

Means of Evidence and Evidence Collection in Contested Procedure in Kosovo

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Abstract

The purpose of this paper is to serve as a helpful tool for students, jurists, lawyers, judges and others, in the professional and scientific aspect. In ruling a contested procedure in a professional manner, the court has to find the truth, so that the contested procedure is most efficient until reaching the final verdict. In my research, I intend to enrich the science with my knowledge in the field of contested procedure.

In this study I have used analytical, comparative, synthesis, generalization and other methods.

Those reading this paper will understand how evidence is the most important part in a fair trial, since failure to prove claims very often leads towards an incorrect situation; they will understand how difficult and painful would be forfeiting rights for the litigating party, which would lead to serious changes, such as losing property, losing a job, compensation of personal income, compensation for damage caused.

The paper in itself contains deposited evidence, which maintain the level of estimation from the court in order to make a judgment in a contested procedure with a court verdict.

In this paper I present the subject of: "Means of evidence and evidence collection in contested procedure", where I have tried to research the theory but also the practice in contested proceedings, addressing the positive aspects, the deficiencies and novelties. In the legal provisions of the Law on Contested

Procedure of the Republic of Kosovo, no. 03/L-006, of 30 June 2008, and Law no. 04/L-118, of 13 September 2012, on amendments to the Law on Contested Procedure, evidentiary means and evidence collection are included in chapter XXII.

Key Words: Evidence, site observation, documents, witnesses, experts, hearing of parties, insuring evidence, Law on Contested Procedure

1. Introductory observations

Evidentiary means and evidence collection are the main facts in a contested procedure that would justify a fair and accurate court verdict. Collection of proof in a contested procedure is a key requirement for a fair trial. I would like to stress that for 15 years after the war in 1999 in Kosovo, since the establishment of our new institutions, and the establishment of the judiciary pillar, evidentiary means and evidence collection have been particularly difficult for both parties and courts involved in contested proceedings, especially in terms of lack of documentation, which is indispensable to evidence. The former violent Serbian regime had taken with itself many cadastral registers, thereby allowing many cases of alienation and abuse of public and private property. In Kosovo, only the situation of properties as of the period 1988-1989 has remained accurate in terms of cadastre of properties. The current condition in cadastral registers in the Republic of Kosovo has been proven inconsistent with the condition in cadastre books found in Serbia; some of them have been reclaimed, but many remain there still. Thus, experts and judges have coped with numerous difficulties in delineating cadastral parcels. Only with the return of cadastral registers, and their certification or verification, will we be able to see the mismatches and abuses. Many litigating parties have reported that their documents went down in flames. Immediately after the war, many case files were reported missing from municipal institutions, thereby leading to difficulties in evidentiary hearings. In some of the Albanian inhabited villages in the northern part of Mitrovica, there is no way of reviewing ownership of properties, due to the presence of parallel Serbian institutions which continue to operate, and in cases of issuance of ownership documents, such as possession lists, they are invalid and not acceptable to the judicial authorities and municipal institutions, specifically the Departments of property, cadastre and geodesy.

There are also contested proceedings in cases of employment relationships and compensation of personal income, disputes in compensation of physical and pecuniary damages in cases of accidents, statutory cases and other contested proceedings reviewed by courts, all cases in which the courts must handle evidence in resolving them.

Evidentiary means and evidence collection, provided for by the provisions of the Law on Contested Procedure of the Republic of Kosovo, no. 03/L-006, of 30 June 2008, and Law no. 04/L-118, of 13 September 2012 on amendments to the Law on Contested Procedure, precisely Articles 319 – 385, Chapter XXII, which provide on:

- Evidence;
- Site observation;
- Documents;
- Witnesses;
- Experts;
- Hearing of parties;
- Insuring evidence, (pre-evidence).

Earlier, the reforms had been initiated in the judiciary system, though the Law on Courts no. 03/L-199, of 20 August 2010, only entered into force in January 2013.

2. Evidentiary means and evidence collection in a contested procedure

Any subject of law, in enjoying their subjective rights in civil law, may be brought to a condition in which they must take their contested case to a relevant court to resolve their disputes.¹

A contest implies a dispute between parties, which requires a contested proceeding thereof. A contest and a contested procedure are two different notions. A contest is about a condition created in a legal relationship, while a contested procedure is a judicial process initiated to resolve the said contest.²

¹ Qehaja Rrustem, "Reply to claim", "E drejta" Review, no. 2 - 2011, Faculty of Law, University of Prishtina, p. 35.

² Qehaja Rrustem, "Reply to claim", "E drejta" Review, no. 2 - 2011, Faculty of Law, University of Prishtina, p. 35.

Usually, litigants make their claims, and the court is thereby presented with procedural case files, which contain facts and proposed evidence to argue such facts, and ultimately, the court holds the contested proceeding and renders an adequate ruling. In ruling over a contested case, the court must find and rule over a solution in a disputed matter, and use its authority to appreciate the disputed civil relationship between the litigating parties.³ Such ruling is a mental and logical operation, in which a found state of fact is established into the material and procedural norm. In a contested procedure, the material of fact is collected and appreciated by the court as a state institution. The ruling is made by a judge entrusted with the case. Court decisions are procedural actions, by which the court expresses its will in regard to the matters presented in a contested proceeding.⁴

In regard of evidentiary means in contested proceedings, the parties make their claims before the court and deliberate on their grounds, make statements, the contents of which must always involve presentation of fact, or extracting facts as legal outcome. The court is not informed of the validity or lack thereof in facts presented by the parties. Due to this, the court proceeds to appreciate the existence of statements directed towards it, as a necessary part of recognition and examination of the matter, and proof is the means for such verification.⁵

Evidentiary means are any sources from which, by sensory perception, we extract recognition of validity of claims of existence or absence of a fact leading to a legal outcome.⁶ Also, substantiation of proof involves a number of procedural actions between the court, litigants and other parties to the procedure, which aim to substantiate facts, all in due regard of relevant legal rules. Substantiation is a method by which the court appreciates and ascertains the truth.⁷ A conviction of the court on the existence or absence of a fact, based on a conscientious and diligent appreciation of evidence, comes as a general outcome of proceedings. The Law on Contested Procedure uses the term "evidence" to state the means of

³ Brestovci Faik, "Civil procedure law", Prishtinë, 2006, pg. 101.

⁴ Ibid, pg. 101-102.

⁵ Brati Alban, "Civil procedure", Tirana, 2008, pg. 275.

⁶ Brestovci Faik, "Civil procedure law", Prishtinë, 2006, pg. 243.

⁷ Morina Iset, Nikçi Selim, "Commentary to the law on contested procedure", Prishtina, 2012, pg. 579.

proof, but the term is also used to mean the basis of proving, or the substantiation result itself.

One must underline the probatory strength of evidentiary means, which means the substantiation strength thereof, which is important in establishing the conviction of the court, and its finding of the existence of fact subject to substantiation. The more direct the relation between evidentiary means and the substantiation object is, the stronger its substantiation power is.⁸

Regarding the **burden of proof**, according to the Law on Contested Procedure, such burden lies exclusively with the litigation parties. Article 7, paragraph 1 provides that "Parties shall present all the facts on which they base their claim and propose evidence which establishes such facts."⁹ If the court is not offered all necessary evidence substantiating facts, there will be no possibility for the court to collect and examine such evidence, and render a ruling. On the other side, there are at least two litigating parties, and both hold opposite positions, and therefore, the claims of a party will be at the detriment of the other, and vice-versa. Consequently, in every specific case, the burden of proof will lie with one or the other litigant. Thus the relation between the court and litigants is replaced with the claimant-respondent relationship, and the objective problem of the burden of proof is substituted with the subjective problem of its division between the parties.

The position of the respondent is more lenient, because there is no burden on the respondent, until the claimant substantiates the facts upon which he establishes his claims. Only if such fact is substantiated, the respondent may face the requirement to file an objection or a counter-claim, thereby trying to present facts to refute, change or inhibit such claims, thereby grounding his own objection or counter-claim. Thus we confirm that the burden of proof lies with every party to prove the facts it is interested to substantiate, obviously only substantiating facts it is most qualified for. This logically leads to the deduction that if proof is not substantiated, the fact does not stand ground. The rule of burden of proof gains its maximum relevance in the moment of the court ruling on the matter.¹⁰

⁸ Ibid, pg. 579.

⁹ Ibid, pg. 580.

¹⁰ Brati Alban, "Civil Procedure", Tirana, 2008, pg. 287, 289-291.

In regard to the **classification of evidence**, it may come in different forms. In terms of source of proof, we classify them in personal evidence, which come from persons or people (parties, third parties, experts, witnesses) and material evidence, which stem from the material world, and contain traces of a certain impact, or can be traces of fact or event that is relevant such as a document, a rock or a wall which is observed by the court.¹¹ To illustrate this: after the war in 1999 in the Republic of Kosovo, evidentiary hearings presented a difficulty in courts, in relation with delineation of property boundaries of litigating parties, due to the lack of cadastral registers, which had been taken by the Serbian state; leaving us only with an overview from the years 1989-1989. Surveying experts grounded their findings also on earlier aerial imagery and the assistance of litigating parties, thereby finding the boundary points, thereby presenting their court proof to assist in delineating property boundaries.

In their manner of formation, evidence may be classified into two groups: substantial and random evidence. Substantial evidence is that acquired from original sources, such as eye witnesses, original documents, etc. Random evidences are those acquired from side sources, such as witness testimonies, who may have not seen the event themselves, but heard it from others.

Regarding the relation to a certain fact, evidence may be classified as direct and indirect. Direct evidence are those that serve as means to directly ascertain a specific fact, such as testimonies of witnesses present when the claimant handed a specific item to the respondent. On the other hand, we have indirect evidence, which are indirectly linked to a certain fact, or are used to obtain an assumed conclusion regarding the existence of a certain fact. An indirect fact may be when a creditor submits a written certificate of a paid debt to the debtor, and the court appreciates that as evidence. But this certificate may have been forged.¹²

According to applicable law and case law, in filing a claim suit, the claimant files his proof in the claim suit. Litigating parties in a court session may propose evidence at the hearing, but may also make other submissions as well. According to the Law on Contested Procedure (LCP),¹³ specifically Article 123.1, a court hearing is scheduled by the court whenever it is

¹¹ Brestovci Faik, "Civil procedure Law", Prishtina, 2006, pg. 244.

¹² Ibid, pg. 245.

¹³ Law on Contested Procedure no. 03/L-006 (Official Gazette of the Republic of Kosovo, of 20.09.2008).

provided by law, or whenever required in proceedings. Also, according to Article 123.2, no complaint is allowed against a decision scheduling the session. The court issues a decision on all evidence, those presented to substantiate facts on the grounds of claim suit of the claimant, and approves the proposals of litigating parties. Meanwhile, the court refuses proposals from litigating parties regarding unnecessary evidence. In an evidentiary hearing, the Court examines all evidence, and in each case, the opposing party may file an objection to any piece of evidence.

In the Commentary to the Law on Contested Procedure,¹⁴ **appreciation of evidence** is thought as a mental exercise of the judge in completing the evidentiary process. The court is not bound to any formal rules according to which it would consider a fact sufficiently proven. All proof and evidence is generally and duly appreciated, while results of such appreciation and proving are processed by the judge in his or her own mental processes to conclude on the existence or absence of such a fact.

To ensure a fair trial, the court must be impartial, and fairly hear the issues of every party, in an equal manner, and within a reasonable time limit, where an independent tribunal shall rule on the disputes related to the rights and obligations of a civil nature.¹⁵ Appreciation of evidence is a role for the national courts. The authorities of the European Convention on Human Rights and Freedoms can only examine the manner of evidence administration, and not their appreciation by the court, except the cases in which there are irregularities or arbitrary proceedings.¹⁶

Also, in the **Civil Procedure Code of the Republic of Albania**, legal provisions stipulate on the collection of evidence. This Code stipulates on proof as data validating or overturning the allegations or objections of the procedural parties. A party claiming a right is bound to prove the facts of his or her claim, in accordance with the law.¹⁷ Hence, the court may render a ruling allowing the parties to prove their facts, to ground their claims and

¹⁴ Morina Iset, Selim Nikçi, "Commentary to the Law on Contested Procedure", Prishtinë, 2012, p. 580.

¹⁵ Article 31 of the Constitution of the Republic of Kosovo, Prishtina, of 15 June 2008, and Articles 6 and 13 of the European Convention on Human Rights and Freedoms, Rome, 4 November 1950, as amended, June 1, 2010, Strasbourg ECoHR=.

¹⁶ Nowicki Antoni Marek "About the European Convention", a short commentary to the ECHR, published by the Albanian Centre for Human Rights (ACHR), Tirana, 2003, p. 193.

¹⁷ Civil Procedure Code of the Republic of Albania, no. 8116, of 29 March 1996, as amended, published by the Centre for Official Publications, Tirana, November 2010, Article 11 and 12.

allegations, by presenting before the court only the necessary proof and those related to the matter under trial.¹⁸ Therefore, the court bases its ruling on the evidence presented by the parties or the prosecutor, obtained in a court session. The court appreciates the proof presented by acts, based on its own conviction, created upon a full review of circumstances of the matter.¹⁹ According to the code, the following are considered proof: expert and expertise; statements of witnesses; allegations of parties; documents; examination of persons, items, site observations, experiments; insurance of evidence.

Also, **the Law on Contested Procedure in the Republic of Macedonia** in its legal provisions provides on its Chapter XVII, "Proof and presentation of evidence". According to this law, the following are considered as proof: site observation, documents, witnesses, experts, hearings of parties. In the Title Eighteen, proof is also considered to be "insurance of proof".²⁰ The law provides that each party is obliged to present facts and propose proof upon which such party grounds his claims, or refutes the allegations and statements of the opposing party. During the procedure, when it deems that it may be a proper solution to a fair settlement, the Court may forewarn the parties of their duties as mentioned above, and specifically of the need to present facts and proposals relevant to the matter, and propose certain proof.²¹ Testimonies include all facts that are relevant for a ruling, and the Court further decides which of the proof proposed shall be reviewed to validate decisive facts.²² The court, by considering all circumstances, in its own conviction, shall appreciate whether it shall validate as accepted or disputed a fact that the party confessed initially, but further denied fully or in part, or limited such confession by presenting other evidence.²³

¹⁸ Ibid, Article 213.

¹⁹ Civil Procedure Code of the Republic of Albania, no. 8116, of 29 March 1996, as amended, published by the Centre for Official Publications, Tirana, November 2010, Article 29.

²⁰ Law on Contested Procedure of the Republic of Macedonia, Official Journal of the Republic of Macedonia, no. 79, of 1 September 2005.

²¹ Law on Contested Procedure of the Republic of Macedonia, Official Journal of the Republic of Macedonia, no. 79, of 1 September 2005, Article 205.

²² Ibid, Article 206.

²³ Ibid, Article 207.

2.1. Site observation

In the Law on Contested Procedure, respectively Articles 326, 327 and 328, a site observation is provided for.

The Article 327 of the Law on Contested Procedure explicitly provides: "If an item that must be observed cannot be brought to the court, or if such an action would incur large expense, the Court shall make a spot observation in the location of such item, thereby drafting minutes of such observation." Therefore, to appreciate evidence by site observation and other ways, according to the Article 15 of the New Law on Contested Procedure, a single judge would decide, for a difference from the old law, according to which, the presiding judge would render the decision.

The difference brought by the new Law on Contested Procedure is that there is no panel or presiding judge anymore, but the Article 327 mentions the court. Article 327 of the Contested Procedure explicitly provides: "If an item that must be observed cannot be brought to the court, or if such an action would incur large expense, the Court shall make a spot observation in the location of such item, thereby drafting minutes of such observation". Therefore, to appreciate evidence by site observation and other ways, according to the Article 15 of the New Law on Contested Procedure, a single judge would decide, for a difference from the old law, according to which, the presiding judge would render the decision.

According to the Commentary to the Law on Contested Procedure,²⁴ the site observation is viewed as a procedural action, in which the court would directly validate, by way of sensory perception, the existence or absence of relevant disputed facts. The spot observation is considered to be amongst the strongest and safest proving means. Also, the site observation often diminishes the need to obtain other evidence, hearing witnesses, hearing parties, etc. An object of such observation may be items and people, but may also be the litigating parties.

The court must draft the minutes of such observation, which shall contain the time of the court's presence at the site, present litigating parties and their representatives, and also an expert if invited by the court. The minutes also describe the object of such observation, the condition thereof, and other data constituting purpose of such observation.²⁵

²⁴ Morina Iset, Nikçi Selim, "Commentary to the Law on Contested Procedure", Prishtinë, 2012, pg. 595.

²⁵ Ibid, pg. 596, 597.

Based on Article 286 of the Civil Procedure Code of the Republic of Albania,²⁶ it is provided that whenever deemed necessary by the Court for a person or an item to be observed directly, *ex officio* or by proposal of a party, the Court may decide to perform a site observation, with or without experts. Also, the Article 287 of the same law provides that the observation of persons, locations, moveable or immovable items, may be undertaken by a Court decision which sets the time, place and manner of such observation. Article 288 of the same Law explicitly provides on prohibition of violating personal dignity, and the occasions in which the court should have due diligence of personal dignity of a person being observed. The court may also decide to not be present itself, and entrust such a duty to an appropriate expert.

In the Commentary to our Law on Contested Procedure as mentioned above, according to the Article 328, the item for which the court undertakes observation as a means of evidence may be held by litigants, a third person, a state authority or any other legal person. According to the provisions of this Article, the court undertakes such an observation by applying Articles 332 and 333 of the present law. While when the item is held by a litigating party, and such party refuses to accept such an observation, the Court may, apart from actions under the law, appreciate the relevance of the fact of refusal of the party and the influence of such refusal in rendering a conclusion of the court on the existence or absence of the fact to be proven.

The site observation is a procedural action, and therefore, the presence of litigating parties in undertaking such observation is directly linked to the application of directness in contested procedure. The parties are allowed to engage in site observation, and obtain, by a sensory perception, their knowledge and create impression and conviction on the object of observation, and to directly express their opinions, convictions and claims on the object observed, to confront their opinions between parties, the judge and the expert, if present, and provide proposals to validate the existence or absence of a disputed fact, or to clarify the circumstances of such fact. If the Court fails to notify the litigating parties of the venue of observation, date and time, then the Court would be in a substantial violation of contested procedure provisions.

²⁶ Civil Procedure Code of the Republic of Albania, no. 8116, of 29 March 1996, as amended, published by the Centre for Official Publications, Tirana, November 2010.

2.2. Documents

Documents in evidentiary proceedings bear large relevance, and may surely be a key element to the resolution of a judicial matter.

In monitoring a civil law case of a property dispute in a Kosovo Court, the Organization for Security and Cooperation in Europe (OSCE) - Mission in Kosovo, had concluded as the following: "The claimant commenced an action to evict the respondent from an apartment he had occupied for 20 years. The claimant argued that the apartment had been allocated to him following the war. The respondent claimed to have had no notification of this allocation, and asserted that he had occupied the apartment - which had been assigned to him by his employer - both before and after the war. During the evidentiary procedure, a considerable number of documents were adduced in evidence by the parties, and several of these were objected to on the grounds of relevance to the case. Despite repeated requests, the judge refused to rule on any of these objections, advising the parties that he would decide on the relevance of the documents at the time he prepared the judgment.

Without knowing whether a particular piece of documentary evidence would ultimately be deemed relevant, both parties in the above case example may have been placed at a significant disadvantage vis-à-vis the opposing party. Should they, for example, examine and/or cross-examine other witnesses about the document in question? How should they deal with the disputed document in their closing arguments? The failure of the court to assess the relevance of the evidence as the case proceeded, and to make evidentiary rulings accordingly, may have seriously prejudiced the parties' ability to effectively present their cases".²⁷ In this case, the court failed in the main session in evidentiary hearing, where the litigating parties had requested that the court appreciate several documents since they deemed such documents to be relevant for the matter. Because, in a main hearing, the Court would have to render a decision approving the proposal of the parties, and the court would have to present such documents as proof, and the court should have given the parties an opportunity to object the proof, and for the parties to be able to justify such an objection. The parties should have a possibility of examining such documents. Here, the court was in breach of the principle of adversariality,

²⁷ OSCE Mission in Kosovo, "Evidentiary procedure in civil cases in Kosovo", October 2011, Prishtina, p.14.

because it denied the parties their right to present evidence, to ground such proof, object against the other party, and defend their claims in the trial. This is rather concerning, a substantial violation of contested procedure provisions, when giving trust to a document in compiling a judgment, because even though there was a possibility, the document was not appreciated in the evidentiary hearing when requested by the parties. In this case, according to the contested procedure provisions, there are legal violations in terms of evidentiary degrees of documents.

A document is a written letter of economic and legal relationships entered into between legal and natural persons, the form and contents of which are necessarily provided for by law, or by a person issuing or demanding so. A document must be regular, there may not be any scratches, erasures by an eraser or bleach, there must not be any partitions or tears, there must be no additions between lines or other disruptions that may render reading irregular. In case such a document contains damages of such nature, it may be presumed that such damages were made to undermine its probatory strength, unless otherwise is proven.²⁸

So, the term document should be distinguished by the term documentation, since, in practice often confused.²⁹ The document is proof, while documentation is presenting the activity of the declaration form.³⁰

The Law on Contested Procedure provides on the documents and their probatory strength, in its Articles 329 – 338. For the documents, the court ensures that they are evidence that may ground a court ruling. Here, we can use a judgment of the Municipal Court in Vushtrri, K. no. 814/2004, of 22 December 2006, related to certification of ownership. In this case, the court had given its trust to documents presented in an evidentiary hearing, upon appreciation thereof, and based on such appreciation; it found that the claim suit of the claimant was grounded. Therefore, one can conclude that a document, such as a decision on inheritance, decision on land consolidation, expertise and other documents may be a substantial piece of

²⁸ Çuri Petraq, "Civil Procedure Law and the Notary" Tirana, 2008, p. 169, 170.

²⁹ Çiçolli Elvana, "Documentary evidence in Albanian Civil Procedure Law", E drejta Review no. 1-4/2007, Law Faculty, University of Prishtina, p. 139.

³⁰ Ibid, p. 139.

evidence, because the claimant in this case proves his ownership of the cadastral parcel.³¹

Generally, documents are divided into public and private documents, domestic and foreign documents, while legal theory differentiates between dispositive and documenting documents. A public document is a written document, which meets the following conditions: such a document must be issued by a state authority or other organizations; the document must have been issued within bounds of its authority, and in the set format.³² The legal presumption of the probatory strength of a public document is grounded upon the necessary trust on the authorities of the document issuer. The lack of trust on such entities would result into legal uncertainty in a country. One must mention that a public document may have probatory strength in other documents, which have been stipulated as equal to public documents, e.g. a document issued by a notary, by an auditor, etc., and such documents may also include documents issued by consular missions, etc.

Private documents do not *a priori* certify the accurateness of contents. Whenever they are disputed by parties, the court is bound to prove their accurateness. In such cases, the court initially validates the authenticity of signatures, and further the contents and substance of document.³³

The Commentary to the Law on Contested Procedure has addressed the division of documents between dispositive and documenting. Dispositive documents are those grounding the establishment, change or termination of a legal relationship. These documents may be public or private. Public documents include final court rulings, state authorities' decisions, etc. Private dispositive documents include written statements, contracts, certificates, etc.

Documenting documents are written documents which do not establish, change or terminate any legal relation. Such public documents may be birth certificates, marriage certificates, death certificates, etc., while private

³¹ This judgment became final by judgment of the Court of Appeals of Kosovo, AC.no. 751/2012 of 22 April 2013, thereby overturning the complaint of respondent N.S., and upholding the judgment of the Municipal Court in Vushtrri, case K.no. 814/ 2004.

³² Brestovci Faik, Civil Procedure Law, Prishtina, 2006, p. 254-255; Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 599.

³³ Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 599.

documents may include certificates of existence of debt, service receipts, etc.

Article 330 of the Law on Contested Procedure provides that foreign acts legalized by law shall have the same weight as domestic public acts, if not otherwise stipulated by an international contract". Meanwhile, Article 331.2 provides: Attached to the act in foreign language, a translation of the act, translated by a permanent court translator, should be filed".

In terms of a document held by a state authority or a legal person entrusted with public authority exercise, when a party is not capable of submitting or presenting it, then the court may, upon a proposal of a party, obtain such act ex officio (Article 332LCP).

Also, if the party claims with the court that the document is possessed by the opposing party, in this case, the court shall render a decision to invite the party which has the document, thereby setting a reasonable timeline, to file with the court such a document, and against this decision no specific complaint is allowed (Article 333. 1, 2LCP). Also upon a proposal of a party, a court may order a third person to file the document which may serve as proof for validating an important fact (Article 337.1LCP).

Therefore, according to the Court's finding on the civil case, it shall review the documents in the main hearing session in the evidentiary hearing, in which litigating parties may make a statement to object such a document, but also to make questions.

2.3. Witnesses

At a time when written documents did not exist, and furthermore, there was no concept of an official document, and there was not even word of scientific proof, witness statements had a central role in evidentiary proceedings, thereby sealing the fate of the matter, based on perception or memory capacities and moral qualities of given persons.³⁴

A witness is a person legally different from litigating parties, and a witness is only bound to clearly and honestly testify to his/her own knowledge of the dispute at trial, and therefore by such statement, he/she may assist in legal addressing of the dispute.³⁵ A witness shall be solely

³⁴ Pëllumbi Engert, "Witness testimonies in civil court cases" - Magistrate School, Tirana, 2010, p. VIII.

³⁵ Çuri Petraq, "Civil Procedure Law and the Notary" Tirana, 2008, p. 158

limited to his own sensory perceptions, refraining from voicing an opinion on the perceived fact.³⁶

Any person summoned as witness is obliged to respond to such a summon, unless otherwise stipulated, and is bound to testify.³⁷ Witnesses are invited by a summon. Such a summon forewarns the witness on the consequences of failure to appear before court without just cause, and for the entitlement to compensate costs.³⁸ A summoned witness under the age of 14 shall be invited together with a parent or legal custodian. Persons with mental or physical disabilities who are absolutely incapable of appearing as witness cannot be summoned, because they do not understand the facts of relevance for the matter. Other persons deemed relatively incapable, such as blind people, may be heard of the facts perceived by them through hearing, while a deaf person may be heard on the facts perceived by sight.³⁹

A witness must first be notified of the duty to speak the truth and not remain silent, and shall be forewarned of the consequences of making a false statement. After that, a witness is asked for his personal data. After general questions, the witness is examined by a party proposing the witness summon, and after, the opposing party. The Court may examine the witness at any time. The witness shall always be asked on how he obtained knowledge of the matters testified for.⁴⁰

The Commentary to the Law mentions that a witness may be a person who has been convicted before for false testimony, but that the Court would take that statement under review as per Article 8 of the Law.

A witness may not be a person who by his or her statements would breach the duty of maintaining official or military secret, unless a competent authority relieves the witness of such duty.⁴¹

A witness may decline testimony in the following cases:⁴²

- a) Before testifying, the court notifies the witnesses of their entitlement to decline testimony.⁴³

³⁶ Brestovci Faik, *Civil Procedure Law*, Prishtina, 2006, p. 258.

³⁷ LCP Article 339.1.

³⁸ *Ibid*, Article 346.1 and Article 355.1.

³⁹ Brestovci Faik, *Civil Procedure Law*, Prishtina, 2006, p. 258.

⁴⁰ LCP, Articles 347, 348 and 354.

⁴¹ *Ibid*, Article 341

⁴² *Ibid*, Article 342.

⁴³ *Ibid*.

According to the LCP, a witness may decline answering certain questions, if there are important reasons to do so, and especially if by answering such questions, the witness would incriminate himself criminally, or incriminate his relatives of a bloodline to a third degree in a vertical line, his/her spouse or relatives of a family line to the second degree, even if marriage has ceased to exist, a person living in extra-marital union with the witness, or his/her legal custodian or person under his/her custody, an adoptee or adopter.

In an evidentiary hearing, witnesses are heard individually, without the presence of other witnesses to be heard later.⁴⁴

If between witness testimonies there are such inconsistencies so as to render difficult the validation of important facts, the Court shall, *ex officio* or upon a motion of a party, confront the witnesses heard before. The confronted persons shall be examined on any circumstance of inconsistency in their testimonies, and the answers given are noted in the court records.⁴⁵

One must have in mind the fact that a witness, in his own personal interest, the party or a third person, may make a false testimony, despite the risk of criminal prosecution which may result. Therefore, in general terms, a witness is a means of evidence less credible than an expert, or specifically a written document.⁴⁶ In terms of consequences and review of witness testimonies as means of evidence, there are objective and subjective factors to be taken into account by the Court. Such are the degree of perception of events and occurrences by a witness, age, vocation, environment (light, relief, distance) in which a witness creates a perception on an event or item, time span from the event or occurrence to the moment of making the statement before the court, and others.⁴⁷

2.4. Experts

To clarify or validate a fact, one must use professional capacities not possessed by the Court, and therefore, the Court shall obtain evidence by expertise.

⁴⁴ Article 347.1 LCP. The witness is heard in the absence of other witnesses to be heard later, and each witness is heard without the presence of the next witness, so that any influence on the other witness by testimonies is avoided. This shall ensure that the testimony is credible (commentary to the Civil Procedure Law, as above).

⁴⁵ *Ibid*, Article 349.

⁴⁶ Brestovci Faik, *Civil Procedure Law*, Prishtina, 2006, p. 264.

⁴⁷ *Ibid*, p. 264.

Experts are persons with specific and sufficient knowledge in a certain area of knowledge, and who based on such knowledge, are capable of providing before the court a true description of a state of fact or reach an accurate conclusion of the outcomes of a certain state of fact. On the other hand, a process of expert study of objects rendered available to them to express an opinion on problems requiring special knowledge or experience, upon an assignment by the Court, is called an expertise.⁴⁸

The Expertise, as an activity to validate disputed facts, is undertaken by an expert hired by court ruling, and results in an opinion submitted by the expert.⁴⁹

The Law on Contested Procedure, in the articles 356 – 372, provides on proving by expertise, whereby the experts provide their opinions and conclusions in their expertise.

This Law, in its Article 356, has provided that the court may *ex officio* or⁵⁰ by proposal of a party, may require expertise as proof, to validate or clarify facts or circumstances, whenever professional knowledge is required, and such knowledge is not possessed by the court.

A party proposing the expertise is bound to show the subject matter and scope of expertise proposed, and to propose a person to provide such expert opinion. An opposing party must be given an opportunity to make a statement against the proposed expertise (Article 357. 1, 2, LCP).⁵¹

The expertise is rendered by an expert. But, the court, by proposal of a party, may engage more experts for different types of expertise. Experts are assigned first and foremost from the ranks of permanent expert roster for given types of expertise. Meanwhile, complex expertise as a rule are entrusted to professional institutions (hospitals, chemical labs, faculties, etc.) If there are specialized institutions for certain types of expertise

⁴⁸ Ibid, p. 265.

⁴⁹ Deraj Enerjeta, "Expert opinion in a civil court procedure and appreciation by the court", "Justicia" Review, Tirana, 2011, p. 1.

⁵⁰ Law no. 04/L-118, of 13 September 2012, amending the Law on Contested Procedure, in its Article 21 provides that in the Article 356 of the basic law, after the word "Court", the following is added "ex officio or".

⁵¹ Law no. 04/L-118, *ibidem*, provides: Article 357 of the basic law paragraph 3. shall be deleted from the text of the law. By this amendment, the court cannot render a decision, namely it cannot decide whether the parties can or cannot agree on the person to perform the expertise. However, according to the basic law, in given cases, the court may decide pursuant to Article 3 paragraph 3, and the court shall not approve the claims of parties in contradiction to the a) legal order, b) legal provisions, and rules of public moral.

(expertise of false currency notes, handwriting, dactyloscopic expertise, etc.), such expertise will be entrusted to such institutions (Article 358. 1, 2, 3, 4, 5LCP).

An engaged expert is bound to respond to the court invitation, and file his/her conclusions and opinion. The court may relieve an expert, upon his/her request, from the duty of filing expertise due to causes for which a witness may refuse to testify, or provide answers to a concrete question. The court may also relieve an expert, upon his/her request, from the duties of providing expertise for other just causes. Such option of being relieved of expertise may be requested also by an authorized person of an authority or organization, which employs the expert (Article 359.1, 2, 3, 4LCP).

Meanwhile, in relation to relieving a person from appearing before the court as an expert, such a relief may be requested based on the same reasons for the judge to be dismissed from the concrete matters. When parties object, a person who is a party, spouse, in family relations with any of the parties, a person with a vested interest in the matter⁵² may not appear as an expert in this matter.

The motion to relieve the expert of the duty must demonstrate the circumstances and grounds of such request to dismiss the expert. No special objection is allowed against the motion to dismiss the expert (Article 360.3, 4, 5LCP).

The expertise may be engaged by a court ruling (Article 361LCP). An expert is always summoned to the main hearing of the case. In the summon, the court reminds the expert that he shall present the opinion in honesty and in compliance with the rules of science and profession, and of the consequences of failure to present a conclusion or opinion within a certain timeline, or the failure of appearing before the court. Also, in the summon, the expert is informed of the right to claim expenses related to the expertise (Article 362. 1, 3LCP).

An expert files his conclusion and opinion in written to the court, before the main hearing session is held, unless the court decides otherwise. An expert opinion must always be justified and reasoned (Article 364. 1, 2LCP).⁵³

⁵² Brestovci Faik, *Civil Procedure Law*, Prishtina, 2006, p. 266.

⁵³ Law no. 04/L-118, *ibidem*, Article 23 was amended by Article 364, paragraph 1, with the following wording: "An expert shall file his conclusion and opinion in written to the court".

When expertise presented is incomplete or unclear, and when there are discrepancies between expert opinions, the Court, ex officio or by party proposal, may require additional clarification. In such a case, the expert is given a deadline to file a written conclusion and opinion. In case the expert fails to present such amended and clarified conclusion or opinion despite the court order, upon a statement by the parties, the court may hire another expert (Article 366. 1, 2LCP). The court sends the parties such a written conclusion and opinion at least seven (7) days before the main hearing session begins.⁵⁴ If more than one expert is hired, all such experts may file a joint opinion or conclusion, if there are no differences between them. If there are discrepancies in their conclusions and opinions, then each expert shall file his/her individual conclusion and opinion. If the expert data in their conclusions have substantial differences, or their conclusions are not clear, are incomplete or contradictory in content or in circumstances considered, and when such deficiencies cannot be eliminated by a repeated hearing of experts, the expertise shall be repeated, with the same or other experts (Article 369, para 1, 2LCP).

In relation to evidence collection by expertise, witness testimony provisions apply proportionally, unless provisions of this law stipulate otherwise (Article 371, LCP). It is important to emphasize that an expert opinion is not binding on the court. The court has not the necessary professional knowledge to clarify certain circumstances, but the court may not approve the expert conclusion and opinion if his or her conclusions fail to stand against criticism based on rules of experience and logic.⁵⁵ There are many cases when the court does not give trust to the expert opinion, thereby emphasizing that the court has its independent conviction and may file an opposite or different opinion from the experts, but it must justify elaborate in detail the difference or objection to such expert opinion in its final decision.⁵⁶ An expert opinion cannot overrule other evidence. An expert opinion may be overturned also by other evidence. An expert opinion in our procedural law shall be appreciated by the court, based on the general evidentiary rules, based on the court's own conviction, based on legal conscience and grounded upon a full review of all circumstances

⁵⁴ Ibid, Article 24 was amended by Article 367, where a deadline of 8 days was substituted with a seven-day deadline.

⁵⁵ Brestovci Faik, *Civil Procedural Law ("E drejta procedurale civile")*, Prishtina, 2006, pg. 268.

⁵⁶ Ibid, pg. 268.

of the matter. When a court overturns the expert opinion due to other evidence, there is no need for new expert opinions.⁵⁷

An expert failing to appear before the court or refusing to perform the expertise, without any justifiable cause, shall be punished according to Article 293 of this Law, but for a difference from the witnesses, an expert cannot be forcefully brought to the court and an expert cannot be imprisoned.⁵⁸

The duty of an expert implies that he or she should present his professional opinion and conclusion in due conscience and in compliance with the scientific rules in the field of expertise. In the contrary, a false opinion filed by an expert consists of a criminal offence.⁵⁹ The conviction of an expert expressed in the opinion and conclusion, even if overturned by the court, does not represent a sanction, unless his positions or statements represent a false opinion or aim with an intention to damage the party.

2.5. Hearing of the parties

Also, litigating parties, respectively claimant and respondent may appear as evidentiary means in a contested procedure.

Litigating parties are the main and safest source of knowledge of relevant facts of the matter of review. The parties know best the factual situation over which they ground their claims. The parties remember their events, occurrences, conditions of item or people, important for establishing and developing a civil relationship.⁶⁰

By a proposal of a party, the court may decide to collect evidence by hearing parties (Article 373LCP). Deriving from the provisions of the Law on Contested Procedure, this law has brought substantial novelties when compared to the old law, having in mind the nature of hearing parties as an evidentiary means. Hence, the old law provided on hearing of the parties only as a subsidiary means, and to be used only when certain facts cannot be established by other proof, or there were no such proof at all (Article 264, paragraph 2, old LCP). Legal science has raised the argument that the provision on subsidiarity of such evidentiary means must be understood as

⁵⁷ Ibid, pg. 268.

⁵⁸ Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 631.

⁵⁹ Ibid, p. 632.

⁶⁰ Brestovci Faik, Civil Procedural Law ("E drejta procedurale civile"), Prishtina, 2006, pg. 269.

an instructive rule, as a suggestion to the court to not rush in using it, whenever it is possible to establish relevant acts by other proof (old LCP).⁶¹

With Article 373 of the new LCP, hearing of the parties as means of evidence has been put at the same level with other means of evidence, and therefore, it can be used as evidentiary means in any time, and to establish any fact. For a difference from the old law, which provided that collection of evidence by hearing parties was left to the end of the procedure, the new Law, in its Article 425, paragraph 1, provides that the evidentiary proceeding begins precisely with hearing the parties.⁶²

It is important to mention that also by filing reply to the claim, the claimant shall learn the position of the respondent on the claim and claim suit, which also provides the claimant an opportunity to clarify or supplement his allegations or even prepare other eventual proof in the form of proposals, during the preparatory session or the main hearing, if such a preparatory session was not held. This allows the court to promptly and efficiently lead the proceedings towards holding and developing the preparatory session.⁶³

Filing a reply to the claim is a key moment in contested procedure, because the respondent elaborates his views to the contested matter.⁶⁴

The court may decide to question only one party, if the other party refuses to answer or does not act as per court summon (Article 374LCP). For a party lacking procedural capacity, the legal representative thereof shall be questioned. The court may also decide to question the party instead of his legal representative, or along with the representative, if possible. For a legal person appearing before court, a person assigned as legal representative by law or general act of such legal person shall be questioned. If several persons appear as litigating party, the court shall decide whether they all or only some are heard (Article 375, paras 1, 2, 3, 4, LCP).

⁶¹ Brestovci Faik, *Civil Procedural Law ("E drejta procedurale civile")*, Prishtina, 2006, pg. 270-271, Iset Morina, Selim Nikçi, *Commentary to the Law on Contested Procedure*, Prishtina, 2012, p. 650.

⁶² Morina Iset, Nikçi Selim, *Commentary to the Law on Contested Procedure*, Prishtina, 2012, p. 650.

⁶³ Qehaja Rrustem, *Reply to claim, "E drejta" Review*, no. 2-2011, Law Faculty, University of Prishtina, p. 41.

⁶⁴ *Ibid*, p. 41.

A summon for the session is served personally to the party, or the person to be heard. The summon shall contain information of collection of evidence by hearing parties, and that the party appearing in session may be heard in the absence of the other party (Article 376, paras 1,2, LCP).

Against a party not appearing before court for hearing, no compulsory measure may be imposed, and neither can the party be forced to provide testimony (Article 377, LCP).

Provisions of the law providing on collection of evidence by hearing witnesses apply also on the collection of evidence by hearing parties, unless otherwise is explicitly provided for hearing of parties (Article 378, LCP).

The Code of Civil Procedure of the Republic of Albania provides on means of evidence by hearing parties, in its Articles 281-285.

This code provides on hearing of the parties in a random order, or motioned by questions officially filed for such purpose. The questions are filed for accepting questions proceeded in the manner and timelines as set by an intermediate ruling. No questions are allowed beyond those formulated in the court ruling, apart from questions agreed upon by the parties, and deemed by the court to be useful for the trial.

This Code provides that the party being heard shall state personally. The party may not use prior and prepared notes. The Court may still allow the use of other written data, which involve calculations or data that are difficult to remember. When a party does not appear for hearing, or refuses to appear without just cause, the court, in its appreciation of other proof, may deem as accepted the facts presented in questions. When failure of a party to respond is duly justified, the court may decide to postpone the session, or obtain answers outside a court session.

Ultimately, one must mention that the court shall ultimately decide on the probatory degree of the parties' statements as means of evidence, depending on the circumstances.

2.6. Insurance of evidence (pre-proof)

This evidentiary means allows for insuring the evidence before time comes for its review. Proof may be obtained even before procedure is developed, when there are circumstances in which a piece of evidence may be lost, or its possession may be difficult, or if it is left as is, it may risk destruction.⁶⁵

⁶⁵ Brestovci Faik, *Civil Procedural Law*, Prishtina, 2006, p. 251, Morina Iset, Nikçi Selim, *Commentary to the Law on Contested Procedure*, Prishtina, 2012, p. 658.

The meaning of insuring evidence is to obtain such evidence before any proceeding is begun, because such piece of evidence may be substantial to the resolution of a dispute, or may have a great impact on its clarification, or it may be lost or its acquisition may be impossible. Such insurance may be requested by an interested party. It is also known that insurance of claims is aimed at preserving material law or subject matter of trial, while insurance of evidence aims to defend the procedural substance of proof.⁶⁶

A party demanding to insure proof must argue and certify before the court on the evidence that must be collected, and the circumstances the validation of which is required by such proof, and the reasons justifying collection of evidence before the trial, or even before filing claim suit.⁶⁷

Therefore, the failure of a party to appear before court demanding pre-collection of proof results in overturn of the request, unless the opposing party requires the same, or the court deems necessary for the trial. Hence, the procedural solution to the failure of requestor of insurance of proof to appear before court is to overturn the request. In such cases, the court does not terminate the hearing, but proceeds further with overturning the motion.⁶⁸ According to Petraq Çuri, this is in contradiction with Article 179/1 of the Code of Civil Procedure of the Republic of Kosovo, because in this case, the court is motioned by the requestor, and if such requestor does not appear in the session, and fails to argue his claims in terms of such proof, the court cannot *a priori* decide to overturn the motion without hearing the requestor. Article 179/1 establishes a rule related to the failure of party to appear before trial, and in the concrete case, that is termination of trial, and as a result, the motion cannot be overturned. This only occurs when a motion is filed before filing a claim suit.⁶⁹

It is important to mention that in case of proof which is substantial to the resolution of dispute, or influential in its clarification, proof under risk of loss or hindrance of collection, an interested party may motion to collect such proof during the court proceedings or even before the trial. The causes

⁶⁶ Brati Alban, Civil Procedure, Tirana, 2008, p. 345, Article 292 of the Code of Civil Procedure of the Republic of Albania.

⁶⁷ Brati Alban, Civil Procedure, Tirana, 2008, p. 345 and Çuri Petraq, Civil Procedure Law and the Notary, Tirana, 2008, p. 187, Article 267 of the Code of Civil Procedure of the Republic of Albania.

⁶⁸ Çuri Petraq, Civil Procedure Law and the Notary, Tirana, 2008, p. 188, Article 296 of the Code of Civil Procedure of the Republic of Albania. An objection is to be made here in terms of the principle of availability.

⁶⁹ Çuri Petraq, Çuri Petraq, Civil Procedure Law and the Notary, Tirana, 2008, p. 188.

of such insurance of proof in concrete circumstances are determined by the category of the evidentiary means itself, which may be used to insure proof. One reason may be to insure a document that may be destroyed or transferred to a foreign country, from which it cannot be collected. Also, any traces in the scene must be taken promptly, for them not to be ruined. Also, a witness with a severe illness must be heard promptly, because of fear of his passing, etc.⁷⁰ Also, other proof that must be collected promptly, and at the site, include any evidence related to animals, such as cows, sheep, or others, if such animals are held by the respondent or anyone else, since there is always fear of distinction, substitution, slaughtering, sale, or else, and such proof would then not be collectible. This type of proof insurance is also subject matter of dispute, and such animals must be returned to the claimant.

Insurance of proof may be requested before and during the procedure of a repeated trial concluded by a final decision. Although the law does not explicitly provide, we consider that insurance of proof may be requested in filing for revision during the procedure. If in a procedure by revision it is found that due to substantial violations of procedural provisions, or due to erroneous application of material law, the state of fact is incompletely certified, the court should accept revision and annul, partially or fully, the judgments of first and second instance courts, or only the second instance judgment, and shall remand to trial the lower instance courts, therefore, in such situations, evidence not reviewed earlier may be collected, and insurance of proof may be rendered necessary.⁷¹ Thus, even after the conclusion of contested procedure, and even after a final ruling, insurance of proof may be allowed, after filing for regular and extraordinary remedies by a party, and the highest instance court renders such a decision.

However, in researching our legislation, I have seen that although it is not explicitly provided by the contested procedure law, insurance of proof may be allowed even after ruling over of all legal remedies and final conclusion of the contested procedure by the Supreme Court of Kosovo, after exhausting all remedies. This should occur by an initiative by the party losing its case in contested procedure. Hence, based on the Rules of Procedure of the Constitutional Court and the Law on the Constitutional

⁷⁰ Article 379 LCP, Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 658.

⁷¹ Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 659, Article 224.2 LCP.

Court of the Republic of Kosovo, within a set legal deadline, the party may file a referral with the Constitutional Court of the Republic of Kosovo, the Constitutional Court finds on violations, and it may render invalid the court decision, or respectively the decision challenged by the party (the ruling of the Supreme Court of Kosovo), and shall remand the case for trial at the court.⁷²

For a difference from the earlier law on contested procedure,⁷³ which excluded the possibility of collecting evidence by hearing parties, the new Law on Contested Procedure provides on the possibility of insurance of proof, with a rather wide scope of all evidentiary means, including there also hearing of the parties, and has ultimately equalized this means of proof with other means of evidence, and therefore, it may equally be used with other means.⁷⁴

Against a decision of the court thereby approving the proposal for insurance of proof, and against a decision thereby approving the motion to collect evidence before service to the opposing party, no objection is allowed.⁷⁵

Failure of a party motioning to insure proof in the evidentiary hearing results in rejection of proposal, unless the same is required by the opposing party or the court deems such evidence useful for the trial. General rules apply for collection of proof and their probatory degree.⁷⁶

If proof is collected before filing a claim suit, the minutes on evidence collection are held in the court keeping such minutes. If the proceeding of

⁷² Rules of Procedure of the Constitutional Court of the Republic of Kosovo, no. 185/1/2010 of 23 November 2010, see Article 74, and the Law on the Constitutional Court of the Republic of Kosovo, no. 03/L-121, Article 47 provides that Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority (in this case, the court is the public authority), while according to Article 49, the referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision.

⁷³ Law on Contested Procedure, Official Gazette 4/1977 (applicable law after the war in Kosovo).

⁷⁴ Morina Iset, Nikçi Selim, Commentary to the Law on Contested Procedure, Prishtina, 2012, p. 658, Article 373 LCP.

⁷⁵ Article 383. Paras 3 and 4 LCP. In case the court deems unnecessary to insure evidence, the court shall render a decision rejecting the proposal for insurance of proof. Against a decision rejecting proposal for insurance of evidence, an unsatisfied party may file appeal (Article 206 and Article 192.3).

⁷⁶ Article 384, paras 1 and 2, LCP.

the claim suit is under development, while the court of the matter has not collected such evidence itself, the minutes shall be sent to that court.⁷⁷ When proof is insured, the evidentiary procedure is concluded, the court by minutes on insurance of proof presents such evidence with all data on evidence. This shall be of service for the main hearing, especially in the evidentiary hearing.

3. Conclusion

The Law on Courts no. 03/L-199 of 20 August 2010 provides on the resolution of backlog cases, and it came into effect on 1 January 2013, and all contested procedure evidence under the review of District Courts as a first instance were transferred to Basic Courts. Now, the District Courts do not exist, neither in first or second instance. In that regard, a Court of Appeals was established in Prishtina, as a second instance court, to review all appeals filed against rulings of Basic Courts.

We hereby conclude that by evidence presented by parties, the matter of review of the court may be clarified. However, there may be disputes between parties that cannot be settled in extrajudicial proceedings. Even without filing a claim suit, a party may require the court to obtain evidence. If the parties cannot resolve their dispute, they are instructed to contested procedure, and filing of a claim. Already with a claim suit, the claimant proposes the evidence, and also during court sessions, presenting his/her claims, aiming for the court to resolve the disputed matter, and on the other hand, the respondent proposes proof related to its own claims, thereby aiming to refute the claims of the claimant. The Court is bound to inform the parties of all evidence, regardless of the source of such proof or evidence, so that the parties may file their statements.

The court should try and resolve the disputed matter within a reasonable time and without undue delay. The more delay there is in a contested procedure, the weaker will the evidentiary proceedings be. In my research for this paper, I have seen that when failing to hear the litigating parties, witnesses, insuring evidence, other expertise, the right to a fair trial will not be enjoyed fully, because witnesses and parties cannot stand fully to their claims in the matter of review, they can forget the events, and may

⁷⁷ Article 385, paras 1 and 2, LCP.

erase the traces, and proof cannot be secured, expertise may be deficient, and ultimately, the parties are damaged.

In a summary, I would state that the right to fair trial would only be enjoyed fully if in a contested procedure, the Court is able to review all evidence and proof in an accurate and diligent manner, and ultimately reach a merit-based decision. Often the courts decide that proof does not sufficiently support the parties' claims, upon an evidentiary hearing. The evidentiary hearing is one of the most difficult responsibilities of a judge, considering the conscientious duty and commitment that the judge must bear in ensuring a fair trial.

4. Recommendations

The judicial authorities are required to hold back during the review of the case, and until its completion, and refute the media campaigns, since the media may often exercise their influence on the court proof and litigating parties, the experts and witnesses, further resulting in statements of judges and lawyers. The judge must defend himself from media provocations in his or her activity in case review.

There shall not be any delay in proceedings, because proof may lose its effect, get lost or destroyed, and ultimately, by delaying the court proceedings, the court may lose its public trust.

Resolve the issue of non-performing judicial authorities in the north of Mitrovica, since already much of the evidence has lost its effect and has been destroyed, because the cases have been blocked since 21 February 2008, and the cases remain unsolved.

To not overburden a judge with different cases in civil, criminal, execution, non-contested cases and others.

In a near future, there should be courts only for civil cases, and only with civil law judges, and specializations in fields of civil law, because law can only be tried on grounds of evidence.

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