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## Court's Evidentiary Initiative in Disputes Concerning Business to Business Trading in the Polish Civil Procedure

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**Abstract:**

**Purpose:** The main goal of the research is to determine the conclusions concerning the court's right to admit and examine evidence *ex officio*, without the litigants' initiative in this respect, with particular emphasis on the type of entities which are parties to the dispute and the consequences of taking or not taking such an initiative.

**Design/Methodology/Approach:** The paper focuses on the analysis of the provisions of the Code of Civil Procedure in the scope of admissibility of the civil court's evidentiary initiative, with particular consideration of the prerequisites for its application, taking into account the subjective aspects. Court decisions were analysed in this respect as well in order to determine whether undertaking the initiative of taking evidence by the court constitutes the obligation or right of the court. The issue of the consequences of both the court's taking the evidence initiative and its failure was also raised in the context of the possibility to appeal the court's decision on this ground.

**Findings:** The results of the research indicated the need for the Supreme Court to adopt a firm resolution having the force of a legal principle dispelling these doubts. Expecting the legislator to make the provisions more precise seems groundless, as it is impossible to cover all procedural situations with a general provision.

**Practical Implications:** The results of the research indicated the need to develop a framework that could be used for evaluation of social campaigns impact on realization level of SDGs.

**Originality/Value:** The conducted research has contributed to determining the admissibility of evidentiary initiative by civil courts in an adversarial trial, taking into account the professional character of the business activity conducted by the parties to the dispute.

**Keywords:** Evidentiary initiative, grounds of appeal, business to business dispute.

**JEL codes:** P48, K15, K4.

**Paper type:** Research article.

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## 1. Introduction

The civil procedure in Poland is based on the principle of adversarial litigation, thus the evidentiary initiative mainly rests with the parties. Nevertheless, there are situations in which the court takes the initiative and *ex officio* allows evidence not identified by the party under Article 232 *in fine* of the Code of Civil Procedure (hereinafter CCP) (Code of Civil Procedure, 1964).

This provision lays down the court's right to allow evidence that has not been presented by the party, i.e., it grants evidentiary initiative to the procedural authority. This issue has been a subject of many discussions among legal scholars and commentators and in the established line of judicial decisions with regard to the extent of the court's permissible actions and with regard to cases where the court should take advantage of this initiative, as well as to consequences of taking this initiative and of abstaining from doing so.

Business to business trading means legal relationships created by agreements (acts in law) executed by parties that are entrepreneurs under Article 43<sup>1</sup> of the Civil Code and Article 4 of the Entrepreneurs Act (Entrepreneurs Act, 2018) and that enter into a bilateral relation of exchange of goods and services in the framework of and in relation to the economic activity they run (Doliwa, 2021). This means that acts in law performed by consumers with entrepreneurs as well as such acts performed by entrepreneurs who run an economic activity on a regular basis but perform these acts in law outside their economic activity will not fall under business to business trading.

The aim of this paper is to analyse the provisions on courts' *ex officio* actions in terms of allowing and taking of evidence, with a particular emphasis on situations where there is a dispute between two entrepreneurs with regard to their economic activity.

## 2. Court's Evidentiary Initiative - A Right or an Obligation?

It must first be recognized that the scope of the court's permissible *ex officio* action under Article 232 *in fine* CCP was precisely expressed in this provision whereby it cannot lead to a change in the complaint's facts (Rylski, 2009), as rightly pointed out by legal scholars and commentators. Then it is worth noting that, according to the mainstream views of civil procedural law writers and the established line of decisions of common courts and the Supreme Court, allowing evidence *ex officio* is the court's right, not obligation, though when it comes to the latter there are opinions that in certain situations this rights actually transforms into the court's obligation.

Legal scholarship points out that numerous amendments to the CCP have led to a move away from a model based on objective truth, which is why elements of the adversarial system have been strengthened and the court's investigative powers

reduced. Despite quite a clear direction of changes, the legislator did not decide to repeal Article 232 *in fine* CCP which authorised the court to allow evidence not presented by the party (Pietrkowski, 2014; Pietrkowski, 2013). What is interesting, this author believes these circumstances to be the premise for the court's *right*, not its *obligation* to allow evidence *ex officio*. What is more, no limitations on the cases of its application have been introduced either, which means that any possible limitations must be sought in other provisions or rules. In practice, this applies to the principle of adversarial litigation and the principle of equality of the parties.

However, we must look at two circumstances in this context. First, we are not dealing with a pure adversarial model of a civil dispute. In order to achieve the constitutional objective of the procedure, both of these principles—adversarial litigation and inquisitorial litigation—are to complete and strengthen each other (Wiśniewski, 2013). Second, the equality of the parties sometimes does require the court to take certain action to mitigate inequalities.

The Supreme Court in the resolution passed by the panel of seven judges of 19 May 2000 rightly noted that “attempts made in judicial decisions and legal writings to limit the scope of Article 232 sentence two CCP cannot be considered accurate. The linguistic interpretation of this provision, as well as political premises and axiological considerations, speak against these limitations. The authority of a judge, here specified by the legislator almost to his discretion, cannot be narrowed down through interpretation or otherwise limited; if the legislator wants to reduce or determine its boundaries, he would have to do it expressly” (SC judgement, III CK 341/05).

However, it seems that the conclusion drawn by the adjudicating panel is somewhat too far-reaching. It was concluded, that “the court should exercise caution towards the possibility to act *ex officio*, though it is difficult to defend a general thesis without risking the challenge of at least *preater legem* interpretation that the role of Article 232 sentence two CCP boils down—as held by the Supreme Court in its judgement of 20 December 2005, III CK 121/05 (unpublished)—only to exceptional cases, such as suspicion of conducting a fictitious procedure, parties' intention to circumvent the law or gross helplessness of one of the parties. While this thesis may indeed be substantiated, it will only be the case where the court, despite an obvious need or even necessity, fails to take the evidentiary initiative *ex officio*; in these exceptional situations it may be concluded—quoting public interest—that the court's right becomes an obligation” (SC judgement, III CK 341/05).

Even though the thesis about the court's obligation to act *ex officio* in certain cases appears also in other decisions (SC resolution, III CZP 4/00; SC judgement, V CSK 377/06; SC judgement, III CSK 282/17), it still seems as over-interpretation of the provision in question and the use of the public interest clause does not seem sufficient to justify it.

For this reason then, it is legitimate to adopt the premises of application of Article 232 *in fine* CCP referred to in courts' decisions, such as suspicion of conducting a fictitious procedure or parties' attempt to circumvent the law (Judgement of the Court of Appeal, I AGa 67/19), in cases concerning non-financial rights under family and guardianship law, in child support claims (Pietrkowski, 2014; Pietrkowski, 2013), in cases concerning unlawful clauses in consumer contracts (SC judgement, II CSK 347/18), and also in the event of gross helplessness of the party acting without a professional attorney who, despite necessary instruction received pursuant to Article 5 CCP, is not able to present evidence to substantiate their claims (SC judgement, III CK 121/05).

The last premise is crucial in the sense that it identifies three requirements for given facts which should be met to recognize admissibility of the court's *ex officio* evidentiary initiative. These are: 1) gross helplessness of the party, 2) no representation by a professional attorney and 3) ineffectiveness of necessary instruction given by the court. As long as the first feature is evaluative and should be examined *ad casum*, the second one is objectively verifiable and we must agree with M. Sieńko who believes that "where there is no suspicion of a fictitious procedure or a procedure conducted with the intention to circumvent the law, the court should not take evidence *ex officio*, especially if the party represented by a professional attorney declares that they do not request that given evidence be taken.

Even though the court is not bound by the party's stance on the issue, such behaviour should be seen as negligence towards one's own interests and as intentional non-performance of procedural obligations that may lead to losing the case, which rules out the court's action *ex officio*" (Sieńko, 2021). If the party is represented by a professional attorney, effects of their omissions burden the party and this attorney risks liability for damages. Under no circumstances should the court's *ex officio* evidentiary initiative be allowed in such a case (apart from the premises of the fictitious procedure and procedure conducted to circumvent the law referred to above). Common courts of law have also spoken about a third feature.

As rightly noted by the Court of Appeal in Lublin, "where the party does not understand sufficiently the complexity of the case (the petitioner believes that the very fact of being declared unfit work results in his right to a disability allowance) and truly is not able to lift procedural burdens by themselves, the Court should take additional steps—it should explain to the party, sufficiently and clearly, the complexity of the situation and the need to take actions necessary to resolve the case" (Judgement of the Court of Appeal, III AUa 452/19). J. Jaśkiewicz rightly concludes that "allowing evidence *ex officio* should be preceded by action intended to stimulate the evidence initiative of the parties. If the parties do not meet the requirement of actively gathering the procedural material, then the court or president of the court should first exercise their right to instruct or explain carried out in the form of instructional assistance" (Jaśkiewicz, 2013).

It is also worth remembering in this context that the court should instruct the party not only about possible procedural steps, but also about their option to seek help of an attorney or the option to file a request for court-appointed legal assistance if relevant criteria are met.

When formulating a general thesis about permissibility of courts' allowing evidence *ex officio*, it is worth pointing to the views of legal scholars and commentators, according to which "it seems justified that even though a court may allow *ex officio* evidence not presented by the opposing party, it is only possible where the following requirements for admissibility of evidence are met: facts are named by the party, the evidence is significant for the case and it is disputable.

Therefore, the *ex officio* taking of evidence not presented by the party to prove facts that neither party refers to in the case must be deemed inadmissible. The essence of this view lies in the fact that circumstances that are not confirmed by the parties, despite being revealed during the taking of evidence, cannot constitute evidence" (Malczyk-Herdzina, 2000). It seems that such a phrase is sufficient for constructing a relevant general thesis, with the proviso that the party should not be represented by a professional attorney.

Given the above, it must be believed that the provision of Article 232 *in fine* CCP creates a right, not an obligation of the court and in no way should we talk about an obligation here, even though in certain situations it may indeed seem that the taking of evidence *ex officio* is the only way to counteract the risk of incorrect settlement of the case, undermining the function of the trial (Judgement of the Court of Appeal, I AGa 67/19) and that courts should exercise this right as an exception. We cannot forget that, as has been discussed earlier, "in civil procedure it is never impossible to solve the case, a state which the *ex officio* taking of evidence is allegedly counteracting.

Thanks to the norm resulting from Article 6 of the Civil Code (CC), any case may be settled, regardless of the scope of evidence submitted, because if it is decided that the party on whom the burden of proving a given fact lies failed to prove the circumstances from which they drew legal effects for themselves, the court decides to the disadvantage of this party, e.g. by dismissing the claim if the burden of proving the fact lies with the claimant" (SC judgement, III CSK 282/17). This position confirms the dominant nature of the adversarial litigation principle here and the need for the parties to exercise due care for the outcome of the procedure.

In the context of the court's acting *ex officio*, it is worth noting that the evidentiary initiative in justified cases may be taken not only by the first instance court, but also the second instance court. As is emphasized by legal scholars and commentators and in the established line of judicial decisions, this results from the full appeal model *cum beneficio novorum*, in which the court of second instance itself also establishes facts and may add to the evidentiary proceedings (SC judgement, III CSK 282/17;

Dolecki and Radkiewicz, 2021; SC judgement, III CSK 244/07). There are no grounds to question this view as in essence the legislator has not limited the scope of application of Article 232 *in fine* CCP and none of the principles of procedure prevent admissibility of evidence *ex officio* (assuming there are relevant premises) only because it is done before a second instance court.

### **3. Consequences of the Court's Taking and not Taking the Evidentiary Initiative**

When we look at the consequences of the court's taking and not taking the evidentiary evidence in the context of the possibility to formulate an appeal or an appeal to the Supreme Court, legal commentary and the body of judicial decisions in fact present all possible variants of this situation. On the one hand, H. Pietrzkowski concludes that where the court does not exercise the right under Article 232 sentence two CCP, the party cannot formulate a legitimate appeal, especially an appeal to the Supreme Court (Pietrzkowski, 2014; Pietrzkowski, 2013).

On the other hand, the Supreme Court held that the court may be challenged for not allowing certain evidence *ex officio* despite the fact that there were reasons for it, though it cannot be challenged for allowing certain evidence, that is exercising the discretionary power granted to it (SC judgement, III CK 341/05; SC resolution, III CZP 4/00). However, it seems that we may see a certain inconsistency here, referred to by T. Wiśniewski, who notes that if we consider the determinants of the court's *ex officio* action referred to above, we must conclude that despite the discretionary nature of this action, we may formulate challenges against the court both from the active and passive angle.

Namely, the court may be challenged for allowing certain evidence *ex officio* and for failing to do so (Wiśniewski, 2013). It seems that this position is justified as long as emphasis is placed on considering the determinants of the court's acting *ex officio* so that if one party does not agree with the assessment of the circumstances under which it was done (e.g. the party believes there were no special circumstances that asked for taking evidence *ex officio* or the party was represented by a professional attorney), this party should be allowed to question this assessment, both in the active and passive angle.

### **4. Limitations of the Evidentiary Initiative in a Business to Business Dispute**

Transposing this discussion onto disputes that arise against contracts executed in business to business trading, it seems that the scope of the court's permissible intervention at issue should be even narrower than examined so far. This results mainly from more stringent requirements regarding due care for one's affairs set for parties of a given legal relationship, which is directly expressed in Article 355(2) CC. It reads, that the due care of a debtor in his business activity is specified with

consideration taken of the professional nature of this business. It is essential as the burden of proof and the scope of facts crucial to the settlement result from provisions of substantive law that regulate a given legal relationship. Sometimes this regulation also covers the catalogue of evidence that must be used to substantiate a given claim (it is the case in e.g. reference to contracts of carriage, where this issue is regulated in the domestic Carriage Law and the CMR Convention).

This is why, taking consideration of the professional nature of the activity operated by a given party to the dispute, it should result in acknowledging that this entity should be aware of both, evidence they should use to substantiate their claim, and facts they are obliged to prove. This should be crucial in assessing negligence of a given party in the proceedings in presenting appropriate evidence, regulated in universally binding laws. Unquestionably, a professional entity is expected to exercise special care in general, and in particular as part of its economic activity, which will be expressed also in their knowledge of regulations governing the industry they operate in.

## **5. Conclusions**

In summary, the court's evidentiary initiative referred to in Article 232 *in fine* CCP is the court's right, not obligation. Since it distorts the adversarial nature of the dispute, it should be applied as an exception and only where the court's not taking the evidence *ex officio* could lead to the issuance of an obviously unfair ruling. What is important, this initiative may be taken both before a first instance court and a second instance court as CCP's provisions do not stipulate any relevant limitations.

Both, the court's *ex officio* action or omission in allowing and taking of evidence without the party's request may result in the formulation of an appeal or an appeal to the Supreme Court. Admittedly, the Polish Supreme Court presented a modest stance in this regard which allowed the challenge only if such evidence is not taken. However, legal scholars and commentators rightly extend the party's right to include the challenging of the court's evidentiary initiative both from the active and passive angle.

When it comes to disputes arising from contracts under business to business trading, it needs to be emphasized that the court's evidentiary initiative should be an absolute exception and permission to exercise it should be even more limited than usual. On the other hand, in a situation where only one party to the dispute is a business operator, the court's evidentiary initiative should be subject to general restrictions, less rigorous than in business to business trading, though still it should not be abused. In legal relations between business operators who do not execute contracts as part of their activity, it should be consistently assumed that the court's evidentiary initiative should be subject to general limitations, even though we speak about entities that must—as a rule—be expected to exercise greater care than natural

persons. However, because provisions on higher care place emphasis on the character of the party's economic activity, this stance seems unjustified.

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