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Evidence Taking in Civil Procedure in the Light of the Amendment of the Code of Civil Procedure of 4 July 2019

Postępowanie dowodowe w procesie cywilnym w świetle nowelizacji Kodeksu postępowania cywilnego z dnia 4 lipca 2019 r.

SUMMARY

The paper pertains to the comprehensive amendment to the Polish Code of Civil Procedure of 4 July 2019, which covered, among others, the regulations concerning evidence in civil proceedings. The amendment influenced all the aspects of evidence procedure: means of evidence, taking of evidence, as well as its assessment. The author attempted to analyse the amended provisions through the essence of the influence that the evidence procedure has on the entire court examination proceedings, and in particular whether the amendment introduced any provisions improving the dynamics of civil procedure.

Keywords: civil procedure; evidence procedure; means of evidence; taking of evidence

INTRODUCTION

On 7 November 2019, a comprehensive amendment to the Polish Code of Civil Procedure of 4 July 2019[1] entered into force. It applies to almost all aspects of civil proceedings, from preparation of the case for examination, reinstatement of proceedings in commercial matters, to changes in court costs in civil matters. In the matter of evidence, the amendment covers the regulations regarding both the evidence taking procedure in general and the regulation of specific types of evidence.

[1] Hereinafter: the Amendment.

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Evidence taking is an integral part of civil proceedings. Its correct and reliable conduct allows finding facts relevant to the resolution of the case in accordance with the actual state of affairs, which results in the issuing of a fair judgement by the court[2]. The goal set for the evidence-taking proceedings is achieved through procedural steps of the parties and participants of the proceedings carried out under the control of the court[3].

In view of the importance of the evidentiary proceedings for the correct resolution of the case in the examination proceedings, the literature on the subject has emphasized that the regulations concerning its course should be built with due caution and prudence. The analysis of the regulations in force justified the conclusion that the provisions regarding the course of evidence-taking proceedings and specifying the manner in which individual pieces of evidence are taken were constructed in detail and were characterised by formalism[4]. In science, however, it was pointed out that evidentiary proceedings were characterised by conservatism of solutions and conservatism in approaching changes. For this reason, attention was drawn to the need to "modernise" the evidentiary proceedings, stating that the then current regulations did not reflect modern realities, first and foremost in terms of technology[5]. However, there were also views according to which the previous regulation had ensured the effectiveness of evidentiary proceedings and the lack of modifications in this respect was not perceived as a shortcoming[6].

The legislature expressed his position regarding the need to modify the provisions on evidence in the explanatory note to the draft of the aforementioned Act amending the Code of Civil Procedure[7]. Objections formulated there as to the current shape of evidence-taking proceedings in civil cases concerned mainly its obsolete form in comparison with contemporary expectations. Therefore, the need to harmonise the terminology and "sort out" the provisions governing evidentiary proceedings was emphasized. The need for improvement has been indicated as the purpose of the changes being introduced. This goal is to be achieved by simplifying some institutions, greater involvement of the parties in the process of gathering

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[2] Resolution of the General Assembly of the Supreme Court of 15 July 1974, Kw. Pr 2/74, containing direction guidelines on the further increase in the level and efficiency of court proceedings, OSNCP 1974, No. 2, item 203.

[3] K. Piasecki, *System dowodów i postępowanie dowodowe w sprawach cywilnych*, Warszawa 2012, p. 311.

[4] E. Rudkowska-Ząbczyk, [in:] *Dowody w postępowaniu cywilnym*, red. Ł. Błaszczak, K. Markiewicz, E. Rudkowska-Ząbczyk, Warszawa 2010, p. 288 ff.

[5] B. Kaczmarek-Templin, *Dowód z dokumentu elektronicznego w procesie cywilnym*, Warszawa 2012, p. 18 ff.

[6] K. Piasecki, *op. cit.*, p. 311.

[7] Explanatory note for the draft Act on amendment of the Code of Civil Procedure and certain other acts, Sejm of the 8th term of office, Sejm Paper No. 3137, p. 49, hereinafter: Explanatory Note.

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evidence[8], time restrictions in the presentation of evidence, or creating a new type of witness (the so-called witness-expert). As regards the reintroduced separate proceeding in economic matters, the possibility of concluding the so-called evidentiary agreement[9]. The changes covered the regulations concerning means of evidence, the manner of taking evidence and its assessment[10].

CHANGES IN THE RULES ON THE SUBJECT AND ASSESSMENT OF EVIDENCE

As regards changes aimed at harmonising terminology, the removal of imprecise expressions or the elimination of practical interpretative difficulties, these changes are mainly of technical and arranging nature. As an example, the change in the wording of Article 224 § 2 CCP[11], which is located outside Chapter III entitled "Evidence", but is in close association with it. That provision governs the closure of the trial before the conclusion of the evidence taking. The provision has so far provided for that the closing of the trial could also take place where evidence is to be examined by an appointed judge or a requested court, or "where evidence from the file or explanations provided by a public administration body is to be examined

[8] It should be mentioned that as a result of the Amendment, Articles 207 and 217, which set out the time frame for parties to submit requests to consider evidence, were repealed. Currently these regulations are contained in Articles 205^{12} and 205^{3}. The former specifies until when a party may present claims and evidence depending on whether a preparatory meeting has been set. The second sets out the conditions for the exchange of further preparatory pleadings between the parties. The legislature seeks to make the whole evidence concentrate at the time of the approval of a trial plan (or at the moment of closing the trial). Pleadings may be exchanged between the parties only by order of the presiding judge and where the complexity of the case or accounting matters so requires. It is argued in the scholarly opinion that there has been a strengthening of the preclusion system and even that it is modelled on separate proceedings in economic matters. See K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 475 ff.; M. Kłos, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz. Art. 205^{1}–424^{12}*, red. A. Marciniak, Warszawa 2019, p. 45.

[9] Regarding the separate procedure in economic matters introduced by the Amendment, which due to the volume of the study will not be discussed herein, Article 458 (9) CCP should be mentioned. According to § 1 of this provision the parties may agree to exclude certain evidence in the proceedings in a case under a specific legal relationship established on the basis of an agreement (evidentiary agreement). As it is stated in the literature, this is a breach of the existing rule that the provisions on evidence taking is not of a default rule character. More broadly see J. Misztal-Konecka, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz. Art. 205^{1}–424^{12}*, p. 175.

[10] Ł. Błaszczak, [in:] *Dowody i postępowanie dowodowe w sprawach cywilnych. Komentarz praktyczny z orzecznictwem. Wzory czynności sądowych i pism procesowych*, red. Ł. Błaszczak, K. Markiewicz, Warszawa 2015, p. 15.

[11] Articles further referred to herein without the legal act specified are articles of the Code of Civil Procedure.

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and the court deems the trial regarding that evidence to be unnecessary". In the context of that provision, there were doubts as to the term "evidence from the file"[12]. The Supreme Court's position in this matter has undergone a sort of evolution[13]. Initially, the judicature was on the opinion that the "evidence from the file" could only be treated as a material of auxiliary nature[14]. In the judgement of 12 December 2005, the Supreme Court expressly stated that the evidence from the file did not exist[15]. A more moderate view was expressed in the judgement of 30 May 2008[16], which concluded that the taking of evidence from the file was not ruled out. This possibility was also confirmed in the judgement of 19 December 2013[17]. In the new wording of Article 224 § 2, the concept of evidence from the file does not exist any more, and this provision states that a trial can also be closed where evidence has yet to be examined by an appointed judge or a requested court, "evidence from a document drawn up by a public administrative body or contained in its files, or evidence from a document in court files or bailiff's files, and the court deems the trial on that evidence to be unnecessary". Therefore, this provision, replacing the vague term of "evidence from the file", lists three categories of evidence that may be examined by the court after the trial has been closed, namely "evidence from a document drawn up by a public administrative body", "evidence contained in the files of a public administrative body" and "evidence contained in the files of a court or bailiff". The reasonableness of the change in the wording of Article 224 § 2 does not raise objections. It should also be noted that the inclusion of the "evidence contained in the files of a court or bailiff" in Article 224 § 2 extends the scope of evidence with regard to which a trial may be unnecessary. In that respect, the change in question is of a strictly substantive nature and the modification of the provision seems to be justified.

On the other hand, the reasonableness of rephrasing the wording of the provisions, which consists in replacing the word "circumstances" with the word "facts", raises fundamental doubts. The need for such a change was being justified by the need to eliminate from the legislation the expression "factual circumstances", perceived as a vague term[18]. This change does not entail any substantive modification of the relevant regulations, and therefore is only of a "cosmetic nature". As a re-

[12] J. Górowski, [in:] *Kodeks postępowania cywilnego*, t. 1: *Komentarz. Art. 1–366*, red. A. Zieliński, K. Piasecki, Warszawa 2016, p. 1068.

[13] E. Stefańska, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Art. 1–505[38]*, red. M. Manowska, Warszawa 2015, p. 656 ff.

[14] Resolution of the Supreme Court of 15 July 1974, Kw Pr 2/74, OSNCP 1974, No. 12, item 203.

[15] Judgement of the Supreme Court of 21 December 2005, IV CK 320/05, Legalis No. 124559.

[16] Judgement of the Supreme Court of 20 July 2007, I CSK 134/07, Legalis No. 128069.

[17] Judgement of the Supreme Court of 19 December 2013, II CSK 176/13, Legalis No. 819277.

[18] Explanatory Note…, p. 50.

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sult, numerous provisions have been amended (Article 126 § 1 (5), Article 187 § 1 (2), Article 210 § 2, Article 339 § 2, Article 485 § 1, Article 499 (2)), the wording of which has the tradition dating back even as far as to the former Code of Civil Procedure of 1930. Nonetheless, the wording of the regulation in a single piece of legislation should be assessed positively. However, it seems that the reasonableness of such modifications to the provisions that have a long tradition should result from actual difficulties with interpretation, which was not the case here[19]. None of these provisions has previously raised doubts, either among scholars in the field[20] or in judicature[21]. The notion of "factual circumstances" was understood as the basis for the statement of claim[22]. Thus, the same meaning should be attributed to the notion of "facts" or "factual basis"[23]. The above means that all these words are treated as synonyms. In this situation, such a modification does not seem to be necessary, as there are no real reasons for this change[24]. Moreover, the unification of regulations should be made on a consistent basis. For evidence taking procedure, the established scholarly opinion points to the need to unify the terminology in other provisions which were not regulated by the Amendment. An example would be the term "presentation of evidence" used in Article 3. As it has been argued in the literature[25], other provisions of the Code of Civil Procedure use interchangeably the phrases "presentation of evidence", "indicating the evidence", "citing the evidence" or "invoking the evidence"[26]. In fact, as a result of the amendment of Article 127 and the repeal of Articles 217 and 258, the terminological diversity in this respect has been reduced. However, this does not result from the intended legislature's action, but a "side effect" of changes made for a different purpose.

Among the amended provisions on the subject and assessment of evidence, the most prominent is the modification of Article 228 defining facts that do not require evidence in civil proceedings. According to the current wording of this provision, evidence was not required for notorious facts and facts known to the court *ex officio*. As it was assumed, notorious facts are facts that are known to the average

[19] A. Jakubecki, *Opinia o projekcie ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (projekt z dnia 27 listopada 2017 r.) sporządzona na zlecenie Ośrodka Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych*, Warszawa 2018, https://bit.ly/2P3j-TqM [access: 9.12.2019].

[20] A. Zieliński, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. A. Zieliński, Warszawa 2017, p. 601 ff.

[21] Judgement of the Court of Appeal in Warsaw of 15 November 2017, I ACa 1377/16, Legalis No. 1714672.

[22] P. Rylski, [in:] *Dowody i postępowanie dowodowe w sprawach cywilnych…*, p. 387.

[23] B. Czech, [in:] *Kodeks postępowania cywilnego*, t. 1: *Komentarz. Art. 1–366*, red. A. Zieliński, K. Piasecki, Warszawa 2016, p. 835.

[24] A. Jakubecki, *op. cit.*, p. 26.

[25] K. Kołakowski, *Dowodzenie w procesie*, Warszawa 2000, p. 19.

[26] E. Rudkowska-Ząbczyk, *op. cit.*, p. 298.

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citizen coming or residing in the locality where the court is based. As for the facts known to the court *ex officio*, this term was understood as facts found out by the judge in the course of his or her official duties[27]. As a result of the Amendment, a new category of facts that do not require evidence has appeared in Article 228 § 2. This category covers facts "about which information is publicly available". According to the Explanatory Note, the reason behind introducing the regulation is the "computerisation and globalisation of information flow"[28]. The grounds for the Amendment are laconic, which can potentially cause difficulties with interpretation[29]. It seems, however, that the provision refers to such facts, which are not notorious in the traditional sense, but due to universal access to databases *via* the Internet or other media, can be deemed facts that do not require evidence in a civil trial[30]. However, the concept of "publicly available information" is, beyond any doubt, vague and will cause problems in practice. In view of the above, the solution that the court should draw the parties' attention to such facts (Article 228 § 2) is reasonable.

As a "side effect" of the Amendment to Article 228, the wording of § 1 of this provision was also modified. A mention was added to it, that the court considers commonly known facts even when not invoked by the parties. The sense of this change is doubtful when one takes into account the understanding of "commonly known facts" in legal science[31].

CHANGES IN PROVISIONS GOVERNING PROCEDURAL ACTIVITIES OF THE PARTIES AND THE COURT IN EVIDENCE TAKING PROCEEDINGS

The change in Article 210 § 2, which establishes the burden for the parties to make a statement concerning the claims made by the opposing party, is in close connection with evidence taking. The original wording of the provision was the opponent's assertions "concerning factual circumstances". Currently, the provision refers to claims concerning facts. As noted, this change is of a cosmetic nature. What

[27] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 514 ff.

[28] Explanatory Note…, p. 52 ff.

[29] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, red. J. Gołaczyński, D. Szostek, Warszawa 2019, p. 188 ff.

[30] M. Malczyk, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian*, red. T. Zembrzuski, t. 1, Warszawa 2019, p. 585 ff.; M. Rejdak, [in:] *Kodeks postępowania cywilnego*, t. 2: *Komentarz. Art. 205^1–424^{12}*, p. 150 ff.

[31] A. Jakubecki, *op. cit.*, p. 27.

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is more important, however, is that, according to the new wording of Article 210 § 2, when making a statement as to the opponent's claims, the party is obliged to "specify" the facts it denies. As is well known, the denial of the opponent's claims regarding a fact makes this fact contentious and requires proof (Article 229 *a contrario*). However, the practice of denying any claims made by the opponent, unless the fact has been expressly admitted by this party, has become widespread[32]. This approach distorted the legislature's original assumptions about the importance of admitting and denying the facts in the proceedings. The modification to the content of Article 210 § 1 will "force" a change in the said practice. However, doubts concern whether the new regulation has been properly situated. Its meaning goes beyond the provisions on the trial. Perhaps, the regulation in question may have been included in the rules on the subject and assessment of evidence, after Article 230.

As part of making more specific the rules governing evidence taking, a new Article 235^1 has also been introduced, according to which: "In the request for considering the evidence, the party is obliged to indicate the evidence in such a way as to enable it to be carried out and to identify and specify the facts to be demonstrated with this evidence". It is a provision which, in general, while referring to all the means of evidence, is intended to regulate the correct structure of the evidence request[33]. It is desirable that the party pointing to certain evidence clearly indicates the facts to be established[34]. The introduction of a provision which explicitly defines the rules of constructing requests for considering evidence has been positively welcomed in the literature[35]. However, it must not be forgotten that it is the court's power to decide whether to accept these requests. The court has the tools to oblige the parties to make the evidence theses more detailed. It, therefore, appears that the introduction of that provision, despite its arranging nature, will not change much in the course of the evidence taking procedure.

In view of the introduction of Article 235^1, the provisions governing the formulation of requests for admission of individual means of evidence have been repealed (Article 258 – evidence from witness testimonies, Article 279 – expert opinion evidence). It seems that, due to the different nature of the types of evidence mentioned, the abandonment of the specific rules goes too far. For example, when requesting the admission of witness testimonies, it is necessary to provide, apart from witness' name, also their address in order to serve the summons to the hearing.

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[32] K. Flaga-Gieruszyńska, A. Zieliński [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 486; S. Sołtysik, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych*…, p. 563.

[33] S. Jaworski, *Kodeks postępowania cywilnego. Komentarz do zmian*, Warszawa 2019, p. 166 ff.

[34] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 531.

[35] K. Górski, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Art. 1–505[39]*, red. T. Szanciło, Warszawa 2019, p. 910 ff.

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Under the new legislation in force, in the absence of a provision, this issue may raise doubts. The problem can arise especially if the requests for considering evidence are submitted by the party pleading before the court on one's own, without a professional legal representative.

There is also a great doubt about the new obligation imposed on the parties in Article 242[1]. According to that provision: "A party who has requested a summons of a witness, an expert or another person shall ensure that the person appears within the prescribed time limit and the place, in particular to notify him or her of their obligation, time and place of appearance". The failure of witnesses to appear at the trial is a problem which, in practice, leads to extending the whole procedure. However, the content and meaning of Article 242[1] raise fundamental concerns. First of all, the provision does not explain how the party is to "induce" those persons to appear at trial[36]. The Explanatory Note to the draft act states that, by introducing the legislation in question, the party to the proceedings will become "jointly responsible for the smooth course of the evidence taking"[37]. However, there is no explanation regarding the consequences borne by a party that has failed to adhere to the obligation[38]. The doubts concern, for example, whether it will be possible, in the event of failure to appear at a hearing notified by a witness party, to impose a disciplinary penalty under Article 274 not only on the witness, but also on the party, since the party is "jointly responsible" for the appearance of the witness[39]. It seems that there is no obstacle to consider such conduct of a party as an abuse of procedural law within the meaning of Article 4[1], and consequently apply to a party who fails to comply with the obligation in question, the measures referred to in Article 226[240]. The literature points to doubts on the question of who should be understood as "another person" as referred to in Article 242[1] beside the witness and the expert[41].

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[36] K. Ziemianin, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych…*, p. 622.

[37] Explanatory Note…, p. 56 ff.

[38] K. Górski, *op. cit.*, p. 931.

[39] J. Misztal-Konecka, *op. cit.*, p. 234.

[40] Article 4(1) added under the Amendment prohibits a party from abusing procedural rights. According to this provision the rights of the parties and participants in the proceedings, provided for in the procedural provisions, may not be used contrary to the purpose for which they were established (abuse of procedural law). It seems that the issue of possible abuse of procedural law in evidence taking proceedings will primarily arise in the context of the initiative to propose evidence. It will become the weapon of the opposing party to challenge evidentiary requests submitted by the other party. An allegation of abuse of a procedural right by a party may also concern "undue" compliance with the obligation under Article 242[1] or party's failure to submit the preparatory pleading within the prescribed time limit. See P. Feliga, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Art. 1–505[39]*, red. T. Szanciło, Warszawa 2019, p. 33.

[41] S. Jaworski, *op. cit.*, p. 172.

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The amendments also affected the rules relating to receiving an affirmation (oath) taken by people appearing before a court (e.g. witnesses, experts). The new Article 242^2 states that only the court or an appointed judge may receive an affirmation, and § 2 of this Article contains the content which was previously contained in the repealed Article 270. Under Article 270 it was apparent that, in the event of a re-examination of a witness, the witness was reminded of the previously made affirmations. These changes seem to be of secondary importance.

However, there are doubts as to the reasonableness of modifying the provisions on the activities of the court in evidence-taking proceedings, in particular the issue of omission of evidence by the court[42] and the new regulation of the content of the decision on admission of evidence.

The regulation of the basis for the court's omission of evidence contained in Article 235^2 was inspired by the regulations existing in criminal procedure (Article 170 § 1 of the Polish Code of Penal Procedure)[43]. The legislature's intention was to "sort out" the circumstances justifying the omission of evidence in civil proceedings and indication that this requires the issue of a decision[44]. In § 1 of this provision, six situations are enumerated, the occurrence of which leads to the omission of evidence. According to this provision, the court may, in particular, omit the evidence: 1) the examination of which is ruled out by a provision of the Code; 2) intended to demonstrate a fact which is undisputed, irrelevant to the outcome of the case or proven as claimed by the applicant; 3) not useful to prove a given fact; 4) impossible to examine; 5) intended only to prolong the proceedings; 6) where the party's application does not comply with the requirements of Article 235^1 and the party has not remedied the defect despite being summoned to do so. However, § 2 indicates that a decision on the refusal to examine the evidence should specify on what grounds the court omits the evidence.

The new rule on the content of the request for considering evidence (Article 235^1) is supplemented with a change in the wording of Article 236 relating to the court's decision on admission of evidence[45]. Article 236 with the amended wording was intended to mirror Article 235^1. All in all, these are not significant changes. The arguments contained in the Explanatory Note, according to which it was necessary

[42] The legislature has stipulated in Article 235^2 that the court "shall ignore the evidence", not "shall dismiss the request for considering the evidence". At the same time, section 2 of the provision stipulates that the court shall issue a decision on the refusal to present the evidence. In view of this, it seems that the court, by issuing a decision in which negatively responses to a request for considering evidence, submitted by a party, in fact "dismisses the request for considering evidence". On the omission of a request for considering evidence, see J. Misztal-Konecka, *op. cit.*, p. 201.

[43] Explanatory Note…, p. 55.

[44] K. Górski, *op. cit.*, p. 915; A. Budniak-Rogala, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych…*, p. 593 ff.

[45] K. Górski, *op. cit.*, p. 914 ff.

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to rephrase the expression "decision to examine the evidence" to "decision to admit evidence", are not convincing as the original term was perfectly understood in practice. Since the modification of the wording of Article 236 was considered necessary, it was worth considering using the term "decision on the admission and examination of evidence", which could dispel any doubts on this issue. However, as regards § 2 of that provision, it states as follows: "If the issuance of the decision on the admission of evidence has been requested by the party, it is sufficient to refer in the decision to the content of this request". This regulation regards only a situation where the court accepts the party's request for considering evidence in its entirety[46]. If, therefore, the procedural body considers the party's arguments as to the taking of evidence to be valid in its entirety, it is possible to refer to the statement of reasons provided by the party without the court having to draw up further statements of reasons. Therefore, this provision is aimed at reducing the procedural obligations of the court.

CHANGES IN INDIVIDUAL MEANS OF EVIDENCE

1. Documentary evidence

The provisions on documentary evidence have been supplemented by a new Article 243^2, according to which: "Documents contained in or attached to the file constitute evidence without issuing a separate decision. The court shall issue the decision, omitting evidence from such a document". The rationale behind the introduction of this regulation, as indicated in the Explanatory Note, results from the need to "sort out" the court's activities relating to the taking of documentary evidence. In accordance with Article 243^2, the decision to accept documentary evidence is issued only if that evidence is being omitted by the court[47]. The argument for such a regulation was the need to "exempt" the court from the need to read documents twice: for the first time when accepting the evidence for consideration, and for the second time in examining the evidence[48].

However, it has been argued in the literature[49] that in practice there is no situation of double review of the evidence by the court. If a party requests for the examination of documentary evidence, it is obliged, in accordance with Article

[46] *Ibidem*, p. 922.

[47] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 542.

[48] Explanatory Note…, p. 58.

[49] J. Sadomski, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Art. 1–505[39]*, red. T. Szanciło, Warszawa 2019, p. 936 ff.

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235^1, to "specify the evidence in such a way as to enable it to be examined and to list the facts to be established by that evidence". Therefore, the party indicates what the evidence refers to, while the court decides on the basis of the request for considering evidence and not the evidence itself. At the stage of the decision on the admission of evidence, the court does not examine the evidence, but the very "arguments" of the party that there is a need for the examination of the evidence and it is relevant to the case being heard. This is due to the clear separation between the examination of the request for considering the evidence from the examination of the evidence requested therein. On the other hand, the abandonment of the issuance of decisions on the admission of documentary evidence contained in the case file legalizes, in a sense, the existing practice. Both in the literature and case-law, there have been arguments that, in practice, the courts did not issue such decisions for admitting evidence. As noted by J. Sadomski, as a result of that amendment, the lack of a decision on the admission of documentary evidence will no longer constitute procedural misconduct[50]. This probably is the real meaning of introducing Article 243^2. However, it must be kept in mind that, as a result of that regulation, the opposing party will be completely deprived of the possibility of expressing its position as to the appropriateness of the examination of the evidence[51]. In addition, the introduction of Article 243^2 is read by scholars in the field as an inconsistency of the legislature, since, when issuing a negative decision on the admission of documentary evidence, the court will be required to double procedural activities[52], that is to say to read the documents, which it intends to omit.

2. Evidence from witness testimonies

As regards the evidence from witness testimonies, one should first note the change in Article 263, which regulates the examination of a witness at his or her place of stay. According to the new wording of this provision: "A witness who cannot appear, when summoned, because of illness, disability or another hindrance that cannot be remedied, shall be examined at his or her place of stay". In the cited provision, apart from changes of a structural (terminological) nature (the term "lameness" has rightly been replaced by the term "disability"), a new circumstance is introduced allowing the witness to be heard outside the court building. This is "another hindrance that cannot be remedied"[53]. This modification meets practical needs. However, the notion of another hindrance that cannot be remedied has

[50] *Ibidem*.

[51] A. Jakubecki, *op. cit.*, p. 29.

[52] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy…*, p. 196 ff.

[53] K. Ziemianin, *op. cit.*, p. 627 ff.

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a broad and indefinite character and should be interpreted so as not to abuse the regulation in question.

An important novelty in the Polish civil procedure is the introduction in the regulations on the trial of the possibility for a witness to testify in writing. Article 271[1] states that: "A witness testifies in writing if the court so decides. In this case, the witness takes the affirmation by signing the text of the affirmation. The witness shall submit the text of the testimony to the court within the time limit set by the court". Until now, such regulation has only existed in the provisions on the European Small Claims Procedure. The transposition of this regulation to the general provisions on evidence from witness testimonies is a breakaway from the current principle that this evidence is taken orally[54]. Taking written testimonies by witnesses is widely used in arbitration proceedings[55].

This provision will undoubtedly facilitate the examination of evidence from witness testimonies and can help streamline the process. It should be borne in mind, however, that it limits the directness of evidence from the witness testimonies[56], according to which the court should directly see the testifying witness. Moreover, the provision does not clearly indicate situations in which there is the possibility of testifying by a witness in writing[57]. Hence, it must be assumed that this depends in each case on the decision of the court[58]. Having in mind the principle of directness of civil procedure, it is therefore necessary to postulate that this option be used in a moderate way. Admission of written testimony should take place in exceptional cases, where it will have a real impact on the promptness of the proceedings, and at the same time will not affect the principle of directness. Scholars in the field argue that the analysed regulation is too laconic, which may cause problems in practice. This applies in particular to the prior preparation of questions by parties to the proceedings[59].

In the provisions on evidence from witness testimonies, Article 272[2] was also added, according to which: "[…] if the court doubts the witness' ability to perceive or communicate observations, it may order the witness to be questioned with the participation of an expert physician or psychologist, and the witness cannot object to this". This provision, modelled on the regulation of the Code of Penal Procedure (Article 92 § 2) introduces the possibility of questioning a witness in the presence of an expert in a situation where doubts are raised as to the ability of the former to perceive or communicate. It is clear that this regulation gives to the court an im-

[54] P. Rylski, *op. cit.*, p. 180.

[55] M. Dziurda, [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych…*, p. 633.

[56] K. Górski, *op. cit.*, p. 985 ff.

[57] M. Dziurda, *op. cit.*, p. 632 ff.

[58] S. Jaworski, *op. cit.*, p. 184 ff.

[59] A. Jakubecki, *op. cit.*, p. 29.

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portant "instrument of control" as to witness testimonies so that they are limited to those "useful" for the outcome of the case. At the same time, the scholarly opinion indicates that the conditions contained in the provision are defined in a broad sense and it will be the court's responsibility to decide whether the presence of an expert physician or psychologist is justified during the questioning[60].

The questioning of a witness in the presence of an expert should be of an exceptional nature if the court "doubts the witness' ability to perceive or communicate observations". It is absolutely unacceptable that the party requesting the questioning of a witness should immediately indicate whether the witness can be questioned without the presence of an expert. The presence of an expert during the questioning should be as least burdensome for the witness as possible. The expert's active participation in the questioning, e.g. by asking questions, seems debatable. It must be noted that Article 272[1] does not give the possibility of examination of the sanity of the witness in general, but merely provides the basis for assessing whether his testimony may be relevant for the outcome of a particular case[61].

In conclusion, the amendment introducing a "special" procedure for questioning a witness should be assessed positively, due to the fact that the court does not have the knowledge to independently assess the mental condition of the witness. However, the court should approach this method of hearing in a manner extremely prudent and with the conviction that this is essential for the settlement of the case.

3. Evidence from expert's opinion

The main objective of the changes to the rules on evidence from expert's opinion was to streamline and speed up the obtaining of expert opinions in the civil procedure, which, as is apparent from the Explanatory Note, constitutes a problem in practice. However, it is doubtful whether the regulation indeed contribute to the achievement of that objective. It does not seem that this objective will be achieved by Article 278[1] added to the provisions on the evidence from expert's opinion. That provision states that the court may admit evidence from an opinion drawn for a public authority in other proceedings provided for by law. Thus, that provision takes account of the use of extrajudicial opinion in civil proceedings, provided that this opinion was drawn up "for a public authority". This applies in particular to the opinions drawn up, e.g. for the public prosecutor in criminal proceedings[62] or for

[60] K. Górski, *op. cit.*, p. 989 ff.

[61] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy…*, p. 202 ff.

[62] S. Jaworski, *op. cit.*, p. 188 ff.

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a tax authority in tax proceedings[63], etc. On the other hand, the provision does not apply to opinions drawn up for a party to the proceedings.

The regulation in question breaks with the rule adopted so far that evidence from the expert's opinion drawn up in another case may not be examined[64]. It is being pointed out, however, that the new solution is beneficial due to the speeding up of the proceedings and excluding the need for two expert opinions coinciding in their contents[65]. However, it should be borne in mind that while, for example, the expert opinion drawn up in criminal proceedings may be used in civil proceedings (e.g. in the trial for the compensation for a road accident)[66], the opinion already drawn up for the purposes of tax proceedings may not comply with the requirements of the opinion for bankruptcy proceedings (e.g. due to different method of valuation by a court-appointed expert)[67]. Therefore, it is always necessary to consider whether the "other opinion" referred to in Article 278[1], retains in the civil procedure the value of an expert's opinion, or should rather be treated as evidence from a private document, which changes things[68]. A strict demarcation can sometimes prove to be difficult.

The amendment to the Code of Civil Procedure does not change the rule that an expert can be excluded at the request of a party, and the exclusion of an expert by operation of law is ruled out[69]. A novelty is that in Article 281 appeared § 2, according to which the court holding the case decides to exclude the expert. That provision removes the previous doubts whether it is the court of higher instance that have the power to exclude an expert or not[70]. The provision also points out that the exclusion follows the hearing of the parties and the expert, which requirement may, after all, be waived if this were to lead to excessive delay in the proceedings. The regulation should be assessed positively, mainly for its flexibility[71].

A provision that refers to Article 281 is Article 290 § 5, which states that a party may request the exclusion of a person appointed by a scientific or R&D institute to draw up an opinion. For this purpose Article 281 is applied *mutatis mutandis*. The

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[63] L. Korczak, [in:] *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy…*, p. 206.

[64] Cf. judgement of the Supreme Court of 10 December 1998, I CKN 922/97, Legalis No. 46212.

[65] M. Łochowski, [in:] *Kodeks postępowania cywilnego. Komentarz*, t. 1: *Art. 1–505[39]*, red. T. Szanciło, Warszawa 2019, p. 1005 ff.

[66] *Ibidem*; L. Korczak, *op. cit.*, pp. 206–207.

[67] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz*, red. K. Flaga-Gieruszyńska, A. Zieliński, Warszawa 2019, p. 586 ff.

[68] A. Jakubecki, *op. cit.*, p. 30.

[69] A. Klich, [in:] *Biegły w postępowaniu cywilnym i karnym. Komentarz praktyczny z orzecznictwem, wzory pism procesowych i orzeczeń*, red. K. Flaga-Gieruszyńska, Warszawa 2017, p. 44 ff.; S. Jaworski, *op. cit.*, p. 190.

[70] Cf. judgement of the Supreme Court of 8 January 2004, I CK 17/03, Legalis No. 63720.

[71] M. Łochowski, *op. cit*., p. 1009 ff.

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sense of introducing this rule is expressed in the removal of the doubts that exist in practice as to who should be excluded when an opinion is requested by an institute. It is worth noting that originally in the Draft Act, the content of Article 290 § 5 was situated in Article 281 § 2. Eventually, however, the legislature decided to regulate the exclusion of the person appointed to draw up an opinion by a scientific or R&D institute, in the provision governing the opinion of that institute.

As regards the changes relating to the affirmation to be taken by the expert, the changes are mainly of a structural nature and consist in placing the whole regulation in one article, namely Article 282. The novelty resulting from § 1^1 is the possibility for the expert to take a written affirmation. This is done by signing the text of the affirmation, which is then attached to the opinion. The admissibility of this form of taking an affirmation was questionable before[72]. This solution goes in line with Article 271^1, which provides for the possibility for a witness to take an affirmation in writing by signing the text of the affirmation. It is noted in the literature that this form of affirmation taken by an expert applies only to experts appointed *ad hoc*[73]. The regular court-appointed experts take the affirmation before they take up their duties, and when making their opinions on subsequent cases, they merely invoke the affirmation[74]. For practical reasons, it seems reasonable that the written content of the affirmation be sent to the *ad hoc* expert at the time of sending him or her the order to draw up an opinion, so that they can read and sign it, and only then proceed to perform their activities[75].

The drawing up of an opinion by an expert entails access to the case file. The revised Article 284 stipulates that the court may order, to the necessary extent, a presentation of the case file or the object of the visual inspection to the expert, and order that the expert be present or take part in the examination of evidence. The Explanatory Note emphasizes that the introduction of the phrase "presentation of the case file to the expert" instead of the previous phrase "producing of the case file to the expert" will determine the admissibility of sending the case file to the expert[76]. As M. Łochowski points out, it was common practice to send the case file to the expert also under the previously applicable provision[77]. In fact, it is only about legalising it. The need to provide the expert with access to the case file in order to enable him or her to give a fair opinion is out of a question[78].

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[72] A. Klich, *op. cit*., p. 51.

[73] M. Łochowski, *op. cit*., pp. 1011–1012.

[74] A. Klich, *op. cit*., p. 51.

[75] M. Łochowski, *op. cit*., pp. 1011–1012. As regards the issue of taking an affirmation by the expert after drawing up a written opinion, see judgement of the Supreme Court of 29 August 2010, V CSK 29/10, Legalis No. 367092.

[76] Explanatory Note…, p. 64.

[77] M. Łochowski, *op. cit*., p. 1013 ff.

[78] E. Rudkowska-Ząbczyk, *op. cit*., p. 483.

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Regarding the possibility of an expert explaining the opinion or drawing up a so-called opinion to supplement the previous regulations, they allowed verification of the opinion only by verbally expressing a position about it by the expert[79]. However, according to the new wording of Article 286, the court may request oral or written supplementation or clarification of the opinion, as well as an additional opinion from the same expert or other experts.

If the opinion was prepared by a scientific or R&D institute, the issue of supplementing, clarifying and preparing an additional opinion has been regulated in Article 290 § 3. In § 4 of this provision, it is stipulated that if the opinion is prepared by a scientific or R&D institute, the oral supplement or explanation thereof, or an additional opinion, shall be submitted by a person appointed to do so by that institute. However, the court may order that the persons who prepared the opinion on behalf of this institute appear at the hearing and submit an oral supplement or explanation of the opinion, or an additional opinion.

The Amendment also included provisions on expert's fees. The content of Article 288 has been divided into three paragraphs, and § 3 states that if the opinion is incomplete or unclear, the award of remuneration and reimbursement of expenses shall be decided after its supplementation or clarification. The categorical wording of the provision indicates that the suspension of remuneration payable to an expert is obligatory if the court does not assess the opinion positively. As indicated by scholars in the field, the provision is of a motivational character for experts and should eliminate opinions devoid of substantive value[80]. The adoption of such a regulation is interesting because in the original version of the amendment to this provision, it was proposed to grant the expert a flat-rate remuneration for repetitive, schematic matters[81]. In the final version, not only was this idea abandoned, but also a regulation aimed at eliminating poor-quality opinions was retained. So far, the expert's remuneration used to be determined on the basis of the expert's invoice, specifying how much time it took him or her to draw up the opinion[82]. It is also worth noting that according to the new Article 278[1], when using an opinion prepared in another proceedings, an expert is not entitled to "subsequent" remuneration, unless the opinion has been supplemented, which entailed undertaking new activities by the expert[83].

It is characteristic that a significant change in the system of procedural law concerning the introduction into the Code of Civil Procedure of the institutions of

[79] A. Klich, *op. cit*., p. 71.

[80] K. Flaga-Gieruszyńska, [in:] *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy…*, p. 210 ff.

[81] Explanatory Note…, p. 65 ff.

[82] A. Klich, *op. cit.*, p. 80 ff.

[83] K. Gajda-Roszczynialska, [in:] *Dowody i postępowanie dowodowe w sprawach cywilnych. Komentarz praktyczny z orzecznictwem*..., p. 665.

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so-called witness-expert is limited to summary procedure. According to Article 505[7] § 3, the submission of testimony by a witness does not prevent him from consulting as an expert, including with respect to the facts of which he testified as a witness, even if he had previously drawn up an opinion for other entity than the court. According to the Explanatory Note, a possible transfer of this regulation to the general provisions on the trial will occur if the provision meets the expectations set for it[84].

The status of witness-expert is obtained by a person who has drawn up private opinions[85] or analyses for one of the parties. Under the legislation currently in force, such a person, despite his or her expertise, could only be questioned as a witness. The introduction of the institution of witness-expert entails the departure of the legislature from a strict distinction between the evidence from the witness' testimonies and the evidence from the expert's opinion. So far, the scholarly opinion[86] and judicature[87] had no doubt that the two means of evidence were completely different, in particular the expert, unlike the witness, was required not only to have special expertise, but also to keep absolute objectivity[88]. The witness, through his or her testimony, describes the events in a subjective manner and with emotional commitment, while the role of an expert is to assess the facts presented to him or her[89].

The rationale for introducing the provision on witness-expert is the consideration of procedural economy. However, due to the importance of the expert's opinion for evidence-taking proceedings, as well as the expectations to be met by the experts in terms of their objectivity, this regulation appears to be too far-reaching and its application in practice can cause problems. It is doubtful whether a specialist who has drawn up a paid opinion for one of the parties will exercise the necessary impartiality in subsequent proceedings.

CONCLUSIONS

The changes in taking of evidence introduced to the Code of Civil Procedure under the Amendment concern such important issues for civil proceedings as the possibility of establishing facts relevant to the case, which eventually affects the substantive decision of the court. Therefore, any modification of the rules in this respect should be made with utmost caution. In the context of the analysis of the changes in the provisions of the Code of Civil Procedure concerning the taking

[84] Explanatory Note…, p. 60 ff.
[85] K. Gajda-Roszczynialska, *op. cit*., p. 657 ff.
[86] E. Rudkowska-Ząbczyk, *op. cit*., p. 482.
[87] Cf. judgement of the Supreme Court of 17 November 2011, III CSK 30/11, Legalis No. 454836.
[88] A. Klich, *op. cit*., p. 21 ff.; K. Gajda-Roszczynialska, *op. cit.*, p. 646 ff.
[89] E. Rudkowska-Ząbczyk, *op. cit.*, p. 482 ff.

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of evidence, one can conclude that, although motivated by the laudable aim of streamlining and speeding up the proceedings, some of them (e.g. consisting in replacing the term "factual circumstances" with the term "facts") are devoid of practical meaning and were in fact unnecessary. Some of the new regulations are controversial and only the practice will verify their value. In particular, this is the case for Article 242^2 that establishes the joint responsibility of a party for the witness' failure to attend a court hearing or Article 505^7 § 3 on the witness-expert. The new features such as the possibility for a witness to provide evidence in writing (Article 271^1) should be regarded as interesting and useful, although with some doubt. On the other hand, the introduction of such provisions as the new wording of Article 263 (questioning of the witness at the place of residence), Article 272^1 (questioning of the witness in the presence of an expert), Article 281 (exclusion of the expert) or Article 288 (remuneration of the expert) raises no objections. The problem of the dynamics of evidence taking has a real impact on the duration of the entire fact-finding proceedings. Undeniably, there is a need to introduce in the Code of Civil Procedure the provisions allowing for its speeding up. Unfortunately, as pointed out above, many of the changes introduced do not meet this objective, having only a "cosmetic" significance.

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Judgement of the Supreme Court of 19 December 2013, II CSK 176/13, Legalis No. 819277.
Resolution of the General Assembly of the Supreme Court of 15 July 1974, Kw. Pr 2/74, containing direction guidelines on the further increase in the level and efficiency of court proceedings, OSNCP 1974, No. 2, item 203.
Resolution of the Supreme Court of 15 July 1974, Kw Pr 2/74, OSNCP 1974, No. 12, item 20.

STRESZCZENIE

Opracowanie odnosi się do obszernej nowelizacji Kodeksu postępowania cywilnego z dnia 4 lipca 2019 r., która objęła m.in. regulacje dotyczące dowodów w procesie cywilnym. Wprowadzone zmiany dotknęły wszystkich płaszczyzn postępowania dowodowego, a więc środków dowodowych, przeprowadzenia dowodów, a także ich oceny. Autorka podjęła próbę analizy znowelizowanych przepisów przez pryzmat istoty wpływu, jakie postępowanie dowodowe ma na całe sądowe postępowanie rozpoznawcze, a zwłaszcza czy wprowadzono do Kodeksu postępowania cywilnego przepisy usprawniające jego dynamikę.

Słowa kluczowe: postępowanie cywilne; postępowanie dowodowe; środki dowodowe; przeprowadzanie dowodów