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Evidence in Civil Law - Portugal

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ABSTRACT The following text deals with the general principles and legal rules regarding evidence and evidence taking in the Portuguese legal system. Based on the rules foreseen in legal texts, as well as court decisions and national literature, the authors approach the general theory behind the current rules and notions in force while also referencing the specifications of the means of proof in use in legal practice.

KEYWORDS: • civil procedure • parties • probative value • taking of evidence • burden of proof • means of evidence • witnesses • expert witnesses • unlawful evidence

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Foreword

The matter of evidence, and evidence taking, assuming the key task of demonstrating the truth of a certain fact, influences the essential aspect of judicial tutelage that is the final decision. As such, the study of the means of evidence, their probative value and evidence taking in general assumes a great role in the development of a regime which serves the ultimate purpose of the Law: the fair resolution of conflicts and the subsequent pacification of social life.

While working in the following text, Portuguese Procedural has been structurally reformed by the adoption of a new Code of Civil Procedure (2013). Considering the impossibility of presenting an in-depth analysis of the changes and implications in legal practice and literature, we aimed at approaching the long (and current standing) principles and practices which still govern Portuguese Procedural law.

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Part I

1 Fundamental Principles of Civil Procedure

Portuguese Civil Procedure is ruled on the Code of Civil Procedure (Lei nº 41/2013, de 26 de Junho) enacted in 2013, known as NCCP. This new Code aimed to rationalize, simplify and expedite the realization of the essential purpose of civil procedure – fair composition of private disputes in time – by conferring the judge inquisitorial and directness powers to form effective the use of means and dilatory nature that the current Code provides for and allows the parties. Also allowing him to rule the procedure, adapting it to the specific nature of the contentious, preventing the commission of acts which, in concrete, prove to be useless and provide for more flexible and streamlining procedural forms, provided, in the abstract, by law.

To prove is to produce a state of certainty in the conscience and mind of the judge to his conviction about the existence or non-existence of a fact or truth or falsity of a statement about a factual situation that is considered of interest to the judicial settlement or solution a process.

Evidence is conceptualized in the objective sense and subjective. In the objective sense, it consists of the means to provide the judge the knowledge of the truth of the facts. In the subjective sense, it is the conviction that the evidence in the process generate the mind of the Court as to the existence or non-existence of facts.

For COUTURE, "prove to demonstrate somehow sure of a fact or truth of a statement" (ALMEIDA, 1927: 112). In his perspective, evidence taking would be a fact-finding method, as a method of verification, demonstration, corroboration of the truth or falsity of all statements made in court when it comes to civil matters.

To prove is to produce a state of certainty in the conscience and mind of the judge to form his conviction concerning the existence or non-existence of a fact or of truth or falsity of a statement about a factual situation that is deemed of interest to the judicial settlement or remedy for a process.

Evidence is conceptualized in the both objective and subjective sense. In the objective sense, it consists of the means for providing the judge the acknowledging of the truth of the facts. In the subjective sense, it is the conviction that the evidence in the process generates in the mind of the judge as for the existence or non-existence of facts.

1.1 Principle of Free Disposition of the Parties

The principle of free disposition of the parties[2] attributes great importance to the will of the parties in the proceedings, through the recognition of a general power of dominion over several procedural aspects (*dominium litis)* (Castro Mendes, 2010: 124).

1.1.1 General Scope of Influence in the Portuguese Legal System

The principle of free disposition of the parties is the one that stands in as opposed to the principle of inquisitorial. In the first, what is decisive is the will of the parties; the second, which falls in the process, is the will of the judge. (Closely following Rui Moreira: 2013)

The principle of free disposition mainly stands on three pillars:

1 - The parties determine the start of the process; It is the beginning of the request, leaving the parties the impetus of the process; art. 3 of the CPC expressly provides for such an expression of this principle;
2 - The parties are in the process object of availability;
3 - The parties have the availability of the conclusion of the proceedings, which may prevent the decision through arbitration, waiver, confession or transaction.

Regarding the availability of the object of the proceedings, it is important to distinguish between the availability for an application and availability issues and availability of the material required for the decision that application.

As for the availability of the application, art. 661 limits the court's activity, the applicant's claim: the sentence cannot condemn in excess or different object than you ask for.

As for the availability of the issues and facts necessary for the decision, art. 660, par. 2 states that the sentence must address all the issues that the parties have raised, notwithstanding some remain hampered by the others solution. In fine adds that shall not take care of others, unless the law permits it or requires their unofficial knowledge (*"ex officio"*).

As stated in the joint reading of art. 3 (1) and art. 5 (1) of the Portuguese Code of Civil Procedure (hereinafter CCP), *"the court cannot provide judgment on an action without it having been requested by one of the parties, with the opposite party having been duly called to oppose it"* and the parties being burdened with the duty of alleging the *main facts* which constitute the cause of action or on which the respective exceptions are based.

Following the general doctrine (*inter alia*, Lebre de Freitas, 2013; Montalvão Machado and Paulo Pimenta, 2010; Remédio Marques, 2011) the principle of free disposition of

[2] In Portuguese *"princípio do dispositivo"*.

the parties can be said to entail the influence over the following aspects in civil proceedings: the (a)) opening of the proceedings, the (b)) configuration of the instance, (c)) the parties in the action (d)) the suspension or termination of the action, (e)) the scope of the final judgement, as well as the (f)) the configuration of its subject matter[3].

1.1.2 Opening of the Proceedings

Considering the general private nature of the rights which constitute the object of the action (namely, their availability), the parties are free to act according to their own volition, appealing, or not, to judicial tutelage (Lebre de Freitas, 2013: 155). The court is, therefore, unable of replacing the party in the initiative of petitioning for the opening of an action (art. 3 (1) CCP).

Such faculty, however, does not mean the parties can't ever be under a burden of acting in the procedure (e.g. the petitioning by the surviving party or joint-party for the substitution of a deceased party's successors in the proceedings, which entails the giving notice of the respective persons to replace the deceased in order for the proceedings to resume) (Lebre de Freitas, 2013: 158).

1.1.3 Configuration of the Instance and of the Parties in the Action

When submitting the application, the plaintiff identifies the defendant(s) while also stating the respective cause of action and pleading (*petitum*) which establishes the instance (art. 552 (1-a)) and art. 259 (1) CCP)[4]. Nevertheless, both pleading and parties can be changed during the proceedings.

The pleading can be altered (by the addition of new facts or alteration of the ones previously listed) following the defendant's counterclaim (art. 266 CCP) or agreement of the parties at any moment during the proceedings (in 1st and 2nd instances (art. 264 CCP)). Parties (plaintiff and defendant when submitting a counter-claim – art. 265 (2) CCP)) can also add or reduce the previously submitted pleading, should such request be the development or consequence of the original pleading[5], until the closing of the final hearing (arts. 283 (1) and 265 (2) CCP). Following the submission or agreement on the

[3] Some authors choose to distinguish two principles within the general principle of free disposition of the parties: principle of free disposition (*strictu sensu)*, which relates to the general liberty of the parties in opening/suspending/ending the action, and a principle of controversy, which relates to the general notion of self-responsibility of the parties in arguing the main facts in the action (Lebre de Freitas, 2013: 156-157). See *infra* notes 8 and 9.

[4] For instance, the pleading of compensation following the listing of suffered damages (Ac. STJ, 10/10/03) (cit. Neto, 2014: 595, art. 552, 26).

[5] The request for the update of the value of interest in debt would constitute the *development* in regard to the pleading of a personal action. The request for the cancelling of a real estate property's registry, on the other hand, would emerge as *consequence* in relation to the pleading in an action of annulment of the respective sale (Lebre de Freitas, 2013: 163, footnote 30).

pleading of the action, the judge is prevented to decide over the scope of what was requested or agreed (during the proceedings) by the parties (art. 609 (1) CCP)[6].

The substitution of both the plaintiff(s) and de the defendant(s) throughout the proceedings can occur by means of descent or succession (through the transfer of the litigious right) and the respective request for the substitution of the party (art. 262-a) CCP). Third parties can also be called to intervene in the proceedings, either by following the request by one of the parties, or acting in their free will and interests (art. 262-b) CCP). As manifestation of the principle of free disposition of the parties, the judge does not have the power to take the initiative of inviting third parties to intervene (Lebre de Freitas, 2013: 164) in the proceedings. Such can occur, however, when the Department of Justice plays the role of accessory party[7] in the proceedings, as well as when the third party's intervention is deems necessary in order to heal any procedural irregularity (under the general duty of administration of the proceedings by the judge – art. 6 (2) CCP) .

The judge can, and must, however, proceed towards the correction of any formal irregularities, should such correction be possible (Lebre de Freitas, 2013: 165). Thus, and should there occur a situation of lack of legal counsel, legal incapacity of a party, or a clear misalignment between intention and action by a party, and should such quality be clear from the proceedings, the judge has the power to act accordingly. If not, the judge has the power to communicate such irregularities (*ex officio* or after an according petition by the parties) and apply its respective consequences (art. 6 (2) CCP)[8].

1.1.4 Suspension or Termination of the Proceedings

The parties[9] are always allowed to reach an agreement. Such decision may either suspend the instance or resolve (extinct) it (Lebre de Freitas, 2013: 158). The suspension of the instance is limited in its duration, not being allowed an extension to exceed a period of three months (in total) as well as not being admitted should the final hearing be already scheduled (art. 272 (4) CCP).

The parties can also waiver, being allowed to do it so unilaterally, yet under the condition of acceptance by the opposing party, should it take place after the providing of the answer or reply (art. 283 (1) and art. 286 (1) CCP), or reach an agreement

[6] Such constitutes what Montalvão Machado and Paulo Pimenta (2010: 30) designate "pleading principle" (*"princípio do pedido"*), as the scope which the judge is unable to transpose with the final decision.

[7] *"Parte acessória"* in Portuguese.

[8] Previous court decisions have considered such decision as being in the discretion of the judge (Ac. RP, 19/02/04) (cit. Neto, 2014: 30, art. 6, 14)), however, and under the current text of the law, an effective duty is in force.

[9] Albeit not exclusively, as the court has the power of suspending the action under several circumstances. Namely, the death of one of the parties or one of the parties' attorneys (art. 269 (1-a), b) CCP).

regarding a resolution to the action[10] (art. 283 (2) CCP). Such an agreement can occur in-proceedings, through unilateral and bilateral means (through admission and waiver of the application or transaction respectively), as well as outer-proceedings, through a declaration in an authentic or private document (art. 284 and art. 290 (1) CCP). After verifying the acts' validity, the judge will then homologate it through sentence with *"res judicata"* value[11], thus extinguishing the jurisdiction (art. 277-d) CCP)[12].

The availability of the parties to appeal can also be considered, aside from the act of submission or waiver of the application, as manifestation of the principle of free disposition (Lebre de Freitas, 2013: 159-160, footnote 18).

1.1.5 Configuration of the Action's Subject Matter

"The process is a sequence of actions aimed at fair composition, by an impartial body authority (the court) of a dispute, that is, of a conflict of interest. (...) It is in the field of civil law which seeks such return." (Amaral, 2013: 9, 10)

"The civil process is therefore a tool for the solution of conflicts of interest. Civil law sets out in general and abstract terms, the rules governing the allocation of rights and the correlative imposition of duties in relations between people." (Amaral, 2013: 25)

1.1.5.1 The Alleging of the Essential Facts

While acting in the proceedings, parties have the burden of presenting the essential facts deemed relevant to their interests in the action (as the facts which constitute its cause of action or base the alleged exceptions) (art. 5 (1) CCP).

[10] The parties cannot, however, reach an agreement in regard to unavailable rights – art. 289 (1) CCP. Such nature will be determined under the light of substantive rules of law which dictate the personal nature of the right in question and, consequently, it's (in) admissibility as the object of a waiver or transaction. For instance, paternity/maternity actions do not admit the parties' transaction, as its subject-matter (the recognition of the civil status of filiations) being of a strictly personal nature, does not admit such an effect. However, the party is able to confess to the subject-matter in such an action, as under the substantive rule (Portuguese Civil Code) a child can be acknowledged should the birth certificate be missing (Lebre de Freitas, 2013: 160-161, footnote 22).

[11] As mentioned by Lebre de Freitas, (2013: 160, footnote 21), the jural situations resulting from the parties' waiver, admission or transaction are, from said point on, under a preclusion effect in regard to a future discussion of its existence or its content.

[12] As juristic acts resulting from a general autonomy of the private will, acting directly on the jural relations implicit in the respective claims, thus possessing a substantive nature, these acts can be considered as being excluded from the scope of the principle of free disposition. Thus, a conceptual distinction can be made between the juristic act of waiver, admission or transaction, and the act making it effective in the procedure, with only the latter constituting a manifestation of the principle of free disposition (Lebre de Freitas, 2013: 162-163).

As such facts relate private interests[13], their presentation to the court is considered to be in the power and volition of the parties, being thus able of contributing throughout the proceedings to the adding and altering of facts and, consequently the subject-matter of the action, as well as restricting the scope of the final decision (any essential fact which the parties have not alleged yet is referenced in the final decision as having been proved in the proceedings will be considered as non-written (Ac. RE, 15/11/12, Proc. 248/09.2TBSRP.E1)). Such can be considered as constituting a manifestation of the principle of free disposition of the parties (Montalvão Machado and Paulo Pimenta, 2010: 29)[14].

1.1.5.2 The Acknowledgment of Facts ex officio by the Court

It's been previously stated that it's up to the parties to determine the object of the process (part disposition). This principle states that, in general, the judge cannot go beyond the limits of the claim as put forward by the parties and he cannot decide *"ex officio"* when the power to raise a certain issue lays exclusively in the scope of to the party. Even when deciding *"ex officio"*, the judge cannot go beyond what was requested by the parties (what they asked for). If the judge decides to do so, the decision is considered ultra/extra petita and can be appealed from by the parties.

The judge can qualify the alleged facts differently from how it had been previously requested by the parties, according to the principle *"curia novit iura"*.

The traditional doctrine states that can be identified on the basis of three requirements (parties, causa petendi, petitum). We believe it to be overly simplified thus, not capable of dealing with all the problems arising in the determination of the boundaries between the claim and the res judicata.

Which part of the decision can be considered as res judicata is not well defined: not only the statements contained in the operative part but also other statements can be included in the res judicata (considering that the claim may require to decide also on some incidental issues).

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[13] Bartoň, Michal and Mates, Pavel (March 30, 2011) define that Public interest is traditionally one of the criteria used to divide the law into private and public. According to the famous definition by Ulpian, the difference between them lies in the fact that *"Publicum ius est quod ad statum rei Romanae spectat, privatum, quad ad singulorum utilitatem pertinet"*. All other interests are of a private interest.

[14] Lebre de Freitas (2013: 167-168) disagrees, however, in classifying such faculty as exclusive, or directly in relation, to the principle of free disposition of the parties, preferring, instead, to connect it to an instrumental option of the law in regard to the parties' relation to the facts, meaning their optimal position constituting the best chance of the court arriving at the actual facts in relation to their jural relations. Moreover, the parties do not have the right to lie in the procedure (*ibidem*). In short, such faculty is related with a notion of "self-responsibility" of the parties regarding the frame of discussion of the matter of fact in the procedure, which imposes the parties' burden of alleging all facts essential to their interests in the action (*id*: 168-169).

There are, in fact, many cases in which the boundaries of the claim, the power of the judge and the res judicata, are not easily defined or definable. It may occur that, for example, the discretionary power of the judge in interpreting the claim results in awarding a remedy that the party did not explicitly claim for.

The judge may acknowledge notorious facts (as facts which "*rest within the general common knowledge"* as *"a known or easily recognizable fact by the majority of people from a determined social sphere (Lebre de Freitas, 2013: 170)*[15]*, to such an extent as to leave no room to doubt its veracity"* (Lebre de Freitas, 2013: 169, cit. Castro Mendes) as well as instrumental facts (which lack the need of being alleged by the parties (art. 5 (2) CCP) as facts which merely *"allow for the proof of the essential facts"* due to their indirect relationship with the essential facts, thus, their observation allowing the deduction of the essential facts (Lebre de Freitas, 2013: 172-173)[16] – and those which arise as a result of the court's functions (Ac. STJ, 23/09/03) (cit. Neto, 2014: 26, art. 5, 13) – in correspondence to a general *"manifestation"* of the principle of *"res judicata"* and of the *"extra procedural value of evidence"* (Lebre de Freitas, 2013: 171 (*apud in*. Alberto dos Reis))[17] or within a context of procedural simulation (when "the parties, while in agreement, create the appearance of a litigation in order to achieve a decision which effects are intended only for third parties, and not for themselves" (Lebre de Freitas, 2013: 50) or fraud (which occurs when "the parties, while in agreement, create the appearance of a litigation in order to obtain a decision which effects are intended, yet damaging to a third party, or in violation of an imperative rule" (*id*).

Also, the parties do not hold any influence over the subsumption of the found facts to the correspondent rule of law, as well as its interpretation and application by the judge

[15] As stated by the author, such scope includes both the parties as well as the judge. To this purpose, the (territorial) extent covered by the knowledge of a determined fact can't be forgotten, in reference to the place in which the action is running (facts can be notorious in a local, regional, national or international level). The historicity of the facts are also to account for (with the technological evolution having greatly contributed to the wider range of communication of facts in today's society. Nonetheless, such should not automatically mean the notorious nature of a generally disclosed fact by social media to such an extent as to overlook the need to check its veracity).

[16] As an example, the author mentions the following situation: a judge, upon visiting a building in order to observe its number of apartments, and noticing there were 10, such a fact could serve as either *direct* proof (should the object of the suit rest in the annulment of a contract due to error in regard to the number of total rooms in the apartment) or an *indirect* one (as a step towards concluding the business value of the estate) – both as proof by inspection. Therefore, as an indirect way of proof, such fact (the existent number of rooms in the apartment) would not be excluded from the matter of fact due to lack of allegation by the parties.

[17] Lebre de Freitas (2013: 171-172) also provides the following example: should an action be the object of repetition, in the same court, the judge has the duty of acknowledging such fact as grounds of the dilatory exception of *res judicata* (for the effect of arts. 580 (1) and 577-i CCP) – should the action be repeated in relation to an action running in a different court, though, the judge will then be limited to the parties will in acknowledging the facts which base the exception itself (as facts excluded from the scope of actions attributed to said *ex officio* power of the judge) (*id,* footnote 49).

(art. 5 (3) CCP) (e.g. the legal qualification of a contract (Ac. RE, 12/07/12[18]) (cit. Neto, 2014: 27, art. 5, 29). The judge is thus allowed to *"ex officio"* acknowledge of, and apply any foreign law that fits to the case, even if the parties do not invoke it (art. 348 (2) of the Portuguese Civil Code (hereinafter CC)) and act towards the correction of any formal irregularities, should such correction be possible and necessary (e.g. insufficiencies or imprecisions in the presentation of the facts)[19]. Lastly, the judge can reopen the hearing, prior to final judgment, should further clarifications be required in order to decide – art. 607 (1-b) CCP[20].

1.1.6 Free Disposition of the Parties and the Taking of Evidence

As the parties are burdened with the proving of the facts which serve as ground for the alleged rights or exceptions in the action (art. 342 (1) CC), the requesting and submitting of evidence will often fall entirely in their initiative. However, the court is not limited to the evidence requested by the parties, being so allowed to requesting and ordering the gathering of all the evidence deemed necessary to the discovery of the truth and/or to the best resolution of the action (art. 411 CCP). As such, the general doctrine *"hesitates in framing the parties' initiative of proof within the scope of the general principle of free disposition"* (Lebre de Freitas, 2013: 177).

To acknowledge facts that are interfering in the lives of litigants, it is necessary that they act, each in itself, bringing their arguments and their evidence or information (evidence) for examination by the judge. Based on the presented evidence the judge forms his judgment and shall render a decision.

This is in fact the power of free disposition of the parties regarding the development of the process. To maintain impartiality, the judge should let each part, within the limits imposed by law, prepare and submit the evidence they have (and are willing to present).

The law has sought to put the judge not only as a spectator in the process of developing the proceedings but also as an instigator of the regular procedural development, in the sense that it can, and should, give impetus to the process; determine evidence; craft known facts and circumstances relied on by the parties; dialogue with the parties at any time and warn them that they are taking actions contrary to the law, etc. This freedom to

[18] Available online at: http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/6e726bac1cc2f34b80257de10056fa65?OpenDocument.

[19] Nonetheless, the judge cannot replace the party in the introduction of essential facts to the cause. Its introduction, upon being invited to complete, clarify or correct said facts, is dependent on the party presenting a new application (art. 590 (3) and art. 591 (1-c) CCP). (Lebre de Freitas, 2013: 166).

[20] Such limitations act here under the light of the inquisitorial principle, which, otherwise, only rules in plain force in the procedure of probate jurisdiction: in these cases, the judge is not attached to the articulated facts by the parties, being free to investigate further, collect evidence and carry out the diligences deemed necessary to establish the material truth (Remédio Marques, 2011: 205-206).

investigate, granted to the magistrate, is known as the principle of free appreciation of evidence.

In civil proceedings, or in non-criminal proceedings, where the public interest is not in discussion worth the principle of formal truth[21].

1.2 Inquisitorial Principle

Given the public nature of civil procedure as well as the public interests inherent to the administration of justice and the functioning of the judiciary system, the interest of protecting the weaker party, exposed to any notable inequalities, the interest of the prevalence of substantive justice over adjective justice, may require many corrections to be made to the operation of the principle of free disposition of the parties.

In addition, art. 265 gives the judge the power of steering the process, deferring towards him the power to overcoming any omissions, to provide for the supply of inadmissibility likely to healing and inviting the parties to practice the necessary actions for subjective modification of the proceedings, when that becomes necessary.

More than that, still prescribes (#3) that the judge must take place or order of its own motion, all reasonable steps to ascertain the truth and due process of law, on the facts that he knows to be legitimate.

Intensification of the inquisitorial principle has an impact on other principles, it is also linked to a principle other than the principle of free disposition of the parties: it is the principle of self-responsibility of the parties.

In the words of Manuel de Andrade[22], a solution in which it assert this principle "*The party is leading the process at its own risk. It is them who have to deduct and enforce the means of attack and defense allocated to them (including evidence), supporting an adverse decision if deciding to omit any. The negligence or ineptitude of the parties inevitably results in loss for them since that cannot be suppressed by the initiative and activity of the judge."*

1.2.1 General Scope of Influence in the Portuguese Legal System

Under the inquisitorial principle[23], the judge is recognized a set of powers which serve to intervene in the interest of the finding of truth and of the achieving the best outcome to the action, being thus able of requesting and ordering all the evidence deemed necessary to the discovery of the truth and/or to the best resolution of the action (art. 411 CCP). Acting beyond the volition and request of the parties, in the context of the

[21] What appears to be true in the face of evidence carried the proceedings, i.e., what appears to be true, given what parts produced as evidence.
[22] Manuel Andrade, *op. cit.*
[23] *"Princípio do inquisitório"* in Portuguese.

finding of facts, the judge is said to have the *initiative* while the parties have the *duty* of cooperating in the finding of the truth (art. 417 (1) CCP) (Lebre de Freitas, 2013: 176).

Such faculty can be viewed as being placed within the scope of an *"ex officio"* duty of investigation by the judge, required for the plain realization of the action (Ac. RL, 24.06.2010: Proc. 12473/04.8YYLSB-A.L1-6)[24] without ever mischaracterizing or invalidating the basing role in the civil procedure of the principle of the free disposition of the parties (Ac. STJ, 28/03/00 Processo nº 457/99) (cit. Neto, 2014: 503, art. 411, 5.) or a mere discretionary power, under a residual nature of requesting any necessary evidence, being nonetheless conditioned by the facts articulated by the parties – therefore exempting a purely arbitrary power by the court (Ac. STJ, 11.01.2001: Proc. 3521/00)[25] and avoiding a mischaracterization of the basing principle in civil procedure which states that all jurisdictional initiative belongs to the parties, including the submission of evidence.

1.3 Principle of Directness

This principle translates mainly on direct contact between the judge and the various means of evidence (Manuel de Andrade, op. cit., 386).

The principle of directness is closely related to the principle of orality. This principle means that evidence must be taken before the same judge that has to say the judgement. In the Portuguese procedural system the main objective of the hearing is to take evidence.

1.3.1 General Scope of Influence in the Taking of Evidence

The judge must provide the grounds in which the decision is based, thus essentially declaring "which facts are considered proven and not proven" while "critically analysing" all the evidence (art. 604 (3)-(4) CCP). In light of such duty, the principle of directness[26] (as referenced by doctrine) dictates the need that (a)) all the taking of evidence during the procedure must take place before the competent judge in the cause; and that (b)) all means of evidence shall position themselves in the most direct relationship possible with the facts they are to prove (Lebre de Freitas, 2013: 193).

Exceptions to the principle of directness are expressly provided by the Code of Civil Procedure, in regards to procedural needs, as well as relating to the unavoidable physical impossibilities in some circumstances during the procedure, such as when the production of evidence must take place in a court other than the one holding the trial

[24] Available online at: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/3b4405868bf1fa72802577bc00616e76?OpenDocument.
[25] Partially available at: http://www.stj.pt/ficheiros/jurisp-sumarios/civel/sumarios-civel-2001.pdf.
[26] In Portuguese *"princípio da imediação"*.

(through the dispatch of a rogatory letter[27] (art. 172 CCP)), in those cases where anticipated production of evidence is to be carried out before a different judge (art. 419 and art. 420 (2) CCP) or when the very nature of the type of evidence implicates its taking in a moment prior to the hearing (e.g. expert evidence), notwithstanding the possibility of the experts presenting further clarification on their report before the court, should it be deemed necessary by the judge or the parties (Lebre de Freitas, 2013: 193-194).

1.3.2 The Taking of Evidence by the Court of Appeal

"(...) Above all the counter-claims arise from the substance of the appeal, assuming the defendant's position on the questions of fact or law raised and the arguments put forward by the appellant. (...)." (Geraldes, 2010: 130)

"Moreover can serve the defendant enlarge the resource object (...)." (Geraldes, 2010: 131)

"In counter-claims under the circumstances, can or should come the following elements: (...) joint documents (art. 693-B) (...)." (Geraldes, 2010: 133)

1.3.2.1 The Renewal of the Taking of Evidence

The Court of Appeal[28] has the *duty* (Neto, 2014: 812, 3) (art. 662 (2-a)-b) CCP) of ordering (*"ex officio")* a renewal of the taking of evidence should there be serious doubts regarding the credibility of a witness or in regard to the meaning of the statement which was provided (e.g. a witness not having been subjected to prior questioning by the judge, in order to attain his/her relationship with any of the parties, his/her interest in the cause and his/her natural ability to testify; the opposing party having not been permitted to counterargument the witness' deposition; or a duly requested confrontation of witnesses having been arbitrarily rejected or ignored – the Court of Appeal must then question the court *a quo* regarding the favouring of said witness' deposition) (Neto: 813, 4).

The Court of Appeal can also order the taking of new evidence should there remain any reasonable doubt regarding the value of the evidence presented. The presentation of documents – if proved as not having been possible until such a moment – is also admissible during the appeal (art. 425 CCP). Appeals suffer limitations in regarding to the taking of evidence before the Supreme Court of Justice (art. 679 CCP).

The established system which allows the Court of Appeal to take evidence is one of an exceptional nature, considering its dependency on out-of-the-ordinary factors which suggest the lack of correspondence, considering the existence of new evidence or the

[27] A formal written request made by one judicial body to another court in a different, independent jurisdiction that a witness who resides in that jurisdiction be examined through the use of interrogatories accompanying the request. (Ana Prata, *op. cit.*)
[28] *"Tribunal da Relação"* in Portuguese.

lack of essential formalities, between the sentence in the 1st level of jurisdiction and the truth; or impose the need of the Court of Appeal to consider or order the taking of new evidence which, until then, did not exist, or was unattainable in its reach.

1.3.2.2 The Evaluation of Evidence by the Court of Appeal

The Court of Appeal will evaluate evidence to the extent necessary to achieve a re-appreciation of the matter of fact and evidence, thus truly ensuring a *"second level of jurisdiction"* (therefore, its activity should not be perceived as one of merely submitting to a formal way of control but, instead, as one of active providing of a *new* judgment (Ac. STJ, 22.02.2011: Coletânea de Jurisprudência/STJ, 2011, 1-76)[29].

Evidence will possess the same probative value, as will the court be able to freely assess evidence, and interpret the previously established matter of fact in such a way as to allow the withdrawal of an autonomous conclusion, differing from the court *"a quo"* (Ac. STJ, 16.03.2011: Proc. 48/08.7TBVNG.P1.S1)[30] – notwithstanding the limitation relating to the definite nature of the previously established matter of fact, which the Court of Appeal cannot alter (unless such an alteration is to be imposed due to the knowledge of irregularities which justify it (art. 662 (1) CCP).

The Supreme Justice Court, on the other hand, can only evaluate evidence in light of its legal procedure (art. 682 CCP).

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

"On the one hand the court cannot resolve the conflict of interest without the resolution it is requested by a party, on the other hand, also the cannot solve without the other is properly called pair oppose. It is what determines the par. 1 of art. 3." (...) "The adversarial principle has been called the cornerstone of civil procedural system."

"It has legal recognition, not only at the stage of the pleadings, but at all stages of the process including the trial and continued to be observed at the appeal stage." (Amaral, 2013: 16)

1.4.1 General Scope of Influence in the Portuguese Legal System

According to the contradictory principle, parties have the right to be heard in the proceedings and aim to be recognized the right of positively acting in their best interest

[29] Available online at:
http://www.dgsi.pt/jtrp.nsf/d1d5ce625d24df5380257583004ee7d7/aa80752ab00b1af080257849057e049?OpenDocument.
[30] Available online at:
http://www.dgsi.pt/jstjf.nsf/954f0ce6ad9dd8b980256b5f003fa814/31018d840dd1b48e80257b900033eb99?OpenDocument.

the proceedings prior to the giving of the final decision which concerns them (Castro Mendes, 2010: 131; Montalvão Machado and Paulo Pimenta, 2010: 31).

Lebre de Freitas (2013: 123-124) places the contradictory principle within the scope of a more general principle of equity and of equal treatment of the parties, beyond the *"valid, yet restrictive"* traditional notion of the contradictory principle as the mere assurance of a *"dialectical discussion [in the procedure], with the advantages arising of [the parties] reciprocal supervision" (ibid)*. Thus, the author understands the contradictory principle in a broader sense, as aiming to ensure the parties' *"effective participation"* in the proceedings, through the recognition of procedural means which allow for the parties' (equal) *"influence over any aspect (facts, evidence, issues of law) in connection with the object of the action and which, at any phase of the proceedings, appears as potentially relevant to the decision"* (*id:* 125*).*

A violation of the party's right to be heard or to act in the proceedings, can be subsumed under the general clause of procedural irregularities foreseen in art. 201 (1) CCP, as the omission of an act or formality which the law prescribes – resulting in said procedural act being annulled. Considering the omission of a parties hearing right – except in the case of lack of answer by the defendant – does not constitute a procedural flaw which the Court should acknowledge *"ex officio"*, any violation in this instance shall be invoked by the interested party within 10 days of its verification during any procedural act (art. 197 (1) and art. 199 CCP).

1.4.1.1 The Presentation of Facts

Regarding the submission of facts, the parties are guaranteed an equality of opportunities in becoming aware of the opposing party's submitted list and of contradicting it (principle of the contradictory). In the same sense, the parties have the right to be heard regarding the "ex officio" insertion of essential facts by the judge (art. 3 (4) CCP).

The new Portuguese Code of Civil Procedure (in force since the 1st of September, 2013), under a general principle of promoting celerity, has adopted a single common form of declarative procedure, which allows for three pleadings: application, answer and reply, the latter being allowed when the defendant counterclaims or, in a negative declaratory action, proceeds to answer. As the plaintiff can no longer alter or expand the pleading (petitum) or the cause of action, considering a rejoinder is no longer allowed, any exception alleged by the plaintiff in the reply can be subjected to contradictory in the preliminary hearing, or, should the latter not take place, in the beginning of the final hearing (art. 3 nº 4 CCP) (Lebre de Freitas (2013: 126-127)).

The admission of supervening facts by the judge carries the need to notify the opposing party to reply within 10 days (art. 588 (4) CCP).

1.4.1.2 The Contradictory Principle and Evidence Taking

The contradictory principle has constitutional consecration (art. 32 par. 5 of the Portuguese Constitution) and means that *"no evidence should be accepted at the hearing, or any decision (even if interim) must be taken by the judge, without having previously been given broad and effective opportunity to procedural subject against which it is directed to argue, to challenge it and to value." "With specific regard to the production of evidence, the principle requires that all evidence must be, as a rule, produced in open court and according to an adversarial procedure".* (Ac. RC. 17-03-2009, Proc. 63/07.8SAGRD.C1)[31]

The scope of influence of the contradictory principle in the right to present evidence dictates the need to guarantee the parties' (equal) faculties of (a)) submitting/requesting evidence, (b)) being present in the taking of evidence and in the (c)) right to be heard in the proceedings.

In regard to the submission of evidence, parties are allowed the petition for the taking of any evidence deemed necessary to achieve the truth in the action. Prior to the admission of pre-appointed evidence (e.g. documentary evidence), the court must guarantee the opposing party's faculty to object it (art. 415 (1) CCP). In regard to evidence which taking will occur during the final hearing, the opposing party will have the faculty to object its admission by the court, while also being admitted to attend and intervene in its scheduled taking (art. 415 (2) CCP). Lastly, and during the final hearing, the parties must be recognized the faculty of orally discussing the taking of evidence in relation to the subject matter which is to base the final decision (art. 3 (3) and art. 604 (3-e)) and (5) CCP) (Lebre de Freitas, 2013: 132-133).

If facing a serious risk of loss, concealment or dissipation of property, movable or immovable, of documents, as well as a future impossibility or facing great difficulty in the obtaining a certain testimony or certain evidence through expert evidence or inspection (therefore excluding a mere reasoning of convenience to the party in such diligence (Ac. RL, 18.01.2007: Proc. 0070922)[32], any party may require their enlisting by the court or its taking prior to the hearing. Such diligence is dependent on the action to which it respects, or of proof of ownership of the rights respecting to the enrolled assets (art. 403 (1) and art. 419 CCP).

The law, however, provides for the enactment of certain provisions without the hearing of the opposing party (art. 366 (1) CCP and art. 393 (1) CCP, in the case of attachment) if deemed necessary to prevent a violation of the law or of the loss of the action (Remédio Marques, 2011: 207).

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[31] Available online at: http://www.dgsi.pt/jtrc.nsf/0/74fccccc257ebcfd8025758d00322252?OpenDocument.

[32] Available online at: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/996dbaba65d6a805802568030000d856?OpenDocument.

The judge can only reject the parties' request on the admission or taking of evidence should such diligence be considered as being merely dilatory[33] (art. 6 (1) CCP) or in offense of the fundamental rights (art. 38 (2) of the Portuguese Constitution).

1.4.2 The Sanctioning of Passivity or Absence by the Party in the Proceedings

Should the defendant, having been notified to answer, not contest nor appoint an attorney within the prescribed time, or should it not intervene in any way during the proceedings, he is said to have defaulted. Procedural default, in the Portuguese legal system, can be *operative* or *inoperative* (the following text closely follows Remédio Marques, 2011: 502-506).

The procedural effect carried out through operative default is the admission of the articulated facts (*"ficta confessio"*), which works as an underlying commination brought about the defendant's lack of answer to the plaintiff's application, in other words, as a consequence of the legal burden of answering the plaintiff's application (an instrument, in itself, envisaged as one the means of contributing in the search of the material truth). The court will, notwithstanding the defendant's lack of action, examine the cause through the scope of the applicable law. The admitted facts can, sometimes, lead to the acquittal of the defendant, though such omission will often lead to the final judgement being in favour of the plaintiff. The alleged facts by the plaintiff will serve as matter of fact in the judgment, once they were not contested (art. 607 (3) CPP).

Inoperative default will be observed when the defendant's lack of action through the omission of an answer or appointment of a legal representative, despite having been notified, will not lead to an admission of the facts alleged by the plaintiff. Such will be the case when: (a)) the, or one of the, defendant/s is legally incapable and the object of litigation is situated in such a spectrum of discussion – art. 568 b) CCP. The lack of answer by someone legally incapable imposes the need to notify the Department of Justice to answer in representation (art. 21 CCP) and should the Department of Justice omit an answer, only then, the party will be considered as to have defaulted; (b)) there being several defendants, some did provide an answer (art. 568 (1) a) CCP); (c)) the volition of the parties is ineffective, by itself, to produce the desired legal effect envisioned by the action, i.e., when the action concerns rights of a personal nature – art. 574 (2) CCP; (d)) the facts can only be proved by presentation of a document – art. 568 d) CCP.

[33] *Dilatory tactics* are methods used by the lawyers by using the rules of in an abusive manner in order to delay the progress of the proceedings. For example, when numerous motions brought before a court for postponement are baseless, time is wasted because the court must stop the course of ongoing proceedings to examine whether there is any merit to the motions. The party in whose interests the motion is brought uses this tactic to gain time to enhance his or her position, or to postpone an action by a court as long as possible to minimize the impact of a decree rendered against him or her. *(Ana Prata, op. cit.)*

Procedural default is also referenced as *absolute* and *relative* by doctrine (Montalvão Machado and Paulo Pimenta, 2010: 193) in correspondence, in its meaning, with the foregoing notions of operative and inoperative default.

If the defendant does not answer, but proceeds to appoint a legal representative or intervenes, in any way, in the procedure, the facts alleged by the plaintiff will not be considered admitted by the defendant. Notification of procedural acts will be forwarded to his person (or his legal representative – art. 247 CCP) with the impossibility, nonetheless, of requiring a deposition as party or enlisting any witnesses (art. 452 and art. 516 (1) CCP *a contrario sensu*).

1.5 Process Material in the Portuguese Legal System

1.5.1 Facts, Evidence, Legal Rules, Rules of the Profession, Science, and Life Experiences (Notion)

In the Portuguese legal system the notion of *"fact"* corresponds to "any real life event which is capable of producing legal effects" (Prata, 2014). *"Evidence"* to the activity intended to demonstrate the veracity of any alleged fact in an action (probative action) *(id)*. *"Legal rule"* to the norm which imposes a conduct in light of a social imperative *(id)*. *"Rules of profession"* to the norms which govern ethical behaviour in the scope of a profession (deontological code). The notion of *"life experience"* can be obtained in accordance to the principle of the common man in which common conducts are susceptible of being legally considered by the court *(id)*. *"Science"*, in relation to law, is the area which occupies itself with the ruling positive law *(id)*.

1.6 Substantive Conduct of Proceedings

The judge is under the general duty of actively guiding the proceedings, promoting all diligences deemed necessary to the normal and most effective running of the action (thus refusing all dilatory acts, as well as, upon consultation of the parties, adopting mechanisms meant to simplify and streamline the procedural within a reasonable time, notwithstanding the *"dominium litis"* attributed to the parties under the general principle of free disposition) (art. 6 (1) (2) CCP) (Lebre de Freitas, 2013: 227-228).

Such duty is materialized by the possibility of providing (*"ex officio"*) for the supply of the lack of procedural requirements which are susceptible to correction; and determining the practice of all the necessaries acts to stabilize the procedural requirements (art. 6 (2) CCP).

1.7 Preclusions; Introduction of New Facts and Evidence

According to Manuel de Andrade[34], this principle is reflected in the recognition that a process has strict procedural cycles, with specific and tight ends.

[34] *Op. cit.*

So when the acts are not performed in the cycle itself (where they are to be performed), they are precluded.

For example: all the ground for the action and all the defense must be presented at once, leaving just for claiming those facts which appear on secondary stage, in the event of being relevant (art. 467, par. 1 d al), as for the petition; art. 488 and 489 in relation to the defense; art. 272 and 273, regarding to the limitations of the change request and the cause of action.

The same reference as to when the offer of proof and the limitations inherent to its modification, application of new means or late offer.

Alternatively, may be consent to the parties the freedom of scheduling facts and/or evidence depending on the course of the dispute were to require their reveal.

The valence of a principle of preclusion is reflected in the enforcement of fair action between the parties in a transparent conduct from the beginning, which enables each of them (the parties) to act and react in good faith, except when the arguments of one of the parties can be made worth while the other is less qualified to do so, possibly even conditioned by their own past performance.

On the other hand, this principle also welcomes interests of promptness, preventing entrainment processes.

In any case, real material interests determine that this principle should be limited in their actions, including allowing the treatment of objectively or subjectively supervening situations.

1.7.1 Notion and Practical Scope

In civil procedure, the parties are considered to be self-responsible in their procedural initiative, in conjunction with the idea of a legal burden, to present the factual and evidential material deemed suitable to sustain the alleged premises, with its omission leading to the correspondent preclusion as a consequence (Lebre de Freitas, 2013: 181).

Notwithstanding the right of the parties to present all the necessary evidence, the practical need of the procedure to be concluded imposes the need of deadlines to which the parties are bound in their procedural faculties, namely, the submitting of evidence or the petition of its taking. Thus, the number of witnesses which each party is able to petition the deposition of is limited (taking into account the value of the matter in controversy – 5 or 10, in both the application/answer and reply – even if the judge is allowed to take into account the specific circumstances of the case and allow an extension); the petitioning for the appreciation of pre-appointed evidence (e.g. documentary evidence) occurs, preferably[35] during the pleadings phase.

[35] It can, nonetheless, occur, in the case of documents and objects, through physical delivery to the court up until the closure of the final hearing – art. 432 (2) and art. 416 (1) CCP.

The existence of burdens, preclusions and comminations, are observable throughout the entire procedure, in all its phases, always in reference to procedural acts which the parties, considering the expected proceedings, must meet within peremptory deadline, or lose the faculty to exercise the right due to the deadline having met its course (art. 139 (3) CCP).

The consequences entailed by a preclusion are the extinction of the correspondent right or status of the party which did not meet the required deadline or burden.

1.8 Principle of Orality

The orality reports to the discussion of the issues of the case. The discussion of the facts is always oral – cf. art. 652; discussing the matter of law, the actions under the ordinary form, may be in writing if the parties that declare not do without – art. 657).

1.8.1 General Scope of Influence in the Portuguese Legal System

The principle of orality does not offer doubts about its contents. Refers to the oral performance of procedural acts being both the cause of discussion, of evidence, and the degree of their consecration also relates to the terms of the respective documentation in the case: including or not its content, whether or not transcribed and, in that case, in whole or in summary.

One of the moments on which this principle stands out, is in the preliminary hearing, where the contents and purpose become crucial in defining the terms of the process. These aims are mentioned in art. 591:
a) To provide conciliation, in accordance with art. 594;
b) To allow the parties to that discussion and of law, where the judge fulfills to assess all dilatory exceptions or when he intends to decide immediately, in whole or in part, on the merits of the case;
c) To discuss the positions of the parties in order to defining the terms of the dispute, and address the shortcomings or inaccuracies in the exposure of the facts that still remain or become apparent as a result of the debate;
d) To heal the pleading, in accordance with par. 1 of art. 595;
e) Determine, after discussion formal adaptation, simplification or procedural streamlining, pursuant to par. 1 of art. 6 and art. 547;
f) To give, after debate, the order under par. 1 of art. 596 and to rule on the complaints deducted by the parties;
g) To settle, after hearing the representatives, which acts to perform at the final hearing, establish the number of sessions and its likely duration and designate the respective dates.

In civil procedure, in particular during the phase of the hearing, seminal acts of the procedure are to be practiced orally between the parties and the court. As the judge bases the final decision in procedural acts which weren't reduced to writing, or any other form of mechanical form of fixation or susceptible to reproduction, a

psychological impression is created in the spirit of the judge, through the elements of evidence (witnesses' deposition, through their way of acting and wording) and the judgment of said proof. Even if the depositions are broadcasted through VCF, such reproduction will not interfere with the impression brought about the contact with the physical expression of the deposition, even if limited.

Nonetheless, some procedural acts, due to their very nature and extension, must be provided in written form (v.g. the applications of the parts – art. 552 CCP and art. 572 CCP, as well as other such diligences to be taken during the procedure, such as the petition of documents – art. 436 CCP).

However, the principle of oral form can be limited in light of a rule of law. For instance, the witness' testimony can be submitted prior in written form when (closely following Lebre de Freitas, 2013a: 290-291): any of the persons listed in art. 503 (2)-b) CCP[36] are requested to testify and opts to do so (in such cases the contradictory principle is guaranteed through the recognition of the parties' faculty of requesting clarifications in writing (art. 505 (3) CCP), which, in the case of the President of the Portuguese Republic, are only admitted for such purpose with the court's consent (art. 504 (3) CCP); there is severe difficulty or impossibility of the witness in being present in court, with the agreement of the parties and authorization of the judge[37]; the parties agree on the taking of the testimony in writing, with its registration in a record[38] signed by the witness' as well as the parties' attorneys, and its deposit in the professional domicile of one of the parties' attorney (art. 517 CCP).

Another important manifestation of this principle there in full tribute to the principle of immediacy, is expressed in art. 662 of C.P.C. the purpose of taking evidence on appeal. That is, the discussion of the cause and the production of such evidence of course there will be in 2nd instance, in compliance with the dictates of immediacy and orality that occur in judgments in first instance.

1.9 Principle of Public Hearing

The Civil Procedure is public. The publicity – public hearing – of the process was made possible with the introduction of the principle of orality and continues to inherit the traditional justification: it is a means to fight arbitration ensuring the truth and fairness of judicial decisions. Publicity underlies the fundamental principles of the rule of law, including the possibility of a popular control of the bodies – as happens with Courts –

[36] Among others, Members of the State Council, incumbents or members of a sovereign organ (with the exclusion of the courts and the equivalent of sovereign organs in the Autonomous Regions of Portugal), judges of superior courts, the State's Attorney or Vice State's Attorney, general officials of the National Armed Forces, high dignitaries of church, the "Bastonário" of the Portuguese Order of Attorneys, the President of the Chamber of Solicitors.

[37] Nonetheless, after the testimony has been provided the judge can order a renewal of its taking (by writing or in his/her presence), either ex officio or after its request by the parties (art. 518 (1) and 519 (1) to 3).

[38] In Portuguese *"acta"*.

exercise sovereign powers (art. 110/1 Constitution). It is in this light that one should understand the publicity as a warranty of the audience of the Courts, which is enshrined in art. 206 Constitution as well as the guarantee of access to the file by all concerned.

1.9.1 General Scope of Influence in the Portuguese Legal System

According to the principle of public hearing, all court's hearings must be held publicly (art. 656 (1) CCP). As referenced in art. 163 (1), "civil proceedings are public". Thus, any citizen has the right to attend and listen to the trial; public reports of the hearings are permitted; attorneys and solicitors, legally capable of practice (as well as any person who reveals a legitimate interest in doing so) can examine and consult records from the court's secretariat, as well as obtain copies and certificates of any procedural documents provided by the parties (art. 167 (2) CCP).

Such public access entails the possibility of entrusting attorneys or solicitors with the documents for free examination outside of the court (art. 169 (1) CCP). However, the reserved nature of the proceedings can impose a restriction on the access of documents (for instance, and regarding an action of promotion and protection of minors, the access to records can be restricted to a direct and physical consultation, subjected to a previous authorization of the judge, thus excluding an unlimited and indiscriminate access (Ac. RL, 12/01/10) (cit. Neto, 2014: 231, art. 164, 7.)).

Underlining the principle of public hearing is the idea of control of the court's function by the general population, acting against any distrust against the justice system and its administration, accentuating the idea of control and, therefore, strengthening its legitimacy. However, such public nature of a trial can be restricted once considered the collision of interests and rights (e.g. when the public attendance of a trial is considered to risk the damage of fundamental values such as one's dignity, private or family intimacy, or jeopardize the effectiveness of the judgement to be delivered, as in the case of a writ of prevention (art. 168 (1) CCP)).

In exceptional cases, the access may also be barred to the media, or its disclosure restricted, in regard to one's right of image and private intimacy (art. 26 (1) and art. 37 (1) of the Portuguese Constitution).

1.10 Other General Principles in the Portuguese Legal System

The principles existent in the Portuguese legal system are free disposition, contradictory, legality, interim protection of the appearance and submission to the substantive limits (Castro Mendes: 181-228)[39] and self-responsibility of the parties; equality of the parties, preclusion[40]; free consideration of evidence; procedural

[39] Direito Processual Civil, I Vol, ed. AAFDL: 181-228.

[40] According to Manuel de Andrade, this principle is reflected in the recognition that a process has strict procedural cycles, with specific and tight ends together. So when the acts are not performed in the cycle itself, they are precluded. For example: all the foundations of the action and all the defence must be claimed at once, leaving just claim even those who seem secondary in the event

acquisition, immediacy, concentration, orality and identity of the judge[41], procedural economy, procedural celerity, safeguarding of the interests before the inevitable delay in the process (Manuel Andrade, 1979: 373)[42].

In light of international principles and rules such as the Universal Declaration of Human Rights and the European Convention on Human Rights, other general principles can be underlined, such as the principle of free access to justice[43] and the courts being guaranteed to everyone[44] (art. 20 of the Portuguese Constitution) a right of access to the law (right to action (opening of proceedings)), popular action[45], the right to a defence[46],

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of being relevant – art. 467, par. 1 d al), as the petition; art. 488 and 489 in relation to the dispute; art. 272 and 273, the limitations regarding changing on the request or on the cause of action. The same reference as to when the offer of proof and the limitations inherent to its modification, application of new means or late presentation. Alternatively to the parties can be conceived free to escalation of facts and/or evidence depending on the course of the dispute would come to reveal their need. The valence of such as principle of preclusion translates into the imposition of fair action between the parties in a transparent conduct from the beginning, which must enable each of them to act and react in good faith, excluding that their arguments can be made count when the other is less qualified to do so, possibly even conditioned by their past performance. On the other hand, this principle also welcomes interests of speedy trial, the entrainment processes. In any case, material truth interests mean that this principle should be limited in its actions, including allowing treatment of objective or subjective supervenient situations.

[41] Appointed in the CCP as principle of fullness of the judge's assistance, relates to whether the requirement that the facts be only decided by the judge who has attended all measures of investigation and discussion practiced at the hearing, that the extension of functional responsibility of the judge to stop the trial, even if the lost by transfer, retirement, etc. Note, however, that art. 654 of C.P.C. only enforces this principle in relation to the decision of the facts.

[42] Noções Elementares de Processo Civil, Coimbra Editora, 1979: 373.

[43] The constitutional jurisprudence has characterized the free access to justice – or the courts, as it states – as being "among other things, a right to a legal conflict resolution, which was due to arrive in reasonable time and in compliance with the guarantees of impartiality and independence, enabling, *inter alia*, proper operation of the adversarial rules, in terms of each of the parties may deduct his reasons (of fact and law), offer their evidence, track evidence of the opponent and discourse on the value and result of one or the other" (Decisions of the Constitutional Court numbers 86/88, of 13 April, in Bulletin of the Ministry of Justice, nº 376: 237, and 444/91, of 20 November, in Bulletin of the Ministry of Justice , nº 411: 155).

[44] "Everyone is guaranteed access to the law and to the courts to defend their legally protected rights and interests, and justice may not be denied for insufficient economic means" (art. 20, par. 1 of the Portuguese Constitution).

[45] The right of *actio popularis*, constitutionally enshrined in par. 3 of art. 52 of the Fundamental Law, in the chapter on rights, freedoms and guarantees of political participation, is an instrument of democratic participation and involvement of citizens in public life, of review of legality, for defence of the interests of the communities and education and civic training of all. It is therefore consecrated a peculiar form of citizen participation, individually or collectively organized in the defence and preservation of core values, because they belong to the same community. In addition to the role it could play in improving the political mind set of citizens, *"instilling in them a sense of active participation in the life"* (Biesla: 34).

[46] Inherent to the rights of defence is the adversarial principle, which results from the bilateral process: when one party claims something, there is to be heard also another, giving you answer opportunity. It assumes knowledge of procedural acts by the accused and the right of reply or

financial judiciary support (Lei nº 47/2007, de 28 de Agosto)[47], independence and impartiality of the courts[48] (Lebre de Freitas, 2013: 100-121). The right to a decision within a reasonable time period[49, 50] (Lebre de Freitas, 2013: 145) and the principle of procedural economy[51], seeking to obtain a decision in the most effective manner (i.e. the exclusive carrying of formalities considered as being *necessary* (indispensable or useful) (Lebre de Freitas, 2013: 203).

2 General Principles of Evidence Taking

The admissibility of evidence is not regulated by formal evidentiary law but in material law.

2.1 Free Assessment of Evidence

"Free Proof means proof appreciated by the judge according to their experience and their prudence, not be subject to rules or pre-established formal criteria, i.e. dictated by law."

"The very substantive law requires that the court freely enjoy the probative way of answers from the experts, art. 389 is the result of the inspection, art. 391, and proving strength of witness testimony, art. 396, all the CC. "

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reaction. Requires: 1- notification of procedural acts to the interested party; 2- possibility of examination of the evidence in the file; 3- right to attend the hearing of witnesses; 4- right to submit written defence.

[47] Available online at:
http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=928&tabela=leis.

[48] In the modern constitutional state, the principle of independence of the judiciary originates in theory of separation of powers under which the executive, legislative and judicial powers constitute three autonomous authorities that are balanced and mutually controlled in order to prevent possible abuses able to be harmful to a free society. This independence means that both the judiciary as an institution as judges, themselves, individually regarded who choose on specific cases should be able to pursue their professional responsibilities without interference from the executive or legislative branch, or other inappropriate sources.

[49] Speeding up the process, reducing the judges' working time, the justice officials and lawyers themselves and court prosecutors in each trial, cannot fail to have its immediate impact and financial expression in favour of the plaintiffs with respect to a decrease in cost of justice (Pessoa Vaz: 1998).

[50] This principle serves a common interest to that of judicial economy, it is revealed in the need for procedural organization so that it come to an end as quickly as possible. It is manifested, for example, in the setting of deadlines for acts by the parties or by the court, on the possibility of deferral of the acts, on the possibility of suspending the proceedings, the continuity rules of diligence or marking of delayed action. It is revealed, also in qualifying as urgent certain acts or type processes.

[51] Translates in hosting efficiency values: the acquisition of certain procedural results should affect necessary and sufficient means and not more than these. The prohibition of useless acts as set out in art. 137, and the reduction to essential formalities of the acts prescribed in par. 1 of art. 138, are emanations of this principle.

"By principle of free assessment of evidence, it opposes the principle of legal evidence, formal and bound." (Amaral, 2013: 381)

2.1.1 General Scope of Influence in the Portuguese Legal System

When assessing evidence, the general rule in the Portuguese legal system is that the court is able of deciding its value in relation to the matter of fact according to its own inner conviction. Such constitutes the principle of free assessment of evidence (Remédio Marques, 2011: 217).

The Portuguese legal system does not expressly state any sort of methodological guidance (i.e. through any legal rule or statute) which regulates the free assessment of evidence by the judge. The understanding of its implications as involving an act of logical reasoning or as result of personal experience of the judge can be obtained through the opinion of doctrine. Essentially, the judge is able of deciding according to an *"intimate conviction (...) in conformity with the impressions obtained [throughout the taking of evidence] (...) [and] in accordance with maxims of experience applicable to the case"* (Lebre de Freitas, 2013: 196). A conviction of absolute certitude is not in order. Instead, the judge can decide based on a conviction of "likelihood" (which does not, however, remove the need of pursuing the *"maximum level of investigation"* in order to guarantee the safest judgement) (Lebre de Freitas, 2013: 200).

The principle of free assessment of evidence applies in regard to witnesses' testimonies (art. 396 CC), evidence by inspection (art. 391 CC), expert evidence (art. 389 CC), proof by declaration of a party (art. 466 (3) CCP) and proof resulting from a party's conduct (art. 417 (2) CCP).

2.1.2 Limits

The court is limited in its decision by those evidence whose probative value is legally fixed, thus influencing the degree of liberty in which the court acts on its judgement. Should certain type of evidence have its value established, the court will not possess the discretion to be able to decide against it/override it based in a principle of free assessment (notwithstanding the possibility of proof of the contrary).

Under the Portuguese Civil Code, the following types of evidence have its value legally fixed: authentic (art. 371 (1) CC) or private (art. 376 (1) CC) written documents, written admission (should it be a admission of judgment – art. 358 (1) CC – or resulting from an authentic or private document (art. 358 (1) and (2) CC, respectively), as well as presumptions of law (*stricto sensu)*[52] (art. 350 CC) and in the case of admission[53] (art.

[52] Lebre de Freitas (2013: 197-198, footnote 9) points that despite "all indirect proof [being], naturally, based in *presumptions*", Portuguese law considers legal presumption an "autonomous mean of evidence", meaning the ability to "advance, through the several proven facts, in the path of [recognizing the veracity] of the essential facts".

567 (1) CCP) (Lebre de Freitas, 2013: 197). Parties' depositions will be freely evaluated by the judge, except if embodying a written admission, done so during or in a moment outside the hearing[54], in which instance its probative value will be legally established – as indubitable proof (art. 466 (3) CCP (parties' declarations) and art. 358 (1)-(2) CC (written admission) (Montalvão Machado and Paulo Pimenta, 2010: 237)).

In the case of indubitable proof by written admission, its facts have its value, and therefore its consequences as to the assessment of evidence, established by law, being only able of being removed through proof of the contrary by legally established means (art. 347 CC *in fine*): lack of the required circumstances which allows for its occurrence or substantial defects, under the scope of susceptibility of annulment provided by art. 359 CC, such as fraudulent noting of facts, physical or moral coercion, deceitfulness or general error in the act of the declaration (Lebre de Freitas, 2013a: 267-272).

In their majority, facts are susceptible of being proven through any means capable of demonstrating their veracity[55]. However, the court can be restricted in its assessment of evidence should there exist a legal restriction, which imposes that certain fact might require certain (i.e. legally imposed) means to prove it. In that sense, the law can require it directly[56] as well as *indirectly*[57], either way, excluding any other means as being able of proving the said facts (e.g. proving certain formal statement through the testimony of a witness, as foreseen, and consequently excluded, by art. 393 (1) CC) (Lebre de Freitas, 2013: 199).

2.2 The Search of Truth in the Proceedings

Truth has always been a factor of legitimating the procedural law. Now, under the assumption that judicial decisions are nothing more than the objective application of positive law – in theory, deriving from the popular will, as emanating from representatives of the people (the government) – rather than the bygone facts accurately reconstruction, it is concluded that the jurisdictional activity meets the popular aspirations, since there would be, from this perspective, no influence of the arbitration of the judge or any other external force. Given these assumptions, the judge (almost a

[53] As the probative consequences of the parties' silence in the proceedings, which constitutes a irrebuttable presumption based in the common "gathered experience" from the common of cases (Lebre de Freitas, 2013a: 88, footnote 12).

[54] If possessing an extrajudicial nature, it must be integrated in either an authentic document or in an accordingly signed private document forwarded to the opposing party or his/her representative (art. 358 (2) CC).

[55] In accordance to art. 345 (2) CC, any clause excluding the future possibility of an otherwise allowed (to this effect, working *a contrario* – meaning, should the desired means of evidence not constitute a legal or public order rule violation) will be null. Thus, as mentioned, should it sufficiently portray reality, said evidence will be admitted.

[56] See art. 364 (1) CC, in regard to the legal requirement of authentic, authenticated, as well as private document in order to prove a certain fact. Also, art. 4 of the Code of Civil Registry, related to the requirement of the according certificate.

[57] Implying the burden of presenting certain document (authentic, authenticated or private) in order to prove the respective statement *(Ibidem)*.

machine), has a sole function function to, merely, realize the abstract law to apply to the specific situation.

It is true that the fundamental objective of Jurisdiction is the right composition of the dispute, or the performance of the actual will of the law it is no less correct that any of these scopes is achieved only through the discovery of the truth about the facts versed in the request.

Linked to the idea of seeking the truth material, are many of the most important institutes of procedural law. The main one, of course, is evidence. Just as an example, note that LENT[58], at conceptualizing evidence, tones its conviction function of the judge about the truth or falsity of a statement.

2.2.1 General Scope of Influence in the Portuguese Legal System

Notwithstanding the concern in achieving the truth in the procedure, the Portuguese legal system has not adopted a *general principle* of material truth. The Portuguese legal system hasn't proceeded in regulating a degree of material truth also. Its notion, instead, corresponds to the overall *quality* of truth, in relation to the matter of facts (within the working dichotomy between the truth inside the procedure – *formal* truth – and its correspondence outside the procedure, thus, related to the facts themselves, as they have occurred – a *substantial*, or *material* truth).

Notwithstanding, as expressed by Lebre de Freitas (2013: 156), the growing ineptitude of a dichotomy of a *material* vs *procedural* truth due to the evolution past the traditional *(liberal)* perspective of the civil procedure towards an unitary notion of *truth*, as the *"relationship of adequacy between intellect and reality"*.

2.2.2 Limits and Exceptions

As far as admissible evidence goes, the Portuguese legal system, under international principles in force under the Universal Declaration of Human Rights, as well as the European Convention of Human Rights, has implemented several restrictions on evidence which abusively infringes fundamental rights such as the physical or moral integrity of the person, as well as one's privacy of home, family or correspondence/other forms of communication. Any evidence obtained through the mentioned means will be, therefore, null (art. 32 (8) of the Portuguese Constitution and art. 417 (2) CCP).

As the attempt to demonstrate the veracity of the facts *"object of the action"*, evidence will be accordingly limited to the scope of the facts either alleged by the parties or *"ex officio"* introduced in the procedure by the judge. Thus, any evidence which does not relate in any way with any of the objects of the action will be, therefor, excluded.

[58] LENT, Friedrich. *Diritto processuale civile tedesco,* Napoli: Morano, 1962: 197.

Selection of evidence can also occur, in broader terms, due to legal limitations (e.g. preclusions, unlawful nature of the act of its obtainment).

Under a general principle of *"cooperation in the discovery of truth"* (art. 417 (1) CCP) (Lebre de Freitas, 2013: 186), both parties, as well as any third party involved in the procedure (e.g. witness, expert) have the duty of complying in their conduct with the search for the truth in the procedure. Thus, anyone, if deemed necessary, must submit any documentary or object deemed as evidence (art. 416 and art. 428 till 431 CCP), allow the (lawfully) requested inspection (art. 490 (1)) or expert examination (art. 480 CCP), or provide the respective statement (art. 452 (in regard to the parties) and art. 417 (1 CCP).

In the context of an appeal before the Portuguese Supreme Court, the latter cannot evaluate evidence, instead, its function lies in the consideration of issues of law.

2.3 Other General Principles of Evidence Taking in the Portuguese Legal System

The following principles are referenced by doctrine in regard to the taking of evidence: principle of cooperation[59], which dictates that all who intervene in the proceedings (parties, attorneys (art. 83 and following of the Portuguese Order of Attorneys Statute)) must collaborate in order to guarantee the closest relation to the finding of the truth in the procedure, as such a general duty is imposed of answering all forwarded questions, presenting any requested objects and appearing in court following a summon to be questioned (Lebre de Freitas, 2013: 185-186; Montalvão Machado and Paulo Pimenta, 2010: 32-33, 207).

Under the equality principle (Montalvão Machado and Paulo Pimenta: 31-32) and principle of "equality of arms"[60, 61] (Lebre de Freitas, 2013: 136-137) parties must be recognized the same amount of influence in proceedings (e.g. opportunities to be heard to act in their interest).

Lastly, the principle of procedural acquisition[62, 63] (Montalvão Machado and Paulo Pimenta, 2010: 33) states that the judge must consider all evidence presented, submitted and took during the proceedings, regardless of the party behind it (i.e. not burdened with its proof) (art. 413 CCP).

3 Evidence in General

As stated in point 1: Evidence is conceptualized in the objective sense and subjective. In the objective sense, it consists of the means to provide the judge the knowledge of the

[59] To be addressed in point 8.
[60] In Portuguese *"igualdade de armas"*.
[61] To be addressed in point 8.
[62] In Portuguese *"princípio de aquisição processual"*.
[63] To be addressed in point 8.

truth of the facts. In the subjective sense, it is the conviction that the evidence in the process generate the mind of the Court as to the existence or non-existence of facts.

For COUTURE, "to prove is to demonstrate somehow certainty of a fact or truth of a statement" (ALMEIDA, 1927: 112). In his perspective, evidence taking would be a fact-finding method, as a method of verification, demonstration, corroboration of the truth or falsity of all statements made in court when it comes to civil matters.

To prove is to produce a state of certainty in the conscience and mind of the judge to form his conviction concerning the existence or non-existence of a fact or of truth or falsity of a statement about a factual situation that is deemed of interest to the judicial settlement or remedy for a process.

Evidence is conceptualized in the both objective and subjective sense. In the objective sense, it consists of the means for providing the judge the acknowledging of the truth of the facts. In the subjective sense, it is the conviction that the evidence in the process generates in the mind of the judge as for the existence or non-existence of facts.

3.1 Means of Evidence

Means of evidence are the instruments carried by the parties and presented to that judge that allow the court to gather the information that will help him to form his understanding of the case. They are listed both in the CC and The CCP, in the Portuguese legal System.

3.1.1 Legal Listing

The Portuguese Civil Code and Code of Civil Procedure list the following means of evidence: presumptions (art. 349 CC), admission (art. 352 CC and art. 452, art. 46 and art. 465 (2) CCP), documentary evidence (art. 362 CC and 423 till 450 CCP), expert evidence (art. 388 CC and art. 467 till 469 CCP), inspection (art. 390 CC and art. 490 till 494 CCP), testimonial evidence (art. 392 CC and art. 495 till 526) and presentation of movable or immovable objects (art. 416 CCP).However, and as pointed by Lebre de Freitas (2013a: 223) both presumptions and presentation of movable or immovable objects cannot be considered as actual means of evidence, since presumptions constitute, instead, a *"stage in the probative iter"* and the presentation of movable or immovable objects are, *"strictly speaking, proof by inspection, through document or expert evidence"* (against Remédio Marques: 380; Montalvão Machado and Paulo Pimenta, 2010: 243). Following Lebre de Freitas (2013a: 224), the Code of Civil Procedure can be considered as (also) establishing the following means of proof: admission, procedural conduct of the party and criminal or foreign sentences.

Despite the legally provided list of means of evidence a *"numerous clausus"* principle does not apply, as parties may agree on the restriction of the proving of certain facts through determined means of proof (with the exclusion of the listed by law and only regarding available rights), as well as exclude certain types altogether, while also

agreeing in the admission of any (diverse) means of proof (Lebre de Freitas, 2013a: 224-225).

Any evidence deemed suitable to demonstrate the truth of the alleged facts will (generally) be admitted (Montalvão Machado and Paulo Pimenta, 2010: 236). In fact, within an agreement, the parties cannot establish the restriction or exclusion of means of proof different from the ones stated by the law (art. 345 (2) CC (*a contrario sensu)*, with the exception of any civil suit dealing with unavailable rights.

3.1.2 Admission in the Proceedings

The parties are not allowed to petition for the taking or admission of evidence which method of obtainment or object is such that it constitutes a violation of fundamental rights, in detriment of such pretension being unlawful, and consequently denied/excluded, e.g., evidence obtained by wrongful interference of one's private intimacy (home, correspondence); violation of human dignity or which production generates, by itself, unlawfulness (e.g. witness statement in violation of professional secrecy) (Remédio Marques, 2011: 565).

A (formal) legal imposition can also be observed, stating the need in which the proof of certain facts should only be considered if provided through certain types of evidence, and excluding others. Such imposition can be direct, should the law demand certain type of evidence in order to prove certain fact – e.g. documents *"ad probationem"*; a civil registration certificate – or indirect, meaning an onus of preserving the document and being able to present it if needed to prove the according declarations and facts regarding juristic acts (e.g. authentic or authenticated private document) (Lebre de Freitas, 2013: 199).

In regard to the proof of rights arising out from a cheque or bill of exchange, as a force a principle of abstraction applies to these documents, should they meet the deadlines stated in the law in order to constitute a debit instrument, their probative value will correspond to a indubitable degree[64].

3.1.3 Probative Value

Considering the imposed probative value existent in certain types of evidence (e.g. authentic documents, written admission by a party) it can be affirmed, broadly, that such types of evidence are constituent of a *stronger* nature (value) in comparison to the type of evidence freely assessed by the judge (e.g. witness testimonies). Implied in the very nature of the taking of evidence, the search for the demonstration of the truth of the alleged facts (art. 341 CC) dictates the correspondent freedom in the means to do so. Consequently, a restriction regarding the types of evidence susceptible of being required or submitted by the parties is not established in the Portuguese legal system (within the restriction and tutelage of fundamental rights, as well as unlawful evidence).

[64] *"Prova plena"* in Portuguese.

Establishing a fixed value of proof in regard to certain types of evidence influences the assessment of evidence in the degree of liberty in which the judge can act on his judgement.

Should certain type of evidence have its value established, the judge will not possess the discretionary power of being able to decide against it based in the principle of free assessment.

Thus, in the case of indubitable proof by authenticated documents, its facts have its value, and therefore its consequences as to the assessment of evidence, established by law, being only able of being removed through proof of the contrary by legally established means (art. 347 CC *in fine*), on the contrary, witness and expert evidence, as well as in the case of private documents, the judge decides according to his free assessment. In such a case, the decision would be obtained through the imposed legal scope of the probative value of certain evidence.

Facts established in a proceeding (as cause of action) will not generally be binding regarding other proceedings (art. 91 (2) CCP). The court is only limited in the decision (thus rejecting an application to take evidence) regarding fats which constitute the scope (pleading) of a judgment provided by a previous competent court and not its factual grounding (cause of action). The latter only occurs regarding facts which any of the parties have required the court to provide judgment with the effect of *"res judicata"* (art. 91 (2) CCP); facts which "create a relationship of a prejudicial [antecedent] nature between the object of the action and the decision [in such a way that] the ground of the previous action influences the examination of the ground in the ulterior action" and facts which relate to a synallagmatic relationship between both proceedings (in the same sense, Ac. RC, 17/05/05) (cit. Neto, 2014: 514, art. 421, 10.).

Parties can always invoke facts proven in other procedures through depositions or expert examinations (through the request of the evidence produced in the previous action (Ac. RL, 16/06/04) (cit. Neto, 2014: 514, art. 421, 8)). However, if the previous procedure offered greater guarantees, the facts in the new procedure will be reduced to mere principle of proof, thus not being able as such to be considered as established facts unless combined with further evidence (art. 421 (1) CCP).

3.2 Third Parties and the Taking of Evidence

Third parties can be called on to deliver or produce evidence (e.g. testify). Under the general principle of cooperation, such duty (resulting from a rule of law – art. 417 (1) CCP) means the need of the aimed person to comply (notwithstanding the possibility of legitimate refusal (art. 417 (3) CCP) with the presentation of assets/objects or relation of facts which are deemed necessary to reach the truth (the breach of such duty signifying the susceptibility of being fined (art. 417 (2) CCP) or out of necessity of making the evidence available, due to the party charged with the burden of proof not being in possession of the evidence (art. 7 (4) CCP).

4 General Rule on the Burden of Proof

The rule on the burden of proof is reflected in the burden on the party to whom it competes to provide the demonstration of the reality of the alleged facts alleged to the substance of the application deducted in court.

With regard to the distribution of the burden of proof, i.e. on which party should bear the burden of proof, the one who rely on a right fit to proof of the facts constituting the alleged right, and the proof of facts impeding, amending or extinguishing the invoked right to that competes to the one party against whom the invocation is made.

The actions to be proposed within a certain period of time after the date on which the author was aware of a certain fact, it is up to the defendant to prove the period has already elapsed, except if the solution is exceptionally assigned by law.

If the rights invoked by the author are subject to suspensive condition (uncertain future event and whose verification the parties have left dependent on the production of the effects of the transaction) or the initial term (time point after which occurs the emergence of the right), it is up to the applicant to proof that the condition occurred or the term won; the right is subject to precedent conditions (and uncertain future event whose check the parts no longer dependent on the cessation of the effects of the transaction) or the final term (time point after which occurs the extinction of the right), it is up to the defendant to prove the verification of the condition or the expiration of the term.

The rules not previously mentioned are reversed when there is a legal presumption (inference that the law draws from a known fact to establish an unknown fact), dismissal or release of the burden of proof or valid agreement accordingly and, in a way general, whenever the law so determines. There is also shifting of the burden of proof when the opposing party has culpably made it impossible to access the proof by the burdened party.

It is null the convention that reverses the burden of proof in the case of inalienable right (the one that the party cannot afford a mere manifestation of will to do so) or when the inversion become excessively difficult the party to exercising its right. It is also void the convention that excludes any legal proof means or admit a means of proof of the diverse legal, but if the legal requirements as to the test have founded on grounds of public policy, the agreement is void under any circumstances.

Proof produced by the party who bears the burden of proof can be opposed by the other party's rebuttal concerning the same facts in order to make them doubtful; to achieve this, it is the issue decided against the burdened party with proof.

One who invoke customary, local or foreign law must prove its existence and content, but the court should seek, on its own motion, to obtain their knowledge. The *"ex officio"* power of the court must be set in action, when it has to decide on the basis of customary

law, local or foreign, and none of the parties has invoked, or the opposing party has acknowledged its existence and content or there is less opposition. Unable to determine the contents of the applicable law, the court will resort to the rules of Portuguese ordinary law.

4.1 General Scope of Influence in the Portuguese Legal System

The main doctrine behind the burden of proof rules in the Portuguese legal system is Leo Rosenberg's *"norm theory"*, which states the need for each party to prove the subjacent facts of the corresponding norm favourable to their respective position (Montalvão Machado and Paulo Pimenta, 2010).

In accordance to the general rule stated in art. 342 CC, by alleging a specific norm favourable to their interest in the action, each party must provide proof of the facts on which said rule stands (the constitutive facts to such right (art. 342 (1) CC)) *"regardless of its difficulty"* (Ac. STJ, 07/02/08) (cit. Neto, 2013: 319, art. 342, 106.I) while the opposing party is burdened with the proof of the facts which challenge/alter/extinguish the force of the rights alleged (peremptory exceptions), or contest the veracity of the matter of fact alleged by the plaintiff/defendant (the latter in the case of reply) (art. 342 (2) CC) (Lebre de Freitas, 2013a: 207)[65]. In regard to a declaratory action where the plaintiff intends to obtain a judgment which states the lack of existence of a determined right or fact[66], either plaintiff or defendant *must* prove the existence of the alleged fact which bases the respective exception (art. 343 (1) CC) (Remédio Marques, 2011: 590).

The general rule of the burden of proof can nonetheless be *shifted* (art. 344 and art. 345 (1) CC) following a rule of law (presumption[67] or exemption of proof[68]) or agreement of the parties (Lebre de Freitas, 2013: 178-179). In short, the party burdened with the presentation of the essential facts can sometimes not be burdened with their proof.

The notion of *burden* results from the consequence connected to the lack of proof, which due to the inherent *doubt* towards the existence of the alleged facts will lead the judge to decide against the party which would otherwise be favoured by the fact being deemed true (i.e. against the party burdened with the proof of the constitutive fact to the respective rule) (art. 414 CCP).

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[65] Within the working logic of a *ficta confessio* legal system (Lebre de Freitas, 2013a: 103), the Portuguese procedural law imposes the legal burden on the defendant of utilizing the answer as a means of objection to the facts alleged by the plaintiff. Thus, unless objected, such facts will be considered as being admitted by the defendant, consequently producing its effects of proof due to the party's silence.

[66] *"Ação declarativa de simples apreciação negativa"* in Portuguese.

[67] E.g. the presumptive death of someone following his/her disappearance in circumstances which do not raise questions on the likelihood of the person's death (art. 68 (3) CC) (Lebre de Freitas, 2013a: 208).

[68] The fact exempted of proof is admitted based on rules which diverge from rules of experience. E.g. presumption of simultaneous death (art. 68 (2) CCP) *(ibid).*

Following the pleading phase, and preceding the discovery phase, the judge will essentially *"assume the guidance of the procedure"* (Lebre de Freitas, 2013a: 151), coming in contact with the facts and thus attempting to guarantee the regularity of the suit, in order for it to proceed for the final hearing. In this sense, the judge must proceed towards the correction of any formal irregularities, should such correction be possible, as the omission of such an act, upon the awareness of said insufficiencies, constitutes procedural nullity (Lebre de Freitas, 2013a: 157). Among said insufficiencies are the circumstances where the party's proposal of facts/evidence are incomplete[69]. However, the judge is not able of advising the parties regarding the adequacy of the type and number of evidence requested/submitted[70]. Instead, the court can require parties to elaborate on claims and express an opinion on factual/legal matter through the "*pre-curative act*"[71,.72]. In order for the parties to amend their respective pleadings, the court will exercise the respective calling through *order of improvement*[73], an act which is insusceptible of appeal due to its provisory nature) (i.e. the party can either act accordingly, or not) (Lebre de Freitas, 2013a: 157).

The constituent, amending or rebutting facts of law that are incidental are inferable in a subsequent or new pleading, being thus articulated by the interested party. All facts occurring after the expiry of a deadline may be subjected to the consideration of the court should they be of a supervening nature. Certain facts, due to their very nature, can impose an exemption of the burden of proof. Such is the case of notorious facts (see *supra* 1.1.5.2). The proof of a certain fact can also occur regardless of the inactivity of the party charged with the burden of proof, under a general principle of procedural acquisition of the proof obtained through other means (e.g. admission from the opposite party) (art. 413 CCP) (Montalvão Machado and Paulo Pimenta, 2010: 236).

In a situation of doubt regarding the proof of a certain fact, and seeing as a *non liquet* does not exempt the court of a decision (art. 8 (1) CC) the judge will decide against the party who would benefit with fact's proof (art. 414 CCP) (Montalvão Machado and Paulo Pimenta, 2010: 235).

4.2 Standards of Proof

The (established) standards of proof in the Portuguese legal system are "*most indubitable*"[74], indubitable[75] and clear evidence[76] (Lebre de Freitas, 2013a: 212). "*Most*

[69] Nonetheless, the judge cannot replace the party in the introduction of essential facts to the cause. Its introduction, upon being invited to complete, clarify or correct said facts, is dependent on the party presenting a new application (art. 590 (3) and art. 591 (1-c)) CCP) (Lebre de Freitas, 2013: 166).

[70] Should the court consider it necessary, it can order the taking of the respective evidence *ex officio*, under the inquisitorial principle (art. 411 CCP).

[71] *"Despacho pré-saneador"* in Portuguese.

[72] See art. 590 (2-b)) CCP ("providing for the amendment of pleadings") and art. 590 (4) CCP ("inviting the parties to cure any insufficiencies or imprecisions in the exposure of the facts").

[73] *"Despacho de aproveitamento"* in Portuguese.

[74] *"Prova pleníssima"* in Portuguese.

indubitable" evidence presents the strongest of all standards of proof, as its value cannot be dismissed[77], while in the case of indubitable evidence, proof of the contrary is allowed (art. 347 CC)[78]. Clear evidence, on the other hand, as a circumstantial gathering of facts which establish a standard of proof which does not require proof of the contrary (the burden of proof is not inverted upon its verification), yields before a mere state of doubt of the judge (Lebre de Freitas, 2013a: 213).

The minimum standard of proof observable in the Portuguese legal system occurs in clear evidence, as it constitutes a circumstantial gathering of facts which establish a standard of proof which does not require proof of the contrary (the burden of proof is not inverted upon its verification), thus yielding before a mere state of doubt of the judge) (Lebre de Freitas, 2013a: 213).

4.3 Doctrine of iura novit curia in the Portuguese Legal System

In regard to the subsumption of the facts to the correspondent rule of law, as well as its interpretation and application the judge is not limited by the allegations of the parties (art. 5 (3) CCP). The court is nonetheless limited by the parties having to allege the necessary facts[79] (in order to decide), as well as cases where the law conditions the use of such power on the will of the parties (e.g. art. 579 CCP, which states that "*the court has the power to "ex officio" decide on all peremptory exceptions whose invocation is not dependent on the parties")* (Lebre de Freitas, 2013: 149-150).

5 Parties' Deposition and Statements

Of the statements
"The last reform of the civil procedural law has allowed the party returns. In accordance with art. 466, par. 1, the parties may apply until the start of oral arguments in first instance, the provision of statements about facts that have personally intervened or who have direct knowledge. (...) The statements are part of special justification in cases where it is not admissible confession of facts." (Amaral, 2013: 334)

Of the depositions
"This is something different from the part of testimony (...) this is required by the counterparty." (Amaral: 2013: 334)

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[75] *"Prova plena"* in Portuguese.
[76] *"Prova bastante"* in Portuguese.
[77] Upon proving the veracity of a fact which bases a presumption of law, the consequent *proven fact* (or presumed fact) cannot be subject of contradiction, thus constituting a presumption *juris et jure*, notwithstanding the possibility of proving the falsehood of the (previously established) existence of the fact which supported the presumption of law, (art. 350 (2) CC).
[78] Also, as noted by Lebre de Freitas (2013a: 213) indubitable proof, in its susceptibility of being subject of proof of the contrary, is in correspondence to the notion of presumption *juris tantum*.
[79] In an action where the defendant alleges facts which demonstrate the existence of forfeiture, the judge will be unable to declare it unless the party requests it (by alleging its effects in the pleading) (Ac. RC, 18/10/88) (cit. Neto, 2014: 634, art. 579, 5.).

"(...) generally is provided at the final hearing, unless urgent pain or the witness is unable to appear in court – art. 456, par. 1 (...) if both parties have then before the court of the cause testifies first the defendant and then the author." (Amaral: 2013, 335)

5.1 Request, Admission and Probative Value

Parties' statements can count as evidence, as both deposition (art. 452 CCP) and declaration of party (art. 466 (1) CCP).

Being unable to provide any statements as witnesses (art. 496 CCP), parties' depositions or declarations can be provided only by someone with legal capacity in the action. Thus, minors and legally disabled or incapacitated are excluded, unless within the limits in which they are able to bind themselves legally through juristic acts (art. 453 (1)-(2) CCP). Should the deposition or declaration as party of someone legally incapacitated be required, the authorization of the respective guardian will be required (art. 153 (1) CC). Should legal representatives of a minor, legally disabled or incapacitated be able to testify, said testimony will have the value of admission only in the exact terms in which they can bind the represented (art. 453 (2) CCP).

The parties' deposition may take place under the initiative of the opposing or joint party (in the respective application) (Chaby, 2014: 111) or by an *"ex officio"* decision of the judge. The party herself is unable to request the deposition, as its purpose is the *"eventual recognition of facts which are unfavourable to its deponent"* (art. 352 CC) (Montalvão Machado and Paulo Pimenta, 2010: 245). The sought admittance differs from the admittance which occurs through extrajudicial means, or obtained in the application (Chaby, 2014: 16). The judge is not restricted in the evaluation of the entirety of the party's deposition (i.e. facts which, despite not constituting admittance, can be evaluated under the principle of free assessment) (Ac. STJ, 20/01/04 cit. Neto, 2014: 528, art. 452, 6).

Declarations of party can be required by the party herself until the beginning of oral allegations in first instance (art. 466 (1) CCP), regarding facts in which she has personally intervened or has (direct) knowledge about (Chaby, 2014: 46).

The statement can only comprehend the discussion of personal facts, favourable or unfavourable to the deponent, of which the party would be expected to be aware, with the exclusion of any shameful or criminal facts of which the party is standing accused of in criminal procedure (art. 454 (1)-(2) CCP) (as admitting the discussion of such facts would entail the right of the party to lie (Ac. RP, 09/06/05) (cit. Neto, 2014: 530, art. 454, 2.).

A party can refuse to provide a deposition. A refusal by the party to provide a deposition will be legitimate (art. 417 (3) CCP) if based in: (a)) violation of one's physical or moral integrity; (b)) intrusion in one's private or family life, home, correspondence or telecommunications; (c)) violation of professional, public official or state secret.

The probative value of the refusal to provide the required deposition by a party will freely assessed by the court (art. 357 (2) CC and art. 417 (4) CCP) (the sanctioning of the refusal/absence of the defendant in a paternity suit is common in court decisions, for instance, and among others, Ac. RP, 23/11/92 (cit. Neto, 2013: 330, art. 357, 1.), Ac. STJ, 30/03/93 (cit. *id.*, 2.) and Ac. RL, 07/03/96 (cit. *id.*, 3.).

If the refusal to testify is considered unjustified, the party will also be subject to the payment of a fine (art. 417 (2) CCP).

Parties' deposition are carried under oath with the judge having the duty of reminding the deponent of the moral connotations in the act (art. 459 (1) CCP). Should he party commit perjury, said behaviour will be penalised with a fine, within the availability of applying other coercive means (art. 417 (2) CCP).

In the Portuguese legal system, in regard to the evaluation of the parties' testimony a principle of free assessment of evidence is in rule.

6 Written Evidence

"I. According to par. 1 of art. 164 of the Code of Civil Procedure, *"is admissible evidence by document, being understood as such the statement, sign or notation embodied in writing or any other technical means in accordance the criminal law."*

II. In this light, lines, such as the nature of the entire document embodied in a written statement, intelligible to most people, that allowing recognize the issuer, must be adequate to prove a legally relevant fact.

III. To the definition of the concept of document if it were solely to indicated par. 1 of art. 164 of the Criminal Procedure Code and a) and b) of art. 255 of the Criminal Code, that that refers any self-drawn up in a process, or contained no statements would be a document and, as such, could be valued for the formation of the court's conviction under the terms and conditions set out in art. 355 of that code.

IV. Such a conclusion would be in clear confrontation, moreover, with the provisions of art. 356 and 357 of the Criminal Procedure Code provisions that prevent, as a rule, the valuation for the formation of conviction the court of proof of steps taken in the preliminary stages of the process, including the valuation of inquiry notices containing the wizard statements.

V. To define the procedural concepts of documentary evidence and self (art. 99 of the Criminal Procedure Code), must start from the idea that the object represented by the document is necessarily an act performed outside the process that it comes to be together.

VI. If, however, the represented object is a process of the measure, whatever it is, then we have a self that it is drawn up and which is subject to a different regime reserved for documentary evidence.

VII. A self cannot in particular be valued for the formation of conviction the court except in the tight limits set by art. 356 and 357 of the Criminal Procedure Code."[80]

6.1 Notion and Classification in the Portuguese Legal System

A document is defined within the Portuguese legal system as "any object made by man with the purpose of reproducing or representing a person, asset or fact" (art. 362 CC). Such notion covers both written and not-written documents, as being of "human authorship" with a "content of a representative nature" with a "teleological nexus" between one another (e.g. photograph) (Lebre de Freitas, 2013a: 227)[81].

Written documents can be of an authentic or private nature (art. 363 (1) CC), signed or non-signed (art. 373, 380 and 383 CC). Authentic documents are produced according to legal formalities of public authorities within its jurisdiction or within the sphere of its activity[82]. All other documents are private. Particular documents can be authenticated when confirmed by the parties before a notary in accordance to the notary laws in the prescribed terms (art. 363 CC). Judicial decisions are not considered in the Portuguese legal system (Ac. STJ, 3/05/11 cit. Neto, 2013: 332, art. 362, 5).

Electronic documents susceptible of representing a written declaration are considered equivalent to private written documents (art. 3 (1) DL 290-D/99 of August 2nd as amended by DL 88/2009, of April 9th). Mechanical reproductions of facts or things, as well as electronic documents non-susceptible of representing a written declaration will be considered non-written documents (art. 368 CC) (Lebre de Freitas, 2013a: 230).

6.2 Probative Value

The copy of a written or non-written document, when produced or attested by a public entity, will have the value of a written document (art. 383 CC till art. 387 CC and art. 4 DL 290-D/99). Outside these cases, the document will have the value of a mechanical reproduction *(id)*.

Video and audio recordings are admitted as evidence within the Portuguese legal system, having, its probative value legally established (art. 368 CC). Should the opposing party fail to impugn its accuracy and truthfulness, audio and video recordings

[80] Proc. 199/07.5GHSNT 3rd Section, Judges: Carlos Almeida – Telo Lucas – Summary prepared by Carlos Almeida.

[81] The author does not generally need to be aware or desire the legal force (probative value) constituted with the production of a document (e.g. a private photograph taken at the parties' vacation as evidence of a certain facto or jural relation) (Lebre de Freitas, 2013a: 228-229).

[82] As decided in Ac. STJ, 24/06/10: Proc: 600/09.3YFLSB, a medical certificate does not constitute an authentic document, as its facts are (instead) the result of an expert's opinion.

will (legally) prove its represented or recorded facts, unless proof of the contrary (by demonstrating the falsehood of such facts) is presented (however, and as decided in Ac. RL, 11/05/99 (cit. Neto, 2013: 366, art. 368, 3.), the cinematographic recording of the defendant's statement does not serve the purpose of admittance, notwithstanding the possibility of contrasting the content of the evidence with the parties' deposition).

The Portuguese legal system recognizes the following types of electronic documents (Remédio Marques, 2011: 576-577):

a) Electronic messages provided with advanced digital signature (art. 26 (2) DL 7/2004, of January 7th; concerning electronic commerce) which, being regarded as written documents, possess the probatory value of written private documents (formal value, regarding its contents, should its signature be recognized as authentic);
b) Electronic documents whose content isn't susceptible of being represented through written form (v.g. featuring a symbol, a movie, or photograph), provided with a digital signature certified by an accredited entity (art. 368 CC). Should the opposite party fail to object its accuracy and truthfulness, these audio and video recordings will (legally) prove its represented or recorded facts, unless proof of the contrary is presented (by demonstrating the falsehood of such facts);
c) Faxed documents by a notary (art. 383 (1) CC) have the probative value of the original document;
d) Privately faxed documents will possess legal value of proof, unless its authenticity is opposed (art. 368 CC);
e) Electronic documents to which a digital signature is not provided by an accredited entity (art. 3 (5) DL 299-D/99) are assessed freely by the court;
f) Civil registry certificates, including registration of automobiles and ships, available through electronic address (art. 211 (2) Civil Registry Code and art. 1 Portaria 1513/2008 of December 23rd) prove its represented or recorded facts unless proof of the contrary (by demonstrating the falsehood of such facts) is presented.

Electronic messages provided with advanced digital signature satisfy the requisite of a written document, thus having the probative value of authenticated private documents (formal probative value). Electronic documents whose content is not suitable for representation as a written statement and possess an electronic signature certified by an accredited body provide prove of the facts or things which they represent will have the probative value of mechanic reproductions (art. 368 CC).

Authentic, as well as authenticated private documents, are presumed to be correct (i.e. *authenticity*) in regard to their content and authorship (art. 370 (1) and art. 375 (1) CC). The presumption of correctness of authentic and authenticated private documents benefit can be contested through allegation of its falsehood (art. 372 (1)-(2) and art. 347 CC).

The legal duty incumbent on the judge in providing the grounds in which the judgement stands (art. 607 (4) CCP) is based on legal and logical arguments which relate to a

critical analysis of the evidence, while pointing out which facts are considered proven and not proven. As such, the judge is not limited in the type of evidence used in support of the judgement, thus being able of deciding with on a basis of documentary evidence.

Authenticated private documents constitute indubitable evidence of its content (of knowledge or will) if attributable to its respective author (art. 376 CC) unless proof of its contrary is presented. Non-authenticated private documents prove its content should the respective party not contest its authenticity (art. 374 (1) CC).

Private documents lacking any signature will be assessed freely by the court (art. 381 (1) CC). Nonetheless, i.e. commercial book-keeping records are admitted as proof amongst traders – art. 44 of the Portuguese Commercial Code.

6.3 Taking of Documentary Evidence

Written evidence, as a rule, does not require its reading at the hearing in order to be effective. However, in order to proceed with the discussion of its facts with anyone deemed necessary, written evidence can be read. Whenever a party claims, justifiably, a serious difficulty in obtaining documents or information that conditions the effective exercise of power or the fulfilment of procedural burden or duty, the judge shall, wherever possible, arrange for the removal of the obstacle (art. 7 (4) CCP).

All copies of documents issued by an authorized body and done so in conformity with its rules are considered as original documents and, therefore, authentic (art. 368 CC).

7 Witnesses

Witness is the person who, not being a party to the proceedings or his representative is called to recount their perceptions of past events – what he saw, what he heard, what he felt.

7.1 Testimonial Evidence

According to Antunes Varela[83] testimonial evidence is considered the most important means of evidence among those which are accepted by law.

The fact that it is a personal narration of a particular event it, in itself a problem, insofar as this narrative stems from perceptual elaborate images in the memory of him who tells the "story". We all know that the images that our memory produces are real to ourselves and there other beings that build images of the same type, but they do not represent a guarantee of the 'absolute' reality.

[83] *Op. cit.*

7.1.1 Admission

Witnesses are considered third parties in regard to the procedural jural relation (Lebre de Freitas, 2013a: 279). As such, the role of witness is refused to the parties[84], their attorneys as well as the judge in the action (once designated as a witness, the judge must state if he/she has the knowledge of facts which could influence the decision, which, if so, dictates the dismissal of the judge as a witness (art. 499 CCP)).

Certain individuals are unable to serve as witnesses in the procedure due to mental disorders or not having the physical and mental fitness necessary to testify in relation to the facts which constitute the object of action. The judge will investigate as to the existence of the required natural ability of people enrolled as witnesses, to assess the acceptability and credibility of their respective deposition (art. 495 (1)-(2) and art. 496 CCP).

If an interdict or person without natural ability to witness is called upon to do so, the judge, upon noticing the provided answers by the declarant as being clearly irregular, will not admit said witness' testimony.

In other cases, the testimony being allowed, the opposing party (i.e. the one whom the testimony worked against) can appeal such a decision (art. 513 (2) and art. 514 CCP), and can still appeal if the court in first instance has decided that the witness may testify (art. 644 (2)-d) CCP).

The witness may refuse to testify under oath, which amounts to a refusal to testify (art. 459 (3) CCP), given that testimony must be under oath. If the witnesses' refusal is not found to be legitimate, such an act, as it opposes the principle of cooperation, will be actionable to the payment of a fine (art. 417 (2) CCP).

Should the witness commit perjury, said behaviour will be actionable to the payment of a fine, as vexatious proceeding (art. 542 (1), (2)-b) CCP).

7.1.2 Judge's Powers and Duties in the Process of Questioning

The questioning of the witnesses is entirely carried by attorneys. However, the judge is able of forwarding questions deemed necessary in order to reach the truth (art. 516 (4) CCP). The court shall preclude lawyers from treating the witness disrespectfully (art. 516 (3) CCP). The judge may also question witnesses in order to obtain the clarifications deemed necessary to ascertain the truth *(id).*

Whenever the questioning of the witness exceeds the scope which has previously been established by the *"thema probandum"* (see, *infra,* footnote 43) the judge is allowed to intervening and restricting the questioning based on such questions having an

[84] Nonetheless, and for instance, joint owners can be appointed as witnesses in an action filed by the condominium (Ac. RG, 22/02/06) (cit. Neto, 2014: 553, art. 495, 6), as well as parties' spouses and ascendants (Ac. RL, 28/06/07 (cit. Neto, 2014: 554, art. 496, 8).

"impertinent nature". However, such a restriction is not permitted if based on the judge's personal consideration of the questioning's lack of brevity or need for conciseness (Neto, 2014: 564, 2).

7.1.3 Delivering and Opposing Party's Powers and Duties in the Process of Questioning

The questioning is conducted by the delivering party's attorney (art. 512 (1) CCP). Attorneys shall not make suggestive or inappropriate questions, or any other questions that may impair the spontaneity and sincerity of the answers.

The lawyer of the opposing party may raise any issues that are deemed indispensable to complete or clarify the testimony (art. 516 (2) CCP), it should not, however, engage in suggestive or impertinent questions, or any others that may impair the spontaneity and the sincerity of answers.

Following the doctrine established by the General Counsel of the Portuguese Order of Attorneys (Opinion from February 23rd, 1953), attorneys are allowed to object and to oppose the opposing party's attorney questioning without the latter's permission following irregularities of questioning (Neto, 2014: 517, 4).

7.1.4 Limits to the Facts Witnesses Can Testify About

The witness may refuse to either provide or develop facts which relate to parties with which the witness has family ties, relating to matters which constitute a violation of fundamental rights or of physical or moral integrity, or interfere with private or family life, or relate to the privacy of one's home, correspondence or telecommunications, professional ethics and state secrets (art. 497 (1), (3) and art. 417 (3) CCP).

7.1.5 Evaluation of the Witnesses Testimony by the Court

Evidence gathered through parties' testimony will be freely assessed by the judge. Cross-examination, allowing one party to react to the testimony provided against him or her, is also admitted.

7.2 Right of Refusal

The refusal of a witness to testify only finds legitimacy in arguments and considerations of particular nature, namely family ties, violation of fundamental rights and professional ethics and state secrets (art. 497 (1), (3) and art. 417 (3) CCP).

Notwithstanding the legitimacy of refusal, the witness shall appear before the judge to report the refusal and the reasons supporting it. The notification to the court shall be admitted in light of a set of circumstances which would otherwise make impossible or difficult for the part to appear in court (art. 518 (1) CCP).

If based in family reasons, the legitimacy of the excuse shall be proved by documentary evidence to that effect. In the case of professional secrecy, and having doubts about the legitimacy of the excuse, the judge shall make the necessary inquiries. If, after these, the court opts for the witnesses' illegitimacy of excuse, he shall order the testimony. Such decision may be object of appeal (art. 644 (2)-d) CCP).

Once a witness has claimed an excuse based on professional secrecy the applicable legal procedure shall be, with the adjustments necessary by the nature of the interests involved, the provisions of criminal procedure on verifying the legitimacy of the excuse and exemption from the duty of secrecy invoked (art. 417 (4) and art. 135 (2), (3) Code of Criminal Procedure).

Regarding professional secrecy, the following activities (among others) are attributed such duty following special rules:

a) Journalists (art. 11 L. 1/99);
b) Bankers (art. 78 till 84 DL 298/92);
c) Attorneys (art. 87 of the Portuguese Order of Attorney's Statute);
d) Church Ministers (art. 16 L 16/01);
e) Chartered accountant (art. 54 (1)-c) DL 452/99);
f) Notaries (art. 32 of the Notary Code);
g) Physicians (art. 13-c) of the Portuguese Order of Physicians Statute);
h) Solicitors (art. 86 DL 8/99);
i) People with the knowledge of Secrets of State (L. 6/94);
j) Public Officials (art. 3 (9) DL 24/84);
k) Pharmacists (art. 101 till 104 of the annexed Statute to DL 288/77);
l) Insurance Brokers (art. 29-f) DL 144/2005);

The excuse based on professional secrecy can be the subject of appeal (art. 644 (2) d). CCP). Should there be reasonable doubt about the legitimacy of the excuse, the judge shall make the necessary inquiries. If, upon doing so, the judge finds the excuses to be illegitimate, the judge may compel the testimony.

7.3 Privilege Against Self-incrimination

The witness shall not be required to answer questions if the answers would argue towards his criminal responsibility. Such right will, however, be exceptional in civil procedure, taking into account the interests and legal relations concerned. The witnesses, at any time during the interrogation, may refuse to cooperate if such compliance could lead to violation of their physical or moral integrity or meddling in their private or family life, in their home, in their correspondence or in their telecommunications as well as a violation of their professional secrecy, as a public official, or of state secrets. The cases which allow for justified refusal are enumerated by law (art. 417 (3) CCP).

Should there be reasonable doubt regarding the legitimacy of the refusal, the judge shall make the necessary inquiries. If, after these, the judge finds the excuses to be illegitimate, he may compel the testimony.

8 Taking of Evidence

The principles relating to evidence in civil proceedings are, often, considered arguments alongside the theory of admissibility of evidence (obtained in an unlawfully).

It is, therefore essential to unveil the outlines of those most important and prominent principles regarding the taking of evidence.

Principle of the Finding of the Truth

Frequent is the association of formal truth to the civil process whereas the search for material truth is reserved for the criminal proceedings. This distinction stems from the existence of several limitations to the pursuit of truth in civil proceedings.

According to this thought one would think that the civil process does not go as far as the criminal proceedings in the search for the truth, being content with just a mere formal fact, it would not be far from reality because, being essentially part process, progress would be given the device principle, ruling the judge, as a passive subject, just based on what these would carry to the process.

Principle of Good Faith

Enshrined in art. 8, 9 and 542 CCP, the principle of good faith is considered fundamental of civil procedure, the first branch of law to be reached by it because *"its instrumental nature before the Civil Law and a certain literary tradition of writing about the good faith in the implementation process have facilitated"*[85] (Menezes Cordeiro: 1984, 37)

Principle of Free Assessment of Evidence

Considered as one of most important principles concerning evidence, comes present in art. 607., par. 5 CCP when is stated that *"the judge freely appreciate the evidence according to his prudent belief regarding each fact"* is, often, articulated with the problem of illegal evidence[86].

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[85] CORDEIRO, Menezes, *Da boa-fé no Direito Civil*, I, 1984: 371.

[86] The probationary procedure is defined as "the methodically ordered scheme of procedural acts intended to enable the use of different means of evidence" and features four phases (ordinary): i) proposition, offering or requirement of proof (the part requires inclusion and of evidence in the case of pre-constituted evidence and evidence constituted, respectively); ii) the admission evidence (consisting of the approval of the proposition, offering or requirement of proof, cf. Art. 543 and 637 par. 2 of the CCP); iii) of evidence (it is the essential phase of the trial procedure of constituted evidence – the preconstituted are formed out of the process – it is at this point that is

Such as its precept implies, the principle of free assessment of evidence seems to imply the freedom to use of them in the last stage of the trial proceedings, the assessment of the evidence, it will mean that we could be led to accept the admissibility of illegal evidence with based on this power the judge has to value evidence. This understanding is totally inaccurate.

Principles of Procedure Acquisition, Inquisitorial and Cooperation

Following closely Remédio Marques, and taking in consideration art. 413 CCP, the role of the judge is to be completely impartial, being guided by the discovery of material truth, should the court in the trial of the facts, "seek to take into account and meet all the evidence in the record, even they take advantage of the other party" so that the decision is in accordance with the real situation.

Our civil procedure, which had been ruled exclusively by the principle of free disposition of the parties – the judge had a passive role in the process, leaving the parties to plead and prove all the facts – currently has a hybrid nature, requiring that reconcile with the inquisitorial principle reinforced with the new CCP reform, according to which the judge plays the role of active procedural subject: can automatically arrange the supply of inadmissibility and collect other evidence in addition to those that are produced by the parties.

The principle of cooperation, in its turn, finds its legal consecration in art. 7 of the CCP by stating that *"in the conduct and process of intervention, should the magistrates, judicial representatives and the parties themselves cooperate (...) to obtain, with brevity and efficiency, due process of law"*, i.e. it is the duty of all cooperate towards finding the truth of the facts, idea reinforced by art. 417 par. 1 CCP.

8.1 Sequence

The sequence of taking of evidence in civil procedure is dependent on the nature of the evidence submitted and the will of the parties or judge. Within the context of Portuguese law doctrine (Remédio Marques, 2011: 584-585), evidence can be classified as being *preappointed* and as *constituent*. Meaning some of the evidence to be assessed by the court is not required to be taken during the hearing, and instead may be submitted by a party/third person. In such cases, (e.g. documents, as well as evidence which was subject to early taking, due to fear of future impossibility or difficult in its taking – art. 419 CCP) the judge can weigh its value prior to the hearing, and decide the suit at that time by the curative act (art. 590 c) CCP).

Constituent evidence will be taken during the hearing (art. 604 (3) CCP). It can be required to be taken (or presented – art. 425 CCP, which allows the parties to submit documentary evidence should its presentation not have been possible until such late moment) during the proceedings, either as the parties have requested its admission by

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extracted from the source provided the evidentiary material it supplied); iv) assumption of proof (incorporation of evidence in the process).

the judge, or its admissibility, at any moment of the procedure, is determined *"ex officio"* (art. 411 CCP) (e.g. testimonial evidence, expert evidence, evidence by inspection).

Parties hold the general responsibility of submitting and presenting any evidence or persons with the awareness of facts deemed relevant to their interests in the action, seeking to prove the facts which they respectively allege or have the legal burden of proving (art. 342 (1)-(2) and art. 343 (1) CC). Together with the respective articulated pleading, the parties shall submit any document (art. 423 CCP) or cinematographic or phonographic reproduction (art. 428 CCP) intended to serve as evidence, together with the request of any testimonial or expert evidence considered necessary which will be accounted and examined by the court, followed by the according acts of giving notice to witnesses[87] and experts (art. 151 CCP).

In regard to evidence to be obtained through the examination of movable or immovable objects, the parties, upon requesting it, shall proceed with its deposit in the court. In the event of being impossible to do so, the party shall notify the opposing party in order to allow its examination outside the court (art. 416 (1), (2) CCP). Any new evidence requested by the judge under the inquisitorial principle will be accordingly ordered *"ex officio"*.

8.2 Deadline

The Portuguese law does not establish an express deadline in regard to the taking of evidence. As such, the judge will take into account the complexity and needs of the action when scheduling and programming the taking of evidence. With the agreement and consultation of the parties and their respective attorneys, the judge will set the date (or dates, if considered necessary) of the hearing, taking into account the foreseeable time necessary to carry out the taking of evidence which will be preceding it (e.g. expert evidence[88]).

When programming the hearing the judge will take into account the foreseeable duration of all the acts involved and accordingly set the necessary date/s (art. 591 (1)-g) and art. 151 (1) CCP).

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[87] Unless the party has assumed the responsibility of guaranteeing the witness' presence at the hearing, in which case the court will not give notice to the witness (art. 507 (2) CCP).

[88] However, as pointed by Lebre de Freitas (2013a: 176 footnote 19) in an action for damages, should the expert examination for the evaluation of damages exceed a period of three months, the scheduling of the hearing can be carried out without the need of waiting for its result (art. 600 (1) CCP). In such case, a generic judgement can be provided (sentencing the party in an amount to be set in the future) which will then take into account in the moment of its liquidation the expert examination (art. 609 (2), 358 (2) and 600 (2) CCP).
The date of the hearing can nonetheless be set should the plaintiff opt to exercise such faculty at the moment of the preliminary hearing or should the necessary time to carry the expert evidence be foreseeable and thus a scheduling of the hearing being already possible while taking such into account *(id)*.

8.3 Instructions

The general instructing guidelines in which the taking of evidence must occur are provided in accord to each type of evidence in the Code of Civil Procedure, which together with the rules concerning illegally obtained evidence and the legitimate refusal to cooperate in the taking of evidence (art. 36 (2) of the Portuguese Constitution and art. 417 (3) CCP) constitute the instructions as to the taking of evidence in both a procedural aspect (deadlines and specific proceedings regarding its submission and requesting) as well as its limits (dealing with the tutelage of fundamental rights and duties of professional or state secrecy in the proceedings).

If legal provisions regarding the taking of evidence are infringed (concerning its method of obtainment or object), such will be susceptible of annulment (through appeal by the opposing party – art. 644 (2)-b) CCP) or of rejection by the court. If the party misses a deadline in the request for evidence such will mean the extinction of the faculty to exercise such right, in light of the precluding nature of a deadline (art. 139 (3) CCP). Nonetheless, an exception is made in regard to documentary evidence, allowing the submission of document/s which have not been possible until such late moment (past the deadline). The same occurs in regard to documents which submission has become necessary due to an ulterior occurrence (art. 423 (3) and art. 425 CCP).

The general[89] requesting of evidence past the legal deadline by the parties will only be admitted if related to supervening matters (art. 588 (1), (5) CCP).

8.4 Taking of Evidence ex officio

The judge has the liberty of ordering (*"ex officio"*) all the necessary taking of evidence deemed necessary to achieve the truth and the most fitting resolution of the dispute (art. 411 CCP) being thus allowed to require additional evidence at any point during the proceedings (e.g. anyone who is deemed to be aware of facts which are relevant to the object of the action yet has not been listed as a witness by any of the parties can be summoned *"ex officio"* by the court in order to testify (art. 526 (1) CCP); by ordering the submission of any documents considered necessary to the action in the possession of a party, third parties or public officials).

8.5 Securement of Evidence

Any party (or anyone concerned with the conservation of an object or document) may require the inventory of property (movable or immovable) assets or documents before or during the main hearing. Such diligence depends on the existence of a serious risk of loss of property or of documents by concealment or dissipation (art. 403 (1) and art. 404 (1) CCP) (*"periculum in mora"*, as commonly stated in court decisions (for instance, Ac. RC, 20/01/04 (cit. Neto, 2014: 497, art. 403, 10).

[89] Not limited by the type of evidence in question as long as it relates to supervening facts which impose the need of submitting new evidence.

The applicant will thus have to provide proof of the property over the respective objects, together with the proof of the circumstances which justify the securing of the evidence (art. 405 (1) CCP).

If the property over the aforementioned objects is dependent on a suit which is still in motion, or which is yet to be filled, the applicant will have to convince the court of the likelihood of its granting in order to have it secured *(ibidem)* (e.g. the request for the enlisting of assets belonging to someone who the plaintiff expects to be acknowledged as father in an the respective action and consequently become his heir is dependent on the proof of the likelihood of the plaintiff's being granted his pleading (Neto, 2014: 496, art. 403, 5).

8.6 Rejection of an Application to Obtain Evidence

The court is able to refuse the taking of evidence which constitutes an infringement of any rule of law regarding the admission of evidence (e.g. the legal limit in the number of witnesses established by law; lack of risk of dissipation or concealment of property when requiring the anticipation of the taking of evidence; lack of mentioning of the object or question of analysis in the request for expert evidence; lack of natural, physical or mental competence to testify; the fact which the party seeks to prove with the witness' testimony being only susceptible of proof through the submission of a document) or is considered unnecessary or impertinent (in Ac. RP, 24/11/09: Proc: 43/07.3TBBTC-C.P1, for instance, the underlying reasoning is based in an exercise of contrasting the questions submitted for the expert with the matter of fact determined in the discovery phase).

An application to obtain evidence can also be rejected by the court if considered to be in violation of fundamental rights or of possessing an abusive nature towards the aimed party/person (e.g. violation of physical or moral integrity; intrusion in private or familiar matters, in the home, personal correspondence or communications; violation of professional or trade secrecy).

The court must justify the refusal of evidence, being so imposed under the legal duty incumbent on the judge to provide justification (legal and logical grounding) of any decision concerning the parties' contested request (art. 205 (1) of the Portuguese Constitution and 154 (1) CCP) together with the fact that such decision (on the admission or refusal of evidence) is susceptible of appeal by the parties – art. 644 (2) d) CCP.

The court can also reject an application not submitted in time based on the preclusive effect of the respective deadline. However, in the interest of truth or in search of the most fitting resolution of the dispute and while in connection with the designated *"thema probandum"*[90], the judge will be able to require it *"ex officio"* at any time during the procedure (art. 411 CCP).

[90] As the product of the latest legislative reform in civil procedure under L. 41/2013 26/06, the current Portuguese Code of Civil Procedure has abandoned a structuring of the facts to be proven

Concerning new matters, the parties can alter the respective applications during the preliminary hearing (art. 598 (1) CCP). The list of witnesses can be altered until 20 days prior to the hearing (art. 598 (2) CCP)[91].

The parties also have until 20 days prior to the hearing to submit any documents which were omitted during the articulated pleadings[92] (art. 423 (2) CCP). The request of evidence which derives from the occurrence of new facts, or its learning at such ulterior moment by the party, is permitted until the hearing is closed (art. 588 nº 5 CCP).

There are, however, types of evidence which can be submitted at any time during the proceedings until the closure of the hearing. Such is the case with opinions provided by attorneys (with the exception of the ones representing any of the parties in the proceedings (Montalvão Machado and Paulo Pimenta, 2010: 244)), professors and technical experts (art. 426 CCP) as well as declarations of party, which can be requested during the final hearing until the moment attorneys start their oral arguments (art. 466 (1) CCP).

8.7 The Specification of Evidence

A general rule which states the parties' need of specifying which facts are intended to prove with the request/submitted evidence is not in force in the Portuguese legal system.

However, parties are under such duty in the case of: documentary evidence, where the parties have to specify which facts are intended to be proven with its submission; whenever the party requests a document in possession of a third party; in expert evidence; and in the case of the request of any taking of evidence prior to the hearing (closely following Lebre de Freitas: 2013a, 218).

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in a manner of a questionnaire to which the evidence and investigation of the court and parties would proceed towards. Instead, as stated in art. 410, "the discovery phase has as its subject-matter the designated "temas da prova" [*thema probandum*] or, when such designation is not to take place, the facts lacking proof". Such topics will serve as both an instrument in establishing the necessary scope of investigation and analysis of the action while also preventing a limitation to the respective acting of the court. Thus, and in relation to the taking of new evidence, the verification of a deadline while still possessing a preclusive effect in relation to the party, as it prevents its submission to the proceedings, does not prevent the court of invoking the primary interest in the search for the truth of the case in an *ex officio* order for new evidence to be taken past the deadline of its submission or presentation, as long as it is related to the discussion, i.e. the *thema probandum* previously established and which guide the taking of evidence in both the discovery and hearing phases (i.e. the "fundamental questions" of the action – cause of action and exceptions, in articulation with the general rules regarding the alleging of facts (Lebre de Freitas, 2013: 197). See, *supra* 1.1.5.2.

[91] The added witnesses won't be given notice by the court, however. As such, the requesting party is responsible with their presence at the hearing (art. 598 (3) CCP).

[92] The party will nonetheless be subjected to a fine, except if proof is offered that the presentation of the document was impossible until that moment.

When petitioning for the admission of testimonial evidence parties list the witnesses by identifying them by name, profession, address and any other detail deemed necessary in order to identify the witness. Parties shall only specify which facts are intended to be addressed with the witness' testimony in specific cases. Such being: when the witness lives abroad and the court or consulate of the area does not have the necessary technical means which would allow the testimony via VCF; when the party lists as a witness the President of the Portuguese Republic, foreign diplomatic agents (under the condition of reciprocity), incumbents or members of a constitutional organ, general officials of the National Armed Forces, high dignitaries of church, the *"Bastonário"* of the Bar of Attorneys, the President of the Chamber of Solicitors; or the witness' testimony should be taken before the hearing (*Id*: 287-288).

8.8 The Hearing

The hearing is the time for meeting the judge, assisted by the clerk, alongside with the parties in person and accompanied by their lawyers or represented by them. It is at this point in time when the production of oral evidence, conciliation, debates and judgment.

In this solemn session are taken all explanations of expert and technical assistants, in case there was report presentation or opinions where there had been previous expert evidence. Makes use the time for personal testimonies heard if they have been applied, and the parties have been duly summoned for this purpose, or else the interrogation if there been ordered by the judge.

It will also be in the audience where it processes the examination of witnesses when they are enrolled in the period within which the judge set at the time of the hearing date, or should attend and effectively having been attended, regardless of intimation.

8.8.1 Taking of Evidence

Evidence which probative value results from its taking during the hearing (e.g. testimonial evidence, deposition or declaration of party), or evidence which the parties are able of submitting during the hearing (e.g. admitted submission of documents; evidence relating to supervening facts) will be taken under the principle of directness. The person in the Portuguese legal system responsible in the taking of evidence is the judge of the competent court to the action, designated under the norms of the Code of Civil Procedure and the *"Organic's Courts Law"*.

Evidence can only be taken before a judge, be it definitely or temporarily (by a replacement judge, which will then nonetheless maintain his function notwithstanding the return of the previous judge). Before a sudden event which imposes a leave of the judge of the cause, or due to death, a replacement will also be attributed, implying the repetition of the previous acts, in order to assure a plenitude of assistance. The judge might also have to decide regardless of having been transferred after having presided all the hearing sessions (such being the case in Ac. RC, 30/05/00 (cit. Neto, 2014: 689, art. 605, 10.) where a judge who has presided two hearing sessions in a parental rights suit

was then transferred to another circuit. Underlining the force of the principle of directness, the Appellate Court stated the duty of the judge of having to decide the action).

The taking of evidence will always occur before a judge. However, it can occur that due to specific circumstances a different judge to the one originally appointed under national law can also be competent to the taking of evidence. Such will be the case when evidence needs to be taken in a different court under national or international law, through the dispatch of precatory/rogatory letter (art. 172 (1) CCP), as well as in the case of anticipation of the taking of evidence (e.g. witness testimony) which can also occur before a different judge (art. 419 CCP).

Evidence can be taken after the ending of the hearing at the trial court. However, such diligence can only occur as the result of an appeal and of circumstances which justify an exceptional taking of evidence in intermediate jurisdiction. Thus, should there be serious doubts regarding the credibility of a witness or in regard to the meaning of the statement which was provided (e.g. a witness not having been subjected to prior questioning by the judge, in order to attain his/her relationship with any of the parties, his/her interest in the cause and his/her natural ability to testify; the opposing party having not been permitted to counterargument the witness' deposition; or a duly requested confrontation of witnesses having been arbitrarily rejected or ignored) or should there exist any reasonable doubt regarding the value of the evidence presented, the Court of Appeal can then request a new taking of evidence or order its renewal (art. 662 (2)-a)-b) CCP).

The presentation of documents – if proved as not having been possible until such a moment – is also admissible during an appeal.

8.8.2 Order of Taking

Art. 604 (3) CCP provides an order in which the taking of evidence shall occur during the hearing, thus stating it in the following manner: a) depositions of party; b) reproduction of any cinematographic or phonographic evidence; c) oral clarifications by the experts regarding their reports and d) inquiring of the witnesses.

8.8.3 Presence and Participation of the Parties

The parties have the right to be present when the evidence is being taken, being able of intervening in their interest (e.g. forwarding questions to the opposing party, witnesses and experts, requiring the confrontation and contradiction of witnesses). However, the parties do not have an obligation to be present at the taking of evidence unless the respective act relies in the parties' physical presence or present cooperation.

A violation of the parties' right to be present at the taking of evidence (e.g. due to illegitimate refusal by the court or under force/coercion by a third party) can be subsumed under the general clause of procedural irregularities foreseen in art. 201 (1)

CCP – as the omission of an act or formality which the law prescribes – resulting in said procedural act being susceptible of annulment.

Considering the fact that such omission does not constitute a procedural vice which the court must officiously acknowledge, any violation in this instance shall be invoked by the interested party within 10 days of its verification during any procedural act (art. 197 (1) and art. 199 CCP).

8.9 Direct and Indirect Type of Evidence

The Portuguese legal system does not have a rule providing a distinction between direct and indirect type of evidence. However, such dichotomy is mentioned by doctrine (closely following Remédio Marques, 2011: 585).

Evidence of a direct type is considered to be that which places itself directly in the reach of the judges' perception in relation to a certain fact (e.g. documentary evidence and witnesses' testimony). On the other hand, evidence of an indirect type places itself in a manner which allows the judge's psychological perception to draw out the conclusions regarding the facts requiring proof (e.g. proof by presumption or when a witness claims to have seen a certain document or of having heard a certain statement from one of the parties)[93].

The recorded testimony of a witness or an expert constitutes a direct type of evidence, as despite its recorded nature, the witness' or expert's testimony allows the judge to directly evaluate its value as proof in relation to a specific fact.

The testimony of a witness or an expert by video-link or similar allowed live communication by IT (videoconference can be used for the purpose of collecting long distance live testimony. However, its use always requires the cooperation of the competent local entities) represents a direct type of evidence as its electronic nature still allows for a direct perception of the witness' or expert's reactions and overall conduct during the questioning.

8.9.1 Summon of Witness

Witnesses will be summoned by the court to testify (the judge orders the court's Secretariat who will in turn proceed with the giving notice to the respective witnesses through certified mail (art. 251 (1) and art. 157 (1) CCP) unless the party has assumed the responsibility of guaranteeing the witness' presence at the hearing, in which case the witness will not be given notice (art. 251 (1), (2) and art. 507 (2) CCP). The court will also not give notice to any witness added to the witness list by the party in use of the faculty of its altering until 20 days prior to the hearing (art. 598 (3) CCP).

[93] Nonetheless, testimonial evidence can be admitted in order to determine the scope of a written document's statement (Ac. RC, 06/07/95) (cit. Neto, 2014: 564, art. 517, 7).

It is also possible to use video to obtain evidence in Portugal, either with the participation of a requesting Member State court, either directly by a court of that Member State.

Witnesses, experts and parties may be heard by videoconference.

However, enjoy the privilege of being interviewed in his home or at the headquarters of their services, when offered as a witness, the President of the Republic and foreign diplomatic agents to grant identical privilege to representatives of Portugal.

Are given the prerogative to testify first in writing, if they so will, besides the above mentioned entities, members of state bodies, other than courts and equivalent bodies of the autonomous regions, the judges of the superior courts, the Ombudsman, the Attorney General of the Republic and the Deputy General Prosecutor of the Republic, members of the Supreme Judicial Council and of the Public Prosecution Council, the generals of the military officials, high dignitaries of religious denominations, the Order of the chairperson of the Bar Association and President of the Chamber of Solicitors.

Under Portuguese civil procedural law, as a rule, witnesses and parties must be heard by video conference at the same hearing and from the district court of the area of residence, the being establishments of experts, laboratories or official services heard by teleconference from their workplace.

The hearing, when directed by the judge of the Portuguese court, pursuant to art. 10 to 12, will always be held in Portuguese, and it may be assisted by an interpreter if necessary (in those cases the parties do not speak Portuguese).

Regarding the taking of evidence, it can also be held in the language of the requesting court, and it may be assisted by an interpreter if necessary.

8.9.2 The Adducing of a Written Statement Before the Testimony

The adducing of a written statement is not the rule in the Portuguese legal system. Instead, an oral and spontaneous testimony is desired in order to guarantee the directness in the proceedings and the free assessment of evidence by the judge.

However, the witness' testimony can be submitted prior in written form when (closely following Lebre de Freitas, 2013a: 290-291) any of the persons listed in art. 503 (2) subheading b) CCP[94] are requested to testify and opts to do so (in such cases the contradictory principle is guaranteed through the recognition of the parties' faculty of requesting clarifications in writing (art. 505 (3) CCP), which, in the case of the

[94] Among others, Members of the State Council, incumbents or members of a sovereign organ (with the exclusion of the courts and the equivalent of sovereign organs in the Autonomous Regions of Portugal), judges of superior courts, the State's Attorney or Vice State's Attorney, general officials of the National Armed Forces, high dignitaries of church, the "Bastonário" of the Portuguese Order of Attorneys, the President of the Chamber of Solicitors.

President of the Portuguese Republic, are only admitted for such purpose with the court's consent (art. 504 (3) CCP); there is severe difficulty or impossibility of the witness in being present in court, with the agreement of the parties and authorization of the judge[95]; the parties agree on the taking of the testimony in writing, with its registration in a record[96] signed by the witness' as well as the parties' attorneys, and its deposit in the professional domicile of one of the parties' attorney (art. 517 CCP).

8.9.3 Questioning

Witnesses must swear an oath (art. 513 CCP). Prior to the questioning, witnesses will be directed into one room which they will then leave individually in order to testify. Their calling will occur following the order in which they are listed in the witness roll, with the witnesses listed by the author preceding the ones listed by the defendant unless the judge, with the agreement of the parties, orders the alteration of the ordering of calling (art. 512 CCP).

8.9.4 Preparation of Witnesses Before the Hearing

Both intervening and non-intervening parties in the proceedings hold the general duty of cooperation and of acting in good faith in its duration (art. 417 (1) CCP).

Thus, and concerning the preparation of witnesses, attorneys and parties must not act in a way which seeks to influence, instruct or manipulate the conduct of the witness in such a way that jeopardizes the finding of the truth in the action. Such conduct is actionable to the payment of a fine, legal expenses and any claimed damages by the opposing party (due to vexatious proceeding). Attorneys, under art. 110 and art. 104 of the Statute of the Portuguese Order of Attorneys, will also be susceptible to a disciplinary action.

8.10 Expert Witnesses

8.10.1 Questioning

Both parties and judge are able of forwarding questions to the expert in the moment of the requesting and during the act of inquiries and examinations by the expert (which they can attend). Following the consulting of the reasoning supported by the expert in the written final report, both parties and judge can request the presence of the expert in the hearing for the providing of further clarifications regarding the object of the expert examination.

The procedure followed in the taking of evidence and the questioning of the expert involves a more active role by the expert in comparison to the procedure followed when

[95] Nonetheless, after the testimony has been provided the judge can order a renewal of its taking (by writing or in his/her presence), either *ex officio* or after its request by the parties (art. 518 (1) and 519 (1) till (3)).
[96] In Portuguese *"acta"*.

questioning witnesses. Experts, after pledging to a conscious performance of their duties (art. 479 CCP) will carry out the necessary analysis and inquiries, while both parties and judge are able to attend it, observe it and present any questions or observations deemed relevant to the object of the expert examination (art. 480 (2) to 4 CCP).

Experts can also request the judge to order the carrying of further diligences and questionings, point questions to the parties themselves and of requesting access to data or other elements part of the proceedings (art. 480 (4), art. 481 (1) and art. 482 CCP).

After elaborating the final report and of the parties being given notice of the experts developed reasoning regarding its object (art. 484 and 485 (1) CCP), the judge can order (*"ex officio"* or upon request by the parties) the expert to provide further clarifications due to deficiency, obscurity, contradiction or lack of groundings in the written report, which the expert will then provide by additional writing (art. 485 (2) till (4) CCP).

Experts will also be present in the final hearing should the judge or any of the parties request it in order for the obtainment of further clarifications regarding the expert examination (art. 486 CCP).

8.10.2 Judge's Powers and Duties in the Process of Obtaining Evidence from Expert

The judge can order the taking of expert evidence *"ex officio"* (art. 467 (1) CCP), thus listing the matter of fact which constitutes the object of the expert examination. When the expert evidence has been requested by the parties, the judge is able of adding to or excluding questions to the ones submitted by the parties (under a judgement of its unnecessary or impertinent nature) (art. 477 and art. 476 (2) CCP). Unless if requiring the expertise from an establishment, laboratory or official service, the judge will only be able to appoint an expert after hearing the parties in the matter (art. 467 (2) CCP). Whenever the matter of fact subject to examination is considered to be complex, or several expert examinations regarding several different matters are to be carried out, the judge can order the designation of a panel of experts to perform the examination (art. 468 (1)-a) CCP).

Following the agreement of the parties regarding the designation of the expert/s and its number (a minimum of one and maximum of three) the judge will order the taking of evidence and establish its deadline, while also being able of appointing a third expert (should the parties not have reach such an agreement prior[97]) (art. 468 (2) and 478 (2) CCP). During the necessary examinations and inquiries by the expert, the judge is able of attending its carrying and forward observations and allow the parties to forward observations themselves to the expert regarding the object of examination (art. 480 (2) till (4) CCP) while also allowing the expert to request further clarifications, forwarding questions to the parties and of accessing data deemed necessary to the object of

[97] However, the judge is able to override the agreement of the parties, rejecting the designated third expert based on a judgement of inappropriateness or lack of ability for such function (art. 467 (2) CCP).

examination (art. 480 (4), 481 (1) and 482). The judge is also able of ordering an extension on the taking of expert evidence which cannot exceed 30 days, a period which is also susceptible of extension (once) if considered justified (art. 483 (1), (3) CCP).

Following the delivery of the final written report by the expert, the judge can order (*"ex officio"* or on the parties' claim) the presence of the expert/s at the hearing for further clarifications regarding the object of the examination (art. 485 (2) till (4) CCP).

Finally, the judge is able of ordering *"ex officio"* the taking of a second expert examination on the same matter (art. 487 (2) and 3 CCP)

8.10.3 Delivering Party's Powers and Duties in the Process of Obtaining Evidence from Expert

The delivering party can require the taking of expert evidence on facts deemed appropriate. As such, the party submits the request for its taking in the pleading/reply while listing the matter of fact/questions which shall constitute the object of the expert examination (art. 475 (1) CCP). At such moment the party can also require an expert witness panel to carry out the diligence (art. 468 (1)-b) CCP).

After the opposing party has been heard and has possibly appointed a second expert, the delivering party can reach an agreement on the number of experts carrying out the taking of evidence – two, or, with the agreement of the opposing party, a third expert can be collectively designated (art. 468 (1), (2) CCP). The delivering party can attend the necessary inquiries and examinations, observe it and present any questions or observations deemed relevant to the object of the expert examination (art. 480 (2) till (4) CCP).

After the elaboration of the final written report and of the party being given notice of the experts developed reasoning regarding its object (art. 484 and 485 (1) CCP), the party can request further clarifications due to deficiency, obscurity, contradiction or lack of groundings in the report, which the expert will then provide by additional writing (art. 485 (2) till (4) CCP).

The party can also request further clarifications by the expert in the final hearing (art. 486 CCP) and request the taking of a second expert examination within 10 days following the knowledge of the result of the first expert examination. The party must nonetheless justify the reasoning for the disagreement with the result of the first expert examination (art. 487 (1) CCP).

8.10.4 Opposing Party's Powers and Duties in the Process of Obtaining Evidence from Expert

Upon the request of an expert examination by the delivering party, the opposing party is heard in order to exercise the faculty of adhering to or extending the matter of fact designated as the object of the expert evidence (art. 476 (1) CCP) and request, should

the delivering party not have done so, an expert witness panel to carry out the diligence (art. 468 (1)-b) CCP).

The opposing party can reach an agreement on the number of experts carrying out the taking of evidence – two, or, with the agreement of the delivering party, a third expert can be collectively designated (art. 468 (1), (2) CCP).

The opposing party can attend the taking of the necessary inquiries and examinations, observe it and present any questions or observations deemed relevant to the object of the expert examination (art. 480 (2) till (4) CCP).

After the elaboration of the final written report and of the party being given notice of the experts developed reasoning regarding its object (art. 484 and 485 (1) CCP), the party can request further clarifications due to deficiency, obscurity, contradiction or lack of groundings in the report, which the expert will then provide by additional writing (art. 485 (2) till (4) CCP).

The party can also request further clarifications by the expert in the final hearing (art. 486 CCP) and request the taking of a second expert examination within 10 days following the knowledge of the result of the first expert examination. The party must then justify the reasoning for the disagreement with the result of the first expert examination (art. 487 (1) CCP).

8.10.5 Written/Oral Opinion

Experts produce written opinions (report) while also having the duty of clarifying (both by writing and orally) any questions related to the object of the expert examination by the parties or judge.

8.10.6 Selection

Whenever possible, registered experts are selected from a list of recognized establishments, laboratories or official services (e.g. National Medico-Legal Institute, National Laboratory of Civil Engineering, and Laboratory of the Scientific Police) (Lebre de Freitas, 2013a: 294)

When such cannot be the case or would present an inconvenience, the judge will designate a single expert whose ability is considered to be free of doubt (art. 467 (1) CCP) unless the parties reach an agreement on the designation of an expert under the same condition (art. 467 (2) CCP).

There are no differences in the rules governing the taking of evidence from an expert appointed by the court and an expert appointed by the parties.

8.10.7 Private Expert Report as Evidence

Parties can present private technical experts report as evidence (art. 426 CCP). However, such will not coincide with expert evidence, *"stricto sensu"*, as its procedure differs[98].

The presentation of a private expert report as evidence by one of the parties can only occur should it mean the presentation of a final written report submitted under the circumstances which allow the appointing of a non-registered expert in the proceedings for an expert examination (having not been possible to designate an expert listed in an official registry, or such being considered an inconvenience, the judge designates a single expert whose ability is considered to be free of doubt (art. 467 (1) CCP) unless the parties reach such an agreement under the same condition (art. 467 (2) CCP).

8.11 Expert's Expenses

The expert's expenses will be paid by the party which requests its taking or is interested in it (art. 23 (1) of the Procedural Costs Regulation (hereinafter Regulation). Payment is made either in the moment of the request or within 10 days following the day of the giving of notice by the court which determines its taking (art. 20 (1) PCR). The legal expenses of the respective act/s of taking of evidence are calculated by the Courts' Secretariat. Based on Table IV of the Regulation, an Advanced Payment form will be issued to which the party or parties will have until 5 days prior to the taking of evidence to comply with.

The advanced deposit of the expenses determines its immediate payment once the diligence is made. The non-payment of the expenses will result in the evidence not being taken (art. 20 (1) and art. 23 (1) PCR). However, the party which did not pay for the expenses may, if still deemed appropriate, do so within five days following the end of such period along with the payment of a fine in the amount of the value in debt (within the maximum amount of 3 unit costs). Following the non-payment within that period, the opposite party may pay for the expenses (art. 23 nº 3 PCR).

The non-payment by the respective party of expenses with the taking of evidence resulting from an *"ex officio"* order will not affect its taking (art. 532 (2) CCP).

In regard to the advancement of the payment of such expenses, and in the absence of an explicit rule in the matter, under art. 116 of the Portuguese Code of Tax Proceedings and Procedure (applicable in the case by analogy) the court (through the Institute of Financial Administration and Justice Equipment) will advance the expense of the taking of evidence non requested by the party, which will then be allocated to the final account of expenses.

[98] Technical expert reports can be submitted at any time during the procedure, being subjected to the free assessment of the court.

8.12 Rejection by the Parties

Parties have a right to reject one expert and propose another when negotiating on the designation of experts to carry out the taking of evidence (art. 468 (1), (2) CCP).

8.13 Written Expert Opinions; Probative Value

Written expert opinions will be freely assessed by the judge (art. 389 CC), as the judge is only bound by the content of written evidence which value is legally fixed: authentic or private written documents (art. 371 (1) and 376 (1) CC, respectively) and written admissions, should it be elaborated during the hearing (art. 358 (1) CC), or written in an authentic or private document (the latter only bounding the judge in its content if addressed to the opposing party or its representative (art. 358 (2) CC).

9 Costs and Language

9.1 Costs

9.1.1 "Legal Expenses" in the Portuguese Legal System

Legal expenses are defined in the Portuguese legal system as the set of expenses resulting from the inherent cost of calling upon the mobilization of the judiciary system in promoting an action in order to resolve a conflict of interest. By *"action"* it is meant any action, execution or incident (named or unnamed), injunction or appeal with the according liability of payment of "*court fees, charges and party expenses"* (art. 3 PCR).

The rules relating to procedural costs in the Portuguese legal system are provided by the Procedural Costs Regulation. Its rules are in force in civil, administrative and fiscal actions, as well as in actions running in the National Injunction Desk.

Its rules also apply, albeit with specifications, to dispossess proceedings running in the judicial courts or in the National Rent Desk (art. 21 to 26 DL 1/2013, 07-01); to cases subject to the DL. 272/2001, 03/10, under the competence of the Department of Justice, as provided in Table II, annexed to DL. 34/2008, 26/02 and to probate proceedings, running in the respective Notary in the terms established by the Legal Regime of Probate Proceedings (LRPP), approved by Law 3/2013, 03/05.

Some proceedings are, however, governed by special rules. Such is the case with proceedings running in the Constitutional Court[99], as well as in *"Julgados de Paz"*[100] and proceedings within the competence of the Board of Tax Enforcement while in its administrative phase[101].

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[99] Cf. Legal Scheme of Procedural Costs of the Constitutional Court and art. 84 of the Law of Organization and Functioning of the Constitutional Court.
[100] Cf. Legal Scheme of Procedural Costs of the "Julgados de Paz".
[101] Cf. art. 1 of the Costs of Tax Proceedings Regulation, approved by the DL. 9/98.

9.1.2 Payment for Expenses Resulting from Taking of Evidence

The costs associated with obtaining evidence ("charges"), are defined as the expenses which result from the proceedings required by the parties or ordered by the court. As such, and in accordance with art. 20 (1) RCP and art. 532 (1) and 2 CCP, charges will be paid by the applicant or the interested party.

Each party is responsible with the payment of the charges to which it has given rise, even when ordered by the Court *"ex officio"*. Should the diligence be considered in the interest of both parties (or its prominent interest not being determined) the responsibility for payment of the respective expenses will be apportioned equally (art. 532 (3) CCP).

Costs will be allocable to an account for the payment by the party or parties responsible in proportion to the respective judgment against her/them (art. 24 PCR) unless the judge determines it to be instead in the responsibility of a certain party due to the unnecessary or dilatory nature of the request (art. 532 (4) (5) CCP).

If the expenses are not paid in the moment judgment is provided, they will be proportionally charged on the account of the responsible to whom judgment was against (art. 24 (2) PCR). However, if the charges are already paid by the prevailing party, they will not be allocated to an account in the expense of the opposite party but will be instead charged through an extrajudicial institute of costs of party in proportion to the judgment against her.

Any charges paid by someone who is then considered not responsible for costs (usually the prevailing party) will not be allocated to an account of expenses (which is not then prepared (art. 30. (2) PCR)) but will be instead charged in an extrajudicial manner. As such, the prevailing party shall then receive the duty payment from the opposite party (art. 26. (2), b) PCR).

9.1.3 Advanced Payment; Payment of Taking of Evidence ex officio

Expenses in the taking of evidence are paid by the party which requests its taking or is interested in it (art. 23 (1) PCR). Payment is made either in the moment of the request or within 10 days following the day of the giving of notice which determines its taking by the court, the observance of a rogatory letter or the scheduling of the hearing (art. 20 (1) PCR).

The legal expenses of the respective act/s of taking of evidence are calculated by the Courts' Secretariat. Based on Table IV of the Regulation, an Advanced Payment form will then be issued to which the party or parties will have until 5 days prior to the taking of evidence to observe. The advanced deposit of the expenses determines its immediate payment once the diligence is made. The non-payment of the expenses will result in the evidence not being taken (art. 20 (1) and art. 23 (1) PCR).

However, the party which did not pay for the expenses may, if still deemed appropriate, do so within five days following the end of such period along with the payment of a fine in the amount of the value in debt (within the maximum amount of 3 unit costs). Following the non-payment within that period, the opposite party may pay for the expenses (art. 23 nº 3 PCR).

The non-payment by the respective party of expenses with the taking of evidence resulting from an *ex officio* order will not affect its taking (art. 532 (2) CCP).

In regard to the advancement of the payment of such expenses, and in the absence of an explicit rule in the matter, under art. 116 of the Portuguese Code of Tax Proceedings and Procedure (applicable in the case by analogy) the court (through the Institute of Financial Administration and Justice Equipment) will advance the expense of the taking of evidence non requested by the opposing party, which will then be allocated to the final account of expenses.

9.1.4 Compensation for Appearance of a Witness Before a Court

The compensation for the appearance of a witness before a court constitutes a legal expense (art. 16 (1)-e) PCR). The witness will only be compensated for travelling costs, with its sum being calculated in accordance with Table IV of the Regulation fixes the remuneration for the appearance of witnesses in the value of 1/500 Cost Unit per kilometer.

9.1.5 Costs Paid by the Requesting Court When Appointing an Expert in the Proceedings

The remuneration of experts is carried out in accordance with Table IV (art. 17 (2) PCR) which fixes the value of 1 to 10 Cost Units per service and 1/10 Cost Unit per page of the provided expert report.

As the listed remuneration for the experts' service is of a variable nature, its value will be fixed by taking into account the type of service, market usage and any indication by the parties (art. 17 (3) PCR), which can be increased with travelling costs deemed justifiable and which have to be requested until the closure of the hearing. Its value is fixed in equal terms to that of the witnesses (1/500 Cost Unit per kilometer). The experts' salaries cannot ever exceed the maximum limit specified in Table IV, even in the case of (proven) several trips, accommodation and any other expenses.

With regard to legal expenses with the appointment of medical experts and medical assistants, its value will be fixed in order of each examination and in accordance with the established in Statute nº 45/2004 of 19/08 (establishing the legal framework for medico-legal and forensic expertise) while also taking into account Administrative Rule nº 175/2011 of 28/04 which approves the list of prices applied for surveys, exams, reports, social information, hearings and other required documents to public or private entities.

9.1.6 Costs Paid by the Requesting Court When Appointing an Interpreter in the Proceedings

Legal expenses with the appointment of an interpreter in a proceeding are fixed in Table IV of the Regulation with the value of 1 to 2 Cost Units for the service.

9.1.7 Procedural Expenses Paid by the Requesting Court Due to Special Procedure or Technology in Accordance with Provisions of Regulation 1206/2001

Under Regulation 1206/2001, should the requested court require so, the requesting court must ensure for the reimbursement without delay of any legal expenses with experts and interpreters as well as any costs resulting from the application of art. 10 (3), (4) of the Regulation.

9.1.8 Costs to be Paid in Advance; Reimbursement

Should an expert opinion be required, the requested court may ask the requesting court (prior to the taking) for an adequate deposit or an advanced payment. The deposit or advance shall be made by the parties if so foreseen in the legislation of the Member State of the requesting court.

Finally, the payment of such legal expenses by the parties will be regulated by the law of the Member State of the requesting court (in the Portuguese case, by the Regulation).

9.2 Language and Translation

The Portuguese courts hold all hearing in the Portuguese language. Translator must be provided if the parties does not understand the Portuguese language.

9.2.1 Professional Accredited Interpreters

An interpreter will be appointed in circumstances where foreigners are to be heard or questioned in the proceedings and are not able of expressing themselves in Portuguese (art. 133 (2) CCP).

With regard to the translation of documents, such will occur through an *ex officio* order of the judge or following the request of the parties when documents in a foreign language are submitted (art. 134 (1) CCP).

Any document written in a foreign language submitted into the proceedings will be translated into Portuguese (art. 134 (1) CCP). Both the judge (*ex officio*) and the parties can request that the applicant attaches a translation into Portuguese when submitting such a document (art. 134 (1) CCP).

If doubts regarding the translation arise, the judge will order the applicant party to submit a new translation of the document carried by notary or authenticated by a diplomatic or consulate agent of the respective State (art. 134 (2) CCP).

In the impossibility of obtaining a translation, or not having the ordered diligence been carried out in the established deadline, the judge can order a court designated expert to translate the document *(ibidem)*.

The interest in the best resolution to the action imposes the need of guaranteeing the best communication and understanding possible in the questioning of the witness, which chances are heavily injured if the witness cannot be understood or is incapable of understanding the questions being forwarded and which are relevant to the finding of the truth.

Thus, an interpreter must always be appointed if the witness is not able of expressing herself in Portuguese.

9.2.2 Covering of Costs of the Interpretation

The witness' testimony, whenever carried under the direction of a Portuguese court, will involve the appointment of an interpreter, should it be necessary due to the witness not speaking Portuguese.

The remuneration of interpreters is carried out in accordance with Table IV (art. 17, (2) PCR) which fixes the value of 1 to 2 Cost Units per service. As the listed remuneration for the interpreters' service is of a variable nature, its value will be fixed by taking into account the type of service, market usage and any indication by the parties (art. 17 (3) PCR).

The legal expenses of the respective act/s of taking of evidence are calculated by the Courts' Secretariat, with an Advanced Payment form being then issued to which the party or parties will have until 5 days prior to the taking of evidence to observe. The advanced deposit of the expenses determines its immediate payment once the diligence is made. The non-payment of the expenses will result in the evidence not being taken (art. 20 (1) and art. 23 (1) PCR).

However, the party which did not pay for the expenses may, if still deemed appropriate, do so within five days following the end of such period along with the payment of a fine in the amount of the value in debt (within the maximum amount of 3 unit costs). Following the non-payment within that period, the opposite party may pay for the expenses (art. 23 nº 3 PCR).

The non-payment by the respective party of expenses with the taking of evidence resulting from an *"ex officio"* order will not affect its taking (art. 532 (2) CCP). In regard to the advancement of the payment of such expenses, and in the absence of an explicit rule in the matter, under art. 116 of the Portuguese Code of Tax Proceedings

and Procedure (applicable in the case by analogy) the court (through the Institute of Financial Administration and Justice Equipment) will advance the expense of the taking of evidence non requested by the opposing party, which will then be allocated to the final account of expenses.

10 Unlawful Evidence

The issue of unlawful evidence and the possibility of its use in the process is a topic of great importance which has been widely discussed, in our times, having both the Doctrine and Jurisprudence come to understand that unlawful evidence in civil proceedings should be considered in the light of the principle of proportionality. Indeed, this principle is also a principle of constitutional interpretation, and well lends itself to resolve conflicts between principles, among them the conflict between the prohibition of unlawful evidence and any other constitutional principle.

10.1 Means of Obtaining Evidence

Despite the lack of an express rule governing the matter in civil procedure, the illegal obtainment of evidence and its sanctioning with nullity by the law results from the Portuguese Constitution (art. 32 nº 8) together with a general clause adopted in art. 417 (3) CCP which allows any party or aimed person of refusing to cooperate with any act of taking evidence in infringement of fundamental rights or relevant interests, the latter in conjunction with rules relating to professional and state secrecy.

Any rights foreseen in the aforementioned rules of these legal instruments (Portuguese Constitution and Code of Civil Procedure) are of an *"erga omnes"* nature. As for its hierarchy, the constitutional rule is placed highest, followed by the rules stated in the Code of Civil Procedure (as a statute) and then by any rules which aim at protecting professional and deontological interests (e.g. professional secrecy, foreseen in instruments such as the Statute of the Portuguese Order of Attorneys).

Both constitutional and statute rules aim at protecting fundamental human rights such as one's physical and moral integrity, right of privacy in one's home and protection of one's family and communications, as naturally imposed limits before the State by the recognition and tutelage of human dignity and freedom in the pursuit of Justice.

Rules regarding State and professional secrecy aim at protecting interests which impose an accounting for such values as national safety, the pursuit and protection of public interests as well as the protection of the inherent trust imposed by the relationship between certain professions and its clients (e.g. the relationship between attorney and represented, based on the trusting of information which the person could otherwise not provide should the possibility of such facts being used against them in future be present or expected).

Any means of obtaining evidence which lead to the denial of essential human rights such as one's physical and moral integrity (torture, coercion, general offense to such

rights), intromission in one's private life, primarily through physical harassment, in order to obtain evidence such as DNA or other rights related to a *"facere"* obligation of the aimed person or intromission in one's home, mail or communications (through wiretapping or other abusive intromission) are prohibited.

The prohibition in obtainment of evidence applies regardless (i.e. towards any/all) of the means of evidence obtained through the infringement of the aforementioned rights and interests.

Any evidence which has been obtained illegally will be deemed null and thus unable to serve its purpose in the procedure. The act itself will also be susceptible of constituting a criminal offense and/or vexatious proceeding (art. 542 and 543 CCP).

The judge's admission of evidence which has been claimed or initially perceived as having been illegally obtained encompasses the previous weighing of the legal values and interests involved, and which balancing ultimately falling towards its admission in the proceeding means the recognition of its aptitude in serving its purpose within the proceedings.

As such, the evidence will carry its legally established value as proof in the procedure once admitted by the judge.

10.2 Illegal Evidence

Although it is not possible to find a clear definition of illegal evidence in the law, José João Abrantes defines it as that *"which is affected by illegality, with regard to its method of production"*, while Elena Burgoa believes that that is *"the proof when gathered infringes rules and principles set out in the Constitution for the protection of personality rights and its manifestation as the right to privacy."*[102]

In the words of Costa Andrade, *"contrary to what has been happening in other jurisdictions, eg, American or German, the intervention of the Portuguese law on this problem area [illegal evidence] has been very discreet"* and evidence enough, is that the Portuguese Code of Civil is silent regarding any explicit regulation of the question of admissibility of illegal evidence.

The illegality of proof can manifest itself in relation to three types of evidence: implying a violation of procedural rules, leading to violation of substantive law and the irregularity affects the formation of evidence[103]. Some other authors do not agree with the previous distinction and presents a narrower concept, stating that there will be illegality when its fails the requested in the material law, for illegality is established within the procedural orbit (where the acts are committed by the judge and give rise to

[102] BURGOA, Elena, *La prueba ilícita en el Proceso Penal Portugués*, Estudos comemorativos dos 10 anos da FDUNL, coord. Diogo Freitas do Amaral, Carlos Ferreira de Almeida, Marta Tavares de Almeida, Coimbra, Almedina, 2008: 602 – author's translation.
[103] Ricci, *Apud* Sara Campos, *op. cit.*

illegality in the strict sense) or outside the procedural orbit (the acts are practiced by the parties or third parties and originate illegitimacy, illegality or illegitimacy and simultaneously).

Despite the lack of an express rule governing the matter of illegal evidence in the civil procedure, illegal evidence and its qualification as being null under the law results from the Portuguese Constitution (art. 32 nº 8) alongside with a general clause adopted in art. 417 (3) of the CCP which allows any party – or person – to refuse to cooperate with any act of evidence taking that are in infringement of fundamental rights or relevant interests, the latter in conjunction with rules relating to both professional and state secrecy.

Thus, illegal evidence is that which results from an illegal act and is therefore null (allowing its distinction from inadmissible evidence – i.e. which infringes procedural rules regulating the taking of evidence and being consequently rejected by the judge or later annulled).

Any rights foreseen in the aforementioned rules of these legal instruments (Portuguese Constitution and Code of Civil Procedure) are of an *"erga omnes"* nature.

As for its hierarchy, the constitutional rule is placed highest, bellow EU law, followed by the rules in the Code of Civil Procedure (as a statute) and lastly by any other rules that aim to protecting professional and deontological interests (e.g. professional secrecy, foreseen in instruments such as the Statute of the Portuguese Order of Attorneys).

Both constitutional and statute rules aim to protecting fundamental Human Rights such as one's physical and moral integrity, right of privacy in one's home and protection of one's family and communications, as naturally imposed limits by State under the recognition and tutelage of Human dignity and freedom in the pursuit for Justice, which is not free of boundaries.

Rules regarding State and professional secrecy aim at protecting interests which impose an accounting for values such as national safety, the pursuit and protection of national interests as well as the protection of the inherent trust imposed by the relationship between certain professions and clients (e.g. the relationship between attorney and represented, based on the trusting of information which the person could otherwise not provide should the possibility of such facts being used against them in future be present or expected).

Any evidence which has been obtained as the result of an illegal act will be deemed null and thus incapable to serve its purpose in the procedure, regardless of its type. The act itself will also be susceptible of criminal prosecution.

Illegal evidence, as such, will not be admitted in the proceedings.

10.3 The Admission of Illegally Obtained Evidence in the Proceedings

Evidence is illegal when it results from the practice of a wrongful act committed within or outside the procedural orbit, distinguishing thus the inadmissible evidence that regardless of act by which it was obtained and for any reason may not have entered the process. The inadmissible evidence is distinguished from irrelevant or unnecessary evidence, although they are valid and lawful, they should also not be accepted by the judge, under the principle of the prohibition of the practice of useless acts (art 6 par. 1 and art. 130 CCP) for not having any relationship with the object in question.

Similarly, if the invalidity affects the procedural acts of admission or taking of evidence and not the evidence in itself, not should designate the inadmissible evidence but rather invalidly constituted evidence.

It now becomes important to refer to the concept of inadmissibility. According to Altavilla, author mentioned by I. Alexandre[104], it is a *"complex figure, which relates to creating an impediment to the entry of a procedural act in the process, or in a phase of such process."* this impediment that can be caused by the law: when banning the practice of an act with certain content or, despite allowing the practice of the act, it cannot be practiced by that guy, that way one time or another. Note also that only the evidentiary acts (offer of proof) may be admissible or inadmissible.

The 1976 Constitution addresses for the first time and unquestionably, in the Portuguese legal system, the concept and regime of prohibitions on evidence[105], which include the illegal evidence, when determining on art. 32 nº 8 the invalidity of *"all evidence obtained through torture, coercion, physical or moral integrity of the person, wrongful interference with privacy, home, correspondence or telecommunications."*

The illegal obtainment of evidence can be ultimately justified in circumstances which appeal to a balance of interests in the situation (closely following, Remédio Marques (2011: 565-566)).

Thus, when the party could not possibly prove the respective facts through any other means, and following the according weighing, evidence can be admitted in the action. Such can be the case in actions of divorce without the consent of one of the spouses based in the infringement of conjugal duties which reveals the definite rupture of the matrimony (art. 1781-d) of the Portuguese Civil Code). Should the plaintiff (spouse) in the action record the insults which constitute the violation of the duty of respect in matrimony, or record/photograph the act of infidelity without the consent of the opposite spouse, its admission as evidence in the proceedings will be subject of discussion and, possibly, admitted. The same applies when the act of violation of one's

[104] ALEXANDRE, Isabel, *op. cit.*: 79.

[105] The rationale behind these evidence prohibitions rests on the perspective of COSTA ANDRADE, on two objectives: "to ensure the inviolability of the irreducible core of the fundamental rights of citizens (...) and preserve the fundamental structure of own procedural model," ANDRADE, Costa, Opinion, CJ 1981, Volume I: 8.

privacy, home, mail or communications occurred with the consent, collaboration or cooperation of the opposite party or when the capture of the evidence occurred accidentally (thus excluding the unlawful nature of act).

In such cases a weighing which takes in consideration weather the legal values and interests are in order, aiming at balancing the parties' rights and relating it with the limitation of rights in accordance with the pretended effect of the action and the situation of the parties with the judgment. Namely, through the imposition of gradual restrictions in the light of principles of proportionality, necessity and adequacy (e.g. imposing a restriction on the principle of the public nature of the hearing and/or ensuring secrecy by all intervening parties – parties, attorneys, witnesses, experts, workers, judges, etc.).

The judge's admission of evidence which has been claimed or initially perceived as having resulted from an illegal act involves the evaluation of any excluding factors of such nature of illegality, as only then can the evidence be admitted.

On the circumstances of such excluding factors having occurred, the evidence will consequently carry its legally established value as proof in the procedure.

References

Table of Cases

Ac. RP, 24/11/09: Proc: 43/07.3TBBTC-C.P1. Available: www.dgsi.pt.
http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/1704687ae7aadb838025768800506365?OpenDocument

Ac. STJ, 24/06/10: Proc: 600/09.3YFLSB. Available: www.dgsi.pt.
http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/11cdfe16c71c0be88025774c003f1dfe?OpenDocument

Ac. RG, 22/02/06 (cit. Neto, 2014: 553, art. 495, 5)
http://www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/9de2cb8200bfc46780257031003a54ea?OpenDocument

Ac. RL, 28/06/07 (cit. Neto, 2014: 554, art. 496, 8)
http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/68d5c96797aa855480257328005fec52?OpenDocument

Ac. RC, 20/01/04 (cit. Neto, 2014: 497, art. 403, 10)
http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/af457c1ba4df069b80256e7e0055509c?OpenDocument

Ac. STJ, 20/01/04 (cit. Neto, 2014: 528, art. 452, 6)
http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/8f6bffb099ffc52780256e52004ebb8a?OpenDocument

Ac. RC, 17/05/05 (cit. Neto, 2014: 514, art. 421, 10)
http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/a821da9f77c34a8980257006004cd770?OpenDocument

Ac. RL, 16/06/04 (cit. Neto, 2014: 514, art. 421, 8)
http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/94a794eca4847c8f80256ec4004cca37?OpenDocument

Ac. STJ, 16.03.2011: Proc. 48/08.7TBVNG.P1.S1. Available: www.dgsi.pt.
http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/813d98b3221b170a8025785b0033684f?OpenDocument

Ac. STJ, 10/10/03 (cit. Neto, 2014: 595, art. 552, 26)
http://www.verbojuridico.net/jurisp_stj/integral/2003/stj03_3308.html

Ac. RP, 19/02/04 (cit. Neto, 2014: 30, art. 6, 14)
http://www.trp.pt/ficheiros/boletim/trp_boletim22.pdf

Ac. RE, 15/11/12: Proc. 248/09.2TBSRP.E1. Available: www.dgsi.pt.
http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/ccfbdd16d015556680257de10056fa2a?OpenDocument

Ac. STJ, 23/09/03 (cit. Neto, 2014: 26, art. 5, 13)
http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/5c7c21af283da6a680256dea003fd2e0?OpenDocument

Ac. RE, 12/07/12 (cit. Neto, 2014: 27, art. 5, 29)
http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/6e726bac1cc2f34b80257de10056fa65?OpenDocument

Ac. RL, 24/06/2010: Proc. 12473/04.8YYLSB-A.L1-6. Available: www.dgsi.pt.
http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/3b4405868bf1fa72802577bc00616e76?OpenDocument

Acórdão do Tribunal Constitucional nº 498/2004 (2.ª série), de 12 de Julho de 2004

Acórdãos do Tribunal Constitucional nº 86/88, de 13 de Abril, in Boletim do Ministério da Justiça, nº 376: 237, e 444/91, de 20 de Novembro, in Boletim do Ministério da Justiça, nº 411: 155

Ac. RL, 18.01.2007: Proc. 0070922. Available:
http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/996dbaba65d6a805802568030000d856?OpenDocument

Bibliography

ALEXANDRE, Isabel, *Provas Ilícitas em Processo Civil*, Almedina, Coimbra, 1998

ANDRADE, J. C. Vieira de, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2nd ed., Coimbra, Almedina, 2002

ANDRADE, Manuel Costa, *Parecer*, CJ 1981, Tomo I

ANDRADE, *Manuel de, Noções Elementares de Processo Civil*, Coimbra Editora, 1976: 191

ANDRADE, Manuel de, *Teoria Geral da Relação Jurídica*, Vol. II, Coimbra, Almedina, 1960

BARBOSA, José Carlos, *A Constituição e as Provas Obtidas Ilicitamente*, 2011

BARTOŇ, Michal and MATES, Pavel, Public *Versus* Private Interest – Can the Boundaries Be Legally Defined? (March 30, 2011). Czech Yearbook of International Law: 172-189, 2011. Available at SSRN:

http://ssrn.com/abstract=1799331

BIELSA, Rafael (1986), *A acção popular e o poder discricionário da administração*, *Revista Forense*: 34

BURGOA, Elena, *La prueba ilícita en el Proceso Penal Portugués*, Estudos comemorativos dos 10 anos da FDUNL, coord. Diogo Freitas do Amaral, Carlos Ferreira de Almeida, Marta Tavares de Almeida, Coimbra, Almedina, 2008: 602

CANOTILHO, Gomes, MOREIRA, Vital — *Direito Constitucional*, 4th ed., Coimbra, 1986

CARDOSO, João, *Sobre a admissibilidade da prova ilícita no processo civil português*, Dissertação do 2º ciclo de Estudos em Direito, área de especialização em Ciências Jurídico-Civilísticas, apresentada à Faculdade de Direito da Universidade de Coimbra sob a orientação de Luís Miguel Mesquita, 2012

CASANOVA, J. F. Salazar, *Provas Ilícitas em Processo Civil, Sobre a Admissibilidade e Valoração de Meios de Prova Obtidos pelos Particulares*, Revista Direito e Justiça, Vol. XVIII, Tomo I, 2004

CHABY, E. (2014) *O Depoimento de Parte em Processo Civil* (Coimbra: Coimbra Editora)

CORDEIRO, Menezes, *Da boa-fé no Direito Civil*, I, 1984: 371

COSTA, Susana H., *Os Poderes do Juiz na Admissibilidade das Provas Ilícitas*, 2006

FREITAS, J. L. d. (2013) *Introdução ao Processo Civil: Conceito e Princípios à Luz do Novo Código* (Coimbra: Coimbra Editora)

FREITAS, J. L. d. (2013a) *A Ação Declarativa Comum: à luz do Código de Processo Civil de 2013* (Coimbra: Coimbra Editora). *Fundamentos da Constituição*, Coimbra, 1991; *Constituição da República Portuguesa anotada*

LENT, Friedrich. *Diritto processuale civile tedesco*, Napoli: Morano, 1962

MACHADO, PIMENTA (2010) *O Novo Processo Civil* (Coimbra: Almedina)

MARQUES, J. P. R. (2011) *Acção Declarativa À Luz do Código Revisto* (Coimbra: Coimbra Editora)

MENDES, J. d. C. (2010) *Direito Processual Civil – I Volume AAFDL – 2012* (Lisboa: AAFDL)

NETO, A. (2013) *Código Civil Anotado* (Lisboa: Ediforum)

NETO, A. (2014) *Novo Código de Processo Civil Anotado* (Lisboa: Ediforum)

PESSOA VAZ, Alexandre Mário. *Direito processual civil : do antigo ao novo código*, Coimbra: Almedina, 1998

PRATA, A. (2014) *Dicionário Jurídico – Vol I.* (Coimbra: Almedina)

RANGEL, Rui, *O Ónus da Prova no Processo Civil*, 3rd ed. rev. e ampliada, Almedina, Coimbra, 2006

ROCHA, Maria Luiza, *Provas ilícitas no processo civil*, Dissertação do 2º ciclo de Estudos em Direito, área de especialização em Ciências Jurídico-Processuais, apresentada à Faculdade de Direito da Universidade de Coimbra sob a orientação de Luís Miguel Mesquita, 2014

SANTOS, Paula, *Da problemática da prova ilícita no processo civil*, Dissertação do 2º ciclo de Estudos em Direito, área de especialização em Ciências Jurídico-Processuais, apresentada à Faculdade de Direito da Universidade de Coimbra sob a orientação de Luís Miguel Mesquita, 2011

VARELA, A *Os princípios fundamentais do Processo Civil*, comemoração do nascimento de Manuel Andrade, promovida pelo Centro de Formação da Ordem dos Advogados do Porto, 1999

VARELA, A. *Noções Fundamentais de Direito Civil* (em colab. com PIRES DE LIMA), 1 e II, 1ª a 6ª Ed., Coimbra Editora