – by means of comparison to any other script whose authenticity is beyond any doubt. To this end, the court may order a graphology test, and have a handwriting expert examine the writing where deemed appropriate. [§ 197 (3) HCCP],
- If the identity of the signatory of an electronic document executed by an advanced electronic signature or the authenticity of the document is in doubt, to resolve such doubt the court shall – on general principle – contact the certification service provider who has issued the certificate to attest the advanced electronic signature in question. In case if there is any doubt concerning the data verified by a time stamp associated with an electronic document, the court shall - on general principle – contact the provider of the time stamping service.[§ 197 (4) HCCP],
- In matrimonial proceedings the court may order the taking of evidence also of its own motion where deemed necessary [§ 286 (1) HCCP], which Section is applicable under the HCCP to all legal actions relating to personal status, including: actions for the establishment of paternity and origin [§ 293 (1) HCCP], actions for the termination of parental custody [§ 302 (1) HCCP], actions for the overturning of decisions for the termination of parental custody [§ 303 HCCP]. In actions for placement under

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<sup>20</sup> See *Bírósági Határozatok*, 1996, № 478.II.

guardianship or conservatorship the court may order the taking of evidence of its own motion where deemed necessary [§ 310 (1) HCCP], or appoint a forensic psychiatrist for the psychiatric evaluation of the defendant's mental state [§ 310 (2) HCCP].

## **2.11 Consequences for Failure to Appear at the Hearing**

Pursuant to § 136-136/B of the HCCP, if the plaintiff fails to appear at the first hearing, and did not previously request the court to proceed with the hearing in his absence, the court shall dismiss the case at the defendant's request. If the defendant fails to appear at the first hearing, and did not present his defense in writing, the court shall issue – at the plaintiff's request – a court order (similar to default judgement) against the defendant consistent with the claim disclosed in the writ of summons, and shall order him to cover the plaintiff's costs. The court may not issue the order if the action should be dismissed. Where a witness or expert is summoned to appear at the first hearing, the court shall examine such witness or expert if present. If this provides sufficient information to resolve the case, the court passes its decision in accordance with the general provisions, or decides whether to issue a court order or to set another hearing.

The court order may be contested by either of the parties orally or in writing, within fifteen days from the time of receipt, by way lodging a statement of opposition at the court issuing the order. If the statement of opposition is lodged in due time, the court having issued the court order shall set a new date for the hearing. The part of the court order that is not contested by a statement of opposition enters into effect, and the new hearing shall be scheduled regarding the contested part only. The defendant will be ordered to cover the costs of the first hearing, if missed, even if eventually succeeds. The fee of the statement of opposition may not be charged to the other party. If the defendant fails to observe the new deadline set on the basis of the statement of opposition, and did not present a counter-plea, the court sustains the previous order, and shall order the defendant to cover the costs incurred in these proceedings as well. This order may not be contested by a statement of opposition and may not be appealed.

Where either of the parties fail to appear at a subsequent hearing – with the exception of Pursuant to § 136-136/B of the HCCP, if the plaintiff fails to appear at the first hearing, and did not previously request the court to proceed with the hearing in his absence, the court shall dismiss the case at the defendant's request. If the defendant fails to appear at the first hearing, and did not present his defense in writing, the court shall issue – at the plaintiff's request – a court order (similar to default judgement) against the defendant consistent with the claim disclosed in the writ of summons, and shall order him to cover the plaintiff's costs. The court may not issue the order if the action should be dismissed. Where a witness or expert is summoned to appear at the first hearing, the court shall examine such witness or expert if present. If this provides sufficient information to resolve the case, the court passes its decision in accordance with the general provisions, or decides whether to issue a court order or to set another hearing.

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Where either of the parties fail to appear at a subsequent hearing – with the exception of a hearing set on account of a statement of opposition at which the defendant failed to appear –, the court conducts the hearing at the request of the opposing party attending, or at the plaintiff's request submitted previously, if absent, or may set a new day in court. If the court proceeds to hold the hearing, the party in default may be informed concerning the pleadings and arguments of the party attending, as well as his request for the performance of taking of evidence, of which he was not previously informed, with a copy of the court records or the preparatory documents communicated by the opposing party delivered, including a notice to make known his observations in a preparatory document, or present them orally at the next hearing. In this case the court reschedules the next hearing. Pleadings and arguments and request for the performance of taking of evidence already made known to the party in default shall be construed as satisfaction of the plea is not objected, the authenticity of the argument is not contested, and the taking of evidence is not opposed by the party in default, except if this would contradict his statement made during the action previously.

## **2.12 The Principle of the Freedom of Proof**

Pursuant to § 3 (5) of the HCCP, unless otherwise provided for by law, in civil proceedings the court shall not be bound by formal requirements relating to the taking of evidence, or to specific procedures for the performance of taking of evidence or to the use of specific means of proof, and may freely use the arguments of the parties, as well as any other evidence deemed admissible for ascertaining the relevant facts of the case. These provisions shall not affect the presumptions of law, including those regulations according to which certain circumstances are to be considered true in the absence of proof to the contrary.

In a free system of evidence *it is within the court's discretion to decide what means of proof it is going to use* in order to establish the facts and *what methods of proof it considers appropriate to apply in the given case*. In a free system of evidence the law gives the court discretion to assess the probative force of the individual pieces of evidence. "The free evidentiary system is necessitated by the fact that it is not possible

to pre-define the probative force of the facts serving as proof, therefore, it is better to entrust it to the court to draw conclusions from them about the facts requiring proof.”<sup>21</sup>

The free evidentiary system is not usually implemented in a fully clear form in practice. However, the free evidentiary system does not provide either the parties (the intervening party) or the court with an unlimited scope of action. The former are bound by the obligation of the bona fide conduct of the lawsuit, while the court is bound by the rules referred to as exceptions in § 3 of the HCCP. The HCCP lays down as a general rule the free evaluation of evidence; however, in some exceptional cases the probative force of a means of proof may be defined in advance. It is in these cases that the law builds some *restrictive elements* into the system of evidence. These restrictive elements may consist of *positive and negative rules*, depending on whether the law prescribes what conclusion the court should or should not draw from the given means of evidence. We may find several positive restrictive elements in the effective regulation relating to documentary evidence.<sup>22</sup> The restrictive elements that are necessary concomitants of the free evidentiary system may be divided in two groups depending on whether they are related to the use of the means of proof (of evidence) or the estimation of evidence. In the first case, the court’s activity is determined in relation to *the means of proof to be applied* or not to be applied; in the second case, the legislator restricts judicial discretion by pre-defining *the probative force of the specific means of proof*. With regard to the applicability of means of evidence, the HCCP does not lay down any restrictions concerning documentary evidence. Existing restrictions may be traced in the definition of probative force. These, as a matter of fact, are realized through *presumptions and temporary truths*; however, because of the possibility of their rebuttal and the provision of proof to the contrary, one may speak of *relative restriction* only.<sup>23</sup>

### 3 Evidence in General

#### 3.1 Admissibility of Evidence

As it has been mentioned above, evidentiary proceedings in Hungarian civil litigation are based on the principle of the free evaluation of evidence; they are not regulated by strict methodological rules. In the *free evidentiary system* it is left to the court to decide which means of proof it will use in order to establish the facts of the case and the application of which method of proof it will find suitable for this purpose; in the free evidentiary system the evaluation of the probative force of the particular evidence is committed to the court’s discretion by the Act. “Free evaluation of evidence is necessitated by the general impossibility to establish the probative force of factual proof in advance, therefore, it is more reasonable to entrust it to the court to draw inferences from them about the facts to be proved.”<sup>24</sup> “*However, free evaluation of evidence does not allow unlimited scope of action* either for the parties (the intervening party) or the

<sup>21</sup> Magyary / Nizsalovszky: op. cit. (see fn. 8.) 403. p.

<sup>22</sup> Harsági Viktória: Okirati bizonyítás a modern polgári perben. HVG Orac Budapest 2005. 30. p.

<sup>23</sup> Farkas József: Bizonyítás a polgári perben. KJK, Budapest 1956. 212.o., Kengyel Miklós: Tanúbizonyítás a polgári perben. KJK, Budapest 1988. 236-237. p.

<sup>24</sup> Magyary / Nizsalovszky: op. cit. (see fn. 8.) p. 403.

court. The former are bound by the requirement of the bona fide conduct of the lawsuit and the court is bound by the rules referred to by the HCCP as exceptions. The Act restricts the procedure of the court by binding or guiding (programme-like) norms relating to the formal requirements concerning evidence as well as the specific methods of proof and the specific means of proof (or “means of proof”), although to differing degrees. Evidentiary rules are, as a matter of fact, always rules containing formal requirements in the sense that the announcement of the means of proof, the order about the taking of evidence, the dismissal of the application for the taking of evidence, the taking of evidence and the recording of its result and process in the records of the court must be carried out in a predefined order laid down by procedural law.”<sup>25</sup>

Free evaluation of evidence is laid down by the HCCP as a general rule, but there are cases when the probative force of some means of proof may be determined in advance, in the abstract. In such cases, based on the Act, during the taking of evidence *restrictive elements* are applicable, which may only be found as exceptions in modern codes of civil procedure. The free and bounded system of evidence may also be distinguished based on the key notions of persuasion and conviction. Following this line of thought, we may speak about free evaluation of evidence if the judge accepts as true the fact the *reality of which he has become convinced of*. If the court is obliged to accept a fact as the basis for his judgement, one may speak of restrictions.<sup>26</sup> Decision based on free conviction means that the judge is only bound by generally applicable logical, natural and empirical rules, but otherwise he has discretion and he is not bound by law when balancing the body of knowledge acquired by him during the action.<sup>27</sup> The process of the development of the judge’s conviction must be traceable rationally so that it could stand the test of the second instance trial if necessary. In the free evidentiary system, a statement may be deemed proven in the particular case if the court has ascertained its reality. However, the court must not be expected to meet impossible requirements. As absolute certainty is rarely achievable and the possibility of its opposite cannot, as a rule, be completely excluded,<sup>28</sup> *the required degree of certainty* must be determined in accordance with the practical realities. For a person capable of clearly understanding life relations, this means such a high level of probability that pushes his doubts to the background (without fully excluding them).<sup>29</sup>

### 3.2 Means of Proof

*Means of proof* may be either persons or things that – because of their state or with regard to their conduct – carry and convey information to the court about the evidence. Means of proof – depending on whether they originate in a person or the state of a thing – may be classified as follows: personal evidence (witness, expert) or real evidence

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<sup>25</sup> Gáspárdy / Harsági: Alapvető elvek. In: Petrik, Ferenc (ed.): Polgári eljárásjog. Kommentár a gyakorlat számára. HVG-Orac, Budapest, 2009, pp. A/23–24.

<sup>26</sup> Sárffy, Andor: Magyar polgári perjog. Grill, Budapest, 1946, 248–249. p.

<sup>27</sup> Zöllner, Zivilprozessordnung. 23. Aufl, Verlag Otto Schmidt, Köln, 2002, 822. p.

<sup>28</sup> Farkas, József / Kengyel, Miklós: Bizonyítás a polgári perben. Közgazdasági és Jogi Könyvkiadó, Budapest, 2005, 65–68. p.

<sup>29</sup> Rosenberg / Schwab / Gottwald: Zivilprozessrecht. Beck, München, 2004, 768. p.

(objects for inspection, documents). This list does not mean a numerous *clausus* of the means of proof. The special characteristic of personal evidence is that in each case “some person’s content of consciousness is conveyed to the court, the evidence has passed through the given person’s psyche, particularly, his perceptive and volitional functions. Thus the psyche is present in the evidence between the factual proof and the fact to be proven. As opposed to this, in case of real evidence, the thing itself – or maybe man as a physiological or psychical being – incorporates or embodies the fact to be proven. That is, real evidence – taken in a general sense – means all things perceivable in the objective world the nature of which – including their relation to other things – allows to establish relevant factual circumstances or to draw inferences about them.”<sup>30</sup>

Section 166 of the HCCP lays down that *no oath shall take place in proceedings*. Numerous modern codes of civil procedure still use some form of oath (preceding or subsequent oath), in earlier Hungarian civil procedural law (Act I of 1911) the subsequent oath (the subsequent confirmation of the testimony or a part of it) was used. Applications for the administration of oath are not incompatible with Hungarian procedural law.<sup>31</sup> This is also confirmed by the fact that the Plósz Code of Civil Procedure of 1911 was familiar with the institution of oath and also by the fact that, in accordance with § 69 of the PILC, it is possible to take an oath or make an affirmation out of court before a Hungarian notary public for the purposes of foreign proceedings; about which a certificate is issued by the notary public.<sup>32</sup>

#### 4 Burden of Proof

Questions relating to the *burden of production of proof* deal with the division of obligations between the litigants with regard to proving the disputed facts. The decision about which party is obligated to prove the specific disputed fact always depends on the nature of the specific case, but the HCCP lays it down *as a general rule* concerning the burden of production of proof that the facts required for the resolution of the case shall normally be proved by the party who is interested in their being accepted as true by the court.

The claimant must specify the evidence for the facts serving as the ground for the right to be asserted already in his statement of claim, and the document or its copy (abstract)

<sup>30</sup> Hámori, Vilmos: Tárgyi bizonyítékok a polgári perben. In *Jogtudományi Közlöny*, 1970/2-3, 103. p.

<sup>31</sup> See: *Szászy’s* views expounded in 1965, according to which the provision of § 166 (2) of the HCCP “concerns public order stemming from its ideological importance, it is obvious that it is unconditionally applicable in all proceedings conducted in Hungary. On the contrary, where the oath is not excluded from the means of proof on an ideological basis, the admissibility and probative force of the oath is not an issue of public order, therefore the administration of the oath is not to be evaluated based on the *lex fori* but on the *lex causae* and the *lex processualis loci actus*, and the form of the procedure is to be decided on the *lex fori*.” Szászy, István: *Nemzetközi polgári eljárásjog*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1963, 302. p.

<sup>32</sup> See Harsági, Viktória / Kengyel, Miklós (eds.): *Der Einfluss des Europäischen Zivilverfahrensrechts auf die nationalen Rechtsordnungen*. Nomos, Baden-Baden, 2009.

the content of which is cited as evidence by the claimant must be attached to the statement of claim [§ 121 (1)–(2) HCCP]. Based on judicial practice, it is not the lack of the statement of claim that may affect the decision of the case on the merits but the lack of evidence serving as the ground for the asserted substantive right, however, for this reason the statement of claim – if otherwise it conforms with the necessary requirements listed in Section 121 HCCP – cannot be dismissed without the issue of process. The burden of proof falls on the claimant, but he may comply with it – if he does not have the documentary evidence in his possession – also by e.g. requesting the court (in accordance with Section 196 HCCP) to obtain the document from the defendant.<sup>33</sup>

The defendant must present in his counterclaim the evidence for the facts on which his defence is founded. In addition to this, if the court considers it necessary for establishing the facts, it may call upon the parties to make statements and it may conduct the evidentiary proceedings. After being called upon by the court, both parties are obliged to present or submit their allegations of the fact, statements and evidence – depending on the progress of the case – in due time required for the careful conduct of the lawsuit furthering proceedings. The legislator regarded the economical aspects of litigation when creating the above rule (and the further provisions facilitating its implementation) as if a party delays, without justification, with the presentation of his allegations of fact, statement as well as with the submission of evidence, and he fails to perform these obligations despite being called upon by the court to do so, the court shall take its decision without waiting for the party's presentation and submission, unless waiting for the party's presentation or submission does not, in the court's opinion, delay the resolution of the case.

During the application of the said general rule relating to the burden of production of proof, specific rules may be of help. However, these specific rules must be looked for among the provisions of substantive law (e.g. in the Hungarian Civil Code); in a great many cases it is specifically regulated who has to prove what.

The judge is obliged to decide the case even in case of failure to prove the allegations of fact, that is, he cannot refuse to take a decision with reference to the impossibility to establish the facts of the case. The regulation concerning the *burden of proof* is intended to provide a solution to this problem. The statutory provisions relating to the burden of proof lay down who must bear the responsibility for failure of proof, or in other words: which party shall bear the adverse effects of unproved facts. “Specifying the means of proof is a burden on the party, which must be overcome for winning the case, for which reason specifying the means of proof is called the burden of proof.” The importance of the concept of the burden of proof may be summed up as follows: “if the party on whom the burden of proof falls fails to specify the means of proof, the fact to be proved will remain unproved and the party will lose the case.”<sup>34</sup>

The HCCP in force lays down, among general principles, the basic rules relating to the burden of proof as follows: the legal consequences of the failure to request the taking of

<sup>33</sup> See *Elvi Bírósági Határozatok*, 2001, № 545.

<sup>34</sup> Magyary / Nizsalovszky: op. cit. (see fn. 8.) 395. p.

evidence or of delaying with the request for the taking of evidence as well as of the possible failure to prove the case must be borne by the party obligated to produce evidence unless the Act provides otherwise. In order to resolve the dispute, the court is obliged to inform the parties in advance about the facts to be proved, about the burden of proof and the consequences of the failure of proof [§ 3 (3) HCCP]. Thus, the burden of production of proof and the burden of proof are linked together in most cases, but there are situations when they may become separated from each other, in such a case the burden of proof is reversed as a result of some special statutory provision (For example, presumptions and temporary truths<sup>35</sup> may lead to the reversal of the burden of proof.)

## 5 Written Evidence

### 5.1 General Rules of Documentary Evidence

New technical possibilities of recent years have challenged the jurists of civil procedural law setting out to provide a modern definition for “document”. On the appearance of electronic documents, some elements of the old concept must be reconsidered. In Hungary the definition of document – corresponding to the requirements of our days – may be formulated as follows: the recording of the content of human thought through signs, mainly characters or signs transformable into characters, serving the purpose of the expression of thoughts, where the base or medium and the form of recording are not relevant in themselves but are on the whole suitable for ensuring the permanent retention and reliable reproduction of thought content.<sup>36</sup>

The document certifies facts in a more permanent and reliable way than other means of proof, therefore it is increasingly gaining ground in legal life. Certain privileges are attached to documents by the legislator, which appear as restrictive elements in the free evidentiary system, such as e.g. the full probative force attributed to particular documents. Privileges also include the possibility of the exclusive use of documentary evidence: concerning facts that may be proved by a document, the court may disregard other evidence [§ 193 HCCP].

If the party endeavours to prove his allegations of fact by a document, he must present the document for examination at the trial. At the request of the proving party, the court may obligate the opposing party to produce the document in his possession which he is obliged to hand over or present to the court anyway in accordance with the rules of civil law. Such obligation falls on the opposing party in particular if the document was issued in the interest of the proving party, or it certifies a legal relation relating to him, or it refers to a negotiation pertaining to such legal relation. If the document may be found in

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<sup>35</sup> “A temporary truth is a call upon the judge, by a legal rule, to consider some legal relation or fact as real until the opposite is proved. Thus, the essential difference between presumptions and temporary truths is that in case of a presumption one may, on the whole, talk about indirect evidence, and the party who is supported by the presumption must prove the intermediate fact. On proving this, he will achieve the same result as he would achieve by proving the indirect fact without the existence of the presumption.” Farkas: *op. cit.* (see fn. 22.) 105. p.

<sup>36</sup> Harsági: *op. cit.* (see fn. 21.) 54. p.



the possession of a person not involved in the lawsuit, this latter person must be heard as witness and ordered to present the document during the hearing [§ 190 HCCP]. The claimant is obliged to attach, already as an annex to the statement of claim, the document or its copy (abstract) the content of which he cites as evidence [§ 121 (2) HCCP]. At the request of the party, the court shall take steps to obtain a document possessed by another authority, a notary public or some organization – through request for assistance – if the party may not directly apply for the release of the document. Obtaining the original document is not obligatory if it is unnecessary to inspect the original document and the party presents its certified or ordinary copy at the trial. Forwarding the document may only be refused if it contains a secret (any subject that is treated as classified information) [§ 192 (1)–(2) HCCP].

## 5.2 The Public Document

*On the European continent, classification as public document* functions according to the same pattern. Not only in German, Austrian and French law but also in Hungarian law public document means a document issued in an appropriate form by an authority or person vested with authenticity acting within the scope of their authority. Public documents are typically attributed the *presumption of authenticity* and full probative force. In the *common law system* one may speak of a public document if the document refers to a public matter and has been issued by a public officer in the line of his official duty.<sup>37</sup> The *notary public* as the person assigned the task of laying down legal transactions in documents exists in all continental European states, but does not traditionally exist in the Anglo-American legal system. In this field some change in attitude may be observed in England. However, the form of public document commonly encountered on the European continent such as the “notarielle Urkunde” (§ 128 BGB), the “Notariatsakt” (pl. § 551 ABGB) or the “acte authentique” (Art. 1312 Code civil), is basically unknown in the common law system.<sup>38</sup>

With regard to their issuers and probative force, documents in Hungary may be divided also into public and private documents. Private documents may be further classified – based on their probative force – into private documents with full probative force and ordinary private documents.

A paper-based or electronic document issued by the court, a notary public or other authority or administrative organ within their competence and in due form as a public document fully proves the measure or decision laid down by it, the reality of the data and facts certified by it, the making of the statement contained in the document and also the date and method of it. The document deemed a public document based on another legal instrument has the same probative force [§ 195 (1) HCCP]. If any of the above requirements are not met, the document cannot be considered a public document, which, however, does not exclude the possibility of evaluating it as a private document.

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<sup>37</sup> Coester-Waltjen, Dagmar: Internationales Beweisrecht. Verlag Rolf Gremer, Ebelsbach am Main, 1983, 315-317. p.

<sup>38</sup> Zweigert, Konrad / Kötz, Hein: Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts. Mohr, Tübingen, 1996, 361. p.

Although the probative force of the public document is partly founded on the authority of the person issuing it, another important ground for it is the procedure preceding the issue of the document and relating to it.<sup>39</sup> Thus apart from the person issuing the document, it is also of crucial importance – when establishing whether a document may be evaluated as a public document – whether the person or authority entitled to issue the public document has issued the document concerning a matter falling within their scope of authority. Formal requirements relating to public documents vary depending on the document type.

The probative force of the original paper-based or electronic document is attributed to an electronic document prepared on the basis of a public document if it has been issued in duly executed form within the scope of authority of a person or authority entitled to issue public documents and it bears a qualified electronic signature and – if it is provided for by legal regulation – a time stamp. The probative force of the original public document is attributed also to the electronic document which has been prepared by a person or authority entitled to issue public documents in accordance with a procedure laid down by separate legal regulation and which is deemed a public document by statute.

The public document must be considered authentic until the opposite is proved; nevertheless, the court may – if it finds this necessary – address the issuer of the document *ex officio* to make a statement concerning the authenticity of the document [§ 195 (7) HCCP]. In accordance with the presumption of authenticity, there is no need to prove the authenticity of the public document in case of an apparently faultless document. The document is dubious if it contains e.g. deletions, insertions, gaps, changes executed in violation of the relating legal rules and it has other external deficiencies (e.g. tear, spots, faded writing, etc.). The presumption of authenticity reverses the burden of proof, in case of a party using a public document as evidence, the opposing party must prove that the immaculate public document is counterfeit or falsified. A document is considered counterfeit if it was not issued by the issuer, as opposed to a falsified document, which is authentic as a matter of fact – that is it was issued by the issuer – but subsequent unlawful changes have been made to it. All documents, including public documents, may be subject to counterproof, but only if it is not excluded or limited by statute [§ 195 (6) HCCP]. At present, Hungarian law does not contain any rule that would exclude or limit counterproof. Documentary evidence may be rebutted by showing that the document is not suitable for proving the particular fact. Rebuttal may be founded on formal deficiency, external irregularity or may be directed against substantive probative force as well. In the former case, the aim to be achieved is to prove that the document is counterfeit or falsified or it was not properly executed, while in the latter case, it must be proved that the apparently unobjectionable document does not correspond to the intentions of the person making the declaration.<sup>40</sup> Rebuttal may extend to the following: the decision contained in the public document was not passed, the measure contained in the document was not taken, the statement

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<sup>39</sup> Hámori, Vilmos: Okirati bizonyítás a polgári perben. *Jogtudományi Közlöny*, 1970/11, 605. p.

<sup>40</sup> Balogh, Béla: Az okirati bizonyítás egynémely kérdése a bírói gyakorlat megvilágításában. Debrecen, 1935, 15. p.

was not made, or these events did take place but at a time, place or in a form different from the one indicated in the document, etc.<sup>41</sup> During the rebuttal, any means of proof may be used, however, the rebuttal of public documents is rarely successful in practice.

The above provisions are applicable to foreign public documents as well provided the foreign document has been endorsed by the Hungarian foreign representation authority having jurisdiction according to the place of issue. In case of an international agreement signed by the Hungarian state to the contrary or based on European Community legal regulation, there is no requirement of endorsement.

### 5.3 The Private Evidence

The proposition that *the notion of private document may rather be approached from a negative direction* also applies to the HCCP in: all documents that do not fall within the category of public documents are qualified as private documents. With regard to probative force, within this group, distinction must be made between the types of private documents with full probative force and the documents usually referred to in legal literature as „simple private documents” not specified by the HCCP. The list of documents falling, by tradition, within the category of private documents of full probative force such as holographic documents, documents prepared in the manner indicated by the HCCP with the participation of witnesses, documents issued with signatures authenticated by a notary public or a judge and documents issued with an authorized signature, has become extended, as a first step, by documents countersigned by lawyers, then by electronic documents. With regard to the former, in accordance with Section 27 (1) of Act XI of 1998 on Attorneys at Law, by countersigning the document, the attorney proves that the document is in conformity with the parties’ express intentions and legal regulations, and that the document has been personally signed by the party indicated in the document in the attorney’s or his assistant’s presence, or that the party acknowledged in the attorney’s or his assistant’s presence that the signature was his own. An attorney may countersign documents prepared by him or with his office’s participation only. The attorney owes responsibility also for the content of the document, the counter-signature – as opposed to the authentication of signatures by the notary public – does not merely serve the purposes of the identification of the person signing the document.

The private document of full probative force serves as full proof – until the opposite is proved – for the fact that its issuer did make or accept the statement contained in it or acknowledged to be bound by it. The authenticity of the private document – in case it is challenged by the opposing party or the court finds this necessary – must be proven by the party producing the document in evidence. *Challenging the authenticity* of the private document does not necessarily have to be the express negation of its authenticity. It is sufficient if the opposing party gives expression to his doubt, proving authenticity will become necessary even in this case.<sup>42</sup>

<sup>41</sup> Gátos, György: A bizonyítás. In: op. cit. (see fn. 18.) 775–776. p.

<sup>42</sup> Farkas, József: Bizonyítás. In: Névai / Szilbereky (eds.): A Polgári perrendtartás magyarázata. Közgazdasági és Jogi Könyvkiadó, Budapest, 1976, 998. p.

The „unproblematic” signature results in the presumption of the integrity of the text above it, but this presumption may be vitiated by the external deficiencies or irregularities of the document. Thus a *rebuttable presumption of authenticity* may be attached to the externally reliable authentic document.

Concerning documents not corresponding to provisions prescribed for public documents or private documents of full probative force (*ordinary private documents*), the court has free discretion also taking into consideration the other data of the lawsuit. This category may include documents intended as qualified documents but having formal deficiencies, documents that are excluded from public documents for lack of jurisdiction or obligatory endorsement and documents that may not be qualified as private documents of full probative force either; as well as electronic documents not bearing a qualified electronic signature.

#### 5.4 Electronic Documents

From a functional aspect documents have not changed significantly over the millennia, and changed only slightly with regard to their physical form. For a long time, even this change had merely concerned the material carrying the information and the method of production of the documents. The last decade brought about a sudden change in this field by *tearing documents out of their “tangible” physical form of existence*, as a result our image of them has changed fundamentally. The change in living conditions necessitated the creation of new legal frames, which were to be constructed having regard to the special characteristics of the electronic environment. This required a radical change in outlook of lawyers, who had been thinking exclusively in traditional documents. The ground of procedural law science, which had seemed firm before, appeared to be shaking: during the formation of a regulatory system capable of accommodating electronic documents properly, *the sole firm point to lean on was the continuity of function of the document*. Thus, for instance, the electronic document, which has been separated from its material and prepared in a non-traditional way, must be functionally identical with its traditional counterpart. This function basically means suitability for storing information permanently and displaying it authentically.

The questions giving rise to debate concerning this form of text processing by modern office technology in our information society, in other words, the *appearance of electronic documents*, are the integrity of content and authenticity of such documents. Moreover, one must find solutions to further specific questions – resulting from their document nature – concerning the presentation and safe storage of documents existing in this form.<sup>43</sup>

An important amendment aimed at the harmonisation of laws is constituted by the legal regulation of *electronic documents*, which was carried out in two steps. Although the regulation had already been born before Hungary’s accession to the European Union,

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<sup>43</sup> Harsági, Viktória: Documentary Evidence in Comparative Perspective. In: Geimer, Reinhold / Schütze, Rolf A. / Garber, Thomas (eds.): Europäische und internationale Dimension des Rechts. Festschrift für Daphne-Ariane Simotta, Lexis Nexis, Wien, 2012, 205–213. p.

Community law had an obvious inspiring effect on development in this field. In summer 2001 the Hungarian Parliament passed the Bill on electronic signatures presented to it. The Act<sup>44</sup> follows Directive 1999/93/EC<sup>45</sup> in its regulation, which has led to a comprehensive modification of the chapter of the Code of Civil Procedure on documents. The second step in this development was constituted by the establishment of the legal frames for electronic legal documents, which, as a matter of fact, had been made necessary by the reregulation of company registration procedures. The Directive 68/151/EEC<sup>46</sup> and the modifying Directive 2003/58/EC<sup>47</sup> provided the questions of company records with a new basis. Act LXXXI of 2003 on Online Company Registration and on Reviewing Company Documents in Electronic Format, which transposed the provisions of the Directive into Hungarian law, laid the foundations for the creation of electronic public documents through the modification of several Acts.<sup>48</sup>

*Hungarian civil procedure law*, which otherwise rather tends to accept the narrower definition of documents, has admitted electronic documents to the range of documents, which is unambiguously revealed by both legal regulation and terminology. In this respect it may be considered the closest to the French solution.<sup>49</sup>

With the entry into force of Act XXXV of 2001 on Electronic Signatures [hereinafter referred to as Electronic Signatures Act], the section of the HCCP regulating private documents of full probative force also became modified. The amendment raised documents issued with a qualified electronic signature also to this category and created the possibility for the countersigning of electronic documents by attorneys. As a further step, legal regulation was laid down by the legislator relating to electronic public documents. The cited Act raised electronic documents – in accordance with the Directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures – to the same level as traditional documents.

Based on the HCCP, out of the three different levels (simple, advanced, qualified) of electronic signatures, exclusively the use of qualified electronic signatures may result in a private document or public document of full probative force. Increased probative force

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<sup>44</sup> Act XXXV. of 2001 on electronic signature

<sup>45</sup> Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures Official Journal L 013 , 19/01/2000 p. 12-20

<sup>46</sup> First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community OJ L 65 14.3.1968. p. 8-12.

<sup>47</sup> Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 amending Council Directive 68/151/EEC, as regards disclosure requirements in respect of certain types of companies. OJ L 221 4.9.2003. p. 13-16.

<sup>48</sup> See: Harsági: op. cit. (see fn. 2.) 287-288. p.; Harsági, Viktória: Elektronische Urkunden als Beweismittel im ungarischen Zivilprozeß. Die Regelung der elektronischen Signatur in Ungarn im Spiegel der Signaturrechtlinie und im Vergleich zur deutschen Lösung. WGO-Monatshefte für osteuropäisches Recht, 2003/4, 274–289. p.

<sup>49</sup> Kengyel, Miklós / Harsági, Viktória: Civil Justice in Hungary. Tokyo, Jigakusha, 2010, 159–160. p.

is attached by the legislator to the electronic version of the document only [see § 4 (3) Electronic Signatures Act], as the printed electronic document does not carry the signs of guarantee that would serve as a basis for it.

## **6 Witnesses**

The witness is perhaps considered the most frequent means of proof. However, because of the subjective nature of the testimony, a certain degree of lack of trust<sup>50</sup> may be observed toward witnesses, which is not a new problem and which justifies the incorporation of certain guarantees. The witness is a person other than the litigants who gives an account of past facts before the court,<sup>51</sup> usually perceived by him directly. Nevertheless, it may happen that the witness is examined concerning past facts that he has become familiar with not through direct perception but through hearsay. Hungarian law – in contrast with e.g. the common law system – does not exclude the application of hearsay witnesses; on the other hand, the reliability of the testimony is subject to judicial evaluation.

### **6.1 Ordering the Examination of the Witness and Summoning the Witness**

If the party intends to prove his allegations of fact by witnesses, he must specify the facts to be proved and announce the names of the witnesses and their addresses to which the summons may be delivered. If the witness to be summoned is a minor, the party shall indicate the witness's age, and the name and address of summons of his/her legal representative [§ 167 HCCP]. The examination of witnesses is usually applied for by the parties. Examination is ordered in all cases by the court even if the taking of evidence is conducted by a requested court.

### **6.2 Witness Protection**

The witness's data must be announced in the statement of claim or some other submission or at the trial. If the party indicates the witness's data in a submission, apart from the name, no other data of the witness have to be stated in it, but on a separate form submitted in a single copy, the party is obliged to indicate to the court the witness's address to which the summons may be delivered – and if necessary, other identification data of the witness. In a specially justified case, instead of the indication of the witness's name, it is sufficient to use some other designation and indicate the designated witness's data on a separate form. If the party announces the witness's data at the trial, the above provisions shall duly apply with the proviso that the separate form

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<sup>50</sup> Based on the results of an earlier survey – when examining the reliability of testimonies – judges consider the following: “71% of judges put emphasis on content analysis, 63% draw inferences about reliability from the circumstances of the examination of the witness, 48% of judges evaluate the sign system and code of the testimony and 27% assess the person of the witness. Fourteen of them (14%) attribute significant importance to their own personal traits in forming their convictions.” Csernok, Gyula: A bizonyítékok mérlegelése a polgári perben. Magyar Jog, 1988/2, 121. p.

<sup>51</sup> Kengyel, Miklós: Magyar polgári eljárásjog. Osiris, Budapest, 2008, 307. p.

containing the witness's data must be handed over to the court in such a way that the other parties or some other person involved in the litigation – apart from the prosecutor – may not be able to learn about its content. The party who has requested that the witness be summoned must preliminarily call upon the witness to make a declaration about whether he would like the above rules aimed at the protection of witnesses to be applied concerning the announcement of his data and the party is obliged to act in accordance with this declaration.

### 6.3 The Obligation to give Testimony

“The obligation to give testimony is carried into effect by the service of the summons. This is the point of time when the person perceiving the phenomena that are relevant for the resolution of the lawsuit becomes a witness in a procedural sense as it is from the time of the service of summons that a witness's obligations are imposed upon him and he is entitled to the rights of a witness.”<sup>52</sup> The obligation to testify is not imposed solely on Hungarian citizens but also on foreigners residing in the territory of Hungary. Persons enjoying diplomatic immunity<sup>53</sup> are exempted from this rule.

The obligation to testify consists of the following elements of content:

- a.) the obligation to appear in court,
- b.) the obligation to provide evidence,
- c.) obligation to produce documents.

*Ad a.)* The obligation to appear in court means the witness's obligation to appear before the court on the date specified in the summons in due process. The witness may not participate at the trial or the taking of evidence before his examination as a witness, and following his examination, he may leave by the court's permission only [§ 172 (1) HCCP]. Exempt from this rule is – apart from persons enjoying diplomatic immunity – the witness who may not appear before the court because of his old age, disease, physical disability or for some other reason; in this case, the court shall hear the witness in his home or his place of residence. In this case the court may order that the witness be examined by the presiding judge [§ 176 (1)–(2) HCCP].

*Ad b.)* The obligation to provide evidence extends – in addition to the presentation of the facts of relevance for the lawsuit perceived by the witness – to the communication of the personal data contained in Section 173 (1) and the answering of questions aimed at the detection of prejudice, which questions the witness must answer even if he is entitled to refuse to provide evidence. An amendment of 2013 has introduced special rules relating to judges: If the judge is subpoenaed to testify with regard to his official actions or to reasons related thereto, the identification procedure shall cover the judge's name, job description, position and address of summons, and the name and address of

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<sup>52</sup> Kengyel: op. cit. (see fn. 22) 98. p.

<sup>53</sup> The HCCP does not affect the scope of diplomatic or other immunity or the special procedural rules relating to diplomatic immunity or immunity of another type [§ 395 (1) HCCP]. Thus, persons enjoying diplomatic immunity cannot be summoned as witnesses, however, through diplomatic channels they may be called upon to make themselves available for hearing in their homes or offices or to make a statement in writing.

the court to which the judge is attached. After the identity of the judge has been verified, the testimony shall be given according to the general provisions. If the service relation of a judge terminates during the action, the general rules shall apply as regards the judge's obligation to give evidence [§ 173 (1)-(1a)-(2) HCCP]. These data are relevant also because they may reveal a ground for the refusal to give testimony or for immunity and – through the clarification of the relationship between the witness and the parties – they also provide help for the judge how to evaluate the testimony. If the court has not ceased to treat the witness's personal data secretly or it treats them secretly at the witness's request, it shall establish the witness's personal data by inspecting his documents suitable for identification and record them in writing and treat them in secret.

*Ad c.)* The witness is not merely obliged to give an oral presentation of what he can remember but he must also produce the documents in his possession.<sup>54</sup> Based on the obligation to produce documents, the witness is obliged to present for inspection to the court the document in his possession or its part pertaining to the lawsuit at the time of his examination, unless he keeps this document in his possession on behalf of a third person not involved in the lawsuit [§ 174 (1)-(2) HCCP].

#### 6.4 The Capacity to Testify and the Refusal to Provide Evidence

„In order to fulfil his role [...], the witness must first perceive the fact or circumstance which will prove relevant for the resolution of a subsequent lawsuit, then he must communicate his perceptions to the court. The witness is capable of doing so only if he has the physiological and psychological abilities that are necessary for the perception and the giving of evidence.“<sup>55</sup> The lack of the above abilities constitutes natural incapacity to testify. The causes that may lead to incapacity to testify are not laid down by the Act, which merely provides that a person who cannot be expected to give correct testimony because of his physical or mental disability shall not be examined as a witness [§ 169 (1) HCCP]. In legal literature the following point of view has developed concerning this: “as a result of the underdeveloped perceptive and mental activities, childhood as well as mental illness, mental deficiency, mental disorder or pathological brain function and the lack or deficiency of organs of perception”<sup>56</sup> may result in natural incapacity to testify. Incapacity to testify taken in its wider, legal sense is unknown in the Hungarian law in force, it means the legal, social or moral incapacity of the witness, however, according to the principle of the free evaluation of evidence, when assessing the result of the taking of evidence, circumstances of this type may also be considered.

A further ground for exclusion as a witness may be if the witness owes an obligation of confidentiality concerning any subject that is treated as classified information and he has not been relieved of this obligation. However, this does not mean full immunity; it solely refers to questions covered by the witness's obligation of confidentiality. The obligation of confidentiality does not cease even after the termination of the relation on which it is founded [§ 169 (3) HCCP]. In case the above grounds apply, the testimony

<sup>54</sup> Magyary: op. cit. (see fn. 11) 238. p.

<sup>55</sup> Kengyel: op. cit. (see fn. 50) 20–21. p.

<sup>56</sup> Ibid. p. 23.



of the witness who has been examined despite the legal provisions described above shall be deemed unlawfully obtained evidence and therefore disregarded as evidence during the evaluation of the result of the taking of evidence [§ 169 (6) HCCP].

In certain life relations it would be inequitable to expect the witness to testify against the interests of his relative, client or patient, etc. and meet his obligation to tell the truth thereby helping the court's activity directed at establishing the facts. This is the justification for the existence of the right to refuse to testify within the circle defined by the Act. The following persons may refuse to testify:

- a) a close relative<sup>57</sup> of any of the parties;
- b) a person who would accuse himself or his relative of a crime by the testimony, on a question relating to it;
- c) a lawyer, a doctor or some other person who is bound by professional confidentiality and through the testimony would violate his obligation of confidentiality unless the interested party has relieved him of this obligation;
- d) the mediator or expert who has proceeded in the mediation procedure relating to the dispute giving rise to the action;
- e) a person bound by business confidentiality, on a matter which would involve the violation of his obligation of confidentiality
- f) media content providers and the persons they employ under contract of employment or some other form of employment relationship, if their testimony would expose the identity of any person from whom they receive information relating to the media content they provide, to the extent covered by that subject. [§ 170 HCCP].

Witnesses who are the relatives of the parties or who are bound by professional confidentiality must be warned by the court about their immunity before their examination or whenever the court learns about such immunity. The warning as well as the witness's reply to the warning must be entered in the records of the court.

## 6.5 The Examination of Witnesses

The witness may not be present at the trial or the evidentiary proceedings before his examination and he may leave following his examination only by the court's permission. Before the start of the examination, the consequences of perjury should be cited. While against the party making a false statement only procedural sanctions are applicable (fine, order to pay consequential costs), the witness's violation of his obligation to tell the truth has consequences pertaining to criminal law.

The witness is examined by the presiding judge ensuring that the testimony does not cover facts that are irrelevant for the case. During the examination – although this is not laid down as an express requirement by the HCCP in force – it is reasonable to render it

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<sup>57</sup> 'Relative' shall mean next of kin and their spouses, adoptive parents and foster parents, adopted persons and foster children, brothers and sisters, spouses, fiancées and domestic partners, spouse's and domestic partner's next of kin, brothers and sisters, and spouses of their bothers and sisters. [§ 13 (2) HCCP]

possible for the witness to give a continuous presentation of the evidence. The other members of the court are also entitled to ask the witness questions. The parties may also initiate questions. The presiding judge may also allow the parties, at their request, to put their questions directly to the witness. The admissibility of questions initiated by the parties or addressed by them directly to the witness falls within the discretion of the presiding judge [§ 173 (3) HCCP].

## 7 Expert Evidence

### 7.1 Appointing an Expert to the Case

If, the establishment or evaluation of a fact or other circumstance of relevance to the lawsuit requires special expertise which is not available to the court, the court may order the appointment of an expert. Usually one expert must be employed; several experts may only be appointed if various questions of special technical nature arise. The HCCP provides that the court shall, in the first place, appoint as experts judicial experts entered in the register of experts, business associations authorized to provide expert opinion, professional institutions, or state organs, institutions, organizations defined in a separate legal regulation. Experts other than the above may be employed only exceptionally, in the absence of the above experts. The technical questions concerning which only particular organizations may provide expert opinion and the organizations authorized to provide expert opinion in specific fields may be defined by a separate legal regulation.

Following the principle of party control, the appointment of the expert takes place – apart from a few exceptions – upon request by the parties. Parties are allowed increased autonomy under the regulation that entered into force in 2006, which puts primarily the parties in charge of coming to a consensus regarding the person of the expert. In case the parties fail to come to an agreement concerning the person of the expert, it shall be decided by the court [§ 177 (3) HCCP]. As the appointment of experts forms part of the court's responsibilities, only an expert appointed by the court may usually act as an expert in the lawsuit, therefore the expert opinion obtained earlier by the party, i.e. the private expert opinion, may be taken into account by the court merely as the party's position.<sup>58</sup>

The obligations of the expert include: *a)* the obligation to appear in court, *b)* the obligation to carry out an examination, *c)* the obligation to give expert opinion. If it is justified by the complexity of the case or the expected volume of the work to be done by the expert, the court shall, at the party's request, call upon the expert – following the preliminary hearing of the expert at the trial if necessary – to prepare a preliminary schedule of his expert task and the expected costs. After consulting the schedule, the proving party shall state whether he requests the expert to do the work.<sup>59</sup>

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<sup>58</sup> See *Bírósági határozatok*, 1992, № 270.

<sup>59</sup> See for more detail Harsági, Viktória: Die Reform des Beweisrechts der ungarischen ZPO. In Nekrošius et al. (eds.): *Civilinio proceso pirmosios instancijos teisme reforma Baltijos jūros regiono valstybėse ir Centrinėje Europoje*, Vilnius, 2005, 139. p.

## **7.2 The Expert Opinion**

The court may order the expert, at the time of his appointment, to present the opinion in writing without summoning him to appear in court. If the court finds it necessary, it may summon the expert to appear in court. The court informs the expert about the questions on which he is expected to give an opinion in the letter of appointment or at the trial. The parties may also request the court to ask the expert specific questions. The expert must be supplied with the data required for the performance of his task. The expert is entitled to inspect the documents pertaining to the lawsuit; he may participate at the trial including the evidentiary proceedings as well, he may directly put questions to the parties, witnesses and other experts and initiate the taking of further evidence if it is required for the accomplishment of his task [§§ 180–181 HCCP].

If the expert cannot present his opinion immediately, the court shall set a new date for the presentation of the opinion or instruct the expert to submit his opinion to the court in writing within a defined period of time. The judicial expert cannot be instructed concerning the content of the opinion. The expert opinion shall be presented – in accordance with the measure taken by the organ appointing the expert – either in writing or orally. Written expert opinions are more frequent in practice because of the complexity of the technical questions. The law may provide for the submission of the expert opinion in electronic format. If the expert opinion is obscure, incomplete, contradictory and seems to conflict with the opinion of another expert or the proven facts or its correctness may be seriously doubted, the expert is obligated to supply the court with the necessary information if called upon. In case of a request by the party to this purpose, the court may appoint another expert.

## **7.3 Common Rules Relating to Witnesses and Experts**

The enforceability of the obligation to testify and the obligation to provide an expert opinion is facilitated by the rules laid down in Section 185 of the HCCP, in accordance with which the sanctions for the violation of this obligation may include an order to pay for costs caused, a fine and in case of experts, the reduction of fees. The court may, at the same time, order the compulsory attendance of a witness or expert failing to appear in court (having left the court).

## **8 Inspection**

In case of exhibits, acquaintance with facts to be proved is carried out through inspection. Inspection must take place if it is necessary to directly observe and examine persons, objects, facts or premises in order to establish an essential circumstance. If inspection is to be conducted on the spot, the court may provide that the inspection be carried out by the presiding judge [§ 188 (1)–(2) HCCP]. It flows from the principle of party control that – apart from the exceptions laid down in the Act – the court is entitled to order inspection at the parties' request.

The person in whose possession the object required for the purposes of the inspection may be found is ordered by the court to present the object, make it available or render the inspection of the object possible. The holder of the object of inspection cannot be summoned as a witness like the holder of a document, as the object of inspection does not form part of the obligation to testify.

The result of the inspection must be recorded in the records of the court, during which it is not enough merely to record the actual performance of the inspection but also the essential data arising during the inspection must be recorded.

## 9 Taking of Evidence

### 9.1 Evidence Based on the Principle of Party Control, *ex officio* Evidence

The fact who takes the initiative and plays an active role during the taking of evidence in the civil lawsuit has a decisive effect on the structure of the lawsuit as well.<sup>60</sup> In this respect, Amendment of 1995 of the HCCP provided a new basis<sup>61</sup> for evidence in civil litigation by setting it as an objective to ensure the implementation of the principle of party control and it confined the operation of law, strongly present in evidence earlier, within narrow, precisely defined limits.

During the taking of evidence based on the *principle of party control* it is the parties' responsibility to find the means of proof and present the facts and evidence that are relevant for the resolution of the case to the court. It may also be formulated in the following way: during litigation based on the above principle, the legislator imposes the obligation to produce material relating to the lawsuit on the parties. As opposed to this, procedural solutions where this task is partially or fully taken over by the court are based on the *inquisitorial principle*. The Amendment of 1995 abolished the earlier general authorization to take evidence *ex officio*, thus, since this amendment the court has been entitled to order the taking of evidence *ex officio* only based on special authorization.

Among the general principles the HCCP lays down that the obligation to produce the evidence necessary for the adjudication of the legal dispute – unless it is provided otherwise by statute – forms part of the duties of the parties [§ 3 (3) HCCP]. Thus effective statutory regulation basically expects activeness from the parties in finding and supplying evidence. Only in exceptional cases is it possible for the court to assume the initiative during the evidentiary proceedings within a civil lawsuit: the court may order the taking of evidence *ex officio* only if it is permitted by the Act [§ 164 (2) HCCP]. In

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<sup>60</sup> Magyary: *op. cit.* (see fn 11.) 388. p.

<sup>61</sup> Kengyel, Miklós: Die Zukunft des ungarischen Zivilprozessrechts nach der Zivilverfahrens-Novelle 1999. *ZZPInt* 2000, 371–372. p.; Kengyel, Miklós: Recent Developments in Hungarian Civil Procedure. In: Storme, Marcel et al. (eds.): *The Recent Tendencies of Development in Civil Procedure Law – Between East and West*. Justitia UAB, Vilnius, 2007, 99–101. p.; Németh, János / Papp, Zsuzsa: Ungarn. In edited by Nagel / Bajons (eds.): *Beweis – Preuve – Evidence*. Grundzüge des zivilprozessualen Beweisrechts in Europa, Nomos, Baden-Baden, 2003, 665. p.

the lack of the party's express request for the taking of evidence, the court shall not take evidence *ex officio*. This may occur only if it is expressly permitted by legal regulation.<sup>62</sup>

## 9.2 The Ordering and Taking of Evidence

The court shall order evidence for the establishment of facts required for deciding the case [§ 163 (1) HCCP]. As a general rule, during the taking of evidence based on the principle of party control, the court orders the taking of evidence based on the parties' request for it, the ordering of evidence *ex officio* is only possible based on special statutory authorization. However, the court is not bound by the request for evidence submitted by the parties or its own decision ordering evidence: it may disregard the order for the taking of evidence or the conduct (supplementation, repetition) of the evidentiary proceedings that have been ordered already if it considers them unnecessary for the adjudication of the legal dispute. The court shall disregard ordering evidence if the party delayed with the request for the taking of evidence through his own fault or submitted the request in violation of the *bona fide* conduct of the lawsuit unless the Act provides otherwise [§ 3 (4) HCCP]. Nevertheless, the discretion concerning disregarding the ordering of evidence must not result in the judge's arbitrary power; therefore, as a guarantee, the legislator built into the Act the judge's obligation to provide justification for it. In the comments to the judgement, the court must specify the reasons why it did not find some fact proven or why it disregarded the offered evidence [§ 221 (1) HCCP]. The court orders the taking of evidence by court order, in which it lays down the fact that the evidence shall be directed at and also the means of proof.

The court may, following an admission by the opposing party, both parties' concordant presentations or one party's presentation uncontested by the opposing party despite invitation by the judge to do so, accept facts as true if no doubt arises in the court concerning them. The court may accept facts based on the presentation of one party only if the opposing party has not contested them despite special invitation by the court to do so and no doubt arises in the court concerning them either. The court may accept the reality of facts it considers to be publicly known. The same applies to facts of which the court has official knowledge. These facts must be regarded by the court even if the parties have not referred to them, but the court is obligated to call the parties' attention to these facts at the trial [§ 163 (2)-(3) HCCP].

In accordance with the principle of immediacy, evidentiary proceedings are usually conducted by the trial court during the trial. The indirect taking of evidence is possible exceptionally: through a requested court (which may also be a foreign court) or through a dispatched judge if the conduct of the evidentiary proceedings by the trial court should cause significant difficulty or disproportionately high extra costs. In such cases the trial court addresses the district court in the area of which the persons to be examined reside or where evidence may be most expediently taken.

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<sup>62</sup> See *Bírósági Határozatok*, 1999, № 565.

In case of the effectuation of evidence by way of requesting another court, the trial court must deliver to the requested court the files required for arranging the request and inform the requested court about all the questions to be clarified during the evidence and all the data required for the taking of evidence (in particular, the names and addresses of the participants of the lawsuit and their representatives, the data relating to the advancement of expenses, the brief description of the case to the necessary extent and the facts to be clarified by evidence, the names and addresses of the persons to be examined and the data pertaining to the possible expenses allowance) [§ 202 (1) HCCP].

During the execution of evidentiary acts by the requested court, the contents of the request must be taken into consideration, the evidence indicated in the request cannot be disregarded by the court, in other words, the contents of the request must be complied with, however, the requested court is entitled to exceed the limits given by the request in the positive direction, that is, it may take evidence going beyond those specified in the request. The requested court must set a day in court for the conduct of the evidentiary proceedings and summon the persons to be heard for that day and also notify the parties about this day. The requested court shall take evidence without the participation of lay assessors. In other respects, the requested court must proceed in due compliance with the rules governing the court of trial and – unless the Act provides otherwise – it shall exercise the rights of the court of trial; the parties are also entitled to apply to the court to put specific questions to the persons to be heard. The requested court may – at the parties' justified request or if it seems necessary based on the data available to the court – conduct further evidentiary proceedings [§ 202 (2) HCCP].

The requested court is obliged to perform within 15 days; in case of missing this deadline, it must inform the requesting court about the obstacle to performance. The requested court must deliver the records of the evidentiary proceedings together with the files of the case to the requesting court within 8 days [§ 202 (3)–(4) HCCP].

Similarly, the taking of evidence through a dispatched judge<sup>63</sup> is possible based on express statutory authorization only. In such cases, during the evidence the rules relating to the court shall be applicable to the procedure of the dispatched judge as well [§ 203 HCCP]. Evidence shall be taken by a dispatched judge if the witness cannot appear before the court due to his old age, illness, physical disability or some other reason, in such a case the witness shall be heard in his home or place of residence; furthermore, if the inspection is to be held on the spot, or if the taking of the document to the court is impossible or should cause disproportionate difficulty, therefore, it must be inspected on the spot.

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<sup>63</sup> In cases where evidence may, in accordance with the law, be taken instead of the first instance court also by the presiding judge, the second instance court may put any member of the panel in charge of taking evidence [§ 249 (3) HCCP].

### 9.3 Estimation of Evidence

The HCCP is based on the free evaluation of evidence, this question is treated with special attention by the Act among the general principles. Unless the Act provides otherwise, in civil actions, the court is not bound by formal rules of evidence, particular methods of evidence or the use of particular means of proof, it may freely use the pleadings of the parties and all other evidence suitable for establishing the facts of the case. These provisions shall not affect statutory presumptions including the legal rules according to which some circumstance must be regarded true until the opposite is proved [§ 3 (5) HCCP].

In the free evidentiary system, the judge has discretion to determine, based on his personal conviction, the probative force of evidence presented to him and, in some cases, to decide to disregard offered evidence; evidence does not have a pre-defined probative force, the judge is not bound with regard to the method of evidence or the applicability of the means of proof. The above statements do not fully prevail in Hungarian procedural law, limitation is caused by certain restrictive elements in this respect, thus e.g. the legally regulated probative force of public documents and private documents of full probative force, the statutory presumptions and the rules relating to the burden of proof, court judgements passed in criminal cases within a circle defined by Section 4 (2) of the HCCP and prohibitions relating to evidence. “Judicial conviction is formed [...] based on the comparison of all evidence presented to the court during the proceedings. On the other hand, although we profess the principle of the free evaluation of evidence, evidence has its hierarchy. This is only a reference to the fact that even the „freest” system of evidence contains some restrictive element, especially concerning documents. This may be explained by the fact that, in order to ensure the safety of transactions, there is a need for means of proof serving as full proof.”<sup>64</sup>

The court establishes the facts of the case based on the comparison of the parties’ pleadings and the evidence presented to the court during the evidentiary proceedings; the court assesses all the evidence in its entirety and adjudges it based upon its conviction. The court has discretion also in evaluating, based on comparison with the data of the case, what importance must be attributed to the fact if a person summoned to appear personally in court did not appear, or the party or his representative did not comply with some instruction, did not reply to the question addressed to him, or declared that he had no knowledge of a fact or did not remember it [§ 206 (1)–(2) HCCP].

The adjudication of legal disputes turning into civil action rests on two pillars: the facts of the case and the legal rule (legal rules).<sup>65</sup> The court carries out the estimation of evidence and establishes its probative value (substantive probative force) in order to establish the facts of the case. Balancing is a procedural act performed by the court exclusively. However, the free estimation of evidence must not mean the judge’s arbitrary decision. A guarantee for controlling judicial discretion is constituted by the

<sup>64</sup> Csernok: op. cit. (see fn. 49) 118–119. p.

<sup>65</sup> Novák, István: Tényállás a polgári perben. Magyar Jog, 1997, 416. p.

judge's obligation to provide justification for his decision. Consequently, in the comments to the judgement, the judge must present the established facts of the case with the indication of relating evidence; reference has to be made to the legal regulations on which the court's judgement is founded. Brief mention should be made of the circumstances given priority by the court during the estimation of evidence, finally the reasons must be indicated why the court did not find some fact proven or why it disregarded the offered evidence [§ 221 (1) HCCP].

#### 9.4 Preliminary Evidence

Evidence is usually taken during the lawsuit, according to the regular course of proceedings, it does not usually take place before the presentation of the counterclaim by the defendant. Preliminary evidence means the taking of evidence before or after the commencement of the lawsuit, but at a stage in which evidence may still not be taken usually. It is aimed at providing the proving fact for the judgement as a basis for inferences. Before the commencement of the lawsuit, the taking of preliminary evidence may be requested from the district court according to the domicile of the applicant or the district court in the territory of which evidence may be taken most reasonably. Since 1 January 2009, notaries public have also been authorized to take preliminary evidence prior to the commencement of the civil action (Act XLV of 2008). In such a case – if the statutory conditions are met – the court, on granting the request, conducts the procedure within the framework of non litigious proceedings. An application filed following the submission of the statement of claim or at the same time as it shall be decided by the trial court.

Preliminary evidence may be taken if:

- a) it seems probable that evidence could not be taken successfully during the lawsuit or at a later stage of the lawsuit or it would cause significant difficulty;
- b) it is likely that the preliminary taking of evidence would contribute to the conduct and conclusion of proceedings within a reasonable period of time;
- c) the party owes an obligation of warranty for the deficiencies of some thing;
- d) the preliminary taking of evidence is permitted by a separate legal rule [§ 207 HCCP].

The court makes a decision concerning the order about the taking of preliminary evidence on hearing the opposing party, unless the opposing party is unknown, however, in an urgent case it may make a decision without this too. A copy of the application must be attached to the summons for the day set for the hearing. If the court decides to disregard the hearing of the opposing party, it must inform him about its decision only if it has ordered the taking of preliminary evidence; in such a case, a copy of the application must be attached to the decision. With regard to orders for the taking of preliminary evidence, appeals may be submitted only against the court's decision rejecting the application [§ 209 HCCP]. The results produced by preliminary evidence may be used by either party during the lawsuit. To the costs of the taking of preliminary evidence, general rules relating to the costs of the proceedings shall be applicable [§ 211 HCCP].



## 10 Costs and Language

### 10.1 Prepayment and Bearing of Costs Relating to Evidence

Court costs shall mean all reasonable expenses involved in litigating an action in good faith before or outside the court (costs of preliminary inquiries and correspondence, procedural fees, witness fees, expert fees, the fees of guardians ad litem and interpreters, the cost of remote hearings and inspections, etc.) [§ 75 HCCP].

Witnesses are to claim compensation for the costs incurred in connection with their appearance, of which they shall have to be advised after the completion of questioning. The court carrying out the questioning shall pay the witness fees established from the sum deposited for such purpose; if the court did not order the necessary sum to be deposited in advance, or if the sum deposited is insufficient, the party shall be ordered to advance the witness fees established. Decisions adopted for the award of witness fees may be contested separately by the witness and the parties, however, such appeal shall have no suspensory effect. If a witness is summoned from out of town, the court may advance the costs of travel to the witness.

The court shall determine the amount of the expert's fee – based on the schedule of charges submitted by the expert – upon receipt of the expert's opinion or after hearing the expert's testimony, in any case within thirty days at the latest. The expert's fee shall be determined by the court of litigation also if the expert was appointed by the requested court. The court's decision may be contested separately by the expert and the parties. The appeal shall have suspensory effect only up to the amount contested. The court shall notify the expert concerning the ruling becoming definitive within eight days from the time when it becomes legally binding. Unless otherwise prescribed by law, the court shall pay the sum to the extent covered by deposit within thirty days from the date of the expert's invoice [§ 186-187 HCCP].

The holder of the object of inspection may require reimbursement for the expenses (expenses relating to his appearance at the trial, the transportation of the object of inspection or his attendance at the on-the-spot inspection) or damage incurred during the implementation of the inspection; the court is obliged to remind him about this. The amount of the expenses or the damage is determined by the court performing the inspection; concerning the advances on this amount, the rules already presented in connection with the advances on witnesses' expenses are duly applicable with the stipulation that the appeal against the decision has delaying force [§ 189 (2)–(3) HCCP].

The costs for the performance of taking of evidence (witness fees, expert fees, the fees of interpreters, the cost of remote hearings and inspections, etc.) shall be advanced by the party adducing evidence, the court, however, may exceptionally order the opposing party to advance the costs for the performance of taking of evidence in full or in part where deemed justified. The court shall adopt a decision concerning prepayments at the time of occurrence of the costs, however, where there is reason to believe that the costs

will be substantial beforehand, or if so justified by other reasons, the court may order the party affected to deposit the sum required with the court. Where an expert has been appointed the court shall order to have the sum estimated to cover the expert's fee deposited.

In Hungary the „loser pays” principle is applied: the expenses of the successful party shall be covered by the losing party. Any exception from this provision shall apply to the extent of the derogations set out in HCCP. Such exception concerning the evidence may be: Where a party fails in carrying out certain acts during the proceedings, or falls in delay with certain acts without justification, or fails to meet a deadline or time limit, or causes unnecessary expenses in any other way, such party may not claim any reimbursement for the expenses resulting therefrom even if he succeeds in the litigation, or may be ordered to cover the costs of the opposing party resulting therefrom irrespective of the outcome of the litigation.

The parties may not be required to cover any costs that may have occurred for – otherwise avoidable – reasons within the court's control. These costs shall be covered by the State as described in specific other legislation.

The court shall ex officio decide as to the bearing of court costs, except if the successful party asked not to adopt a decision concerning the bearing of court costs. The court shall decide as to the bearing of court costs in its judgment or other decision delivered in conclusion of the proceedings. If, however, on the strength of law a witness, an expert or any non-litigant person is to be held liable for the costs of certain acts during the proceedings, the court shall forthwith order such person to cover the said costs. The court may follow the same procedure where the costs of certain acts during the proceedings are to be covered by either of the parties irrespective of the outcome of the proceedings [§ 76-80 HCCP].

## **10.2 The Interpreter**

Court proceedings are conducted in the Hungarian language, but no one shall suffer a disadvantage because they do not speak Hungarian. The HCCP lays it down among the general principles that everybody shall be entitled to use their mother tongue, regional or minority language in court proceedings. The court is obliged to employ an interpreter if it is required for the implementation of the above principles [§ 6 (2) HCCP]. If the person to be heard concerning the lawsuit does not speak Hungarian and the court of trial is not proficient enough in the language used by that person either, an interpreter shall be employed during the hearing. In order to render the appointment of an interpreter unnecessary, it is sufficient if one member of the trial panel is proficient enough in the foreign language. Any person with hearing impairment shall be interviewed or questioned, upon request, with the help of a sign language interpreter, or shall be allowed to make a written statement instead of being interviewed or questioned. Any person who is to be heard in the action is deafblind, the hearing shall be conducted with a sign language interpreter at his request. Upon request, speech-impaired people shall be allowed to make a written statement instead of being interviewed or questioned.

The provisions of the Act relating to experts shall duly apply to interpreters [§ 184 HCCP].

The costs of interpreters employed under § 6 shall be advanced and borne by the State. Translation costs arising in the cases defined in § 6 are advanced by the State instead of the party entitled to use his mother tongue, regional or national language, while concerning the bearing of these costs, general rules relating to court costs are applicable. However, costs arising from the translation of court decisions and requests are borne by the State [§ 78 (4)-(4a)-(4b) HCCP].

## **11 Unlawful Evidence**

The HCCP, which is founded on the principle of the free evaluation of evidence, contains a rather small number of provisions the violation of which would result in the unlawfulness of evidence. With regard to the use of unlawfully obtained evidence, the HCCP does not formulate generally applicable clauses of the type contained in the Act on Criminal Procedure. Prohibitions are concentrated around the witness statement and expert opinion, but in other areas the lack of general and special prohibitions results in uncertainty concerning such illegalities arising out of litigation as e.g. the stealing of documents or obtaining an electronic letter through unauthorised access to the e-mail system. Farkas regarded evidence obtained unlawfully – through the violation of personal rights actually – to be admissible (e.g. a stolen letter), but he considered this sharply distinguishable from unlawful conduct violating the authenticity or genuineness of documents. In his study on secret sound recordings, Székely objects to the admissibility of evidence obtained through the violation of personal rights. Gáspárdy regarded it as part of the ethos of the free evidentiary system that unlawfully obtained evidence could not be used during the action. „Neither shall the principle of the free evaluation of evidence be interpreted to mean that the parties are entitled to use means of any origin or content without limitation in order to assert their claims.” To support his argument, he cites judicial practice, which has laid down the inadmissibility of unlawfully obtained evidence with regard to specific cases only, but he emphasizes that these statements can be attributed “serious general importance as principles”.

## **12 International Aspects**

In the case of cross-border disputes it may constitute a problem for the courts to obtain evidence that could well be conclusive if the means of evidence is located or resides abroad (for example, if the witness lives abroad; the scene to be inspected is located in another state, or documentary evidence is kept outside the territory of the state where the trial court is situated).

A special type of request is when the taking of evidence is to be carried out abroad. If evidence is to be taken in a foreign state with which the Hungarian state has signed an international agreement<sup>66</sup> or there has been a practice of reciprocity concerning the

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<sup>66</sup> The most important international agreements of this type in which Hungary also participates are: the Hague Convention of 1954 relating to civil procedure and the Hague Convention of 1970

performance of requests for judicial assistance, measures for evidence must be taken accordingly. In the absence of an international agreement signed by the Hungarian state or a practice of reciprocity, the court may set a deadline for the party – at his request – to present a public document about the taking of evidence corresponding to the legal rules of the foreign state and endorsed if necessary. The validity of the taking of evidence abroad must be adjudged based on the law of the place where the evidence was taken, but it must be considered valid also in case it complies with the provisions of the Act<sup>67</sup> [§ 204 HCCP]. This latter rule constitutes an exception to the *lex fori* principle.

The possibility of performance of requests on the part of foreign courts outside the European Union to take evidence in Hungary must be adjudged based on the provisions of the Code on Private International Law. Since Hungary's accession to the European Union, legal acts of the level of regulations have been directly applicable in Hungary as well. Such a legal act has been passed within the subject-matter of evidence as well, namely Regulation (EC) 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, which, on entering into force, replaced the Hague Convention of 1970 signed in the same field.

The Regulation contains several solutions greatly contributing to the simplification and acceleration of the procedure (e.g. the requesting court shall deliver the request for the taking of evidence directly to the requested court and the direct taking of evidence by the requesting court may also be possible under certain conditions). In the cases where the necessary means of proof may be found abroad, the Hungarian court has to face a lot of difficulties in order to obtain the evidence which is often crucial for the resolution of the case. The passing of the regulation was necessitated by the fact that owing to its cross-border nature, this problem may not be solved at the level of the Member States, therefore Community regulation is indispensable.

In the European Judicial Area it had become obvious by the millennium that the traditional system of legal assistance known from international civil procedure law no longer offered an adequate answer – corresponding to the degree of integration – to solve the problem of taking of evidence abroad. The effective improvement of cooperation in the field of taking of evidence may be achieved only *at the Community level*. The coming into effect of Regulation (EC) № 1206/2001<sup>68</sup> has, for the first time, enabled the courts in all states of the European Judicial Area to proceed based on *uniform rules* during their cooperation in the taking of evidence abroad – in civil and commercial matters.

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on the taking of evidence. This latter entered into force in relation to Hungary on 11 September 2004.

<sup>67</sup> Kengyel, Miklós / Harsági, Viktória: Länderberichte. Ungarn. In: Geimer, Reinhold / Schütze, Rolf A. (Hrsg.): Internationaler Rechtsverkehr in Zivil- und Handelssachen. München, C.H. Beck, Band 5, 1151.16. p.

<sup>68</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. OJ L 174, 27.6.2001, p. 1–24

As regards the nature of Regulation (EC) № 1206/2001, it constitutes a technical rule basically. It has not resulted in the genuine unification of the laws relating to the taking of evidence abroad, it merely simplifies the process, unifies its technical aspects and accelerates it Europe-wide.<sup>69</sup> It does not directly regulate the method of carrying out the actual taking of evidence abroad. These questions are governed by the provisions of international treaties and the domestic laws of the Member States or they fall within the court's discretion.<sup>70</sup> The taking of evidence itself follows the principle of *lex fori* regardless of whether it is carried out by the trial court or the requested court. In Heß's opinion, this step may be considered only a temporary intermediate solution, as even in the present European Judicial Area parties may still be subject to the collision of numerous procedural laws. In the medium run, therefore, it would be absolutely necessary to elaborate a more generally applicable system of rules relating to the *European law of evidence*.<sup>71</sup>

As a result of the coming into effect of the Regulation on the taking of evidence, one has been able to observe a shift from the traditional system of cross-border legal assistance toward a *new model of cooperation* in the European Union, where the direct taking of evidence in the national territory of another Member State has also become possible within the frames set by the Regulation. By this partial relinquishment of the exercise of judicial power, the Member States have *given up a small segment of state sovereignty*, which means an essential change compared to the rules contained in either the Hague Convention of 1954<sup>72</sup> or that of 1970<sup>73, 74</sup>.

Regulation (EC) № 1206/2001 distinguishes between *two essentially different ways* of obtaining evidence located abroad. The *request*, well-known from the traditional model of cooperation, has been supplemented with the possibility of the *direct taking of evidence* by the court of the requesting state. The two methods of solution (active and passive legal assistance) constitute alternatives of equal rank; where there is no need for the application of coercive measures in order to render the taking of evidence feasible, the requesting court (trial court) has the right of choice between the two alternatives. When *deciding which method to choose*, the traditional request or the direct taking of evidence, the *trial court* must have regard to *expedience*. In general, it may be

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<sup>69</sup> Berger, Christian: Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO). Praxis des Internationalen Privat- und Verfahrensrecht, 2001, 524, 527. p.

<sup>70</sup> Schulze, Götz: Dialogische Beweisaufnahmen im internationalen Rechtshilfeverkehr. Praxis des Internationalen Privat- und Verfahrensrecht, 2001, 528. p.

<sup>71</sup> Heß, Burkhard: Die Integrationsfunktion des Europäischen Zivilverfahrensrecht. Praxis des Internationalen Privat- und Verfahrensrecht, 2001, p. 393. Heß, Burkhard – Müller, Achim: Die Verordnung 1206/01/EG zur Beweisaufnahme im Ausland. Zeitschrift für Zivilprozess International (Jahrbuch des Internationalen Zivilprozessrechts), 2001, 150. p.; Hess, Burkhard: Europäisches Zivilprozessrecht. C.F. Müller, Heidelberg, 2010, 462. p.

<sup>72</sup> Hague Convention of 1 March 1954 on Civil Procedure.

<sup>73</sup> Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

<sup>74</sup> For more detail on this topic, see: Nagel, Heinrich: Nationale und internationale Rechtshilfe im Zivilprozess; das europäische Modell. Nomos, Baden-Baden, 1971, 78. p.

considered an argument for the direct taking of evidence that the trial court knows more about the case and it is subject to its own domestic law during this part of the procedure as well. Thus, one unified procedural law is applied throughout the whole procedure. It is also an advantage of this solution that the principle of immediacy is implemented better. On the other hand, this way of taking of evidence is usually more costly.

A regulation is a norm that is *directly applicable* in the Member States; therefore, it does not require a separate legislative act on the part of the Member States. Nevertheless, some articles of the regulation leave it to national legislation to regulate some questions of detail which are intended to promote the implementability of the regulation (thus, e.g. the appointment of the acting courts and a central body, the determination of the language in which requests addressed to the courts of the Member State may be accepted). The Hungarian legislator laid down these rules among the provisions of the *Law-Decree on International Private Law and Decision No. 1147/2002 (IX.4.) Korm. of the Government*.<sup>75</sup>

The central body must be *designated* by the given Member State. In most Member States the function of central body is performed by the Ministry of Justice of that state, while in other cases by some other ministry or possibly by a court appointed to this role etc. In Hungary the central body is the Ministry of Public Administration and Justice.

Pursuant to § 68 (6) of the PILC, requests from the Member States of the European Union -conveyed by virtue of the regulation – shall be executed by the district court attached to the court of justice of competence (or the Buda Central District Court in Budapest) in whose territory of jurisdiction *a*) the place of residence or the habitual abode of the person to be questioned is located, or *b*) the article to be inspected is located, or *c*) in other cases where taking of evidence can be executed most expeditiously.

In accordance with the provisions of Decision No. 1147/2002 (IX. 4.) Korm. of the Government, the competent Hungarian courts accept requests conveyed by virtue of the regulation *in the Hungarian and English language*.

The Member States shall indicate which means they regard acceptable for the transmission of requests and communications. Within the frames of these means, printed forms must be forwarded in the most expeditious way. Under the Regulation, forwarding may take place by any suitable means. Only one restriction is specified concerning the *means of communication*: it must be ensured that the *integrity of content* of the document *is not injured* by the given means, in other words: “the document received accurately reflects the content of the document forwarded” and the Regulation also prescribes the requirement that information must be legible (Article 6). In practice, these criteria may be met by the electronic transmission of the request, in other words, its forwarding either by fax or e-mail, unless the state of the requested court has

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<sup>75</sup> 1147/2002. (IX. 4.) Kormány határozat egyes polgári jogi igazságügyi együttműködési tárgyú európai közösségi jogszabályok végrehajtása érdekében szükséges intézkedésekről.

precluded the use of such means.<sup>76</sup> The individual Member States shall also inform the Commission about the possible means of transmission. These data are also recorded in the Manual, which may be downloaded from the internet.<sup>77</sup> The Hungarian courts and the central body (Ministry of Justice and Law Enforcement) also accept requests by virtue of the regulation that are forwarded by mail, fax or e-mail by the courts of the Member States.

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<sup>76</sup> Klauser, Alexander: *Europäisches Zivilprozessrecht*. Manz, Wien, 2002, 427. p.; Schlosser, Peter: *EU-Zivilprozessrecht. Kommentar*. Beck, München, 2009, 493. p.

<sup>77</sup> The Manual may be downloaded from the Internet from the official website of the European Union at the following address:

[http://ec.europa.eu/justice\\_home/judicialatlascivil/html/index\\_en.htm](http://ec.europa.eu/justice_home/judicialatlascivil/html/index_en.htm). On the website there is a search system called “*European Judicial Atlas*” built on the data of the Manual, which facilitates access to the data of the trial court.





## Part II – Synoptical Presentation

### 1 Synoptic Tables

#### 1.1 Ordinary/Common Civil Procedure Timeline

The parties' rights correspond with their obligations. The court's neglect of its duties may result in trial error (*tuomiovirhe, rättegångsfel*).

Phase #	Name of the Phase Name of the Phase in National Language	Responsible Subject	Duties of the Responsible Subject (related only to Evidence) and Consequences of their Breach	Rights (related only to Evidence) of the Responsible Subject
1.	Filing an action, statement of claim (application)  <i>Keresetlevél benyújtása</i>	Plaintiff  <i>Felperes</i>	On the content of the claim and the duties of the plaintiff: Sections 121-121/A. and 122-123 HCCP, on the petitions in general: Sections 93-94 Hungarian Code of Civil Procedure – HCCP.  Consequences: discontinuance of period of limitation (Section 6:25 Civil Code) and discontinuance of statute of limitations (Section 6:25 Civil Code) and  Otherwise, the effects of bringing proceedings in courts shall materialize on the date on which the claim or counterclaim is served to the opposing party	--

			according to Section 128 HCCP	
2.	Examine the statement of claim  <i>A keresetlevél vizsgálata</i>	Court  <i>Bíróság</i>	The court may examine the statement of claim without delay, not later than within thirty days from the time of delivery to the court, so as to determine whether it contains any remediable deficiencies (Section 95), whether the case should be transferred to another venue (Section 129), or as to whether the statement of claim should be rejected without issuing any writ of summons (Section 130), and shall make the necessary measures. Sections 124-124/A. HCCP	--
3.	Setting the date of hearing  <i>A tárgyalás kitűzése</i>	Court  <i>Bíróság</i>	The court is responsible for setting the date of hearing according to Section 125 HCCP	--
4.	Summons to appear in court Service of the claim on the opposing party (defendant)  <i>Idézés A keresetlevél kézbesítése</i>	Court  <i>Bíróság</i>	The court is responsible for service of the summons and the claim on the defendant according to Sections 96-97 HCCP.  The effects of bringing proceedings in courts shall materialize on the date on which the claim or counterclaim is served to the opposing party according to Section 128 HCCP. The consequence of the service of the claim on the defendant: <i>lis pendens</i> .	--
5.	Hearing  <i>Tárgyalás</i>	The court and the parties  <i>A bíróság és a felek</i>	According to Chapter IX (Sections 133-162) HCCP. On subsequent	--

			hearing (if any): Section 142-144 HCCP.	
6a.	Plea of the plaintiff  <i>A keresetlevél ismertetése</i>	The court and the plaintiff  <i>A bíróság és a felperes</i>	According to Section 138 HCCP at the beginning of the first hearing the plaintiff or the presiding judge shall read out or explain the statement of claim. Next the plaintiff is to plead if he maintains the claim presented in the statement of claim unaltered, or shall indicate the changes or revisions he wishes to make, if any.	
6b.	Counter-plea of the defendant  <i>Az alperes ellenkérelme</i>	Defendant  <i>Alperes</i>	According to Section 139 HCCP after the plea of the plaintiff the defendant shall present his counter-plea, aiming either to have the case dismissed (Section 157), or it offers defense argument, or contains a cross-claim (counterclaim, set-off) against the plaintiff's claim. In the counter- plea the defendant shall present the facts underlying his defense and the supporting evidence. Consequence: initial appearance.	
6c.	Taking of evidence, preclusion  <i>Bizonyításfelvétel, preklúzió</i>	Court and the parties  <i>Bíróság és felek</i>	The court shall proceed to hear the arguments of the parties on the merits of the case, and if the facts can be determined during the first hearing, the court shall adopt a decision without delay. The court - if so required to ascertain the relevant facts of the case - order the parties to make their pleas and shall perform the taking of evidence procedure.	

			<p>The party shall present the facts, make his pleas and submit any supporting evidence in due time and in a timely manner as consistent with and pertaining to the status of case, and as the case progresses. If the taking of evidence cannot be performed in spite of this during the first hearing, the court may adjourn the hearing and order more elaborate preparations for the case. Where either of the parties falls in delay in presenting the facts, making his pleas and submitting any supporting evidence without just cause, and fails to remedy the situation when so ordered by the court, the court shall adopt a decision in the absence of the party's presentment, except if the court is of the opinion that waiting for the party's presentment shall not delay the conclusion of the proceedings. Section 141 HCCP</p>	
7.	<p>Deliberation the results of taking of evidence</p> <p><i>A bizonyítás eredményének mérlegelése</i></p>	<p>Court</p> <p><i>Bíróság</i></p>	<p>According to Section 206 HCCP</p>	
8.	<p>Sentencing</p> <p><i>Ítélethozatal</i></p>	<p>Court</p> <p><i>Bíróság</i></p>	<p>According to Sections 212-232 HCCP</p>	
9.	<p>Appeal</p> <p><i>Fellebbezés</i></p>	<p>Court and parties</p> <p><i>Bíróság és a felek</i></p>	<p>According to Chapter XII (Sections 233-259) HCCP</p>	
10.	<p>Retrial</p> <p><i>Perújítás</i></p>	<p>Court and parties</p> <p><i>Bíróság és a felek</i></p>	<p>According to Chapter XIII (Sections 263-269) HCCP</p>	
11.	<p>Felülvizsgálat</p>	<p>Court and parties</p>	<p>According to Chapter XIV</p>	

	<i>Judicial review</i>	<i>Bíróság és a felek</i>	(Sections 270-275) HCCP	
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## 1.2 Basics about Legal Interpretation in Hungarian Legal System

There is no protocol for interpretation of substantive legal norms and for interpretation of procedural rules.

## 1.3 Functional Comparison

<b>Legal Regulation</b> <b>Means of Taking Evidence</b>	<b>National Law</b>	<b>Bilateral Treaties</b>	<b>Multilateral Treaties</b>	<b>Regulation 1206/2001</b>
<b>Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)</b>	<p>Possible according to Section 202 HCCP:</p> <p>“Where the taking of evidence is performed upon request, the requested court shall be provided all documents which are necessary for carrying out the request. The presiding judge shall disclose to the requested court all issues which are to be clarified during the taking of evidence, as well as all data and information deemed necessary for the performance of the taking of evidence. This includes, in particular, the name and home address of the parties to the proceedings and of their counsels, information relating to the prepayment of costs, a brief description</p>	<p>Possible according Section 204 HCCP:</p> <p>If the taking of evidence has to be performed in a foreign state with which the Hungarian State has signed an international agreement for satisfying requests or if they exercise reciprocity, the taking of evidence shall be performed accordingly.</p> <p>The validity of taking of evidence performed abroad shall be determined according to the law of the country where the taking of evidence was performed, in any case, it shall be deemed valid if it complies with the provisions of this Act.</p>	<p>Possible according Section 204 HCCP:</p> <p>If the taking of evidence has to be performed in a foreign state with which the Hungarian State has signed an international agreement for satisfying requests or if they exercise reciprocity, the taking of evidence shall be performed accordingly.</p> <p>The validity of taking of evidence performed abroad shall be determined according to the law of the country where the taking of evidence was performed, in any case, it shall be deemed valid if it complies with the provisions of this Act.</p> <p>For example Hague Convention on Taking of Evidence Abroad in Civil and</p>	See Art 4-5. and 10

	covering the appropriate segments of the case and the facts to be clarified by the taking of evidence, furthermore, the name and home address of the persons to be questioned. If the requesting court has granted exemption from costs (right of prenotation of duties) to either of the parties to the case, the related information shall be disclosed as well.”		Commercial Matters (1970)	
<b>Hearing of Witnesses by Video-conferencing with Direct Asking of Questions</b>	Not applicable.	Not applicable.	Not applicable.	See above and Art 10.
<b>Direct Hearing of Witnesses by Requesting Court in Requested Country</b>	Not applicable.	Not applicable.	Not applicable.	See above and art 12 and 17.

<b>Legal Regulation Means of Taking Evidence</b>	<b>National Law</b>	<b>Bilateral Treaties</b>	<b>Multilateral Treaties</b>	<b>Regulation 1206/2001</b>
<b>Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)</b>	Possible according to Section 202 HCCP: “Where the taking of evidence is performed upon request, the requested court shall be provided all documents which are necessary for carrying out the request. The presiding judge shall disclose to the requested court all issues which are to be clarified during the taking of evidence, as well as all data and information deemed necessary for the performance of the taking of evidence. This includes, in particular, the name and home	Same as answered above.	Same as answered above.	Same as answered above.

	<p>address of the parties to the proceedings and of their counsels, information relating to the prepayment of costs, a brief description covering the appropriate segments of the case and the facts to be clarified by the taking of evidence, furthermore, the name and home address of the persons to be questioned. If the requesting court has granted exemption from costs (right of prenotation of duties) to either of the parties to the case, the related information shall be disclosed as well.</p> <p>The requested court shall set the date for the performance of taking of evidence, and shall summon the persons to be questioned, and shall notify the parties concerning such date. The requested court shall perform the taking of evidence in the absence of lay assessors. In other respects the requested court shall proceed according to the regulations applicable to courts of litigation and - unless otherwise provided for by law - exercise the rights of the court of litigation; the parties may also address questions to the persons to be examined. The requested court - at the justified request of the parties, or if deemed necessary relying on the information on hand - may perform the taking of additional evidence.</p> <p>The requested court shall comply with the request within fifteen days. If the requested court failed to carry out the request within fifteen days, the reason therefor shall be communicated to the requesting court.</p> <p>The requested court shall record the findings of the taking of evidence in a report. The report shall indicate both the requesting and the requested court. The report made on the taking of evidence shall be sent to the requesting court within eight days, including the relevant documents. If carrying out the request falls in whole or in part within the jurisdiction of another court, the requested court - after taking its part of the evidence - shall send the documents to the other court of jurisdiction, and shall notify the requesting court and the parties accordingly.”</p>			
<p><b>Hearing of Witnesses by Video-conferencing with Direct Asking of Questions</b></p>	<p>Not applicable.</p>			

<b>Direct Hearing of Witnesses by Requesting Court in Requested Country</b>	Not applicable.			
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