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Evidence in Civil Law - Finland

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First published 2015 by
Institute for Local Self-Government and Public Procurement Maribor
Grajska ulica 7, 2000 Maribor, Slovenia
www.lex-localis.press, info@lex-localis.press

Book Series: Law & Society

Series Editor: Tomaž Keresteš

CIP - Kataložni zapis o publikaciji
Narodna in univerzitetna knjižnica, Ljubljana

347(480)(0.034.2)

KOULU, Riikka
Evidence in civil law - Finland [Elektronski vir] / Riikka Koulu. - El. knjiga. - Maribor : Institute for Local Self-Government and Public Procurement, 2015. - (Lex localis) (Book series Law & society)

Način dostopa (URL): http://books.lex-localis.press/evidenceincivillaw/finland

ISBN 978-961-6842-47-1 (epub)

281108224

Price: free copy

This project has been funded with support from the European Commission. This publication reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

With the support of
the Civil Justice Programme
of the European Union

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RIIKKA KOULU

ABSTRACT Finnish civil procedure has a close connection with other Scandinavian legal systems and co-operation between the States is active. In addition, the legislation, case-law and scholarly doctrine are more and more influenced by European co-operation through the EU and Council of Europe. The principles of free disposition, free assessment of evidence, audiatur altera pars, and burden of proof form the basis for an oral and direct public hearing. It follows from these due process principles that no methods of proof are forbidden but their relevance depends on the court's assessment. The procedural doctrine in Finland is well established and has roots in the Swedish code of civil procedure of 1734, although it has gone through extensive reforms. On February 10, 2015 the Parliament of Finland passed the reform of chapter 17 of code of civil procedure, which contains the legislation on law of evidence. The extensive reform systematically updates and streamlines the previous legislation on evidence in addition to introducing new regulation e.g. on anonymous witnesses and banning invocation of evidence, which has been obtained by illegal means. The reform of chapter 17 concludes the systematic reform.

KEYWORDS: • procedural law • due process • fair trial • civil procedure • law of evidence • free assessment • access to justice

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DOI 10.4335/978-961-6842-47-1 ISBN 978-961-6842-47-1 (epub)

Available online at http://books.lex-localis.press.

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Author Biography Riikka Koulu (LL.M. trained on the bench) is a doctoral candidate of procedural law at the University of Helsinki. In her theoretically-oriented doctoral dissertation Dispute Resolution and Technology: Revisiting the Justification, she focuses on the implications of implementing technology into dispute resolution and how this shift creates the need for new legal interpretations and concepts. In addition, her research interests include Internet governance, Science and Technology Studies and critical systems theory. Her earlier publications concern e.g. justification of ODR (2014), doctrines of dispute resolution and technology (2013), access to Internet (2012) and videoconferencing (2010, 2011).

Foreword

American author Hunter S. Thompson has said that "We cannot expect people to have respect for law and order until we teach respect to those we have entrusted to enforce those laws." As his words depict, the role of courts is of uttermost importance for defending law and justice. The integrity of the judge and the values of procedural norms are essential for the credibility of law. In short, the courtroom is a central arena for providing justice. However, getting your day in court is not always self-evident, especially in cross-border situations. As the world comes more and more globalized and interaction detaches from national borders, we are facing new challenges of providing sufficient access to justice.

Challenges of cross-border litigation are related to the pronouncedly national role of procedural norms and their co-operation with cross-border legal instruments. To overcome obstacles of cross-border litigation we need to address the interface between different national legal systems, the cross-border instruments of the EU and multilateral conventions. We need to understand the intricacies of legal pluralism. In this task international co-operation and exchange of knowledge is essential.

This national report has been written for the purpose of providing information on the central concepts, values and principles of Finnish law of evidence. The work has been done as a part of research project Dimensions of Evidence financed by Civil Justice/Criminal Justice Programme of the European Union. The project has been coordinated by Prof. Dr. Vesna Rijavec at the Faculty of Law, University of Maribor, Slovenia. I would like to thank Prof. Dr. Rijavec and her team for all the work they have taken to guarantee the realization of such an ambitious project, which provides valuable information for improved understanding of our shared procedural values and possibilities of increasing access to justice.

In Montréal, May 2015

Riikka Koulu
University of Helsinki

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Part I

1 Fundamental Principles of Civil Procedure

The Finnish civil procedure is regulated in Code of Judicial Procedure (in Finnish *oikeudenkäymiskaari* 4/1734, hereinafter the Code) which also provides complimentary provisions for criminal and administrative procedure. Similar to Sweden, the Code makes a distinction between dispositive cases in which the parties are free to settle outside the court and non-dispositive cases which are not amenable to settlement out of court. Most civil and commercial cases are considered dispositive where as non-dispositive cases include resolution of marriage, child access, paternity and guardianship issues in which there is a public interest involved.[2] Mostly the procedural rules of adjudication are the same for both types of disputes, but, some differences concerning in-court settlements, evidence and legal fees do exist. In addition, uncontested dispositive claims concerning debt, eviction or restitution can be processed in a summary procedure as long as they have not been contested.

On February 10, 2015 the Parliament of Finland passed the reform of chapter 17 of code of civil procedure, which contains the legislation on law of evidence. The extensive reform updates and streamlines the previous legislation systematically and takes into consideration the development of due process principles.[3] Also, the compatibility with the Regulation on obtaining evidence (1206/2001) has been taken into consideration.[4] At the time of writing it is still unclear when the new regulation will come to force, as it has not yet been ratified by the President.

However, the status quo of Finnish law of evidence remains the same, as due process principles and other interpretative changes have taken place in case-law and in the doctrine. Regardless, some changes to the previous status quo have been introduced. In addition, the numbering in chapter 17 will change as a result of the reform. In this report I will describe the existing status quo in accordance to the law that is in force at the time of writing. References to the new chapter 17 are made, mostly in footnotes in order to avoid confusion with the earlier numbering, when the new legislation will bring changes to the previous practice.

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[2] Jyrki Virolainen, Prosessin päälajit ja tehtävät, p. 62, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[3] Government's Proposal 46/2014 vp.
[4] Government's Proposal 46/2014 vp, p. 18.

1.1 Principle of Free Disposition of the Parties and Officiality Principle

The Finnish civil procedure recognizes both, principle of free disposition of the parties (in Finnish *dispositiivinen periaate*, in Swedish *dispositionsprincipen*) and the officiality principle (in Finnish *virallisperiaate*, in Swedish *officialprincipen*) which are considered to be role principles stating the division of labour between the parties and the court.[5] The Code does not specifically name the principles or their scope but they have been established in legal practice and jurisprudence. In addition to these two principles, principle of co-operation between the parties and the court is recognized.

In dispositive cases, e.g. in cases where a settlement between the parties is accepted,[6] the principle of free disposition of the parties is fundamental. Principle of free disposition binds the court to the parties' procedural acts which include deciding on filing a case, extent of trial documents and evidence, acknowledging a legal fact and the content of one's claim. The judge is responsible for conducting the proceedings but he is bound to the parties' claims and cannot grant more than is demanded. The court cannot ignore a party's confession of the claim or of a legal fact (chapter 17 § 4).[7]

According to the officiality principle, the court decides on the conduct of proceedings, including the form (written or oral preparation, oral preliminary hearing), joinder of claims, scheduling the main hearing and other procedural acts. The court has to provide the parties the opportunity to be heard on such decisions. The court decides a case based on parties claims and the evidence they have referred to. The Finnish procedural law does not allow *extra et ultra petitum*, but, instead, is bound to the parties claims. The acts of parliament, case-law and relevant regulation do not have to be referred to by the parties as the court has the responsibility to know the law of its own accord (*jura novit curia*).[8]

A starting point in Finnish procedural law is that a civil action may not be changed during the proceedings (chapter 14 § 2). However, prohibition against amendment of action does not prevent the plaintiff from claiming a performance if such claim is based on a change in circumstances, or from claiming confirmation of a legal relationship

[5] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 199, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

[6] Distinction between dispositive and non-dispotive cases is essential in Finnish civil procedure as there is an emphasized public interest in non-dispositve cases. Legal fees and the court's responsibilities are regulated differently in these two groups of cases. In non-dispositive cases a settlement between the parties is generally not accepted (child custody, guardianship, divorce, paternity) as legal status is changed through them. However, even in nondispositive cases the court aims at an amicable solution and can give a decision which follows the parties' settlement if such settlement is considered to be acceptable (e.g. in the best interest of the child). In dispositive cases a settlement can be reached between the parties at any given time.

[7] In the revised chapter 17 the section numbering changes. The future section for the consequences of confession is chapter 17 § 5 (HE 46/2014).

[8] The principle of jura novit curia is emphasized in the revision of chapter 17. After the reform the section number for the principle will be chapter 17 § 4 (HE 46/2014). See also, Govenrment's Proposal 46/2014 vp. P. 50.

which has been contested during the trial, or from making a subsidiary claim on same grounds. Such new claims have to be made before the main hearing. If the claim is amended in the main hearing it would be ruled inadmissible. No such claims can be presented in the Court of Appeals.

Claims, grounds and a list of evidence has to be given by the party without delay (chapter 5 § 20). This means that new legal facts and evidence have to be introduced before the court declares that the preliminary stage is over, i.e. before the main hearing. As a main rule, new evidence cannot be referred in appeal a case to higher instance, unless the appellant establishes a probability that he or she had not been able to refer to the circumstance or evidence in the district court or that he or she has had a justifiable reason for not doing so (chapter 25 § 17). The court may exhort a party to fulfil his or her duties before a deadline under the threat that after the deadline he or she may not refer to a new claim or circumstance, or present new evidence, unless he or she can show that it is probable that there is a valid reason for his or her conduct (chapter 5 § 22). A more important threat of preclusion is provided for in chapter 6 § 9 which forbids the parties to invoke a new circumstance or evidence in the main hearing not invoked in preparation unless the party can present a justified reason for it (chapter 6 § 9). The consequence of preclusion is that the court will not take the circumstance or evidence into consideration. As stated above, late evidence can be accepted if the party can show a valid reason for not presenting the evidence earlier. This will be discussed in detail later.

1.2 The Adversarial and Inquisitorial Principles

The terminology of adversarial and inquisitorial principles is recognized in the Finnish legal system. The terms are used to refer to different legal cultures and to explain historical development of the current system. The main element of adversarial principle is the contradiction principle, where the parties assume an active role in obtaining evidence, both parties present their case in an oral hearing and the court remains rather passive. In inquisitorial procedures the court adopts a more active role participating in obtaining evidence, investigating and adjudicating the case. In Finland, the chosen form of procedure for both criminal and civil cases is adversarial. However, in non-dispositive cases the court adopts a more active role which could be considered also as a more inquisitorial procedure.

It follows from the adversarial principle that the parties have the main responsibility to obtain evidence and refer to essential legal facts and evidentiary facts which prove them.[9] Although the parties have the obligation to obtain the necessary evidence, the Code grants the court a right to decide on its own initiative to obtain necessary

[9] The division of labour in accordance with the principle of adversiality is highlighted in the revised chapter 17. The party's obligation to prove his or her claims and the rights that follow from this will be provided for in chapter 17 § 1-2 (HE 46/2014).

evidence. However, in dispositive cases the court cannot hear a new witness or demand a document to be presented if both parties object (chapter 17 § 8).[10]

Although the wording of the Code grants the court in theory wide powers concerning obtaining evidence, the case law and jurisprudence have assumed a reserved stand. The Supreme court has stated that a Court of Appeals shall not return a case to the district court for obtaining new evidence on the court's own initiative.[11] In jurisprudence the court's role in obtaining evidence especially in dispositive cases has been considered as mainly complementary and focused on the already provided trial documents, as court's neutrality and objectivity might be compromised if it assumes an active role in obtaining evidence. However, the court's freedom of action in obtaining evidence in dispositive cases has little practical importance, as usually the parties provide the needed evidence.[12]

In non-dispositive cases the court's discretion to obtain evidence on its own initiative increases significantly. For example, the Act on Child Custody and Access § 16 states that in a case concerning custody or access the court must obtain a report from the social welfare board, unless it is clear that such report is not required for reaching a decision. Thus, the officiality principle is more decisive in non-dispositive cases.

The judge is responsible for conducting the procedures. The Finnish legal system makes a distinction between material (*aineellinen*) guidance which focuses on investigating the matter, clarifying the trial documents and restricting the amount of evidence when necessary, and between procedural (*muodollinen prosessinjohto*) which refers to the formal course of the proceedings, i.e. scheduling the hearings, summons, and ensuring that the case proceeds in a lucid and orderly manner (chapter 6 § 2a).[13] The material guidance is more pronounced in preliminary stages while procedural directing is essential in the main hearing. The court has the responsibility to draw up a summary of the claims, grounds and evidence in addition to the facts that will proved by the named evidence during the preparation of the case and before the preliminary hearing (chapter 5 § 24). An opportunity to comment on the summary is given to the parties.

[10] The rule will remain the same after the revision of chapter 17. However, the rule will be renumbered as chapter 17 § 7 (HE 46/2014).

[11] The Supreme court has dealt with the court's right to obtain evidence on its own initiative in decisions 1995:44 and 1996:133. Although the cases dealt with criminal procedure, the legal rule formulated by the court is applicable also in civil cases. In both cases the lower court, Court of Appeals, had returned a case to the district court so the lower court could obtain new evidence. The Supreme court returned both cases to the Court of Appeals and confirmed that obtaining new evidence on the court's initiative was not grounds for returning the case.

[12] Juha Lappalainen, Yleistä todistelusta, p. 604, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

[13] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 199, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

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

Contradictory principle is one of the most fundamental principles of fair trial which is safeguarded by the constitution of Finland (731/1999, 21 §) and the European convention of human rights. The core of contradictory principle is that a case should not be decided without hearing both parties, or, without reserving them the opportunity to be heard and to present their case and evidence that supports their claims. In addition, the judgment cannot be grounded on such evidence or material that the other party has not had the opportunity to view and comment. Parties should be heard also on evidence obtained by the court on its initiative as well as on legal facts that are *ex officio* taken into consideration.[14] The court has the *ex officio* obligation to ensure that such opportunity is reserved.[15] In Supreme Court precedent it is highlighted that preserving the contradictory principle should provide a genuine possibility of participation instead of just safeguarding the formal hearing procedure.[16] In the revised chapter 17 the parties' right to comment on each piece of evidence obtained during the proceedings is even further accentuated.[17]

Contradictory principle is connected with all the phases of trial. It is the main rule, but, there are certain exceptions. First, a claim has to be dismissed without hearing the respondent if it is clearly groundless (chapter 5 § 8).[18] Second, the court can use its own discretion whether to ask a statement from the other party in a complaint on the basis of a grave procedural error (chapter 31 § 4). Third, the court can grant an interim order on precautionary measures without reserving the opposing party the opportunity to be heard, if the purpose of the measure would otherwise be compromised (chapter 7 § 5.2).

As stated before, the parties have the responsibility to refer to the legal facts they want to be taken into consideration by the court and to present the evidence supporting their claim. Due to contradictory principle, the parties have the right to comment on each piece of evidence presented in the case (chapter 17 § 9).[19] The evidence is presented in the main hearing where both parties are called with or without the obligation to be present. If a party is not present although obligated, the court may evaluate whether this behaviour has significance as evidence (chapter 17 § 5).[20] If evidence is obtained outside the main hearing, the court calls both parties to such event (chapter 17 § 8b).[21]

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[14] See Supreme Court decisions KKO 1994:7; 1994:26; 1997:139.
[15] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 127, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012; Juha Lappalainen, Siviiliprosessioikeus I, Lakimiesliiton kustannus, Jyväskylä 1995, pp. 61-64.
[16] See Supreme Court decision KKO 2005:134.
[17] See Government's Proposal 46/2014 vp p. 45. The right to comment will be included to the legislation as chapter 17 § 1 (HE 46/2014).
[18] See also Supreme Court decision KKO 1998:86.
[19] The revised numbering will be chapter 17 § 1 (HE 46/2014).
[20] The revised numbering will be chapter 17 § 6 (HE 46/2014).
[21] The revised numbering will be chapter 17 § 57 (HE 46/2014).

If the court has violated the contradictory principle in some way, the injured party can appeal to the Court of Appeals or the Supreme Court following the instance order of the court system. If the time limit for appeal has gone, it is possible to turn to extraordinary channels of appeal, e.g. to apply for the final judgment to be annulled based on a procedural error (*tuomiovirhekantelu*, chapter 31 § 1), or, apply for reversal of the judgement (*tuomion purku*, chapter 31 § 7), or, apply for a new deadline for a regular appeal (chapter 31 § 17).

The section 6 of the Constitution of Finland provides for equality (*yhdenvertaisuus*) and states that "everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person". In procedural law, this equality translates into granting the both parties genuinely equal opportunities to present their cases.[22]

The party might also decide on remaining passive or absent from the trial. The sanctions for such passivity or absence depend on the case (whether it is dispositive or non-dispositive), the phase of the trial (neglecting the written response, preliminary hearing, main hearing) and the obligations placed upon the party.

If the claim is incomplete and the plaintiff does not respond to the court's request for supplement, the claim is dismissed without considering the merits (chapter 5 § 6).

If the respondent does not give written response in a dispositive case, a default judgement can be given. In dispositive case, if both parties are absent from a court hearing, the case shall be discontinued (chapter 12 § 9). Also, if the respondent is absent from a court hearing or has not submitted a written response, the plaintiff has the right to receive a default judgment based on his or her claim (chapter 12 § 10). Such default judgment can be appealed in the same court that has given it (chapter 12 § 15). If a default judgement is given against the plaintiff the claim is dismissed (chapter 12 § 12), if against the respondent the claim is accepted (chapter 12 § 13).

In non-dispositive cases the sanctions are similar to dispositive cases. For example, if the applicant does not respond to the court's request, the case is dismissed without considering the merits (chapter 8 § 7). However, due to the nature of non-dispositive cases, the absence of another participant does not lead to default judgment but instead the case may be considered and decided despite his or her omission (chapter 8 § 7).

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

Orality (*suullisuus*) alongside with immediacy and concentration is one of the most important procedural principles in Finnish legal system since the procedural law reform

[22] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 126, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

of 1993.[23] Importance of orality is highlighted in the Code although not directly stated. For example, after the written claim and response the court makes a decision whether the preparation is continued in writing or in an oral preparatory hearing or transferred directly to the main hearing (chapter 5 § 15). The main hearing is oral: at the beginning the court explains what has been found out in the preliminary stage after which the parties present their cases, evidence is obtained and finally, the parties present their closing arguments (chapter 6 § 2). According to the Code, the main hearing shall be oral. The parties are banned from reading written statements or making their case in writing (chapter 6 § 3).

Orality and immediacy are in legal literature seen as interlinked as oral testimony is considered to provide for the immediacy of obtaining evidence.[24] The core of orality is that the parties present their claims, grounds and evidence in public oral hearing either in person or presented by lawyers.[25] Evidence is presented in the main hearing and witnesses give testimony orally. Written pleadings are not read out aloud but instead, the case is presented by oral statements. Orality is seen to preserve both the fundamental right to fair trial as well as the objective of finding material truth.

Although importance of orality is emphasized, both civil and criminal cases in the lower courts become pending by a written claim, and the respondent is asked for a written statement before the oral preliminary hearing. The main rule is that the case has to be discussed in an oral hearing (chapter 5 § 15 c on preliminary hearing, chapter 6 § 2 on main hearing). However, the court may decide the case without holding an oral hearing, if it is not necessary and both parties agree on this (chapter 5 § 27a). The higher courts may decide upon an oral hearing but this is somewhat exceptional (Court of Appeals chapter 26 § 12 and Supreme Court chapter 30 § 20). It should also be noted that administrative courts have adopted a written procedure as the main rule, but, oral hearing can be arranged when necessary (Administrative Judicial Procedure Act 586/1996, § 37).

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[23] See travaux preparatoires: HE 15/1990 vp. The legislative reform came into force in 1993. Principles of orality, immediacy and concentration principle were the slogan for the 1993 reform. However, the principle had been adopted earlier in legal praxis, despite the fact that the old statute of 1948 had still regulated a more protocol-based procedure than oral. See: Mika Huovila: Periaatteet ja perustelut. Tutkimus käräjäoikeuden tuomioiden faktaperusteluista prosessuaalisten periaatteiden valossa arvioituna. Suomalainen lakimiesyhdistys. Helsinki 2003, p. 72. The shift to orality, immediacy and concentration is considered to have taken place in the legal praxis already in the beginning of 20th century (see Committee report 2003:3, p. 205), but, the attempted legislative shift then failed due to political reasons. See: Committee report 1901:8, p. 43-44. Also e.g.: Kevät Nousiainen, Prosessin herruus. Länsimaisen oikeudenkäytön 'modernille' ominaisten piirteiden tarkastelua ja alueellista vertailua. Suomalainen lakimiesyhdistys. Helsinki 1993, p. 540. In general it is considered that orality and immediacy are prerequisites for the free evaluation of evidence. See, e.g.: HE 33/1997 vp., p. 27. Jyrki Virolainen – Petri Martikainen, Pro & contra. Tuomion perustelemisen keskeisiä kysymyksiä, Talentum, Helsinki 2003, p. 200.

[24] Tauno Tirkkonen: uusi todistelulainsäädäntö, WSOY, Porvoo 1949, p. 65.

[25] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 173, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

1.5 Principle of Directness

Principle of directness is usually understood as immediacy in Finnish procedural law and it is one of the most important procedural principles.[26] Its core content is that the parties' statements and evidence must be obtained in an oral, immediate and concentrated main hearing (chapter 17 § 8a).[27] The court deciding the case must receive the evidence at first hand without intermediaries and the decision has to be based solely on material presented in the main hearing.[28] Similar to principles of orality and concentration, immediacy is seen to provide for both fair trial and finding the material truth.[29] In jurisprudence immediacy is sometimes considered as two-fold: first, it holds that the judge remains the same during the whole procedure, which has been traditionally an important definition of immediacy, and second, that the evidence is preserved directly to the judge deciding the case.[30]

There are exemptions to the principle of immediacy. For example, the court may obtain evidence outside the main hearing under certain circumstances (e.g. if a new main hearing is organized and evidence that has been obtained earlier cannot be obtained anew, chapter 6 § 8, or in legal assistance is asked from another court). The court has to invite the parties to the session where evidence is obtained outside the main hearing (chapter 17 § 8b).[31] Evidence obtained outside the main hearing has to readmitted unless there is impediment (chapter 17 § 8e).[32] If there is an impediment, the court shall study it on the basis of the material compiled during the admission of the evidence.

Also documentary evidence has to be obtained orally. The court may accept such evidence without reading it only if its contents are known to the members of the court,

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[26] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 199, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

[27] In the revised chapter 17 there will be no section on oral, immediate and concentrated main hearing. However, the principle is left in place and can be deciphered from other sections, e.g. chapter 17 § 56.

[28] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 183, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012; Juha Lappalainen, Siviiliprosessioikeus II, Lakimiesliiton kustannus, Jyväskylä 2001, pp. 163-173.

[29] Riikka Koulu: Videoneuvottelu rajat ylittävässä oikeudenkäynnissä. Sähköisen oikeudenkäynnin nousu, University of Helsinki Conflict Management Institute, Helsinki 2010, p. 104.

[30] Mika Huovila, Periaatteet ja perustelut. Tutkimus käräjäoikeuden tuomioiden faktaperusteluista prosessuaalisten periaatteiden valossa arvioituna. Suomalainen lakimiesyhdistys. Helsinki 2003, p. 221.

[31] The revised numbering will be chapter 17 § 57 (HE 46/2014).

[32] In the revised chapter 17 evidence obtained outside the main hearing does not need to be admitted again, unless a party has been absent and requests for it or the court considers that there are other important reasons for admittance. The revised numbering will be chapter 17 § 59 (HE 46/2014).

the parties agree to the same and the same may also otherwise be deemed appropriate (chapter 17 § 8e).[33]

The principle of immediacy is particularly pronounced in obtaining evidence in the lower courts. If the second instance Court of Appeals decides upon obtaining evidence anew, this evidence is presented in an oral and immediate hearing in the second instance (chapter 26 § 15).[34] However, the Court of Appeals can decide to decide the case solely based on written statements if no oral testimony has to be received (chapter 26 § 14). If the appeal is decided without an oral hearing the Court of Appeal may use the recorded evidence from the district court to ascertain the contents of evidence when necessary (chapter 26 § 12).

In legal praxis it is typical that the Court of Appeals receives the evidence again and evaluates it. However, in certain civil cases a leave to continue the proceedings in an appellate court is needed before the court takes the case into consideration (chapter 25a).

1.6 Principle of Public Hearing

Public hearing is the main rule in all court instances and national open access to public records policy highlights its importance. According to the Act on the Publicity of Court Proceedings in General Courts (370/2007), court proceedings and trial documents are public unless provided otherwise in this or another Act (§ 1).

The principle means that all procedural acts including the preliminary hearing, the main hearing, judicial inspection or other procedural session where the parties have the right to be present or where oral testimony is presented are open to the public as well. There are some exceptions to the principle. First, internal court actions such as evaluation of evidence by the court and referendary presentation of the case in higher instances are closed from parties and public.[35] Second, the court may decide that oral proceedings are closed from public under certain circumstances, e.g. if publicity would endanger the external security of the state, or, if sensitive information regarding private life is presented, or, if the case involves a minor (Act on the Publicity of Court Proceedings in General Courts § 15).

1.7 Principle of Pre-trial Discovery

Principle of pre-trial discovery does not exist in the Finnish procedural system and the Code does not provide tools for pre-trial obtaining of evidence. As the principle does

[33] The rule will be changed in the revised chapter 17. According to the new chapter 17 § 54 (HE 46/2014), a document has to be introduced to extent of what is necessary.

[34] The same quality standards than in the district court apply to obtaining evidence in a hearing in the Court of Appeals. See: Supreme Court decision 2008:59.

[35] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 159, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

not exist, there is no definition of its content in the Finnish system. Usually pre-trial discovery is considered to refer to US legal system.

There are no rules in legislation or in case-law that parties should present their evidence to each other outside the trial. According to the Code, application of summons should include as far as possible, the evidence that the plaintiff intends to present (chapter 5 § 2). Evidence has to be named and presented in the preliminary hearing and the main rule is that no new evidence is admitted in the main hearing.

Regardless, there are neither rules that forbid parties from presenting their evidence to each other outside the trial. The parties may present evidence to each other before the trial on voluntary basis. A typical example of such situation would be pre-trial negotiations. For example, the members of the Bar Association are obliged to try to settle the case before filing a claim.

2 General Principles of Evidence Taking

2.1 Free Assessment of Evidence

Finnish Law of Evidence is grounded in free assessment of evidence which is provided for in chapter 17 section 2 stating that "after having carefully evaluated all the facts that have been presented, the court shall decide what is to be regarded as the truth in the case".[36] Free assessment of evidence means that the court has the discretion to freely evaluate what evidentiary value of each piece of evidence without such value being regulated in advance in the Code.[37] The exception to this main rule is that the court is bound to a confession made by a party in dispositive cases (chapter 17 § 4).[38] Also, presentation of evidence is not limited to specific types of evidence or specific means.[39] Parties are not allowed to agree what evidentiary value should be granted to a certain piece of evidence and their freedom of action is connected to presenting the evidence and to refer to which evidentiary fact is supposedly proved by each named piece of evidence.

Free assessment of evidence gives the court a wide scope of discretion to decide what should be regarded as the truth.[40] This discretion is sometimes bound to different material legal principles, especially in non-dispositive cases, such as the principle of the

[36] The revised numbering will be chapter 17 § 1 (HE 46/2014). The new wording does not include reference to truth but instead stipulates that the judge has to assess the weight of evidence unbiased and in accordance with the principle of free assessment of evidence.
[37] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 212, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[38] For further information, see Supreme court decision 2005:123 and 2003:54. The revised numbering will be chapter 17 § 5 (HE 46/2014).
[39] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 122, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[40] See: Juha Lappalainen, Yleistä todistelusta, p. 595, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

best interests of the child in custody cases (Act 361/1983, § 10), or the best interest of an incompetent person in guardianship cases (Guardianship Services Act 442/1999, § 1). Also employment cases which are dispositive operate on a reverse burden of proof which means that when the employee appeals the cancellation of the employment contract, the employer has to show that there has been acceptable grounds for his or her action. In addition, the judgments of the Courts of Appeals and precedents of the Supreme Court direct the evaluation of evidence in the lower courts. In jurisprudence different theories are developed to assist the evaluation, e.g. preponderance of evidence theory[41] or evidentiary value theory.[42] However, none of the evidence theories has been adopted as a dominant theory in legislation or legal praxis.

2.2 Relevance of Material Truth

Traditionally in jurisprudence, material truth has been considered to be the objective of trial proceedings, although a concession is made that as material objective truth is rarely reachable, the goal is to settle on the procedural truth.[43] However, after joining the ECHR, the principle of fair trial has become more and more pronounced. Although these two principles, material truth and fair trial, are interlinked, it is considered that to some extent different means are needed to provide for each of them.

The principle of material truth is provided for in the legislation (chapter 17 § 2). In jurisprudence, material truth refers to convincing the court's assessment of evidence that the referred claim about certain circumstance corresponds with a real life fact.[44] The principle is more pronounced in non-dispositive cases where the court has the discretion to obtain evidence on its own initiative.

The revised chapter 17 § 1 will not include a reference to material (or procedural) truth but instead stipulates that the judge has to evaluate unbiasedly the relevance and weight of all evidence presented in the case. Although the legal status quo does not change as the result of the reform of chapter 17, removal of the reference to material truth displays its decreasing significance as the objective of civil procedure.[45]

There are limitations to the principle of material truth. For example, chapter 17 section 11 of the Code prohibits from admitting as evidence a private written statement drawn

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[41] See closer e.g.: Timo Saranpää, Näyttöenemmyysperiaate riita-asiassa, Suomalainen lakimiesyhdistys, Helsinki 2010, p. 295.
[42] See e.g: Jaakko Jonkka, Todistusharkinnasta, Lakimiesliiton kustannus, Helsinki 1993.
[43] See e.g.: Hannu Tapani Klami – Marja Rahikainen – Johanna Sorvettula, Todistusharkinta ja todistustaakka. Johdatus todistusoikeuden perusteisiin, Lakimiesliiton kustannus, Helsinki 1987, pp. 18-22.
[44] Mika Huovila, Periaatteet ja perustelut. Tutkimus käräjäoikeuden tuomioiden faktaperusteluista prosessuaalisten periaatteiden valossa arvioituna. Suomalainen lakimiesyhdistys. Helsinki 2003, p. 192.
[45] Government's proposal HE 46/2014 vp p. 45.

up for the purpose of a pending or imminent trial and an oral statement entered or otherwise stored in the record of a criminal investigation or another document.[46]

There exists a general obligation to testify in Finnish law of evidence. It is provided for in chapter 17 section 20 of the Code. However, certain relatives of the parties need not testify against their will. Also, the president of the Republic may not be called as a witness (chapter 17 § 22).[47] There are limitations to hearing witnesses. Limitations include public officials who may not witness on circumstances they are bound to keep secret due to this function, medical personnel, attorneys and legal counsel, mediators and priests (chapter 17 § 23).[48]

In addition, there is an obligation to present a document when it can be assumed that a document is of significance as evidence in a case. However, the obligation does not extend to the relatives of an accused, to public official if the document contains information the official would not be allowed to testify upon, or to personal notes and correspondence unless there is unless very important reasons require its presentation (chapter 17 § 12).[49] Also, the author, publisher or broadcaster of mass communication may refuse to reveal the identity of his or her source (chapter 17 § 24).[50]

Still, there is no obligation to be heard as an expert witness, unless he or she is under the obligation to serve as an expert witness by virtue of public office or function or on the basis of a special provision (chapter 17 § 46).[51] Neither is an expert witness obligated to disclose a business or professional secret, unless very important reasons otherwise require (chapter 17 § 48).[52]

There are limitations to propose new facts and evidence (*ius novorum*) in Finnish law, as is discussed above. Mainly, new facts have to be pleaded before the end of the preliminary stage and the higher courts do not allow new facts or evidence unless the party demonstrated a legitimate grounds why these could not be presented earlier.

The standards for material truth are set higher in criminal cases and non-dispositive civil cases than in dispositive cases. Most evidence theories consider that the view more likely corresponding with reality and which is enough to convince the judge fulfils the standards set for material truth.

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[46] The revised numbering for the ban of written testimonies will be chapter 17 § 24.
[47] The revised numbering will be chapter 17 § 32.
[48] The revised numbering will be chapter 17 § 11-14, 16-17.
[49] The rule will be changed to some extent in the revised chapter 17. The revised chapter 17 § 38 (HE 46/2014) stipulates that the court may demand that a document is presented regardless of any confidential information, if it can be presented without revealing said information. However, if the witness has the right or obligation to refuse from testifying, the same right or obligation extends to documents in his or her possession. The revised numbering will be chapter 17 § 9.
[50] The revised numbering will be chapter 17 § 20.
[51] The revised numbering will be chapter 17 § 9.
[52] The revised numbering will be chapter 17 § 19.

3 Evidence in General

3.1 Methods and Standards of Proof

Unlike parties in civil cases or the accused in criminal cases, witnesses are required to give oath before they are allowed to testify (chapter 17 § 28). In the revised chapter 16 some changes regarding the oath will be introduced. After the reform is in force, all witnesses will give an affirmation on their honour and conscience and there will be no longer the possibility to choose between an oath on religion and affirmation.[53]

Witnesses under oath are often considered to give a more realistic narrative than parties who can be heard for probative purposes in their own case. Also authenticated documents and documents registered by authorities are usually considered to have more evidentiary value than other documents.

In Finnish civil procedure free assessment of evidence is the main rule. However, legal presumptions in material law are an exemption to this main rule. According to the Code, when there is a special provision in law on the significance of a piece of evidence, this shall apply (chapter 17 § 2).[54] Legal presumptions are rare: the classic examples are the presumption of husband's paternity when the mother was married at the time of birth (Paternity Act 700/1975, § 2, *pater est* presumption) and the presumption that jointly owned property is owned in equal shares if nothing else is proved. In legal literature this provision is considered to have little meaning as a legal presumption can be overturned by evidence. Therefore legal presumptions can be described as rules on the burden of proof instead of as predetermined weight of evidence. Thus, when a party claims that the presumption is invalid, he or she has the burden to demonstrate this by evidence.[55]

In addition to legal presumptions, a notorious facts do not have to be proven. Also, the court is bound by a party's confession, as discussed above. Outside these, there are no rules on predetermined weight of evidence. There are no rules in the Code or in case-law, which would stipulate preference to particular types of evidence.

In jurisprudence it is considered that free assessment of evidence requires the so called free evidence presenting which means that there are no a priori limitations to what can be presented as evidence.[56]

Standards for proof are in the current doctrine understood through the norms on burden of proof which regulate against which party an unsolved claim about a legal fact falls. The court has to present grounds for assessing evidence in its decision (chapter 24 § 4). Usually in jurisprudence the level of proof that is enough to convince the judge is referred to by words "presumable", "probable", "evident" or "definite". In practice,

[53] The revised numbering will be chapter 17 § 44.
[54] The revised numbering will remain the same, chapter 17 § 2.
[55] See: Juha Lappalainen, Yleistä todistelusta, p. 596, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[56] ibid p. 598.

"sensible preponderance of evidence" is considered to fulfil the burden of proof.[57] Besides these formulations of provisions, there are no minimum standard of proof to consider a fact as establish in Finnish procedural law.

The proper wording of standards of proof has been discussed in the revision of chapter 17. In the end, the wording "credible proof" was chosen, although also this wording has some inherent difficulties. During the parliamentary process the Law Committee emphasized that the chosen wording is not meant to change the existing status quo.[58]

3.2 Means of Proof

Numerus clausus principle is not recognized in Finnish law of evidence. Although the Code regulates only certain types of evidence, documentary evidence (chapter 17 § 11), witnesses (chapter 17 § 18), expert witnesses (chapter 17 § 44), judicial inspection (chapter 17 § 56) and hearing of a party (chapter 17 § 61), other types are allowed as well.

This status quo will not be changed by revised chapter 17 for the most part. However, the revised regulation will include the ban for the invocation of evidence, which has been obtained by illegal means. In addition to this, evidence that has resulted from torture is not accepted. This revision means a change to the previous status quo, which has adopted a negative stance towards such bans. According to the earlier doctrine, such errors in obtaining evidence can be corrected through the concept of evidentiary value, which would be more in accordance with the free assessment of evidence. However, the ban on illegal evidence is considered necessary in order to give more protection to the ban of self-discrimination, i.e. a person is not obliged to testify, if he or she would discriminate himself or herself by testifying. In the legislative process the relationship between such a ban and the case-law of the European Court of Human Rights was closely discussed.[59]

Also, the revised chapter 17 distinguishes between the ban of certain themes in evidence (*todistusteemakielto*), ban of certain ways of obtaining evidence (*todistuskeinokielto*) and ban on certain methods (*todistusmetodikielto*). The ban on themes refers to the obligation of a lawyer to refuse from testifying on confidential information received under the lawyer-client privilege. The ban on ways of obtaining evidence means that evidence cannot be obtained against the ban of self-indiscrimination. The ban on methods means that no leading questions may be posed. However, the boundaries between these concepts are difficult to maintain, as is stated in the Government's proposal.[60]

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[57] ibid. p. 684. Juha Lappalainen, Näytön arviointi, p. 695, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[58] Law Committee's Memorandum 19/2014 vp.
[59] Government's Proposal 46/2014 vp, p. 26. The ban will be included in chapter 17 § 25 (HE 46/2014).
[60] Government's Proposal 46/2014 vp, p. 26.

3.2.1 Party Statements

In Finnish civil procedure, there are no means of evidence which would be excluded from possible modes of proof. This is considered to follow from free assessment of evidence. However, there is a rule that evidence on notorious facts or facts that the court knows *ex officio* need not be proven (chapter 17 § 2).[61] Also the court shall not admit evidence, which is not material to the case or that has already been proven, or if the fact can be proven in another manner with considerably less inconvenience or cost (chapter 17 § 7).[62]

This means that all parties may testify in a civil case. Also under-aged parties may give an oral statement. If a party is under 15 years old or mentally incapacitated, the court may hear him or her for probative causes, if it is considered appropriate and if the hearing is central to the clarification of matter and the hearing would not cause him or her suffering (chapter 17 § 21).[63]

A party's obligation to testify or right to refuse differs to certain extent from witness' obligation to give testimony. A party may be obligated to attend the court session personally in order to help clarifying the case. His or her presence can be forced by threat of fine and the court can also order him or her or his or her legal representative to be brought to the hearing or to a later hearing (chapter 12 § 19).[64] However, threat of fine cannot be used to parties under 15 years or mentally incapacitated. Regardless, there are no sanctions that can be taken if the party refuses to answer a specific question in the main hearing. However, such refusal can have evidentiary value.[65] There are no grounds for such refusal in legislation or case-law as the party does not have a witness' obligation to testify.

Parties' statements are considered to be evidence in the Finnish procedural law. The provisions on the hearing of a witness apply, in so far as appropriate, to the hearing of the party (chapter 17 § 61).[66] The party does not give oath as he or she speaks in his own case, but, under specific circumstances it is possible to request that the party gives affirmation.

The revision of chapter 17 abolishes the possibility to hear a party under oath or affirmation. The parties' still have the responsibility to answer truthfully, although they have no obligation to self-discriminate themselves. Also, the parties do not have the obligation to answer all the questions, but the meaning of such refusal can be assessed according to the free assessment of evidence.[67]

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[61] The revised numbering will be chapter 17 § 5 (HE 46/2014).
[62] The revised numbering will be chapter 17 § 8 (HE 46/2014).
[63] The revised numbering will be chapter 17 § 27 (HE 46/2014).
[64] The revised numbering will be chapter 17 § 62 (HE 46/2014).
[65] Juha Lappalainen, Todistuskeinot, p. 667, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[66] The revised numbering will be chapter 17 § 26 (HE 46/2014).
[67] Government's Proposal 46/2014 vp, p. 29-30.

However, the parties have an obligation to tell the truth (chapter 14 § 1).[68] The parties are heard before witnesses in the court session. In a civil case a party may be heard under affirmation on circumstances especially relevant to the resolution of the case (chapter 17 § 61).[69] A party may also be heard under affirmation as to the type and quantum of the damage he or she has suffered because of an offence. However, requesting an affirmation from the party is exceptional in the legal praxis. Also the opposing party can request that other party be heard.

There is a provision on the consequences of a party not testifying although obligated to be present at the court session. According to chapter 17 section 5 of the Code, if, regardless of a court order and without a valid reason, a party fails to appear in court or otherwise fails to fulfil something in a trial or fails to respond to a question intended to clarify the case, the court shall, taking into consideration all the facts available in the matter, consider what effect the conduct of the party has as evidence.[70]

There are no rules in legislation about assessing party hearing as evidence. However, in practice party hearing is often considered subjective which affects its evidentiary value.

If a party is heard under affirmation, the consequences of a perjury are the same as regarding witnesses. According to the chapter 15 section 1 of the Criminal Code of Finland, if a party to a matter in court, when heard under affirmation makes a false statement in the matter or without lawful cause conceals a pertinent circumstance, that person shall be sentenced for a *false statement in court* to imprisonment for at most three years.

3.2.2 Formally Prescribed Types of Evidence and Cheque Disputes

There are no formally prescribed types of evidence for proving certain facts in Finnish legal system.

However, if the plaintiff's claim is based on a cheque, bill of exchange or negotiable promissory note, such document has to be annexed to the applocation for the summons as an original (chapter 5 § 14).[71] The importance of cheques has declined significantly since the 1980's and they have little practical meaning in the legal praxis nowadays.

3.2.3 Different Types of Evidence

As discussed earlier, the Finnish procedural law has adopted free assessment of evidence, which means that there are no rules in legislation about the evidentiary value

[68] The revised numbering will be chapter 17 § 26 (HE 46/2014).
[69] This will be no longer possible after the revision (HE 46/2014) comes into force, as stated above.
[70] The revised numbering will be chapter 17 § 6 (HE 46/2014).
[71] In the revision of chapter 17 this obligation has been revised. A private document may be presented, if the plaintiff's claim is based on a cheque. The revised numbering will be chapter 17 § 24 (HE 46/2014).

of certain types of evidence. However, some guidelines have been developed in legal praxis through logical persuasiveness.

As stated above, the revision of chapter 17 will introduce a ban on evidence, which has been obtained illegally. Evidence obtained through torture is always excluded. Also, illegally obtained evidence is also excluded, if there are important grounds for this considering all aspects of the trial.[72]

Typically, there are no means of evidence which can be applied only after the modes of proof required by the law become impossible. However, the court gives and order for DNA testing in paternity cases only after the possibility of paternity is shown to be probable (700/1975 paternity act). Different types of evidence is used to prove different types of facts. Usually, expert opinions are used in cases where the court lacks knowledge own a specific matter, e.g. in patient injury cases.

In addition, no evidence on known facts is needed. Chapter 17 section 3 states that "a fact that is notorious or known to the court *ex officio* need not be proven. In addition, no evidence need be presented on the contents of the law. If the law of a foreign state is to apply and the court does not know the contents of this law, the court shall exhort the party to present evidence on the same."[73] The content of foreign law forms an exception to the *jura novit curia* principle.

Also, some facts such as official ownership of real estate are shown by excerpts from public records.

In addition, there are forms requirements in material law. For example, a prenuptial agreement has to be registered in the magistrate in order to become effective (234/1929 Marriage Act) as well as a deed for purchase of real estate has to be simultaneously undersigned by the parties and a public official (540/1995 Code of Real Estate). These forms requirements are connected with the issue of evidentiary value as following the form requirements is considered to show that evaluation of true intention of the contracting parties has been conducted already at the time of registration. Yet, a last will has to be done in writing and witnessed by two unbiased persons in order to become effective, although the inheritance code regulates also the possibility to give a nuncupative will (40/1965 Inheritance Code).

3.3 Duty to Provide Evidence

As stated before, the parties in dispositive cases have the obligation to provide evidence to present their claims, grounds and evidence they refer to demonstrate the validity of their claims.[74] The court's right to obtain evidence on its own initiative is seldom

[72] The revised numbering will be chapter 17 § 25 (HE 46/2014).
[73] The revised numbering will be chapter 17 § 4 (HE 46/2014).
[74] Chapter 17 section 1 states that "in a civil case the plaintiff shall prove the facts that support the action. If the defendant presents a fact in his or her favour, also he or she shall prove it." The revised numbering will be chapter 17 § 2 (HE 46/2014).

practiced in dispositive cases. Regardless, in non-dispositive cases such as child custody and access, guardianship and paternity the court usually obtain the necessary evidence by asking the social welfare board for a statement or by ordering DNA tests.

According to chapter 17 section 5, if the party fails to present evidence, the court shall, taking into consideration all the facts available in the matter, consider what effect the conduct of the party has as evidence. However, there is no obligation to present specific evidence and it is possible for the party to proceed an action without presenting evidence. In doing so, she or he takes the risk of the case being dismissed and having to answer for the adversary's legal expenses.

Third persons have the general obligation to witness, as stated before. Also, the obligation to present an original document in court can be placed upon third persons as well. If a third person fails to present the document, a conditional fine can be imposed and also ordered enforceable (chapter 17 § 17). If a third person does not comply the summons to be a witness, the threat of a fine can be imposed and ordered enforceable (chapter 17 § 36).[75] If on the basis of the conduct of the witness or another person to be heard in person for probative purposes, it can be assumed that he or she will not comply with the subpoena to arrive in court, the court may order that he or she be brought to court.

In dispositive civil cases a final judgment has the so called positive res judicata (*oikeusvoima*) effect which means that the earlier decision cannot be contested in a later trial, but instead, it is binding to the court deciding on the latter case.[76] However, *res judicata* effect should not be mixed with the earlier decision's evidentiary value. The court assesses what value as evidence the earlier judgment has based on free assessment of evidence. In legal praxis, both civil and administrative decisions have a high evidentiary value.

4 General Rule on the Burden of Proof

4.1 Doctrine Behind Burden of Proof

The court assesses whether there has been enough evidence to meet the burden of proof. The current doctrine of burden of proof states which party shall bear the consequences of not meeting the demand for evidence. If there has not been enough evidence to demonstrate that a party's claim about a legal fact should be considered true, the claim is then rejected. It is also possible that the burden of proof shifts from the party to another as the party responsible for meeting the burden fulfils his or her task.[77]

[75] The revised numbering will be chapter 17 § 62 (HE 46/2014).
[76] Juha Lappalainen, Tuomion oikeusvoima, p, 738, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[77] Juha Lappalainen, Näytön arviointi, p. 686, p. 212, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

Standards for the burden of proof vary in different fields of material law and are most often developed in jurisprudence, as stated before. Usually experience-based probability has been granted considerable meaning in assessing whether the burden of proof has been met.[78] The Supreme Court's precedents do not include clear-cut standards for evaluating when there has been sufficient level of evidence to convince the judge, but instead, the Supreme court grounds its decisions on burden of proof and whether the party holding the burden has fulfilled it. In jurisprudence it has been suggested that the court decides for the option, which is more likely than the opposite.[79]

As stated before in 3.2.3, notorious facts and the content of legislation are exempts from the burden of proof. However, if the law of a different country is not known by the court, the party has the obligation to explain its content (chapter 17 § 3).[80] Regardless, doctrine of *jura novit curia* is essential to Finnish procedural law. The doctrine obliges the court to know the law: legislation, legal praxis and jurisprudence and to state in its decision the applied sections of a law.[81]

4.2 Duty to Contest Specified Facts and Evidence

The plaintiff has the responsibility to present his claim, its grounds and name the evidence he is going to present to meet the burden of proof already in his original claim (chapter 5 § 2). Correspondingly, in his or her reply the defendant has to state whether he or she accepts or contests the action, the grounds for contesting, and to list the evidence he or she intends to present (chapter 5 § 10).

After the preliminary written stage, in the preliminary hearing, it is determined what are the claims and grounds of the parties, which issues are under dispute, what evidence is going to be presented in the main hearing and what is intended to be proved with each piece of evidence (chapter 5 § 19). The court is responsible for determining these issues and to ensure that the parties state all the circumstances they intend to invoke. If a written or oral statement of a party is unclear or incomplete, the court shall put the questions to him or her that are necessary to clarify the matter. Also, the court shall ensure that nothing irrelevant is brought into the case and that no unnecessary evidence is presented in the case (chapter 17 § 21).[82]

It is much discussed how much of material conduct of procedure can the court administer to advice parties when their proposed evidence is incomplete. Especially, if the party is presented by a legal counsel, excessive guidance to one party is sometimes seen to endanger the court's neutrality. In small claims cases where a consumer is rarely presented by an attorney, the court's instruction is often considered to provide for the equality of arms. However, the extent of such guidance is left on the court's own

[78] ibid. p. 692.
[79] ibid. p. 695.
[80] The revised numbering will be chapter 17 § 4 (HE 46/2014).
[81] E.g.: Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 212, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[82] The revised numbering will be chapter 17 § 8 (HE 46/2014).

discretion. Regardless, the court is responsible for ensuring that claims, grounds and evidence is presented and to ascertain which issues are under dispute. Fulfilling these tasks cannot be considered to violate the principle of neutrality.

The court has the obligation to inform the parties of their responsibilities both in summons and in the hearing.

As stated before, if the party does not comply with his or her obligation to present evidence and does not have a justified reason for this, the court evaluates what bearing the party's conduct has as evidence.

4.3 Collecting Evidence on the Court's Own Initiative

As stated above, the court may obtain evidence on its own initiative in civil cases. This freedom of action is provided for in chapter 17 section 5 of the Code. The right is usually not exercised in civil dispositive cases where an out-of-court settlement between the parties is acknowledged.

The revision of chapter 17 has taken this into consideration, as discussed above.

However, in non-dispositive cases such as child custody and access, guardianship and paternity it is commonplace that the court asks for the social board's statement (Act on Child Custody and Access) or orders a DNA test. In non-dispositive cases it is considered that there is a public interest which requires the court to assume an active role in obtaining the necessary information for deciding the case.

The court may allow additional submission of evidence if new facts become known during presentation of evidence. According to chapter 6 section 9 of the Code, the party claiming a new circumstance has to show a legitimate reason why the circumstance was not referred to before the main hearing. Such a legitimate reason could be that the party could be that the party did not know about the piece of evidence before the hearing. Also, new evidence may be admitted if the parties agree to this.

As stated earlier in 3.3, a party or a third person may be obliged to present a document in court under the threat of a fine. Thus, a party does have means to obtain evidence that he is not possessing. Also, it is considered in jurisprudence that while assessing burden of proof, the obligation to present evidence should be placed upon the party who has the best opportunity to present the needed evidence.[83]

5 Written Evidence

Written documents are one of the means of evidence mentioned in the chapter 17 of the Code. Written document is defined as a physical piece of evidence whose evidentiary value is connected with its content. In jurisprudence, a distinction is made between such

[83] E.g. Juha Lappalainen, Näytön arviointi, p. 693, p. 212, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

written documents and objects of inspection such as graphological samples, photos, maps or video recordings which have evidentiary value based on their visual content. A written document can be electronic audio or video recording as well if it can be printed to a readable form.[84]

As the means and types of evidence are not restricted in Finnish law of evidence, there are no prohibitive rules governing which types of electronic documents would be recognized and which not. Also, due to the free assessment of evidence their probative value has not been regulated.

The principle of free methods of evidence is emphasized in the revision of chapter 17. However, the ban on illegal evidence will change the previous status quo, as discussed above. Still, the revised sections of chapter 17 highlight that the court can use witness or party testimonies, expert statements, documents, objects, private documents and correspondence (though under some restrictions) and conduct examination of a place, real estate or an object.[85] According to the *travaux preparatoires*, such an examination can be done to electric records, methods of saving data to databases etc.[86]

Generally speaking, electronic documents are considered to fulfill the form requirement of written form. In addition, electronic documents delivered to the authorities do not have to be signed, if the document includes sender information and there is no uncertainty about the originality or integrity of the document (13/2003 Act on Electronic Services and Communication in the Public Sector 9 §).

Electronic signatures are provided for by Act on Electronic Signatures (14/2003) which enables legal actions to be completed through electronic signatures.[87] According to the section 2 of the Act, electronic signature is defined as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authenticating the identity of the signatory". Advanced electronic signature "means an electronic signature a) which is uniquely linked to the signatory; b) which is capable of identifying the signatory; c) which is created using means that the signatory can maintain under his sole control; and d) which is linked to other electronic data in such a manner that any subsequent change of the data is detectable."

The Act on Electronic Signatures is based on the directive 1999/93/EC of the European Parliament and of the Council on a Community framework for electronic signatures.[88]

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[84] Juha Lappalainen, Todistuskeinot, p. 621, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[85] The revised numbering will be chapter 17 § 38 (HE 46/2014).
[86] Government's Proposal 46/2014 vp p. 100.
[87] "If the law requires that a signature be attached to a legal act, this requirement shall be fulfilled at least by an advanced signature based on a qualified certificate and created by means of a secure signature-creation device" (617/2009, 18 §).
[88] HE 36/2009 vp., p. 5. More on electronic signatures in Finnish law of obligations, see: Ilja Ponka, Sähköinen tunnistaminen ja allekirjoitus Suomen velvoiteoikeudessa, Unigrafia Oy, Helsinki 2013.

Thus, the requirement of written form is fulfilled with electronic documents and electronic signatures are generally accepted. Regardless, the question of fulfilling stricter requirements, e.g. the form requirement for a last will (written form, two witnesses simultaneously present with the testator at the moment of signing etc.), by electronic means has not yet risen in legal praxis.

Due to the free law of evidence, other types of written evidence than ones listed in the Code can be presented. Their probative value is assessed *in casu* according to the principle of free assessment of evidence.

5.1 Public and Private Documents and Presumption of Correctness

As stated above, there are some legal presumptions of correctness, e.g. the husband's paternity and that joint owners have equal shares if nothing else is proved. In addition, it follows from the public credibility of a register that excerpts from public records are considered to have very high evidentiary value.

Although some documents have *a priori* high evidentiary value, the circumstances in which such document could alone form the base of a judgment are limited. However, a final judgment in a civil case has positive *res judicata* effect which means that if a preliminary question such as existence of a legal relationship is *res judicata*, that judgment has to be placed as a starting point in a trial concerning the effects of such relationship.

In legislation there is no distinction between the evidentiary value of private and public documents, although the distinction between these types of documents is made.[89] The evidentiary value is decided on in casu basis.

All documents can be contested. The evidentiary value of written documents is based on the assumption that they are genuine. However, in legal praxis the authenticity of documents is rarely contested as the parties' difference of opinion usually concerns how the document should be interpreted and what is its evidentiary value.

Falsification of evidence is punishable under chapter 15 sections 7 and 8 of the Criminal Code. A person, who for the purpose of having an innocent person sentenced or otherwise to cause damage to another person, conceals, destroys, defaces, alters or otherwise falsifies an object, document or other item necessary as evidence before a court or in criminal investigations and that he knows to be of significance in the matter, shall be sentenced for *falsification of evidence* to a fine or to imprisonment for at most two years. A sentence for falsification of evidence shall be imposed also on a person who, for a purpose referred to in subsection 1, submits a piece of evidence that he or she knows to be false or falsified to be used as evidence in court or in criminal investigations, or himself or herself uses it in a misleading manner (7 §). Aggravated

[89] Juha Lappalainen, Todistuskeinot, p. 621, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

falsification of evidence is punishable by imprisonment from four months up to six years (8 §).

5.2 Taking of Evidence

The main rule is that the parties are responsible for producing evidence. This obligation is stated in the code. According to chapter 17 section 1, the plaintiff shall prove the facts that support the action. If the defendant presents a fact in his or her favour, also he or she shall prove it.

If the court decides to obtain evidence on its own initiative, it has more coercive power to ask for documents than the parties as it has a sanction mechanism. Also, legal aid between different officials is possible. There are no general provisions on how the court would ask for such written evidence. In child custody cases the court sends the trial material to the social board's and asks for their statement (Act on Child Custody and Access). A DNA test is conducted by the court giving a decision assigning the parties to give blood samples.

According to chapter 17 section 8e, the court may order that documentary evidence be admitted in the main hearing without reading it only if its contents are known to the members of the court, the parties agree to the same and the same may also otherwise be deemed appropriate. However, this section is slightly changed by the revision of chapter 17, as discussed above.

A starting point is that original written copies have to be presented at court unless the court holds a copy to be sufficient. Thus, it is not necessary to produce the documents in their original version in most cases. Also, if the document contains information that the party need not present or must not present, or if it otherwise contains information that is not to be disclosed, an extract from the document shall be presented from which said information has been deleted (chapter 17 § 11b).

6 Witnesses

6.1 Obligation to Testify

As stated above, a witness may not refuse to testify. If a witness refuses without a valid ground, coercive measures can be taken (chapter 17 § 36).[90] However, there are exceptions to this main rule. First of all, in a civil case, a person may not be heard as a witness if the eventual judgment will be to his or her benefit or detriment as if he or she were a party. Second, a fiancé or spouse of a party, a direct ascendant or descendant of the party or their spouses and the siblings of the parties do not have to testify against their will (chapter 17 § 20).[91]

[90] The revised numbering will be chapter 17 § 62 (HE 46/2014).

[91] The revised wording changes the status quo to some extent. According to the revised chapter 17 §17 (HE 46/2014) the spouse or ex-spouse, current common law partner, sibling, or ascending or descending relatives may refuse from testifying.

The court calls the witnesses to court, unless this has been entrusted to a party (chapter 17 § 28).[92]

If a witness refuses to testify she or he must come to the court to mention the grounds for the refusal and show a plausible reason for it. Mentioning the grounds for refusal and evidence on the relationship is sufficient. The court has the obligation to inform the witness when she or he has a right to refuse giving testimony.[93] The court has no discretion to evaluate whether the witness' grounds are acceptable if the relationship has been established. When the witness decides to testify in spite of her right to refuse, she is obligated to answer questions of both parties.[94] In jurisprudence it has been considered that no evidentiary value can be granted to witness' refusal.[95]

In addition to this close relation's right to refusal, the Finnish law of evidence regulates which persons are considered unfit to testify. Persons under fifteen years and mentally incapacitated person may be heard as a witness the court deems this appropriate and if hearing him or her personally is of central significance to the clarification of the matter; and hearing the person would probably not cause said person suffering or other harm that can injure him or her or his or her development (chapter 17 § 21).[96] Witnesses under fifteen years or mentally incapacitated do not give oath and no coercive measures may be used against him or her. However, such a witness may be brought to court (chapter 17 § 38).[97]

Privilege against self-discrimination is recognized in Finland. As discussed, this right is further accentuated in the revision of chapter 17. According to chapter 17 section 24 of the Code, a witness may refuse to reveal a fact or answer a question if he or she cannot do so without incriminating himself or herself or a person who is related to him or her.[98]

6.2 Obligation to Give Evidence

There are other limitations regarding witnesses than being unfit to testify. First, the President of the Republic may not be called as a witness (chapter 17 § 22).[99] Second, certain witnesses are bound to professional secrecy. These limitations to giving testimony are listed in the Code and their scope of application is specified in legal praxis.

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[92] The revised numbering will be chapter 17 § 41 (HE 46/2014).
[93] Juha Lappalainen, Todistuskeinot, p. 639, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[94] See Supreme Court decision 1985 II 93.
[95] Lauri Hormia, Todistamiskielloista rikosprosessissa II. Oikeudellinen tutkimus., p. 74, Suomalainen lakimiesyhdistys, Helsinki 1979.
[96] The revised numbering will be chapter 17 § 27 (HE 46/2014).
[97] The revised numbering will be chapter 17 § 64 (HE 46/2014).
[98] The revised numbering will be chapter 17 § 18 (HE 46/2014).
[99] The revised numbering will be chapter 17 § 32 (HE 46/2014).

These limitations are not absolute. The court can, if very important reasons demand it, oblige a witness to reveal confidential information. However, the court's session may then be held without the public. In jurisprudence, it is often perceived that such very important reasons actualize mostly in criminal cases and rarely in civil cases.[100] Still, right to refuse revealing professional secrets does not exempt the witness from coming to the court session, giving an oath of an affirmation or to testify on other facts and circumstances.

Status-bound limitations to giving testimony are acknowledged when a witnesses has access to information based on his or her profession. Professional secrecy expands to official secrets, state secrets, doctor-patient and attorney-client privileges and mediator's confidentiality. According to chapter 17 section 23 a public official may not testify on matters he or she is bound to keep secret in his function.[101] Also medical personnel and their assistants may not testify on what they have learned in the practice of their profession unless the patient consents to such testimony, an attorney or counsel may not reveal facts entrusted to him or her for the pursuit of the case, unless the client consents to such testimony. Also mediators are bound to keep secret regarding the mediated matter, unless particularly important reasons require that he or she be heard, or the person for whose benefit the duty of confidentiality has been provided consents to such testimony. However, these limitations do not apply if the public prosecutor has brought a charge for an offence punishable by imprisonment for six years or more.

A party may contest the court's evaluation of professional secrecy when appealing the judgment.

In addition, a witness may refuse to give a statement which would reveal a business or professional secret unless very important reasons require that the witness be heard thereon (chapter 17 § 24).[102] If a CEO would refuse testimony based on business secrets, his refusal would be accepted unless very important reasons require his testimony. Evaluation of such reasons is at court's discretion. The Code does not define the scope of business secrets. It makes no difference if the private company is a holder of public service. However, public law entities have more limited definition of trade secrets, so, somewhat different criteria would be applied to them.

As stated before, a state official may not reveal official secrets. Breach of official secrecy is punishable by fine or imprisonment up to two years (Criminal Code, chapter 40 § 5). The scope of official secrets is defined by administrative legislation. The obligation and right to refuse testimony based on secrecy requires that giving testimony would result in criminal liability.[103]

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[100] Juha Lappalainen, Todistuskeinot, p. 649, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[101] The revised numbering will be chapter 17 § 12 (HE 46/2014).
[102] The revised numbering will be chapter 17 § 19 (HE 46/2014).
[103] Juha Lappalainen, Todistuskeinot, p. 640, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

A journalist may refuse to answer a question on the identity of the source of the information upon which the communication was based, as well as a question which cannot be answered without identifying the source of the information which right is provided for in chapter 17 section 24 of the Code. Regardless of this protection of sources the witness may be ordered to testify in a case which is punishable by imprisonment for six years or more.[104]

According to the Church Act chapter 5 section 2, a priest has an absolute responsibility to keep secret what has been told to him in private confession. If someone confesses to a priest that he or she is preparing to commit a crime, the priest has the obligation to advise the person to contact the officials. If the person does not comply with this advice, the priest has to inform the officials about the future crime in advance but without disclosing the identity of the person in question. No principle can outbalance the priest's secrecy.[105]

A medical doctor and other medical personnel are bound to secrecy if the patient does not consent to revealing such information. As stated before, the doctor may be ordered to testify in a case which is punishable by imprisonment for six years or more.[106]

An attorney is bound to secrecy based on attorney-client privilege in respect of what the client has entrusted to him or her for the pursuit of the case, unless the client consents to such testimony. An attorney may be ordered to testify in a case which is punishable by imprisonment for six years or more. However, the counsel of the defendant cannot be ordered to testify even in cases concerning aggravated crimes.[107]

Also mediators are bound to secrecy. They may be ordered to testify in a case which is punishable by imprisonment for six years or more.[108]

6.3 Oath

Before giving his or her testimony, the witness can choose to give an oath or an affirmation (chapter 17 § 24).[109] If the witness has no religious affiliation, she or he gives an affirmation. As stated above, the possibility of giving a religious oath has been abolished in the revision of chapter 17.[110]

The wording of the oath is as follows: "I, <insert name>, do promise and swear by almighty and all-knowing God that I shall testify and state the whole truth in this case, without concealing it, adding to it or altering it."

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[104] The revised numbering will be chapter 17 § 20 (HE 46/2014).
[105] The revised numbering will be chapter 17 § 16 (HE 46/2014).
[106] The revised numbering will be chapter 17 § 14 (HE 46/2014).
[107] The revised numbering will be chapter 17 § 13 (HE 46/2014).
[108] The revised numbering will be chapter 17 § 11 (HE 46/2014).
[109] The revised numbering will be chapter 17 § 44 (HE 46/2014).
[110] KOM 69/2012, Todistelu yleisissä tuomioistuimissa, p. 56.

The wording of the affirmation is as follows: "I, <insert name>, do promise and swear on my honour and conscience that I shall testify and state the whole truth in this case, without concealing it, adding to it or altering it."

If a witness refuses to give an oath or an affirmation the court can use coercive measures such as place the witness under threat of a fine or by imprisonment up to six months (chapter 17 § 36).[111]

A person unfit to testify based on age or mental incapacity does not give oath, as stated above. Also grounds for refusing testimony based on professional status are discussed above.

6.4 Duties and Powers

The court has the duty to conduct the proceedings. Taking an oath or affirmation is one of these duties (chapter 17 § 31). In non-dispositive cases the party who has named the witness begins questioning after which the opposing party can place questions, and thereafter, the court (chapter 17 § 33).[112] Thus, cross-examination is applied in Finnish law of evidence. Leading questions are prohibited and the court shall disallow manifestly irrelevant, confusing and otherwise inappropriate questions.

The witness has to give testimony orally but may use written notes as memory aids (chapter 17 § 32).[113] Expert witnesses produce a written opinion (chapter 17 § 44)[114] before the main hearing and may be heard orally as a witness (chapter 17 § 49). Parties do not give oath or affirmation and what they testify in their own case is usually in legal praxis considered subjective which affects evidentiary value of such statements.

The penalty for perjury is imprisonment up to three years (Criminal Code chapter 15 § 1). The penalty for aggravated false statement in court is punishable by imprisonment for at least four months and at most six years (Criminal Code chapter 17 § 3. Criminal Code makes a distinction between false statement and negligent false statement. The latter is punishable by fine or imprisonment up to six months (Criminal Code chapter 15 § 4).

7 Taking of Evidence

7.1 General Statements

The main rule is that evidence has to be obtained in the main hearing (chapter 17 § 8a).[115] There are provisions for exceptions. The court summons the parties and witnesses to the court session if summoning the witnesses unless this has been entrusted

[111] The revised numbering will be chapter 17 § 63 (HE 46/2014).
[112] The revised numbering will be chapter 17 § 43-49 (HE 46/2014).
[113] The revised numbering will be chapter 17 § 47 (HE 46/2014).
[114] The revised numbering will be chapter 17 § 36 (HE 46/2014).
[115] The revised numbering will be chapter 6 § 2 (HE 46/2014).

to a party, as stated above. The court has the duty to conduct the proceedings which means that usually in the preliminary hearing the court together with the parties decides on the schedule for the main hearing.

A court may set a deadline to the parties for producing written documents and to name witnesses already in the preliminary stage. If a party does not follow such a deadline, he or she takes the risk of preclusion, as stated above. In case of preclusion no new evidence can be presented after the main hearing has begun, unless the party has a legitimate reason and avoids preclusion.

The question whether the court is bound to its decision on evidence is somewhat undecided in the Finnish doctrine. No unambiguous precedents exist. In legal scholarship the leading opinion was that the court is able to change its procedural decisions during the trial. This opinion resulted from the ban to appeal procedural decisions separately from the material decision. However, in the current literature opinions are emerging which consider that the court should be bound to its decisions as otherwise legal certainty and effective guidance are endangered. An intermediary opinion is that the court is bound to its decisions and these decisions should not be changed at least without a valid reason such as a change in the circumstances of the case etc. However, the situation is not clear.

Chapter 17 section 10 provides for the possibility to present evidence in advance for a case that is not yet pending.[116] The person who wishes for this, applies for the permission of a first instance court. The permission is granted if his or her rights depend on the admission and there is the danger that the evidence is lost or will be difficult to present later. Evidence may not be obtained in advance for the purpose of obtaining information on an offence. If somebody else's rights depend on the presentation of this evidence, he or she may be invited to be present for the hearing if necessary. No witness or expert witness may be obligated to testify in another court that the district court of his or her residence. This provision on obtaining evidence in advance is rarely applied.

7.2 Rejection of an Application to Obtain Evidence and Specifying Evidence

The court may reject evidence in some situations. First, evidence on notorious facts is not allowed (chapter 17 § 3).[117] Second, the court shall not admit piece of evidence that pertains to a fact that is not material to the case or that has already been proven, or if the fact can be proven in another manner with considerably less inconvenience or cost (chapter 17 § 7).[118] The court has an obligation to ground its decision to disallow evidence.

As discussed above, the revision of chapter 17 introduces the ban of illegal evidence and evidence obtained by torture.[119]

[116] The revised numbering will be chapter 17 § 61 (HE 46/2014).
[117] The revised numbering will be chapter 17 § 5 (HE 46/2014).
[118] The revised numbering will be chapter 17 § 8 (HE 46/2014).
[119] The revised numbering will be chapter 17 § 25 (HE 46/2014).

New evidence in the main hearing or in the higher instances is allowed in some cases when the party has a legitimate reason for not presenting the evidence before.

The parties have an obligation to specify their evidence, name their witnesses and legal facts they want to prove with each piece of evidence (chapter 5 § 20).

If there is an earlier final judgment it might have a res judicata effect on a later trial. If the earlier judgment does not concern the dispute at hand in the later proceedings, the facts established could have evidentiary value. The court may reject obtaining evidence in these situations if it considers it unnecessary.

7.3 The Hearing

Principles of orality, concentration and directness apply to obtaining evidence in the main hearing. Only the deciding judge or junior judges, i.e. lawyers who are completing a court training period at the district court in order to have the title of 'trained on the bench' (*varatuomari, vicehäradshövding*) and sit as judges on their own cases, are allowed to take evidence.

The court may decide to take evidence outside the main hearing in another court (chapter 17 § 8c).[120] Also, a party or a witness may be heard before the main hearing, if this is necessary in order to clarify a circumstance on which an expert witness is to be heard (chapter 17 § 48a).

In international evidentiary taking the testimony can be given before someone else than a judge.

There are rules in Finnish law of evidence on taking different types of evidence. The court may order that documentary evidence be admitted in the main hearing without reading it only if its contents are known to the members of the court, the parties agree to the same and the same may also otherwise be deemed appropriate (chapter 17 § 8a).[121]

The main rule that evidence must be presented in the main hearing has much bearing and evidence may not be obtained after concluding the main hearing. However, if the court after the conclusion of the main hearing finds it necessary to supplement the hearing in respect of a specific issue and if the issue subject to supplementation is simple or minor, the court may supplement the hearing by requesting a written statement on the issue from the parties. Otherwise the hearing may be supplemented by continuing the main hearing or by holding a new main hearing in the case (chapter 6 § 14).

[120] The revised numbering will be chapter 17 § 56-60 (HE 46/2014).
[121] As discussed above, this provision has been changed by the revision of chapter 17 to some extent.

The parties have the right to be present at the main hearing while the court obtains evidence but not an obligation, unless they have been summoned personally by the threat of a fine. Usually the parties are summoned to be personally present.

The court may not begin the main hearing in a party's absence, if his or her personal presence is essential (chapter 6 § 6). However, the party's unexcused absence from the main hearing in a civil case shall not prevent the admission of evidence. When evidence has been admitted regardless of the absence of a party, the evidence shall be readmitted in the presence of the party, unless there is an impediment. A party who is present shall be granted the opportunity to express his or her opinion about every piece of evidence presented to the court (chapter 17 § 9).[122]

Distinction between direct and indirect types of evidence is not made in Finnish law of evidence.

Audio and video conference may be used to obtain evidence from a distance when there is a synchronous link between the main hearing and the distance access point (chapter 17 § 34 a).[123] Such video or audio evidence may be obtained from abroad as well, if the other state approves this procedural act.[124]

7.4 Witnesses

The witnesses are summoned by the court if this is not entrusted to the party for some reason (chapter 17 § 26).[125] The witness is obliged to be present at the time of the main hearing by a threat of a fine (chapter 17 § 36).[126] The procedure of summons is provided for in chapter 11 of the Code and usually registered letters or such are used. A witness gives oath or affirmation before testifying. Witnesses are questioned individually. Parties do not need to adduce the written statement before the testimony and written statements are not usually approved as evidence.

The doctrine of preparing the witnesses has changed during the last decades. Earlier, it was not considered advisable that the counsel necessarily even discusses with the witness before the hearing. Nowadays it is approved that some preparation of witnesses is done by the legal counsel, but, extended coaxing of the witness is not accepted and affects the testimony's evidentiary value.

[122] The revised numbering will be chapter 17 § 1 (HE 46/2014).
[123] The revised numbering will be chapter 17 § 52 (HE 46/2014).
[124] See: Riikka Koulu, Videoneuvottelu rajat ylittävässä oikeudenkäynnissä, COMI, Helsinki 2010.
[125] The revised numbering will be chapter 17 § 41-42 (HE 46/2014).
[126] The revised numbering will be chapter 17 § 29, 62 (HE 46/2014).

7.5 Expert Witnesses

Provisions for hearing expert witnesses differ from those regulating other witnesses to some extent.[127] The code provides the court the power to name the expert witness, unless parties agree on the person (chapter 17 § 46).[128] Typically, the parties name the witnesses. If a party relies on an expert witness who has not been appointed by the court, the provisions on a witness apply to the same (chapter 17 § 55). Still, even if an expert is named by the party, there are specific obligations that apply.

If the court has appointed the expert, the court conducts the questioning and after this, the parties may place questions. If the expert is named by a party, he or she starts the questioning after which the opposing party and the court may place questions (chapter 17 § 33).

It is typical that the parties name their expert witnesses. If the court appoints an expert, parties have to be heard on the appointment (chapter 17 § 46). The court cannot appoint a different expert than the one parties agree on. In addition to appointing experts by the court and the parties, the parties may present private expert's opinion as evidence.

The Code does not regulate how the experts are chosen in detail. Chapter 17 section 44 that the court shall obtain a statement on this question from an agency, a public official or another person in the field or entrust the giving of such a statement to one or more experts in the field who are known to be honest and competent. Subsection 2 provides that if the law requires the use of expert witnesses in a specific case, the separate provisions on this apply. There is no specific list of experts that directs the court's choice.

An expert witness has to give a written substantiated statement based on the findings of his or her investigation. The court may allow the expert to give his or her statement orally (chapter 17 § 50).[129] In addition to the written statement, the expert will be heard orally if a party requests it or the court considers it necessary.

According to chapter 17 section 53, the expert is entitled to a reasonable fee for his or her work and compensation for necessary expenses.[130] This right is limited, if the statement is given by a holder of a public office or function. If the expert is appointed by the court, the parties are liable for the fee jointly. However, if the expert is appointed on the request of one party alone, he or she is liable alone. If the expert is appointed by the party alone, she or he is liable for the fee and the question of legal fees would be handled separately.

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[127] See generally, Juha Lappalainen, Todistuskeinot, p. 670, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.

[128] The status quo has not been changed by the revision of chapter 17. However, the role of expert witnesses has been clarified in the legislative process and in the revised norms. The revised numbering will be chapter 17 § 34-37 (HE 46/2014).

[129] The revised numbering will be chapter 17 § 34-37 (HE 46/2014).

[130] The revised numbering will be chapter 17 § 66 (HE 46/2014).

According to the principle of free assessment of evidence, the court is not bound to written expert's opinion or other written evidence, but instead, evaluates its worth as evidence on an *in casu* basis.

8 Costs and Language

8.1 Costs

According to the legal definition of chapter 21 section 8, compensable legal costs are the costs of the preparation for the trial and the participation in the proceedings, as well as the fees of the attorney or counsel. In addition, compensation shall be paid for the work caused by the trial to the party and for the losses directly linked to the trial.[131]

The party who has named the evidence is responsible for the occurring expenses (chapter 17 § 40).[132] However, the losing party is responsible for the winning party's litigation costs including costs for obtaining evidence after the judgment is given (chapter 21 § 1).

In some situations compensation to witnesses can be made in advance, but typically, the witnesses are compensated once the trial has ended.

Besides compensating witnesses, expenses may occur from obligation to present an original document at the court's session or from judicial inspection.

Compensation for appearing as a witness includes reasonable compensation for necessary travel and maintenance expenses as well as for loss of earnings (chapter 17 § 40).[133] A witness is entitled for advance payment from the private party who has named him or her and the amount of adequate advance is at the court's discretion. When the court has in a civil case called a witness on its own initiative, the parties shall be jointly and severally liable for the compensation.

Compensation may be paid from the state's funds in some circumstances (e.g. when the referring party is entitled to legal aid paid by the state) which are regulated separately (666/1972 State Compensation for Witnesses Act). The maximum compensation for loss of earnings and travel expenses are regulated by a Government's decree.

As stated above, an expert's appearance as a witness and compensation for his or her are regulated differently from other witnesses. Also an expert is entitled to advance payment, and when the expert has been appointed by the court the court may order that

[131] In general, see: Juha Lappalainen, Oikeudenkäyntikulut ja niiden korvaaminen, p. 779, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[132] The revised numbering will be chapter 17 § 65 (HE 46/2014).
[133] The revised numbering will be chapter 17 § 65 (HE 46/2014).

the advance payment to the expert witness is made from State funds (chapter 17 § 53).[134]

Official language of the proceedings is Finnish or Swedish and in some cases Sami. A person who does not speak any of these and wants interpretation has to take care of it at his or her own expense, unless the court orders otherwise (chapter 4 § 1).

The Regulation 1206/2001 is complemented by chapter 17 of the Code. There are no provisions about the requesting court's obligation to compensate expenses according to article 5 (2) of the Regulation.

The interface with Regulation 1206/2001 has been taken into consideration in the revision of chapter 17, as discussed above.

However, the above mentioned provisions apply to cross-border situations as well. Also, the Code does not list any additional costs which would occur from using videoconferencing technology. Regardless, the witnesses have the same right to compensation while obtaining evidence by video-conference than normally. The reimbursement of translation costs is decided in the final judgment.

If a party is receiving legal aid from the state's funds, State Compensation for Witnesses Act applies. In this act and in the decree given by the Ministry of Justice based on the act, specific amounts of compensation are regulated. Provisions on compensating the daily allowance based on the time used and the travel expenses by cheapest and most convenient method are very detailed. However, the act applies only to compensations that are paid by the state. There is not similar regulation in cases where the party who loses the case pays the other party's legal fees. However, these fees including the compensation to witnesses have to be reasonable. In the end, the court decides if the claim for legal fees is reasonable.

8.2 Language and Translation

According to the Code, the language of the proceedings is one of the official languages of Finland, Finnish or Swedish or in some cases Sami depending on the parties' mother language. If the party's native language is Finnish or Swedish but not the same as language of the proceedings, the court is responsible to ensure translation without costs to the party (423/2003 Language Act 18 §).[135]

The main rule is that in a civil case the party wishing translation to other than the official languages is responsible for its costs (chapter 4 § 2). However, the court must *ex*

[134] Juha Lappalainen, Todistuskeinot, p. 673, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[135] In general, see the expert's report on legal translation: Oikeustulkkauksen selvityshanke, Asiantuntijaryhmän raportti 2008.

officio ensure the interpretation for nationals of other Scandinavian countries.[136] Also, if a party is entitled to legal aid from the state funds, she or he is also entitled to needed translation and interpretation sevices without cost (257/2002 Legal Aid Act chapter 4 § 1). When the party organises interpretation at his or her own expense, she may chose freely an interpreter.

If the court appoints an interpreter, it always uses accredited interpreters which have experience from court room interpretation. The police and district courts have their own lists of acceptable interpreters and usually a degree in translation studies is required. However, membership in The Finnish Association of Translators and Interpreters is not a requirement. Drafting such lists is not organized and issues regarding the competence of legal interpreters remain.[137]

Written evidence has to be translated into Swedish or Finnish. In a dispositive civil cases the parties would be responsible for the translation costs which then would be allocated to the losing party in the final judgment as a part of litigation costs.

There are no provisions on appointing an interpreter when interpretation is necessary for hearing a witness. However, the court is responsible for conducting the proceedings in the last resort and thus, for effective access to justice, appointing an interpreter in this situation belongs to the court's discretion.

The witness is not a party in a case and therefore protection for his or her linguistic rights can likely be waived if the witness is able to give testimony in the language of the proceedings in which case the interpreter would not be necessary as the court's assistant. However, as stated above, the situation is somewhat vague currently and the court has a wide discretion.

Interpreter is not automatically appointed when the requesting court is taking evidence directly based on the Regulation. Same considerations apply than in national cases.

9 Unlawful Evidence

9.1 Illegally Obtained Evidence and Illegal Evidence

As a starting point, Finnish procedural law does not make a distinction between illegally obtained and illegal evidence. However, the revision of chapter 17 will change Finnish law of evidence on this matter. The ban of invocating unlawful evidence against the privilege of self-discrimantion has been formulated in the case-law of the Supreme Court and through the reform it will be introduced to legislation as well. The ban excludes evidence obtained by torture or by other illegal means from the accepted evidence. The reform is not ratified at the time of writing, although it has been passed

[136] Jyrki Virolainen, Periaatteet prosessioikeudessa, p. 230, in Dan Frände et al. (ed.), Prosessioikeus, 4th ed., Sanoma Pro 2012.
[137] Oikeustulkkauksen selvityshanke, Asiantuntijaryhmän raportti 2008, p. 13.

by the Parliament. The reform will most likely come into force in autumn 2015 or spring 2016.

According to the principle of free assessment of evidence, the main rule is that all evidence is accepted and issues related to obtaining the evidence have effect on its evidentiary value.[138] However, a distinction between limitations due to witness' professional secrecy (*todistamiskiellot*) and limitations in reclaiming evidence (*hyödyntämiskielto*).[139] The doctrine on professional secrecy and limitations in reclaiming evidence have been developed in national case-law and based on ECHR article 6 and on ECtHR's case-law concerning it. For example, if there has been a breach of fair trial principles in police investigation, the accused's narrative may not be used as evidence against him or her.[140] However, the limitation of using such evidence as in case 2012:45 applies only to evidence against the accused, instead, evidence supporting the accused's innocence cannot be limited. Also, such limitations cannot be applied in civil cases.

Neither does the Finnish law of evidence provide a normative solution to establishing the illegality of means of obtaining evidence.

10 The Report about Regulation 1206

The information about Finland in The Report about the Regulation 1206/2001 is not entirely accurate. Finland is a member in multilateral agreements which have provisions on obtaining evidence (namely, The Hague Convention of 1 March 1954 on Civil Procedure, The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Convention of 26 April 1974 between Sweden, Denmark, Finland, Iceland and Norway).

Finland has also bilateral legal assistance treaties with the United Kingdom (SopS 3/1934), Russian Federation and Ukraine (SopS 47–48/1980, SopS 82/1994) and Czech Republic (SopS 67–68/1981Hungary (SopS 39–40/1982) and Austria (SopS 29/1988). Most of these bilateral treaties are replaced by EU Regulation. The most important bilateral treaty with the Russian Federation is also losing its significance as Russia has become a member of the Hague Convention of 1970.

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[138] See Supreme Court decision 2011:91. In the case nursing staff had filed a police report based on a patient's narrative which he had given while committed to a psychiatric ward on the crimes he had committed. Although the personnel did not have a right to file the report due to their official secrecy, the medical certificates could be used as evidence in the criminal proceedings.

[139] Mikko Vuorenpää, Todistamiskiellot ja todisteiden hyödyntämiskielto, Oikeustieto 4/2009, p. 22.

[140] See Supreme Court deicsion 2012:45. In the case the defendant was found guilty of an aggravated drug offence partly based on the narrative he had given during police investigation. As it was uncertain whether the accused had waived his right to have an attorney present or understood the meaning of such waiver, the court held that the accused's right not to assist in discriminating himself had been violated and thus, the police reports could not be used as evidence. See also: Supreme Court decision 2013:25.

Table of Authorities

The Ministry of Justice is the competent central authority referred to in article 3 (3) of the Regulation 1206/2001.

The most important statute is the Procedural Code (oikeudenkäymiskaari, rättegångsbalken4/1734). An English translation of the Code following the legislative reforms up to 718/2011 can be found at: http://www.finlex.fi/en/laki/kaannokset/1734/en17340004/ - last visited 14.2.2014. The translation is used in this report when referring directly to the text of the Code.

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	Application for a summons *(Haastehakemus)*	Plaintiff *(Kantaja, Käranden)*	The plaintiff has the obligation to present the claim and the circumstances in which it is based. She or he must also name the evidence as far as possible. The plaintiff has to make the claim on litigation costs and court's jurisdiction (ch 5 § 2) and to supplement the application if requested by the court(ch 5 § 5). She or he bears the consequence of dismissal without considering merits if not supplemented (ch 5 § 6)	
	Interim order *(Väliaikaismääräys, interimiska beslut)*	The Court	The court is responsible, on the request of the plaintiff, of granting	

			an interim order without hearing the defendant (ch 5 § 7)	
2	Issue a writ of summons *(Haasteen tiedoksianto, delgivning)*	The court	The court is responsible to issue a writ of summons to the defendant (ch 11)	
3	Response *(Vastaus, svaromål)*	The defendant *(Vastaaja, svaranden)*	The defendant has to admit or challenge the claim, state the grounds for refusal and name the evidence as far as possible, make a claim on litigation costs, enclose the written documents when possible, enter a plea of inadmissibility (ch 5 § 10)	
4	Preparation *(valmistelu, förberedelse)*	The court and the parties	The court decides whether preparation is continued in writing or if the case is scheduled for a preliminary hearing or directly for main hearing (ch 5 § 15), parties are responsible to delivered requested additional written pleadings (ch 5 § 15a), the court has to inform the parties on the judge and phases of the case (ch 5 § 18)	
	A deadline for naming evidence the party wishes to refer to, Preclusion *(Valmistelun sisäinen prekluusio)*	The court and the parties	The court may set a deadline for preclusion and the parties have to present all evidence before this (ch 5 § 22)	
	Summary of claims, grounds and evidence *(Yhteenveto, sammanfattning)*	The court	The court drafts a summary of the case during preparation before the preliminary hearing (ch 5 § 24)	
	Preliminary session	The court and the	Decision on hearing	

	(valmisteluistunto, förberedelsesammanträde)	parties	expert witnesses, judicial inspection or presenting written evidence has to be done during preparation (ch 5 § 25), parties have to state their claims, grounds and evidence and to state their opinion on the adversary's case (ch 5 § 20), deciding the case without a main hearing (ch 5 § 27 and 27a).	
	Conciliation *(Sovinnon aikaansaaminen, förlikning)*	The court and the parties	The court has to further a settlement when possible (ch 5 § 26)	
5	The main hearing *(Pääkäsittely, huvudförhandling)*	The court and the parties	Duties stated in chapter 6 of the Code, obtaining evidence (ch 17), at the beginning the court must ascertain that the requirements for the main hearing apply (ch 6 § 6), hearing witnesses in case the main hearing is postponed (ch 6 § 8), conducting the hearing "The court shall ensure that the hearing of the case proceeds in a lucid and orderly manner [and] that the case is thoroughly considered and that irrelevant matters are excluded from the case (ch 6 § 2a)	
	Claims and statements	The parties	The parties have to state their claims orally and to comment on the opposing party's statement (ch 6 § 2)	

	Obtaining evidence	The parties, in some situations the court	Ch 17; parties are responsible for questioning (ch 17 § 33), conducting the hearing is the court's duty (ch 17 § 33) as well as summoning the witnesses (ch 17 § 26), questioning an underaged witness is the court's duty (ch 17 § 15) as well as taking the oath or affirmation (ch 17 § 28), protocol and recording of evidence is done by the court (ch 22)	
	Closing arguments *(Loppulausunto, slutplädering)*	The parties	The parties give their closing arguments before the main hearing is ended (ch 6 § 2)	
6	Consideration of the merits and assessment of evidence, giving the judgment	The court	Chapter 24, giving a grounded judgment based on the claims and evidence presented at the main hearing, appeal instructions (ch 25 § 3)	
7	Declaring the intent to appeal *(Tyytymättömyyden ilmoittaminen, Missnöjesanmälan)*	The parties	Declaration of the intent to appeal in 7 days from giving the judgment under threat of forfeiting his or her right to be heard (ch 25 § 5)	
7a	Leave to Continue Proceedings and Appeal to Court of Appeals *(Jatkokäsittelylupa, valitus, vastavalitus, tillstånd till fortsatt handläggning, besvär, motbesvär)*	The parties	In certain civil cases the parties have to deliver a request for a leave to continue proceedings (ch 25a) simultaneously with the appeal (ch 25 § 15), the opposing party has the option to file a counter-appeal (ch 25 § 14a-14c)	
	Proceedings in the Court of Appeals	The court, the parties	The responsibilities of the court and the	

	(Käsittely hovioikeudessa, handläggning I hovrätten)		parties is similar to district court, provisions in chapter 26; written response ch 26 § 3, preparation ch 26 § 7, main hearing ch 26 § 13-16	
7b	Appeal from District court directly to the Supreme court as precedent appeal *(Ennakkopäätösvalitus, prejudikatbesvär)*	The parties, the court	The parties can agree to appeal directly to the Supreme court in certain cases (ch 30a § 1), the leave to appeal is granted by the court if there is precedent value in the case, otherwise the district court's judgment becomes final (ch 30a § 2)	
8	Appeal to the Supreme Court *(Valituslupa, valitus Korkeimpaan oikeuteen, ansökan om besvärstillstånd, besvär)*	The parties, the court	After the case is decided by the Court of Appeals, the parties can appeal to the Supreme court (ch 30), the court may grant leave to appeal (ch 30 § 2-3), otherwise the Court of Appeals' judgment becomes final	
	Proceedings in the Supreme Court *(Käsittely korkeimmassa oikeudessa, handläggning i högsta domstolen)*	The parties, the court	Proceedings in the court (ch 30 § 4-21a)	
9	Extraordinary channels of appeal *(Ylimääräinen muutoksenhaku, extraordinärt ändringssökande)*	The parties, the court	In certain circumstances the judgment can be appealed without time limits, e.g. complaint on trial error (ch 31 § 1), Reversal of a final judgment due to criminal activity of the court or counsel (ch 31 § 7), Granting a new deadline (ch 31 § 17)	

1.2 Basics about Legal Interpretation in Finnish Legal System

There is no protocol for interpretation of substantive legal norms. The Ministry of Justice administrates an ejustice portal with translations of essential substantive acts which can be found at: http://www.finlex.fi/en/

The ejustice portal has also translations of the procedural acts.

1.3 Functional Comparison

Legal Regulation / Means of Taking Evidence	National Law	Bilateral Treaties	Multilateral Treaties	Regulation 1206/2001
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	Possible under chapter 17 § 8c of the Code "If the court decides that evidence be admitted in another court, the former shall submit a request on the same to the latter and at the same time briefly explain the case at hand and what is intended to be proven with the evidence."	Between Finland and Russia, applicable: "The parties give legal assistance to each other upon request in accordance with their own legislation by hearing witnesses"	Nordic Convention of 1970, no significant differences, there is a general obligation to testify in other Nordic courts (Act 349/1977)	The formalities of requesting legal assistance differ, but no significant differences to the procedure, except the possibility to apply the requesting court's lex fori in art 10(3)
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	Videoconferencing possible according to chapter 17 § 34a	No references to videoconferencing in the treaty	No references to direct hearing or to videoconferencing in the treaty in the Nordic Convention Hague Convention of 1970 and Permanent bureau's report on taking of evidence by videolink 2008: direct execution via videolink is possible	Specific reference to videoconferencing in art 10 (4)

Direct Hearing of Witnesses by Requesting Court in Requested Country	A witness can be heard outside the main hearing (ch 17 § 41)	No reference to direct hearing	No references in the Nordic Convention, the Hague Convention of 1970 requires that the requesting country's official is in the requested country	Possible according to articles 12 and 17

Legal Regulation / Means of Taking Evidence	**National Law**	**Bilateral Treaties**	**Multilateral Treaties**	**Regulation 1206/2001**
Hearing of Witnesses by Mutual Legal Assistance (Legal Aid)	Chapter 17 § 8d of the Code: "(1)A court that admits evidence on the request of another court shall determine the time for the admission of the evidence. (2) The court that admits evidence shall deliver the material compiled during the admission of evidence to the court where the main case is pending." Also Act 171/1921 on Legal Assistance	Same as answered above	Same as answered above	Formalities in the Regulation differ to some extent, no significant functional differences in comparison with national law
Hearing of Witnesses by Video-conferencing with Direct Asking of Questions	Possible, chapter 17 § 34a of the Code, as stated above	Same as answered above	As answered above, videolink can be used when applying Hague Convention of 1970	As answered above, no impediments
Direct Hearing of Witnesses by Requesting Court in Requested Country	No exact provisions, accepted in legal praxis	Same as answered above	Same as answered above	As answered above, no impediments

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