CIVIL LITIGATION IN SPAIN: HOW TO PRACTICE EVIDENCE IN CIVIL PROCEDURE

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Civil Litigation in Spain: How to practice evidence in a civil procedure

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Abstract

Evidence Law and Practice is the key to succeed on a civil procedure. It is possible to have some rights, but if they cannot be proved the desired legal consequences will not be obtained and the proceedings will not finish in a satisfactory manner. In this article we will explain that civil procedure evidence is governed by the dispositive principle and all the principles arising out of it. The rights disputed in civil procedure are private rights, that is, available to the parties. In this regard the parties are entitled to take action and therefore bring a claim, which means that they define the Court’s powers of decision as it is bound by the parties’ petitions and by all those facts and legal grounds they bring which they consider appropriate to protect their rights. In short, the parties are responsible for providing the means of proof they consider opportune for guaranteeing the successful outcome of their respective claims.

Keywords

Civil Procedure, Dispositive Principle, Evidence, Illegal Evidence.

Abbreviations

CPA (Spanish Civil Procedure Act 200); CC (Spanish Civil Code); LOPJ (Spanish Judicial Power Act 1985)

Contents.


I. INTRODUCTION.

In civil procedure, there are some situations in which proof of facts –and sometimes of foreign law- is necessary for the Court to apply substantial law, thus granting what the parties request. For instance, in a sale agreement the buyer is obliged to pay the price of the thing purchased; if lack of payment is proved before the Court,
the legal consequence established by Spanish Law will be reached, that is, delivery of
the thing. That is why evidence is so important for the successful outcome of civil
procedure. It is possible to have some rights, but if they cannot be proved the desired
legal consequences will not be obtained and the proceedings will not finish in a
satisfactory manner.

In civil procedure evidence is governed by the dispositive principle and all the
principles arising out of it. The rights disputed in civil procedure are private rights, that
is, available to the parties. In this regard the parties are entitled to take action and
therefore bring a claim, which means that they define the Court’s powers of decision as
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responsible for providing the means of proof they consider opportune for guaranteeing
the successful outcome of their respective claims.

II. TYPES OF EVIDENCE.

Evidence in civil matters can be classified in three groups:

(1) Direct or circumstantial Evidence.

   (a) Direct evidence refers to the fact that knowledge of or the existing
       relationship between the object of the evidence and the judge is direct and without
       intermediaries. In the Spanish legal system only judicial examination is direct evidence.

   (b) Circumstantial evidence refers to those cases in which the Court has
       knowledge or relation of some fact at stake through events, things or people. Circumstantial
       evidence is also understood to be when evidence of the main event is
       provided by evidence of other events, which having been determined, assume the
       existence of the former (presumptions).

(2) Full and half proof.

   (a) Full proof is that which requires the Court to be fully convinced of the
       truthfulness of the facts.

   (b) On the contrary, half-proof implies that the law only requests
       probability, verisimilitude or accreditation.

(3) Main evidence, rebutting evidence and evidence to the contrary.

   (a) Main evidence tends to prove the facts which are the basis for
       applying the legal regulation being requested in the proceedings. It refers to the proof of
       the very basic –or “constituent”– events –“hechos constitutivos”–.

   (b) Rebutting evidence also has a bearing on those basic facts on which
       the whole claim stands, but it attempts to introduce doubt in the Court’s mind over the
       truthfulness of the events given in evidence by the opposing party.

   (c) Evidence to the contrary can be offered to counteract affirmative
defences and its maximum application is for disproving rebuttable presumptions
       (praesumptio iuris tantum) (infra).

III. OBJECT OF PROOF: ALLEGATIONS OF FACT AND ISSUES OF LAW.
In Spanish civil procedure, proof can be defined as the procedural activity aimed at achieving certainty in the opinion of the Court over the existence or non-existence of the disputed information supplied by the parties to the proceedings. This certainty can either stem from the judge’s conviction, or by applying legal rules to establish facts. The following therefore, is not necessary to be object of proof:

1. Firstly, facts provided by the parties where both parties agree (Art. 281.3 CPA) and therefore, are not disputed facts. In this regard the CPA requires the parties to make express statements on the facts alleged by defendant, and the complainant (Art. 405.2 CPA) and the facts introduced by the party answering the counter-claim (Art. 407.2 CPA).

The same goes for tacitly admitted facts either because they are not expressly discussed at the opportune moment, or because said party remains silent or gives evasive responses concerning the truthfulness of the same, provided said facts are prejudicial to him (Art. 405.2 and 407.2 CPA). The final moment at which the parties define agreement or not on the facts are the preliminary hearing, in the ordinary proceedings (Art. 414 CPA), or at the beginning of the hearing, in the verbal proceedings.

2. Secondly, there is no requirement to prove notorious facts. This type of facts is part of the general culture of a group. For instance, affirming a father-son relationship will depend on whether the party affected by recognition of the notorious fact, challenges it or not.

3. Finally, no proof is required for facts favoured by a presumption, that is, legal presumptions which consider a fact exists when circumstantial evidence has been proved. The party affected by such a presumption must challenge the truthfulness of the evidence since iuris tantum presumptions admit evidence to the contrary. The same can be said with regard to maxims of experience which are definitions, concepts or hypothetical judgements based on experience. These maxims only have to be proved if the court is unaware of the maxim in question.

6.05. The principle iura novit curia (the court knows the law) imposes the obligation on the court to apply the law in each specific case, even though it has not been alleged by the parties to the dispute (Art. 218.1.II CPA). This is written, internal and general Law. Therefore, custom, foreign law, historical law, regional regulations (and in general those which are not published in the Official Gazette of the Spanish State) would have to be proved.

IV. ASSESSMENT OF THE EVIDENCE

Assessment of the evidence by the court aims to satisfy it of the certainty or truthfulness of the facts alleged and proved by the parties. It does not attempt to achieve the absolute truth. Conviction of the certainty or verisimilitude of the facts is sufficient. Civil procedure aims to achieve formal truth.

The Spanish civil procedure system has two ways for assessing the evidence.

1. In some cases the Law prescribes how the court must assess certain evidence. The CPA establishes maxims of experience explicitly or implicitly, allowing the court
no margin of discretion to feel convinced or not after examining the evidence, in case the fact is considered to have been established according to law. This is the legal assessment system.

(2) In contrast therewith, in other cases—in fact, the majority of cases— the court is free to apply its maxims of experience and satisfy itself as to whether the fact stated by the party is true or not. This is the so called discretionary assessment system. In conclusion, there are public documents (Arts. 319-323 CPA, Arts. 1219, 1220.I and II, 1221.I, 2 and 3 and 1221.II Civil Code), some private documents (Art. 326 CPA and 1225-1230 Civil Code) and testimony according to Article 51 Commercial Code constitute legal proof.

Whatever the system of assessing the evidence may be, it is a constitutional requirement that rulings be reasoned (Art. 120.3 Spanish Constitution) especially in what is called the joint weighing of the evidence. This refers to these cases in which several means of proof are assessed jointly. Thus is because they complement or contradict each other, because when they are considered individually, they would not have sufficient evidentiary strength or meaning.

What the Spanish Supreme Court has prohibited is the resort to this means in order to ignore the existence of evidence for legal assessment which—as we have already said—is mandatory for the court to consider. In short, joint assessment must be done of all the evidence belonging to the same type of assessment (either legal or discretionary).

V. THE BURDEN OF PROOF: THE CONSEQUENCES OF LACK OF PROOF.

Once we have established which sort of realities must be proved, it is now necessary to approach who must provide the proof.

As a general rule, the “principle of ex-parte submission” answers the question of who must prove a given fact. In civil procedure the parties bear the burden of making the allegations of facts and the burden of proving them and convincing the court. That is, the claimant must prove these basic facts on which the claim is based, under the dispositive principle. And the defendant must provide the facts which constitute the defence against the claimant.

Any other facts—either of impeditive or extinctive nature—provided by the parties can be considered by the court regardless of who provided such evidence under what is known as the “principle of procedural acquisition”. Hence, the court may take into consideration the evidence contributed by the parties, independently of which party brought it. The doubt arises as to which party bears the “evidentiary burden” as failure to meet this obligation will cause the party to suffer the consequences.

When there is lack of proof for a given fact the Judge must ask himself who is prejudiced by this lack of proof and therefore, who should have proved it, given that the court is not responsible for distributing the evidentiary burden among the parties. Thus, the judgment will be unfavourable to the party who should have proved and who, nevertheless, was unable to provide convincing proof and must therefore suffer the consequences (Art. 217.1 CPA).
In conclusion, and according to this doctrine, the party must ask himself what he is supposed to prove, in order to convince the court. In this regard it is necessary to distinguish:

(1) The claimant (and counter-claimant) must prove the certainty of the constituent facts —“hechos constitutivos”— upon which the claim is based.

(2) The defendant (and counter-defendant) bears the burden of proving the facts which impede, extinguish or nullify the validity of the constituent facts provided by the claimant.

(3) Thirdly and lastly, the rule concerning “evidentiary availability and ease” (Art. 217.7 CPA) complements the above. This rule adapts the general rule on the burden of proof to the case at stake, as sometimes, criteria such as proximity to the sources of the evidence, unjustified refusals on the part of the defendant to prove certain elements and so on, must allow the court to draw its own conclusions on the evidence.

**VI. DISTINCTION BETWEEN SOURCES AND MEANS OF PROOF. THE IMPORTANCE OF LAWFULNESS**

Any discussion as regards evidence must be based on the distinction between sources and means of proof.

(1) The source of proof is extra-procedural and exists independently to the evidence (a witness, a film, etc.).

(2) The means of proof is the form in which knowledge is provided to satisfy the court (testimony during the trial, playing of an audiovisual recording, both subject to rebuttal and hearing before the court).

Only in this second intra-procedural phase can the court be convinced of the truthfulness and adherence to the Law of the basis for the plea.

Means of proof are regulated in Article 299 CPA and they refer to:

(1) Examination of the parties and expert witnesses.

(2) Documentary proof.

(3) Expert reports.

(4) Judicial examination and,

(5) The means for reproducing image and sound and computer documents.

In contrast, as sources of proof are obtained extra-procedurally and therefore without judicial control, they can become null and void if care was not taken about when they were obtained, and if any basic rights and freedoms were violated. Any evidence improperly obtained would be invalid, given that there is only one way to achieve the truth and that is along the path of legality.

Said differentiation between sources and means of proof serves to understand the scope of Article 11.1 LOPJ and consequently of what is known as the “fruit of the poisonous tree” which states that “evidence obtained direct or indirectly by violating basic rights or freedoms will be without effect” (Constitutional Court Judgments,
114/1984, of 29.11.1984 and 81/1998, of 2.4.1998). This present doctrine must be understood on the basis of several assumptions:

(1) It is only applicable to violations of basic rights and freedoms which occur at the moment when the source of evidence is obtained.

(2) It is only applicable to relative basic rights, such as for instance, inviolability of the home which may have to accept judicial examination provided constitutional guarantees are respected.

(3) Inadmissibility refers both to the sources of the proof obtained directly with infringement of a basic right and those which are obtained indirectly or derivatively, as unlawfulness extends to everything gained through the violation.

Inadmissibility of this unlawful means of evidence is regulated by Article 287 CPA, according to which:

(1) When a party understands that in the direct or indirect obtaining of an admitted source of proof, basic rights or freedoms have been violated, he must assert this immediately, serving notice to the other parties. Unlawfulness may also be brought on the court’s own motion.

(2) The opportune moment will be the act of the trial (ordinary proceedings) or the start of the hearing (verbal proceedings) before examination of the evidence begins (Art. 433.1 and 446 CPA). That is, the regulation is based on the moment at which the means of proof have been proposed and admitted and it is then when the question of their unlawfulness must be raised.

(3) Relevant useful proof can be examined to accredit its unlawfulness.

(4) The decision will be handed down orally. An appeal for reversal may be brought against this decision, and subsequently the issue of its unlawfulness may be raised again in an appeal against the ruling.

VII. EVIDENTIARY PROCEDURE

There are four different phases of evidentiary procedure: petitioning the court for evidence to be taken, discovery, admission by the court and finally, examination of the evidence.

The first stage in evidentiary activity consists in petitioning the court to begin the evidence stage and for it to accept it. This act is carried out verbally in the preliminary hearing (Art. 429.1 CPA). If the court refuses, the appropriate objection must be lodged to reserve the party’s right to challenge said point in an appeal against the merits of the prospective judgment.

Secondly, and at this same stage in the oral proceedings, each party must propose the specific means of proof they wish to avail themselves of. The court cannot propose evidence unless otherwise established by law (Art. 282 CPA, exclusively on matters of capacity, filiations, marriage and minors). In accordance with civil procedure principles, Article 429.1.II CPA lays down the power of the court to “warn” the parties that the evidence they propose may be insufficient.
The third stage focuses on admission by the court of the different means of proof to be finally examined. Said oral decision may be appealed against before the same judge and then subsequently on appeal against the merits of the prospective judgment.

Refusal by the court to admit a means of proof must be based on one of the following reasons:

1. Because it refers to an undisputed fact.
2. Because proposed evidence is irrelevant, that is, because it addresses events which are unrelated to the object of the procedure.
3. Because the evidence is useless, that is, because the means proposed is not adequate for proving what it was intended to prove.
4. This is the moment, as mentioned above, for challenging lawfulness of the evidence or for ex officio weighing of its lawfulness.

Lastly comes the most important part of the evidentiary proceedings: examination of the evidence. This process is governed by six principles:

1. Unity of action: Given that this moment is governed by the principle of orality, the CPA intends all the evidence to be examined at a single hearing or in the least number of hearings concentrated in time. Exceptions must be made for cases where the evidence has already been examined before (early evidence) or which has to be examined outside the court headquarters.

2. Immediacy: As a consequence of the above, only the court that is due to render the judgment must decide in accordance with what it has been seen and heard during the examination. So that no delegation is possible except, logically, in cases of “judicial cooperation” with another court, since the ruling court’s decision will be arrived at on the basis of the documentary consideration made by the other assisting court (Art. 429.5.II CPA).

3. Contradiction: All the evidence is examined with full intervention of the parties; lack of a proper defence is prohibited. Correct summon is sufficient to presume the parties have been granted the right; which, in any case may be waived by the party or its counsel.

4. Publicity: The evidence is examined at a public hearing and only in exceptional circumstances may the court serve the parties with an order to carry out the trial “in camera”.

5. Order of the examination: Article 300 CPA establishes the following order for examining the means of proof:

   a) Examination of the parties.
   b) Witnesses.
   c) Experts.
   d) Judicial examination of the evidence (in the same court headquarters).
   e) Reproduction of word, sound and image.

6. Documentation: Orality means that the court secretary must document the proceedings in writing, with the help of the necessary sound and image recording means.
VIII. EARLY EVIDENCE – “Prueba anticipada” –.

The evidentiary proceedings can take place before the oral hearing, if some fears exist that the source of the proof may be lost, making it impossible to bring to the proceedings (Arts. 293-296 CPA). This is a real examination of the proof and, therefore, it will be subject to the above principles. The CPA contemplates two moments when early evidence may be presented:

(1) Before the proceedings begins: Only the future claimant can apply for this by addressing the competent court to hear the future proceedings. The court must ensure that it is competent to hear the dispute in the future and therefore, that it is competent at the moment of the application to examine the evidence. This process must begin within two months, at the risk of losing probative value. In order to ensure the right to a defence, the future defendant must be summoned to the examination of the evidence.

(2) During the course of the proceedings before the oral hearing: At this second stage, either of the parties to the proceedings may apply, and the same court which is hearing the main proceedings will be competent.

6.27. In both cases, the court will issue a court order answering the request made by the party or parties, against which no appeal is possible.

IX. SECURITY OF THE EVIDENCE.

In contrast to the above, the CPA envisages the possibility that either party may ask the court to secure a given source of proof. So that in the future, when the proceedings begin, it may be successfully examined, thereby avoiding natural risks, human behaviour, etc., which may lead to the deterioration or disappearance of the object, document, and so on to be examined as a future means of proof (Art. 297 and 298 CPA). In this case the object is made available to the court so that it can give a decision on:

(1) Preserving the things or situations.
(2) Issuing an injunction, with contempt of court warning.
(3) Providing a record of the situation of the object in question.

In order to do so, the court must establish:

(1) That the evidence which the intention is now to secure is relevant and useful.
(2) That there are reasoned fears that it may be disturbed or damaged.
(3) That the securing measure adopted by the court may be carried out for a limited time and without causing serious detriment to the parties involved.

Exceptionally these present measures may be adopted without hearing the affected party if there is a demonstrable risk of irreparable damage.
X. MEANS OF PROOF

It has already been said that sources of proof are extra-procedural and unlimited, but means of proof are procedural and constitute a *numerus clausus*. In this regard, only the means of proof detailed below may be examined and in the manner regulated by Law.

A. Examination of the Parties

As a general rule, only those parties to the process are examined. The only exception to this statement, are the two circumstances under which it is possible to call a third party to declare:

1. When the questions referred to the parties concern non personal facts about the declarant (and that the declarant proposes that the third party in possession of the information reply directly).

2. When the declarant party is a legal person and has to make a statement about facts in which the declarant person has not intervened (an entity’s legal representative).

This means of proof can only be used to examine the *disputed* facts (not admitted by the opposing party) and *personal* facts concerning the declarant party (in which it took part directly). And provided the intention is to seek acknowledgement of personal facts which are prejudicial to it (Art. 316.1 CPA). There is nothing to prevent a co-litigant from calling on its co-litigant to make a statement.

The party called to give evidence is under three obligations:

1. First, to appear at the hearing, at risk of being sanctioned with a fine (Art. 292.4 CPA) and a warning that silence may amount to an *ficta confessio*; that is, to inference of admission of facts which are entirely prejudicial to it (Art. 304 CPA).

2. Secondly, to give evidence during the hearing, unless bound by professional secret and at risk of any evasive responses or silence being declared by the court as amounting to silent admission –“*ficta confessio*”- (Art. 307 CPA).

3. To respond categorically.

Several aspects are worth highlighting with regard to the manner of examining this means of proof:

1. Generally, the examination must take place in the court which is hearing the matter and exceptionally, it may be carried out at the party’s domicile -for instance, for health reasons- and/or by judicial co-operation if the court considers it appropriate and the party or third party being examined resides outside the judicial district under its jurisdiction.

2. The questioning will be done orally, and the law does not permit the use of a draft (for neither the questions nor the responses). Questions must be put affirmatively, clearly and precisely without assessment or evaluation, always meeting the requirement
of usefulness and relevance. And they have to be admitted by the court. They can also be rejected either *ex officio* by the court or at the request of a party by making the opportune objection. When the questions of the lawyer proposing the evidence have been responded to, the other parties’ lawyer may formulate new questions.

Sometimes, it may be advisable, as the Law permits, to request that several declarants who are to give evidence on the same fact be held incommunicado to ensure the meaningfulness and success of this evidentiary means.

Article 314 CPA prohibits a reiterate examination of the parties on the same facts on which they have already given evidence.

(3) In this examination, public authorities are privileged parties as they can reply in writing without attending the hearing, and the document will simply be read out in the oral proceedings.

(4) This means of proof can be freely weighed (Art. 316 CPA) with the legal exception that tacitly admitted facts are understood to have been proved as are facts admitted by the party for whom they are prejudicial (Arts. 304 and 307 CPA).

B. Documentary Evidence

This is a means of proof based on the written expression of the situation, either because it is a public document –from Spain or abroad (Art. 317 CPA)-, a private document (Arts. 317, 319 and 324 CPA) or an electronic document (Act 59/2003, of 19.12.2003 on the electronic signature).

Generally and as with any other type of document, the Law indicates that the appropriate moment for presentation is when the initial allegations are being made. That is, it must be presented together with the claim or in the reply to it. In addition, the Law establishes a closed system for determining exceptions, all based on reasonable causes, which justify one of the parties not presenting the document on time, with reference to several events:

(1) Because the claimant has only found out about the relevance and existence of said documentary source through the allegations provided by the other party (Arts. 265.3 and 272 CPA);

(2) Because the document was generated after the claim or the reply, or if before, the party now proposing it had no knowledge of its existence or simply it was impossible to obtain the document before for causes not attributable to the affected party (Arts. 265 and 270 CPA).

Documentary evidence requires no probative activity, but only verification. Only when the authenticity of the document is challenged will there be a true examination of the evidence at the preliminary hearing, which is the appropriate moment to admit, challenge or provide evidence of its authenticity (Art. 427 CPA). Having established this possibility, procedural law concludes that if a document goes unchallenged, it provides full proof and must be considered as such by the court (Art. 318 CPA for public documents and 326.1 CPA for private documents).
Finally, we shall look at two situations concerning the presentation of documents.

(1) Firstly, the party voluntarily shows the document in its power or if it is a public document the party may indicate the register, file or protocol where it can be found.

(2) But the Law also regulates the possibility of requesting that the other party, third party or public entity show a document in its power (Arts. 328 to 333 CPA).

(a) Documents held by the party: A party may demand either in writing or orally that the other party shows a document in its power. And this will be considered in the preliminary hearing (ordinary proceedings) or at the start of the hearing (verbal proceedings). Accurate indications should be given as to the nature of the document in question or a non certified copy or photocopy of the same, if any, should be presented. In view of this demand, the other party may:

i.- Shows the document so that the court secretary can make a record of the same.

ii.- Not shows it without giving a justified reason. The Law authorises the court to give evidentiary value to the mere photocopy or the version of the contents of the document stated by the party requesting it (Art. 329 CPA).

iii.- Not shows the document giving reasons to this respect. In these cases the court may not give evidentiary value to the requested document.

(b) Third party documents: In this second case, as the person holding the document is not a party to the proceedings, the Law only authorises the court to order presentation of a third party document if it were going to provide the basis for the judgment on the case.

The court will summons the third party and arrive at its decision on the basis of the third party’s statement. If the court decides not to admit the document, there is no further appeal, unless the issue is raised again in an appeal against the merits of the judgment. Should the court decide to request presentation, the party will be summonsed to present it before the court Secretary. The Law is silent on the effects of non compliance. It might be possible to deduce grounds for contempt of court or the court might be able to issue a search warrant to look for said document at the third party’s domicile. Since article 256 CPA authorises limitation of a basic right such as the inviolability of domicile in the fixed cases envisaged therein, such a restriction cannot be admitted generally. In this regard, account would have to be taken of Law 15/1999 of 13.12.1999 on data protection.

(c) Documents held by a public institution: The document will probably be held by a public law entity. Public law entities are under an obligation to collaborate with jurisdictional organs unless the information is confidential, subject to the aforementioned Law on data protection, or classified as secret and confidential.

Having made all these points, it is necessary to establish the differences between a private and a public document and consequently the different system for evaluating them.
1. Public Documents

A public document is authorised by a Notary or competent public employee, in accordance with the formalities required by Law (Art. 1216 Civil Code). The CPA offers a list of possible public documents (Art. 317 CPA):

(1) Decisions and formalities regarding judicial action and certification of the same issued by court Secretaries.

(2) Documents authorised by notary according to law.

(3) Documents with the intervention of Official Associated Brokers –now notaries- and certifications of the operations they were involved in.

(4) Certificates issued by Land and Commercial Registrars.

(5) Documents issued by legally authorised public civil servants to certify on matters in the course of their duties.

(6) Documents which, in reference to the files and registers of State institutions, public authorities or other public law entities, are issued by civil servants authorised to attest depositions and actions of said bodies, authorities and entities.

Public documents must be provided for the proceedings in the form of the original (files and protocols), certified copy (issued by a civil servant), non certified copy and even photocopy, bearing in mind that in the last two cases, their authenticity may be challenged (Art. 334 CPA). After that, the following situations may arise:

(1) The public document presented before the court goes unchallenged and therefore provides full proof.

(2) The document is challenged and after comparison and/or an expert test, it is declared false. In such cases, the document will lack evidentiary value and criminal proceedings must be brought for the offence of falsifying a public document.

(3) It may be materially impossible to make any comparison: in these cases, the Law authorises the court to weigh said document according to logic and reason/good judgement.


2. Private Documents

In contrast to public documents, there is no definition of private documents in the Civil Code. It merely states at Article 1255 that such documents will have the same value or cogency between the signatories as a notarial instrument. In this regard, the CPA states that private documents are any documents which are not public, or in other words those which are not listed in the aforementioned Article 317 CPA. The reason for the lack of systematisation is precisely because there are no formal requirements for private documents.

Private documents must be provided in the form of the original, copy and photocopy. The value differs according to the situation generated:
(1) Firstly, the document may not be challenged. In this case, the document must provide full proof for the court.

(2) The document may be challenged and declared valid. In this case, it will provide full proof and it will not be subject therefore to discretionary assessment by the court.

(3) In some cases comparison of the document may be materially impossible and the CPA authorises the court to weigh the evidence according to the rules of logic and reason.

(4) The legislator makes specific mention of the presentation of non certified photocopies as means of proof for a private document (Art. 334 CPA). In this case, the Law envisages that if the party being prejudiced challenges its accuracy the document will be compared with the original, and it may be possible to propose an expert report. If the comparison cannot be made, the evaluation will be made according to the rules of logic and reason.

(5) The authenticity of electronic private documents may be challenged in the same way.

Generally, litigants are under a duty to discover documents, with warning from the court that in the case of obstruction the document in question may be weighted (Art. 329.1 CPA). Equally the document may be in the possession of a third party who must attend the preliminary enquiries under Article 256 CPA. Thirdly, the document may be held by an official entity which will be under an obligation to issue the document and provide it for the hearing, unless it is secret (Art. 332 CPA).

C. Expert’s Report Evidence

1. Concept and Characteristics

This is a means of proof which brings an uninvolved third party (natural or legal person) to the proceedings, so that they can provide their technical, artistic, scientific, or practical know-how concerning some aspect of the dispute. It aims is to allow the court to assess the facts or relevant circumstances provided they do not concern knowledge of the Law, which –as it has already been says- lies with the court. Said knowledge (source of proof) is contributed to the proceedings as means of proof through an expert report. It is therefore necessary to distinguish between the evidence provided by the expert report and the expert, since the former is a means of proof consisting in the presentation of a report whereas the second is a personal source of proof whereby knowledge is provided through an examination, report, etc.

There are two types of expert evidence: the expert is either proposed by the party or appointed by the court from official lists sent by the Professional Associations.

This report is provided by the party at the start of the proceedings, or where appropriate, at the preliminary hearing or before the trial. In principle, it is not rebuttable, but it can be taken to the oral hearing to be rebutted by the opposing party’s expert who presents a different report. It is important to note that the court cannot reject the report proposed by a party.

1.2. Expert’s Report Commissioned by the Court.

As its name states, this report is produced by the court-appointed expert. By its nature, this report will always be subject to rebuttal. This type of expert report is only possible, pursuant to Article 339 CPA:

1. If it is announced that the party entitled to legal aid has applied for it.
2. If it refers to allegations or claims not contained in the writ of claim.
3. If it refers to complementary allegations or claims permitted in the preliminary hearing or,
4. If it has been requested in the allegation documents, provided that the court considers that the report is relevant and useful. In this case, it should be pointed out that if the parties agree on the person or entity which should issue the report, the court will not have to choose from among the possible candidates on the list.

An expert must have the necessary official qualification in the matter object of the report or be an authority on the matter. The expert must act objectively. For that reason the Law has established grounds and a procedure to “challenge” –“recusación” or “disqualify” –“tacha”- the expert appointed by the court or the party respectively (Arts. 125 to 128 CPA) to ensure objective, impartial behaviour. The expert can never be also Judge or one of the parties, but he must necessarily be an uninvolved third party who is appointed precisely because of his/her technical knowledge, necessary to understand the facts.

The court-appointed expert can be challenged on the grounds laid down in Article 219 LOPJ and under Article 124.3 CPA for:

1. Having provided services as expert to the opposing litigant or being dependent or a partner of the same.
2. Having previously given a contrary report on the same matter;
3. Having shares in a society, establishment or company which is party to the proceedings. Correlatively, the expert has a duty to abstain if circumstances should arise which prevent him from continuing as expert in view of the duty of impartiality which is also incumbent upon him.

If the expert has been proposed by the party, he cannot be challenged. These cases would give rise to “disqualification” which warns the court of circumstances which cast doubts upon his impartiality but does not prevent the report from being issued. Said disqualifications are subject to a preclusive period for each type of proceedings and justificatory evidence may be proposed.

The expert is entitled to receive fees and demand a provision of funds before starting to study the matter. The expert is obliged to appear at the hearing, swear or
promise to tell the truth, act as objectively as possible and present the expert report. Breach of his obligations may lead to the appropriate penal sanction.

2. Evidentiary Procedure

Evidence is provided on the basis of the principle of *ex-parte* submission. Only in certain proceedings concerning matters of filiations, paternity, maternity, capacity and matrimonial proceedings can this evidence be examined *ex officio* (Art. 339 CPA).

2.1. The Expert’s Report Commissioned by the Party.

The appropriate moment for presenting expert reports is during the allegations, even after the supplementary allegations in the preliminary hearing, since they open new terms. In this last case, the report must be provided five days before the hearing is to take place.

When the report has been presented, the expert’s appearance in court will be subject to what the parties have requested and the court has agreed on (Art. 347.1 CPA). During the hearing both the parties and the court may ask any questions they consider appropriate as to the object of the report.

2.2. The Expert’s Report Commissioned by the Court.

The parties may request an expert report at two different times (Art. 339 CPA):

(1) In the initial pleadings and,

(2) In the supplementary pleadings at the preliminary hearing.

Finally, the court can also agree this *ex officio* for the proceedings referred to *supra*.

In all these cases, the law favours the expert being appointed by mutual agreement and where this is lacking he is appointed by the court from among the candidates on the list issued by the professional associations.

An important issue is the costs generated by this evidence. The report will be paid for by the person requesting the report and if it was jointly requested, the costs will be split.

When the report has been issued the court will serve notice on the parties so that they may make a statement on the convenience or otherwise of calling the expert to the oral hearing. The court may also decide this *ex officio* in order to question the expert or ask for explanations on the object of the report. Specifically the parties may request:

(1) Full presentation of the report if such presentation requires other operations to supplement the written document by the use of documents, materials and other elements (Art. 336.2 CPA).
(2) Explanation of the report or some of the points.

(3) Response to the questions and objections on the method, premises, conclusions and other aspects stemming from the report.

(4) Responses to requests made to extend the report to other related points if it can be done in the same act and for the purposes of knowing the expert’s opinion on the possibility and usefulness of such an extension and the period required to do so.

(5) Criticism of the report in question by the opposing party’s expert.

(6) Disqualifications which may affect the expert.

3. Comparison of Handwriting

This is a particular case of expert report stemming from the presentation of documentary evidence and the subsequent challenge to its authenticity. This last issue has already been approached in this chapter. In such cases, the parties do not intervene in the appointment of the expert as the expert is court-appointed. The expert must compare the challenged document with any authentic or original document. If it is not possible to obtain the original, the court shall construct the challenged document in accordance with the rules of logical and reasonable examination of the evidence.

Finally, it should be pointed out that assessment of expert evidence is governed by the rules of logical and reasonable examination.

4. Testimony

Testimony is a means of proof based on the examination of an uninvolved third party who has directly seen or heard something of the events object of the proceedings or else knows of the same indirectly, and is therefore a hearsay witness –“testigo de referencia”- (Art. 299.1.6 CPA).

Once again here, a distinction must be made between the source of the evidence -the witness and his knowledge- and the probative means -questioning at the trial with cross-examination and hearing-.

The “non involvement” requirement for this witness makes this function incompatible with the exercise of the jurisdictional function, and provides a ground for objection (Art. 219 LOPJ) and nor is it possible to be a party to the proceedings as the knowledge of the parties is provided through other probative means, examination of the parties.

4.1. The Witness: Concept and Characteristics

The witness is only a natural person able to obtain sensory perceptions. The witness must be able to understand what has been seen or heard and what takes place in the proceedings. Because of that witnesses under the age of 14 are only allowed to intervene in exceptional cases if they have the necessary discernment. Legal persons
who know the facts inform of this through documentary evidence and can only be witnesses if represented by a natural person.

The third party is always a natural person, because they are the only ones able to have sensory perceptions. Furthermore, a third party is such because a witness who is a party will be subject to examination of the parties. CPA recognises the figure of the expert-witness so the concurrence of both conditions in a single person may be a means of proof.

The witness has a duty to appear at the hearing unless there is just cause, under sanction of a fine and a warning of criminal proceedings against him due to contempt of court. He also is under an obligation to state and tell the truth on pain of being accused of the offence of false witness in civil proceedings. There is no obligation to give evidence in cases where knowledge of the facts is obtained because of a given professional status and is covered by professional secret. Besides, the witness is entitled to compensation where appropriate (Art. 375 CPA).

It is possible to challenge the suitability of the witness to act as such. In such cases disqualification or presumption of bias are regulated (Art. 377 ff. CPA), and the relevant evidence may be examined which will be decided in the ruling on the merits of the case, when the court must decide whether or not to take the statement into account and grant it credibility or otherwise to what the witness has said. It is therefore an expression of the principle of assessing the evidence according to the rules of logical and reasonable examination.

4.2. Evidentiary Procedure

Examination of this means of proof is based firstly, on the parties formulating a series of general questions directed at accrediting the suitability of the witness and other specific questions about possible bias or links with the other party. Once said questions have been formulated, the true examination begins. Questions to the witness must be formulated in the affirmative and clearly. They may be challenged and declared irrelevant and useless because they do not address facts known personally by the witness. If the judge does not admit a question, the party may make the appropriate objection for the record.

Testimony must be proposed at the preliminary hearing. Prospective witnesses must be identified with all the available data. The party must undertake to bring its witnesses or apply to the court for those which need to be summonsed and for which judicial co-operation is needed to examine them.

Examination of this evidence begins with the taking of the oath or promise to tell the truth from the witness, proceeding from general questions to the true oral cross-examination. The witness must reply directly, without the support of a written document, except in the case of accounts, books and other documents necessary to give an accurate reply. The court must reject irrelevant and useless questions and the party that formulated them may object as before. The court has the authority to examine directly and ask for clarification of certain points, etc.

The CPA regulates the court’s ability to order face to face interviews (Art. 373) as a form of confrontation between witnesses and between witnesses and parties when there are contradictions. This may be done at the request of a party or ex officio.
Two types of questions are put to the witness.

(1) A series of general questions aimed at finding out how suitable the witness is for the job.

(2) When it has been accepted that the witness is suitable, examination of the facts object of the evidence can begin. The questions must be formulated in the affirmative and orally. Said questions can be objected to by the other party in an attempt to get them dismissed. The court decides whether the question is relevant and the party can always leave a record of its disagreement. The court must *ex officio* dismiss questions which do not concern the object of the process, which do not refer to the witness’s own knowledge and if despite dismissing the question the witness has replied, it will be expressed in the record so that the reply will not be taken into account in the assessment.

The court weighs this evidence at its own discretion and according to the rules of logical and reasonable examination.

5. Judicial Examination

This is a means of proof based on the court’s direct perception of the facts which are the object of the evidence, whether they are people, places, movable or immovable things (Art. 299.1.5 CPA).

Examination of these means of proof is only at the proposal of a party with the necessary indication of whether the expert has to attend the act of examination or even a witness or the party itself. Cases such as these represent a joint examination of the evidence and must obey the rules of execution, assessment and imposition of costs in each case. Equally the performance of such examination may have to be preceded by a restriction of rights such as for example a search warrant (Art. 354.1 CPA) limited by respect for the dignity and privacy of persons.

The evidence must be examined in the presence of the parties (provided that the court does not consider it perturbing) and their counsel, under the principles of contradiction and immediacy and the court secretary must make a record of the act, the appropriate technological resources for recording image or sound being authorised by law (Art. 359 CPA). This examination may be carried out by judicial co-operation in the cases where the court may not move to the place in question, thus failing to fulfil the principle of immediacy.

The court secretary will make a record of what has been examined and done with special care to ensure that strictly objective data is recorded along with any subjective perceptions and weighing by the judge, expert and parties.

The CPA does not regulate the system of assessing this evidentiary means since the judge, logically, will attend to what is perceived by the senses. In the event of judicial co-operation, a differentiation must be made between the aspects of the act which are merely noting what is perceived by the court which examined the evidence and assessment of those facts. The first aspects, in terms of objective data, provide legal proof but the second are subject to the rules of logical and reasonable examination of the evidence.

The CPA lists as means of proof the instruments which serve to reproduce words, sounds and images and the instruments that permit the storage, retrieval and reproduction of words, data, figures and mathematical operations carried out for accounting purposes or other purposes relevant to the proceedings. In short, it is a matter of distinguishing two blocks of probative means which in reality are very similar:

(1) Firstly those which serve to reproduce images and sounds before the court, and,

(2) Secondly the instruments for storing, retrieving and reproducing words, data, figures and mathematical operations.

6.1. Reproduction before the Court of Images and Sounds.

The parties may propose as means of evidence the reproduction before the court of words, images and sounds captured by means of filming, recording and other similar instruments. The parties may include along with this proposal:

(1) The written transcription of what it is said, seen or heard in said document and which is relevant to the case.

(2) Reports and other means of evidence which support their argument.

The other party must make use of probative means which it considers opportune to disprove said affirmations. This act of evidence will be reproduced in the hearing under the principles of contradiction and immediacy and the result must be documented.

6.2. The Instruments for Storing, Retrieving and Reproducing Words, Data, Figures and Mathematical Operations.

In these cases one of the parties proposes as means of proof direct knowledge of the diskette, USB, cd-rom, computer software and hardware, and so on, provided both that they are relevant to the proceedings and are examined with contradiction and hearing. Although the CPA is silent on the issue, it is advisable that, together with the presentation the transcript of the data referred to above is included as well as the proposal of the other probative means which the party wishes to make use of to examine this evidence.

The images, words, and so on may well be contained in audiovisual means or storage instruments which are not available to the party who wishes to present said information through this means of proof. Preliminary enquiries under the aforementioned Article 256 CPA on the matter of documentary evidence do not expressly include this circumstance although it seems reasonable for it to apply by way of analogy. This probative means may even be dealt with in circumstances where it is appropriate to secure the evidence in advance, given the easy vulnerability of this type of information stored in such instruments.
The party or the third party holding a document is under a duty to discover documents (Arts. 328 and 330 CPA) and we consider that these rules apply here. Only non compliance with said duty could authorise a preliminary enquiry devoted to such purpose.

The appropriate moment for providing the means, as in all cases of documentary submission, will be together with the writ of claim and exceptionally in the aforementioned cases to examine documentary evidence (Art 265.2 and 3 CPA) at the hearing before the oral proceedings. Subsequent presentation will only be possible in the cases envisaged in Article 270 and 271 CPA:

(1) Documents dated after the claim or the reply to it provided it was impossible to obtain them before;

(2) Documents dating before the claim or reply to it if the party presenting them justifies that it did not know of their existence beforehand;

(3) Documents which could not be obtained before for causes not attributable to the party provided the place where they can be obtained is designated.

(4) The same goes for new facts or new news.

The appropriate moment for examining them will be at the preliminary hearing and the party must also at this moment propose the need for expert assistance while they are being examined.

The court shall assess this means according to the rules of logical and reasonable examination of the evidence.

7. Presumptions as Method of Proof

This is not a means of proof but a probative method consisting in three phases of reasoning:

(1) The starting point is the existence of a fact which has effectively been proved or admitted by the parties (basic fact or indicia);

(2) An affirmation or presumed fact is arrived at (which is deduced from the previous fact and is the factual assumption of the rule which the intention is to apply in the proceedings).

(3) The reasoning is the link between both premises.

Sometimes the presumption is laid down by law, in other cases, by the court. But an accurate logical link is required in this case. The former presumptions are known as legal presumptions; the second, iuris tantum presumptions.

(1) Legal presumptions admit proof to the contrary; they are iuris tantum presumptions (Art. 385.2 CPA). Their existence exempts the favoured party from the obligation to prove the presumed fact, but it still has to prove the basic indicia. All this must be understood without forgetting that probative activity can also intervene in the opposite sense for the party prejudiced by said presumption. For example, when the
Civil Code refers to the rights of the “nasciturus” (art. 29), it assumes the basic fact of the pregnancy which must be proved and presumes the right of the unborn child over its dead father. The logical link between the pregnancy and inheritance entitlements is that there was a pre-existing father. Proof to the contrary would be evidence accrediting the lack of sexual relations between the pregnant woman and the now dead father.

(2) There are also judicial presumptions where the court establishes the precise, direct link between the certain basic facts or indicia which has been proved or acknowledged and the fact presumed by the court. In both cases, the party prejudiced by the presumption may provide evidence to the contrary.

In these cases of judicial and legal presumption and in accordance with the principles of civil procedure:

(1) The basic fact or indicia must have been brought to the proceedings by the party.

(2) The presumed affirmation or consequence must also be provided by the party in the cases of judicial presumption or by a rule in the event of legal presumption.

8. Final Enquiries

Final enquiries are acts of official investigation, aimed at forming the court’s conviction over the material contributed to the proceedings, and are only possible in the verbal proceedings. This process is part of the powers to materially direct proceedings which, surprisingly, are given to the court. These final enquiries can be requested by the party and exceptionally provided for ex officio (Art. 435.2 CPA).

There are four possible situations which give rise to this probative activity:

(1) Means of proof which, for reasons beyond the control of the party which proposed them have not been examined;

(2) Any relevant and useful evidence referring to new facts or new news.

(3) Exceptionally the court may agree ex officio or at the request of a party to examine means of proof already examined on facts introduced by the parties if the examination did not provide clear information for reasons beyond the control of the person who examined them.

(4) Article 309.2 CPA on matters of examination of the parties, if the representative of the legal person has stated the name of the person who knows the facts personally, that person will be called to make a statement at this stage of the final taking of evidence.

The application must be made after the evidentiary phase, in the following twenty days before the judgment is handed down. If the court rejects the application, there is no further appeal, except in an appeal against the merits of the judgment. Said examination shall be governed by the principles of contradiction, hearing and immediacy.
9. Appeals

In ordinary proceedings, the court must decide whether to admit or reject each piece of evidence proposed (Art. 285 CPA). The decision may be appealed against before the court that rendered the judgment which must substantiate and rule immediately. If the appeal is rejected, the party may formulate the appropriate objection in order to maintain its rights at second instance. In short, at that time no further appeal is possible.

In the case of verbal proceedings, under Article 446 CPA an appropriate objection may be lodged against any decision on whether or not to admit evidence in order to maintain the right to review this disagreement at second instance, but no further discussion is possible at that time.

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