ISSN 2414-8385 (Online)
ISSN 2414-8377 (Print
European Journal of Multidisciplinary Studies
May-August 2018
Volume 3. Issue 3

Means of Evidence in the Contested Procedure

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Abstract

This research paper addresses means of evidence in contested procedure, through describing and analyzing all means of evidence recognized under the Law No. 03/L-066 for the Contested Procedure in Kosovo (hereinafter LCP). This research, amongst others, provides for a comparative overview on certain important issues between LCP, the old Law on Contested Procedure in Kosovo which was in force until 2008, and the Code of Civil Procedure of Albania (hereinafter CCPr). Nonetheless, despite containing comparative elements, the research, in its entirety, aims to elaborate the means of evidence in line with LCP, while highlighting the strengths and weaknesses of relevant legal dispositions in Kosovo covering this matter. This paper will initially define means of evidence, the importance these means have on determining relevant and contentious facts between litigants, universally recognized facts as well as facts which must be necessarily determined through means of evidence. Following this, this paper will elaborate other institutes relevant for the contested procedure, as: object of evidence, obtainment and assessment of evidence, etc. This paper will initially provide a description and explanation of means of evidence foreseen under LCP of the Republic of Kosovo. Given that it is precisely the evidence administered in a contested procedure what gives direction to determining the merits of the case in a certain matter, this paper pays particular attention to evidence obtaining methods, starting from examination, evidence administration through experts, and party hearing. This research paper humbly acknowledges that it does not suggest that all elements and matters concerning means of evidence in contested procedure have been covered. Nonetheless, we are confident that it does cover the fundaments of the addressed topic.

Keywords: means of evidence, contested procedure

Introduction

Means and obtainment of evidence in the contested procedure represent vital procedural actions, which allow for verification of complete and fair factual situation, through which the court, as a state entity, guarantees an impartial and fair judicial process.

Means of evidence in the contested procedure serve for the verification of facts presented by the parties, or, verification of facts which need to be determined by the court *ex officio* in cases when the parties wish to dispose of the rights which they cannot freely dispose of. The main actions which the court undertakes in order to determine the material truth concerning the contested matter and every other judgment for the revealing of this truth is nothing but a recognition process.[1]

We must note that the contested procedure only verifies those facts deemed relevant for dispute settlement. The court will determine which facts are to be considered relevant for the establishment of the factual situation which will serve as basis for applying the material law. In most cases, the court deals with the identification of those facts which belong to the past, which are inconsistent with the time the matter is being reviewed in the court.[2]

Concerning the evidence and their obtainment in the contested procedure, Article 321, Paragraph 1 of LCP, suggests that it is not necessary to prove facts which are universally recognized, and neither the facts which the court has verified in previous judgements. Universally recognized facts are those which the natural person is familiar with, as are, e.g. earthquake, floods, war etc. In view of the above stated legal definition we notice that even facts already established within previous final judgments/rulings do not request to be re-verified, even if applied in a different case. For example, should we assume that the final judgment has established that the damage has been caused and has also conclusively identified

[1] Brestovci, Faik, Procedura Civile I, Universiteti I Prishtinës, Prishtina, 2006, pg. 231.
[2] Ib Id.

the person responsible for the damage, in the contested procedure, for the reduction or increasing of the lifetime rent, the issue of (non-)existence of damages and responsible person will not be reviewed, given that said facts have already been established through the final decision of a previous judgment.

The essence of the contested procedure may only be achieved if the issued judgment in the procedure where contested facts exist between litigants is accurate. This, however, may only be achieved if the factual situation verified in the procedure is identical with the events in the past.[1]

LCP has approved the subjective burden of proof, given that it is an obligation for the litigants to provide evidence through which relevant facts for dispute settlement may be established. In view of the adversary principle of the contested procedure, facts which have been affirmed during the proceedings do not need to be verified.

Means of evidence and obtainment of evidence are procedural actions which, in absence of an intermediate judgment[2], are highly important, given that the court cannot initially decide merely on the legal basis of the lawsuit, and only later address its height.

Evidence in Contested Procedure

Evidence in contested procedure indicates the use of means of evidence which are recognized within the LCP, for the verification of the factual situation, which must be necessarily confirmed in order to apply the material and legal norms which would assist in dispute settlement. In our procedural system, evidence, just as the ascertainment of the factual situation, is a mutual task between the court and litigants.[3]

The court reviews the evidence according to its independent understanding, as it deems appropriate, which indicates that the court is not dependent to a certain legal norm in how it evaluates the probative evidence. However, this does in no way imply that the court is completely independent in its assessment. The court still has a legal obligation to justify the basis upon which it has evaluated evidence as trustworthy, or vice-versa, why it has considered a certain fact as unsubstantiated.

The party in procedure must maintain an active role, given that due to dispositions set out in LCP, the parties are obliged to represent and provide the court with all relevant facts for dispute settlement, and put forth all evidence which helps determine the alleged facts[4]. As far as the active role is concerned, this may also be maintained by third party persons who participate in the contested procedure, as is, for instance, a mediator.

Object of Proof

Object of proof implies all contested facts between litigants which, as we previously noted, are relevant for dispute settlement. The main task of the court throughout the main review session is to differentiate the contested facts from those uncontested, and then, similarly, differentiate the relevant facts from those irrelevant for dispute settlement. It is not uncommon for the judge to be insufficiently prepared to review the case, which leads to a tendency to also review facts irrelevant to dispute settlement, which in fact is one of the main reasons the proceedings, and trial, are delayed.

Object of proof, are those facts which the litigants present to the court through different procedural steps, either through lawsuits, response to lawsuits, in the main hearing and all the way until the completion of the contested procedure.[5]

According to general principles of the civil law, legal facts imply facts which are relevant for the creation, modification or suppression of civil legal rights. Legal facts which may be manifested through natural events (for instance, one of the litigants requests to be exempt from the responsibility, given that non-compliance with the contract is a result of a *vis major*), and, the same, those which may be manifested through natural persons' actions (for instance, one of the litigants alleges that a contract has been unlawfully terminated one-sidedly), are also considered to be Objects of Proof in the contested procedure.

[1] Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 228.
[2] LCP does not recognize intermediate judgment. This gives an even more significant importance to probative means compared to the improtance given to them through the old LCP..
[3] Brestovci, Faik, Procedura Civile –I- Universiteti i Prishtinës, Prishtina, 2006, pg. 232.
[4] Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 228.
[5] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 378.

An object of proof may be a positive fact (e.g. existence of a contract), as well as a negative fact (non-existence of a contract).[1] Conversely, object of proof cannot be legal norms and neither civil legal institutions, but only those legal facts the (non-)existence of which brings about the implementation of the material norms.

Thus, in light of the above, we may conclude that object of proof implies facts manifested as natural events, that is, events in the causing or prevention of which the litigants cannot have an impact, as are, i.e. floods, earthquakes, explosion of nuclear reactors etc.;, nonetheless, object of proof may also be natural persons' actions, as are, e.g. the fact whether the goods have been sent, whether the necessary actions have been undertaken for the prevention of damages, etc.;, followed by a long list of actions potential of being defined as an object of proof.

Evidence as a Necessary Procedural Action

Evidence (proof), is presented as a mandatory procedural action in all cases where the parties' allegations are conflicting. Should one of the parties allege that a specific contract has been established, whereas the other party denies such establishment, these claims must be confirmed through specific means of evidence recognized by LCP. All means of obtainment of evidence must be in line with the legal requirements. Courts cannot use other means of evidence, apart from those specifically foreseen under the relevant laws. For instance, the court cannot request from the witness to give an oath based on religious rituals in order to obtain their testimony.

The answer as to which facts are relevant for dispute settlement would depend on the fair legal qualification of the contested legal matters from the court.[2] Generally speaking, the important facts that allow for the issuance of a decision in contested procedure are those which fall into the dispositions of the material legal norms through which the claimant defends his denied legal rights.[3]

Based on Article 322, Paragraph 2 of LCP: "*[i]f the law does not foresee something else, the party that contests the existence of a right carries the responsibility to prove which fact was the obstacle.*"

If the defending party affirms the request for lawsuit of the claimant, through a response to the lawsuit, the court has no obligation to review the facts presented in the lawsuit, but may instead issue a decision based on the affirmation of the defendant. The only exclusion to this procedure would be in the event that the party which affirms the allegations of the claimant in the request for lawsuit, acts in contradiction with Article 3, Paragraph 3 of LCP.

Should the court form a negative impression on the truthfulness of a certain fact which is vital to the basis of the request for lawsuit, further proof concerning the defendant's denials will not be necessary. Should the court consider a certain fact provided from the defendant liable (e.g., that the request for lawsuit has passed the statutory limitation), attaining proof in relation with facts in which the claimant has based his lawsuit will be unnecessary.[4]

Cases in Which Evidence is Not a Mandatory Procedural Action

Contested procedure is a procedure based on which the parties are guaranteed with a fair and impartial judgment. There are certain situations in which the evidence obtainment procedure and evidence obtainment in general do not need to be undertaken. Such situations would occur when a party admits a certain fact; when we deal with universally recognized facts; and when we face legal presumptions also known as *"presumtio juris"*.

Statement of Facts

Statement of facts is a unilateral procedural action of litigants, through which the parties ease the work of the court to a large extent, given that, as we previously noted, the facts affirmed by the parties do not need to be proven.

The above rule has an exemption to it, which has to do with the application of Article 3, Paragraph 3 of LCP, based on which the court will not accept the affirmation of the parties if through such affirmation the parties are willing to dispose of

[1] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 380.
[2] Triva, Sinisha dhe Dika, Mihajlo, Gradzansko Parnicno Procesno Pravo, Narodne Novine, Zagreb, 2004, pg.485.
[3] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 381.
[4] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 381.

rights which they cannot freely dispose of. When we say 'rights which the parties cannot freely dispose of', we denote the disposal of rights which goes against the legal system, legal norms and ethical public norms.

Statement (or affirmation) of facts is a unilateral procedural action, through which a party in procedure declares that the facts set out by the opposing party are correct, even when said facts may be unfavorable for the party admitting their accuracy.

We may come across cases when the party is questioned by the court whether it affirms a certain fact or not, and it remains silent as opposed to expressly declaring that it does. Such passive attitude, or silent response, may be interpreted in three ways:[1]

The party affirms the fact alleged by the opposing party;

The party objects the fact alleged by the opposing party; and

The court will evaluate the silent answer of the party based on its own evaluation.

Different authors support one or the other presumption of the three. However, we may consider that the second interpretation is the most fair. That is, due to the fact that a passive statement (or lack thereof), according to analogy, is interpreted in line with the norms of the Code of Criminal Procedure, which articulates that should the defendant not give any declarations concerning his innocence, or guilt, it is considered that the party objects the existence of guilt. In this situation, silence cannot be construed as acceptance – in the contrary, it must be considered as an objection towards facts claimed by the opposing party.

Universally recognized facts

Universally recognized facts, are those which are well-known to all people, or to a large network of people, without having to prove them through means provided for within the law. The court considers the universally recognized facts as established due to procedural cost-effectiveness, but also due to the impossibility to prove them, which is why the court deems it unnecessary to assess their truthfulness. In this manner, for example, earthquake as a natural disaster is an undeniable fact and it would be highly unnecessary to request from the seismological agency to issue specific evidence to ascertain that the earthquake has indeed occurred. Otherwise, earthquake as a natural occurrence, could be relevant in contested legal issues if the party responsible for damages intends to defend its position precisely due to such natural event. Under these circumstances, the party will defend its positions claiming that said natural occurrence has prevented it from fulfilling the requirements as set out in the contract, and accordingly requests to be exempt from the responsibility of the damage caused. This natural event may be at times only known to a certain country or a number of countries, depending on its proportions.

However, for a fact to be considered as universally recognized, it must also be known to the court.[2] The party which may base its allegations on the lack of knowledge of such fact, may try to prove that said fact does not possess the qualities of a universally known fact. Should said party succeed in establishing the lack the 'universal' qualities for the alleged facts, then the latter must be established through evidence which will verify the accuracy and truthfulness of the opposing party's allegations that such fact is indeed universally recognized.[3]

C) Legal presumptions - "*presumtio juris*"

The facts which are provided within a legal norm, which contain legal presumptions, do not need to be proven. This implies that the existence of these facts is established through presumptions of the law itself.[4] When we deal with legal presumptions, we only need to verify the legal link between the occurred event and the fact foreseen within the law. This way, for instance, based on Law No. 2004/32 for the Family, the father of the child born in a wedlock, is considered the husband of the child's mother. Most of the legal presumptions are however, refutable, because the contrary may be

[1] Triva, Sinisha dhe Dika, Mihajlo, Gradzansko Parnicno Procesno Pravo, Narodne Novine, Zagreb, 2004, pg.490
[2] Brestovci, Faik, Ib Id, pg. 239.
[3] Ib Id.
[4] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 386.

substantiated. Here, for example, it may be verified that the father of the child born in a wedlock, may not necessarily be the husband of the child's mother.

Legal presumptions are not considered as contested by the court, if they are not initially contested by one of the litigants. An example may be drawn if we hypothetically consider a contested procedure concerning alimentation (child support): If the child for whom alimentation from one of the parents is requested was born in a wedlock, based on the legal presumption that the child's father is considered to be the child's mother's husband, the court will not deem it necessary to verify if the father from whom alimentation is being requested, is indeed the biological parent. However, if the father, throughout this contested procedure objects his paternity, then, the court has an obligation to ascertain whether the father from whom child support is being requested is in fact the biological father.

Taking of Evidence

The legal system of the Republic of Kosovo (through different laws on different time-frames) has recognized both the active and passive role of the court concerning taking of evidence. This way, based on LCP and ex RSFJ, the court had an option of taking evidence *ex officio*, based on the principle of review and investigation.

Whereas, according to LCP in force in the Republic of Kosovo, the court, in principle, has a passive role in the taking of evidence, which implies that the court does not propose the taking of evidence *ex officio*, but instead, the parties in procedure have the burden of proof for their presented claims. By way of derogation, the court, based on Article 3, Paragraph 3 of LCP, may suggest the taking of evidence *ex officio*, if it considers that the parties are intending to dispose of rights with which they cannot freely dispose of. Mostly, the taking of evidence in this manner is applied in family disputes, especially when a child's alimentation and custody is concerned.

Normally, taking of evidence is undertaken in line with the request of the parties. Through initiating such evidence obtainment, the parties act in accordance with their personal interests, but at the same time, fulfill their legal obligation to provide the court with all procedural materials.[1]

The idea of creating a passive role for the judge in the contested procedure has been an attempt to preventing the judge to initiate deliberate taking of evidence which could favor one of the parties, causing a legal procedural apprehension. This also serves as an effort to maintain the neutrality of the court as a state body which is independent and impartial. However, this aim of the Kosovar legislator, although significantly progressive and guarantees a fair and impartial trial, has its own deficiencies. The most substantial weakness of this system is that, in certain situations, the court may have insufficient professional knowledge for specific facts which appear as contested between the parties, in spite of which, the court has no right to propose an expertise *ex officio*. In cases when the opinion and observation of an expert in relation to contested facts is mandatory, and the parties fail to propose an expertise, the court will find it highly difficult to decide on disputed issues based solely on its merits and authority.

The taking of evidence is primarily completed in the main hearing, however, as an exclusion, this procedural action may also be undertaken before the main hearing, with the purpose of ensuring additional evidence. The decision on taking of evidence precedes the actual taking of evidence. This decision must specify the fact which constituted the object of proof and the means of evidence through which such fact will be established.[2]

A separate complaint against the decision which approves or dismisses the proposal for taking of evidence is not allowed, but this decision may be appealed against once the final judgments is issued, respectively, the judgment through which the contested procedure is concluded.

Evidence Proposing

Evidence, namely means of evidence, are proposed by the litigants through ways provided for within the applicable laws. Based on Article 402 of LCP, the court notifies the parties, through a summon letter for the preparatory hearing, on their obligation to represent all relevant facts which support their claims no later than in the preparatory hearing session, as well as all evidence which they deem relevant throughout the procedure. Nonetheless, the parties may also propose the taking of evidence throughout the main hearing session, if they manage to prove that the failure to ensure said evidence in the

[1]Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 244.
[2]Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 245.

preparatory session was not due to their fault. The proposal for the taking of evidence must not be notional, but rather oriented in the establishment of facts relevant for the dispute.

The few competences recognized to the court for taking of evidence, which are of a supplementary character, do not represent a violation of the principle of availability of evidence. For instance, the calling of an expert by the court[1], which is not an evidence but a mean to obtain and assess the evidence (Article 224/a of CCPr), the questioning of the parties which has more of an explanatory and supplemental nature, rather than investigative (Article 283 of CCPr), or the examination of the people and things primarily decided for by the court (Article 286 of CCPr).[2]

In the Kosovar procedural law, the principle of judicial investigation has been abolished, however, as an exception, the court applies it in specific cases. This principle is mostly applied in family disputes which deal with child custody. In such disputes, even if the parents agree upon which parent will be given child custody, the court must *ex officio* obtain evidence whether the appointed parent fulfills the conditions required for the upbringing of the child.

The Court must abide by and decide only on the basis of means, explanations, documents and evidence indicated or brought forth by the parties (Article 20 of the CCPr), through thoroughly examining all the circumstances of the case.[3] Therefore, in light of the above, we can conclude that the facts and means of evidence through which relevant facts are determined are in principle proposed by the parties, and exceptionally *ex officio* from the court.

Means of Evidence

Means of evidence imply things and people which allow for the court to be introduced to relevant facts for dispute settlement. LCP recognizes five types of means of evidence: site examination (sight-seeing), documents, witnesses, expertise and hearing the parties.

Examining the sight – Sight-seeing

Sight-seeing is a mean of evidence through which, with the help of senses, the court (respectively the judge in the case) verifies relevant facts or clarifies circumstances relevant for the dispute. Based on the legal definition, sight-seeing is undertaken each time it is deemed necessary to establish a fact, or clarify a specific condition, for which direct examination of the sight by the court is necessary.[4]

Example: The Judge arrives at the scene and observes the signs of vehicle braking; the judge visits the plaintiff's residence to determine the noise coming from the defendant's apartment so as to determine the obstruction of possession; the Judge orders the Claimant to bring the product to the court, to determine that its logo or appearance represents a breach of a protected trademark, as provided for within the law.

Examination of sight is realized in ways most appropriate for fact establishment, to be determined through this type of means of evidence. The court will observe the disputed item at its sight, only when it is structurally impossible to bring the object to the court.

Example: If the object of dispute is the proof of ownership of an immovable object, it is naturally unfeasible for the latter to be brought to the court, for which reason the judge needs to observe the property through examining it at its location.

In the event that the object which needs to be examined is in the possession of the opposing party, and the latter refuses to allow its examination, we apply the dispositions stipulated within the LCP which provide for ways of receiving proof from third parties. The same applies in cases when the disputed item is in the possession of a state body.

19 LCP does not foresee the possibility for the court to *ex officio* propose obtainment of evdience through expertise, except in cases where application of Article 3, Paragraph 3 is concerned.
20 Alban Abaz Brati, Procedura Civile, Botimet Dudaj, Tirana, 2008, pg. 284.
21.Alban Abaz Brati, Procedura Civile, Botimet Dudaj, Tirana, 2008, pg. 285.
4 *See* Article 326 of LCP

Documents

Due to a traditional division, documents may be of private or public nature. Private documents are those which have been drafted by persons with no public authority, e.g. a contract for sale of a certain amount of mobile phones established between two private companies, is considered a private document given that private companies are not entitled to public authorizations.

Unlike private documents, public documents are those drafted and issued by public authorities within the limits of public authorizations.

Example: The Single Administrative Document (SAD) is a public document, because it serves to determine the value of the imported goods. Should it be disputable whether said goods have entered the Republic of Kosovo, such thing may be verified through presenting the SADs', which are public documents, due to its drafting by the public authority – the Kosovo Customs.

Based on Article 329 of LCP, documents which have been drafted by public authorities within the limits of their competences, as well as documents which have been drafted in ways specific for particular entities as provided within the law, prove the accuracy of its content.

LCP, however, also provides for the possibility of arguing that the public documents have not established the facts accurately or that they has been improperly drafted. It is not a rare occurrence that the public documents contain incorrect data. In the example given above, the Custom SAD may contain incorrect data concerning the amount of goods delivered, the origin of the goods etc; Therefore, if the actual amount of goods which have entered the country is being contested, the parties have the right to establish, different from what is provided in the SADs, that the data in the latter is incorrectly listed, and instead, establish that the amount of goods which entered in Kosovo have been lower, or higher, from what the SADs provide.

If the document is in the possession of a state or legal body who has been entitled to public authorizations, whereas the party is incapable of providing such document, the court will, according to the party's proposition, obtain this document *ex officio.* Sometimes, the question arises as to which legal persons have been entrusted with public competencies, and whether commercial banks fall within that category. Based on the previously stated disposition (Article 332 of LCP), the court may compel commercial banks to submit the bank statements of the respondent, in line with claimant's proposition, in order to examine such statement as an evidence to the contested procedure. We consider that the court, based on Article 332 of LCP, may enforce such request upon banks. That is due to the latter's licensing from the Central Bank of Republic of Kosovo, which by itself entitles them to exercise certain public authorizations.

Should one of the litigants claim that the document is within the possession of the opposing party, the court will issue a decision which obliges the opposing party to provide the court with the document to then serve as a probative item. If such document pertains to both parties alike (e.g. a written contract), or if the party itself refers to a specific document, that party may not refuse to submit said document. In the event that the party that has been requested to provide the evidence denies its possession, the court will investigate such matter. One way to examine such possession would be the direct sight examination, witness hearing or party hearing. In this respect, scientific proof will also be administered as an evidence.

Example: Through the e-mail dated 19 October 2012, the respondent has sent an e-mail informing the claimant of the confirmation and acceptance of contract, adding that the same has been protocoled in respondent's archive with the protocol No. 123/2012.

If the party who possesses the document is not willing to submit it to the court, acting in contrary to the decision of the court for the submission of such document, or denies the allegation that it indeed possesses said evidence, the court will use its own discretion to assess the significance of these claims. Before deciding that the party has failed to comply with the court's decision due to party's inaction and denial that such evidence is within its possession, the court must initially justify its findings through available evidence.

In this case, the establishment of contract between litigants is not contentious, given that the e-mail dated 19 October 2012 shows that the respondent has notified claimant for acceptance and confirmation of the contract, adding that it has also been protocoled. Additionally, the litigants have confirmed the same. In this situation, the court will consider the existence of such contract as founded therefore ascertaining that the parties have entered into a legal contractual obligation.

Witness evidence

A witness is a natural person, whose duty is to provide the court with declarations concerning facts obtained through the use of senses (seeing, listening).[1] The witness differs from the expert in so far the nature of evidence is concerned. The witness does not offer its own opinion in relation to the facts, but rather verbally argues what it considers happened in the past. Only persons capable of providing information pursuant to facts relevant to dispute settlement may serve as witnesses.

The necessity and aim for the fair and right verification of facts has influenced the issuance of rules which regulate the obtainment and means of evidence, which also represents a general civic obligation.[2] However, evidence obtainment through witness listening is still the most disputed and questionable mean in the contested procedure.[3]

One must be over 14 years old to be eligible of becoming a witness in a contested procedure, whereas minors below that age can only be questioned as witnesses if their say is vital to dispute settlement. It is evident that the ability to serve as a witness is gained at the same age with legal capacity, as set out in Law No. 04/L-077 on Obligational Relationships.

It is not a rare occurrence for the courts in the Republic of Kosovo to propose the taking of evidence through witness hearing, without prior specifications as to which facts must be verified through such hearing. There have been cases in trade disputes, when despite the existence of scientific evidence, the taking of evidence through witnesses has been proposed without prior ascertainment as to what the witness is ought to prove. In respect to the facts which need to be established through witness listening, Article 340 of LCP stipulates that *"The party that suggests a witness should beforehand tell what the person will testify about."*

A witness has four main tasks in contested procedure:

The witness is obliged to respond positively to court's summoning letter;

The witness is obliged to tell the truth;

The witness must tell everything he/she knows concerning the facts it testifies about; and

The witness is obliged to answer the questions set out by the court and litigants, or litigants' representatives.

Insofar the legal obligation for testimony is concerned, there are some limitations. Based on Article 6(1) of the European Convention for Human Rights,[4] the right to testimony must imply the inalienable right to an impartial and fair procedure. However, limiting this right through national legislation does not necessarily indicate its violation.

There are certain restrictions foreseen for particular persons in serving as witnesses, due to the general interest, whereas some specific people may refuse to testify due to their relationship with either of litigants. To better illustrate this, we will cite Article 341 of LCP which emphasizes that *"Witness cannot be a person if his/her testimony reveals an official secret or military secret until the competent body relieves him/her from the duty."*

There are, however, other people who are exempt of the obligation to give testimony, i.e., the lawyer, concerning facts he has been informed of through representing the party in procedure; the religious cleric, for the information the party has entrusted him with through confession; proxy representative, for the facts revealed through representing the party in procedure etc. In the event that the lawyer who has been entrusted with representing the client reveals information protected by the lawyer-client relationship, not only did he/she violate the dispositions within LCP, but also the Code of Professional Ethics for the Lawyers, and consequently he/she must be subject to disciplinary sanctions and procedures.

Witnesses are heard separately, without the presence of the witnesses who will be heard after. The possibility for hearing the witnesses in their own apartment is recognized in case they suffer from a disease which prevents them from being present at the court. The witness testifies on matters relevant for dispute settlement, namely matters for which the witness

[1] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 406.
[2] Morina, Iset ; Nikqi, Selim , KOMENTAR, Ligji I Procedurës Kontestimore, GIZ, Minsitry of Justice, Pristina 2012, pg. 607.
[3] Ostojic states that the power of hearing of witnesses must be considered only if the contested facts adressed by the witness may also be established through other evidences.
[4] Which, according to Article 22 of the Constitution of Republic of Kosovo, is directly applied in the Republic of Kosovo.

has been summoned to testify. After such testimony, the witness may be cross-examined from the judge, the parties and their representatives, in order for such testimony to be verified, complemented or clarified.[1] The judge must not allow for suggestive questions to be addressed to the witness (questions whose wording leads to a specific type of answering) as well as questions which are beyond the disputed subject.

Expertise

Evidence obtainment through expertise is applied in cases when the facts which need to be clarified need professional knowledge lacked by the court. In the contested procedure, the necessity to engage experts in different scientific fields arises significantly often.

Based on Article 356 of LCP, the court, based on parties' propositions, may request an expertise for specific facts, each time the necessity for professional scientific knowledge is required.

It is worth noting that, different from LCP of 1977 which was applied in the Republic of Kosovo until July 2008, the current LCP does not provide for the so-called "*superexpertise*". Based on 1977's LCP, if there were contradictions between the experts' declarations, or if the expertise developed by the experts was self-contradictory or inconsistent with scientific rules, the court was entitled to order a superexpertise.

According to the LCP in force, should the data of experts differ substantially, or if their findings are unclear, incomplete or self-contradictory, and these deficiencies cannot be remedied by repeating the listening of those experts, it will order a repetition of expertise with the same or different experts. The expertise is always ordered through a decision issued by the court, which must, *inter alia*, determine: the contested object, the volume and content of expertise, the deadline for submission of opinion and conclusion etc.

Setting the object of expertise has a particular importance. We may often encounter a legal practice within the courts where issued decisions do not specify the object of expertise. These situations cause inconvenience even amongst the experts, as they cannot exceed their scope of expertise appointed by the court. It is worth noting that even experts sometimes provide assessment of legal issues which is entirely beyond their scope and must in no way be allowed. The primary and sole focus of experts is to offer their opinion regarding facts relevant for dispute settlement. Legal issues within contested procedure may only be weighed in by the court, and the latter is the only authoritative body to assess those matters. The Code of Civil Procedure of the Republic of Albania, exclusively stipulates through its Article 224/b that "it is not for the expert to offer a legal opinion".[2]

The obtainment of evidence through expertise is often criticized in the legal doctrine and practice. Judges are often criticized for ordering expertise, not only for evaluating factual information, usually of a technical nature, but also for indirectly allocating the power of interpreting and assessing legal norms to be applied, hereby illegally delegating their competencies to the experts.[3]

Nonetheless, I consider that evidence obtainment through expertise is mandatory each time a dispute settlement is in need of professional knowledge in different fields of science. This way, for example, a judge does not possess professional knowledge to determine the intensity and duration of physical pain of a person injured in traffic. Therefore, we can conclude that despite the skepticism about expertise as a mean of evidence, it has been, and remains one of the most important means of evidence in contested procedure.

Hearing of witnesses

The hearing of witnesses is also considered a probative tool, regulated within LCP, disposition 373 through 378. The Code for Civil Procedure of the Republic of Albania also regulates this matter through articles 281 – 285.

Different from LCP, CCPr, in its Article 282, foresees that the court's statement of the case may be given verbally or in any procedural act signed personally by the party. LCP does not recognize a verbal statement.

[1] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 411
[2] Article 224/b (Law no.8812, dated 17.05.2001) of Civil Procedural Code of the Republic of Albania.
[3] Simoni, Alessandro et al, Veshtrim Krahasues mbi Procedurën Civile, Tiranë 2006, pg.245.

LCP regulates the exact way for obtaining this evidence specifically and clearly. The law provides that should the party lack legal capacity, its legal representative must be questioned as a substitute. Whereas, concerning the legal entity, the person responsible of representing said entity is entitled to giving testimony, always according to the legal norms. In the event that the dispute is between numerous litigants, the court will, based on its discretion and reasonability, determine if all of them will be heard.

For comparative purposes, we consider that it is worth according a critical review to Article 284 of the CCPr of the Republic of Albania, according to which, the party cannot use notes prepared in advance while questioning, except in situations when given answers contain complex calculations which are hard to remember. In view of the difficulty to determine which data is "hard to remember", we consider that this disposition lacks "*ratio juris"*.

Conclusion

General principles for evidence obtainment are foreseen in Articles 319 through 325 of LCP. Article 319 addresses the principle of addressing evidence by the parties, which makes LCP part of a majority of continental procedural systems. Based on this article, each party bears the burden of proof for those facts upon which it wished to base its claims. For the facts proven by legal presumptions, the party to whose favor such facts go is not obliged to provide evidence.

We must be particularly attentive towards recognizing the fact that the only issues to be verified in the contested procedure are those relevant for dispute settlement between litigants. Taking evidence irrelevant to dispute settlement will only delay the procedure and consequently, goes against the principle of efficiency, stipulated under Article 10 of LCP. Parties need to be cautious in such way as to only propose means adequate to evidence obtainment. Legal facts cannot be established through inadequate means. That goes to say that, for instance, psychological pain experienced by the litigant in disputes for immaterial damages cannot be verified through witness hearing, because that would be construed as inadequate. Concluding these facts, relevant to the procedure, will have to be completed through engaging experts in the field of psychiatry.

In light of the above, we may conclude that the general principle that concerns the obtainment of evidence by the court only allows for obtainment of evidence relevant to dispute settlement, which are also legally admissible. On the contrary, proposing evidence unrelated to the object of contest, will be found as inadmissible, because, not only does it fail to realize the purpose of assisting the court to issue a fair and impartial decision, but delays the legal procedure overall.

References

[1] Alban Abaz Brati, Procedura Civile, Botimet Dudaj, Tirana, 2008, pg. 284.
[2] Alban Abaz Brati, Procedura Civile, Botimet Dudaj, Tirana, 2008, pg. 285.
[3] Article 224/b (Law no.8812, dated 17.05.2001) of Civil Procedural Code of the Republic of Albania.
[4] Brestovci, Faik, Procedura Civile –I- Universiteti i Prishtinës, Prishtina, 2006, pg. 232.
[5] Brestovci, Faik, Procedura Civile I, Universiteti I Prishtinës, Prishtina, 2006, pg. 231.
[6] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 378.
[7] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 380.
[8] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 381.
[9] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 381.
[10] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 386.
[11] Jaksic, Aleksandar, Gradzansko Procesno Pravo, Belgrade, 2010, pg. 406.
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[13] Morina, Iset ; Nikqi, Selim , KOMENTAR, Ligji I Procedurës Kontestimore, GIZ, Minsitry of Justice, Pristina 2012, pg. 607.
[14] Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 228.
[15] Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 244.
[16] Poznic, Borivoje, Gradzansko Procesno Pravo, Savremena Adminsistracija, Belgrade, 1999, pg. 245.
[17] Simoni, Alessandro et al, Veshtrim Krahasues mbi Procedurën Civile, Tiranë 2006, pg.245.
[18] Triva, Sinisha dhe Dika, Mihajlo, Gradzansko Parnicno Procesno Pravo, Narodne Novine, Zagreb, 2004, pg.485.
[19] Triva, Sinisha dhe Dika, Mihajlo, Gradzansko Parnicno Procesno Pravo, Narodne Novine, Zagreb, 2004, pg.490