

## Evidence Limitations on the Part of the Entrepreneur in the Economic Process

Maciej Rzewuski

Ph.D. habil., Assistant Professor, Faculty of Law and Administration, University of Warmia and Mazury in Olsztyn, correspondence address: ul. Popiełuszki 21d, 10-693 Olsztyn, Poland, e-mail: rzemac@interia.pl

 <https://orcid.org/0000-0001-5637-9257>

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**Abstract:** This article addresses an issue that is highly debatable both in the theory of civil procedural law and in the practice of jurisprudence, namely the entrepreneur's right to a court and, consequently, the possibility of respecting the principle of material truth in a separate proceeding in commercial cases in the context of evidentiary limitations introduced by the legislator under the Act of 4 July 2019 amending the Code of Civil Procedure. Due to the fact that eponymous matters are complex and multifaceted, the present article shall describe and signal selected specific issues, which seem to raise the most doubts among representatives of the world of science and practitioners who apply civil law daily.

### 1. Introduction

Professionalism in the activity conducted by entrepreneurs contributed to the legislator's reinstatement of separate proceedings in commercial lawsuits under the Act of 4 July 2019 amending the Code of Civil Procedure and certain other acts.<sup>1</sup> The main purpose of this amendment was to ensure more efficient adjudication of cases involving entrepreneurs and to achieve a quicker result in the form of a ruling ending a court litigation.

It is worth remembering that the introduction of separate proceedings in commercial lawsuits did not constitute any novelty for the Polish civil

<sup>1</sup> Journal of Laws 2019, item 1469.

procedure, as the relevant legal solutions in this respect had been functioning since 1 October 1989<sup>2</sup> until the entry into force of the Act of 16 September 2011 amending the Act – the Code of Civil Procedure and certain other acts.<sup>3</sup> However, in deciding to reanimate the commercial procedure, the legislator aptly pointed out that it must not amount to automatic reinstatement of the previous legal regulations given of the change in the legal state that had taken place over the previous several years as well as manifold developments in the social and economic spheres. For this reason, some solutions were reinstated, some others were suitably modified and others were abandoned altogether. For example, the following prohibitions were not reinstated: inadmissibility of suspending the proceedings at the unanimous request of the parties, inadmissibility of giving instructions to the litigants by the commercial court, inadmissibility of the court to examine the evidence obtained by hearing the litigant's *ex officio*.<sup>4</sup>

Primarily, significant changes were introduced in the sphere of evidence in separate proceedings in commercial lawsuits. This refers in particular to the introduced evidentiary limitations, which in practice pose serious problems for entrepreneurs, creating a real risk of losing a civil case. Before proceeding to the analysis of selected specific issues related to the eponymous subject matter, it is worth making a few remarks of a general, systemic nature.

## 2. The Notion of a Commercial Lawsuit

Under the provision of Article 458<sup>2</sup> § 2 of the Code of Civil Procedure, commercial lawsuits are, in particular, lawsuits in civil relations between entrepreneurs within the scope of their business activity, even if any of the parties has ceased to conduct such activity. This means that a given case will have a commercial character if the following three prerequisites are met jointly: the lawsuit concerns civil law relations, these relations are between

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<sup>2</sup> Separate proceedings in commercial lawsuits were introduced into the Code of Civil Procedure by the Act of 24 May 1989 on the hearing of commercial cases by the courts (Journal of Laws 1989, item 175, as amended).

<sup>3</sup> Journal of Laws 2011, item 1381.

<sup>4</sup> Broader on the subject: Maciej Rzewuski, *Nowa procedura gospodarcza – reforma KPC* [New Commercial Proceedings. The Reform of the Code of Civil Procedure], LEX/el. 2019.

entrepreneurs, and the case arose within the scope of business activity conducted by entrepreneurs.

The legislator also included the following in the category of commercial cases: lawsuits arising from the company relationship and concerning the claims referred to in Articles 21<sup>12</sup>–21<sup>14</sup>, Articles 291–300 and Articles 479–490 of the Code of Commercial Companies;<sup>5</sup> lawsuits against entrepreneurs for the cessation of environmental infringement and restoration to the previous state of affairs or for the repair of damage related thereto, and for the prohibition or restriction of activities that threaten the environment; lawsuits against persons liable for the entrepreneur's debt, be it as an alternative or joint and several debtor, by operation of law or deed; lawsuits between bodies of a state-owned enterprise; lawsuits between a state-owned enterprise or its bodies and its founding or supervisory authority; lawsuits related to bankruptcy and restructuring law; lawsuits for granting a collection title which is a final or immediately enforceable decision of a commercial court or a settlement concluded before that court; and lawsuits for deprivation of enforceability of a collection title based on a final or immediately enforceable decision of a commercial court or a settlement concluded before that court.

Eventually, all lawsuits arising from construction contracts<sup>6</sup> and contracts related to the construction process for the performance of construction work, from leasing contracts, and against persons liable for an entrepreneur's debt, be it as an alternative or joint and several debtors, by operation of law or deed were deemed to be commercial cases. This extension constituted a significant broadening of the concept of commercial proceedings compared to the legal status prevailing before 3 May 2012.

By Article 458<sup>2</sup> § 2 of the Code of Civil Procedure, the legislator excluded from the category of commercial lawsuit cases concerning the division of joint property of partners of a civil partnership after its termination,

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<sup>5</sup> Act of 15 September 2000 – The Code of Commercial Companies and Partnerships (Journal of Laws 2020, item 1526, as amended).

<sup>6</sup> Cognizance of the case to be commercial therefore depends only on the subject matter of the legal relationship in question. If the claimant's asserted claim has its source in a contract referred to in Article 647 of the Civil Code, the case is subject to cognizance in separate proceedings in commercial proceedings, even if none of the parties to the lawsuit is an entrepreneur within the meaning of the substantive law.

and a claim purchased from a person who is not an entrepreneur, unless the claim arose from a legal relationship within the scope of economic activity conducted by all its parties. This solution expressed an endorsement of the line of jurisprudence developed under the previous legislation, according to which a lawsuit between an entrepreneur who acquired a claim by way of an assignment in the course of their business activity and a debtor for the satisfaction of this claim constitutes a commercial case as long as the claim falls within the scope of the debtor's business activity, even if the original creditor is not an entrepreneur.

### 3. Evidence Limitation – Time Limits in Citing Claims and Submitting Evidence

The issue of evidence limitation is closely related and, in a way, results from the obligation to concentrate procedural material in civil proceedings.<sup>7</sup> As the Supreme Court rightly emphasized in the judgment of 9 August 2019, II CSK 353/18:

the purpose of the concentration regulations is to induce the parties to present the necessary statements, claims and evidence at the earliest possible stage of the proceedings to settle the case as soon as possible, and in order to enable the court, by providing it with access to the complete procedural material, to issue a correct decision. The risk of the court disregarding late statements, claims, or evidence is intended to encourage the parties to duly fulfill the burden of supporting the proceedings (Article 6 § 2 of the Code of Civil Procedure) and thus contribute to the achievement of the indicated objectives. If the court disregards claims, statements, or evidence as late, assuming that there were no premises justifying the inclusion of these claims, statements, or evidence, the review of the application of the concentration provisions is justified by the fact that it is about assessing whether a party has not been unjustifiably deprived of its right to invoke assertions or evidence, that is, in essence, its right to be heard. Sanctioning the incorrect disregard of claims, statements or

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<sup>7</sup> Andrzej Jakubecki, in *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian [Practice Towards the Amendment of Civil Procedure. Consequences of Changes]*, eds. Marcin Dziurda and Tadeusz Zembrzuski (Warsaw: Wolters Kluwer, 2021), nt 1; Ewa Stefańska, “Commentary on Article 205(3),” in *Kodeks postępowania cywilnego. Komentarz. Tom I. Art. 1–477(16) [Code of Civil Procedure. Commentary. Vol. I Articles 1–477(16)]*, ed. Małgorzata Manowska (Warsaw: Wolters Kluwer, 2021), nt 8.

evidence serves to reconstitute a party's violated right to be heard. Consideration of the speed of the proceedings must then give way.<sup>8</sup>

The above-mentioned provision of Article 6 § 2 of the Code of Civil Procedure formulates

the burden of supporting the proceedings, the scope of which includes citations affecting the acceptance or dismissal of the claim. It establishes the need to present the procedural material 'without delay', i.e. in such a way that the proceedings can be conducted efficiently and quickly. The quantifier "without delay" should be interpreted compatibly with the notion of 'late' claims, statements and evidence.<sup>9</sup>

In the model of evidence limitation, the effect is in the form of the inability to take into account facts or evidence not submitted on time results *ex lege*. Therefore, the act specifies a specific time limit, or rather a stage of the proceedings, by which the parties may effectively submit the procedural material to the court. Facts and evidence cited later are disregarded by law.<sup>10</sup>

It is beyond dispute that the essence of the evidence limitation is related to the problem of distribution of the burden of proof in civil law cases. The view of the Supreme Court is worth noting here, according to which:

presentation by a party of evidence to prove certain assertions about the facts of the case, from which it draws beneficial effects, is not its right or procedural obligation, but a procedural burden resulting from and guaranteed by law, primarily in its interest. It is in the interest of the party, which is to win the trial, which requires it to take all possible procedural steps in order to prove the presented statements about facts; the party cannot be compelled to take them (...). What a party should prove in a particular trial is determined primarily by: the subject of the dispute, substantive law regulating specific legal relations, and procedural law regulating the rules of evidence.<sup>11</sup>

<sup>8</sup> OSNC 2020/6/51.

<sup>9</sup> Tadeusz Zembrzusi, "Commentary on Article 205(3)," in *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian* [Code of Civil Procedure. Court costs in civil cases. Pursuing claims in group proceedings. Transitional provisions. Comment on amendments], vol. 1, ed. Tadeusz Zembrzusi (Warsaw: Wolters Kluwer, 2020), nt 37.

<sup>10</sup> Likewise Jakubecki, in *Praktyka wobec nowelizacji postępowania cywilnego*, nt 1.

<sup>11</sup> Polish Supreme Court, Judgment of 17 June 2009, Ref. No. IV CSK 71/09, LEX no. 737288.

In practice, the perception of evidence limitation and its role in the fair conduct of a civil law trial is significantly influenced by the way this institution is treated by the court on the merits. As an example, it is worth noting that in the judgment of 10 July 2008, III CSK 65/08, the Supreme Court stated that:

whether there was a need to submit evidence later, circumstances and conditions related to the course of a specific case decide, and the laws on evidence limitation cannot be applied in a formalistic manner at the expense of the possibility of substantive examination of the case. Therefore, the court should conduct an in-depth analysis of the evidence submitted in the lawsuit in connection with the content of the submitted request, and only on its basis should it determine whether the evidence submitted later was at least implicitly offered within the preclusion period laid down by the Act.<sup>12</sup>

The issues raised will be described in more detail later in this chapter.

The basis for the application of the rules of evidence limitation in separate proceedings in commercial cases is the provision of Article 458<sup>5</sup> § 1 of the Code of Civil Procedure. According to it, the plaintiff in the lawsuit and the defendant in the statement of defense are obliged to cite all claims, statements, and evidence to support their positions. Moreover, by delivering the instructions referred to in Article 458<sup>4</sup> § 1 of the Code of Civil Proceedings, the presiding judge calls on the party to present all the claims, statements, and evidence within the prescribed period, not shorter than one week, however, depending on the circumstances of the case, the presiding judge may specify a period longer than one week. Statements/claims and evidence invoked in violation of § 1–3 of the regulation are disregarded unless the party substantiates that it was not possible to invoke them or that the need to invoke them arose later. In such a case, further statements, claims, and evidence should be cited within two weeks from the date on which their invoking became possible or the need to invoke them arose.<sup>13</sup>

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<sup>12</sup> LEX no. 448045.

<sup>13</sup> Maciej Rzewuski, “Zarzut naruszenia reguł prekluzji dowodowej [Allegation of Violating the Rules of Evidentiary Exclusion],” in *Środki obrony pozwanego w postępowaniu przed sądem I instancji [Defence Measures of the Defendant in Proceedings Before the Court of First Instance]*, ed. Maciej Rzewuski (Warsaw: Wolters Kluwer, 2022), 233–234; see also: Tomasz Szanciło, “Commentary on Article 458(4),” in *Kodeks postępowania cywilnego*.

It seems that under Article 458<sup>5</sup> § 4 of the Code of Civil Procedure

no so-called contingency rule has been introduced (...). The proponents of this concept therefore assume that the need for a given party to invoke new statements, and claims and evidence may result, in particular, from the position of the opposing party in the trial. With regard to, for example, the plaintiff, the evidence limitation applies primarily to statements, claims, and evidence directly related to the demand contained in the lawsuit, and not to the statements, claims, and evidence that could be presented in the hypothetical assumption of the defendant's possible defense (...). This line of reasoning also includes the view that the plaintiff does not have to anticipate the defendant's possible allegations, even if it seems obvious that they will be raised, for example in the case of a pre-trial deduction. The lawsuit is supposed to concern the demand contained therein, and not the possible allegations of the defendant.<sup>14</sup>

Without denying the accuracy of the above reasoning, there is no doubt that the limitation rigors, which is a separate process in commercial cases were demanding compared to the ordinary process, constitute a significant impediment to the exercise of the constitutional right to court by the entrepreneur. In most cases, the delay of the person authorized in citing the relevant statement, claim, or submitting evidence will be equated with failure to meet the procedural burdens resulting from Article 6 of the Civil Code and Article 232 of the Code of Civil Procedure, and as a consequence may lead the “latecomer” to lose the entire case.

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*Komentarz do Art. 1–505(39) [Code of Civil Procedure. Commentary to Articles 1–505(39)],* vol. 1, ed. Tomasz Szancilo (Warsaw: C.H. Beck, 2019), 1570 et seq.; Radosław Flejszar, *Postępowanie w sprawach gospodarczych. Komentarz [Proceedings in Commercial Cases. Commentary]* (Warsaw: C.H. Beck, 2007), 165 et seq.

<sup>14</sup> Tadeusz Wiśniewski, “Commentary on Article 458(4),” in *Kodeks postępowania cywilnego. Komentarz. Tom. II. Artykuły 367–505(39) [Code of Civil Procedure. Comment. Volume II. Articles 367–505(39)]*, ed. Tadeusz Wiśniewski (Warsaw: C.H. Beck, 2021), nt 9. Compare with the Polish Supreme Court, Judgment of 18 April 2008, Ref No. II CSK 667/07, Legalis; Jacek Gudowski, “Commentary on Article 458(5),” in *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian [Code of Civil Procedure. Court Costs in Civil Cases. Pursuing claims in group proceedings. Transitional provisions. Commentary on amendments]*, vol. 2, ed. Tadeusz Zembrzuski (Warsaw: C.H. Beck, 2020), 1119.

#### 4. Primacy of Documentary Evidence – Limitations on the Use of Personal Evidence

Another limitation of the entrepreneur in the exercise of his right to court at the stage of examination proceedings before the commercial court are statutory regulations that limit the possibility of providing evidence using witness statements or hearings of the parties. Specifically, these are two legal solutions that were added to the Code of Civil Procedure by the amendment of 4 July 2019.

The former of the provisions cited in Article 458<sup>10</sup> of the Code of Civil Procedure, according to which the court may admit evidence from the testimonies of witnesses only when, after exhausting other means of evidence or in their absence, unexplained facts relevant to the resolution of the case remain. Although the above-mentioned regulation does not completely eliminate the possibility of taking evidence from the hearing of the parties in separate proceedings in commercial cases on the terms set out in Article 299 of the Code of Civil Procedure, however, such evidence may be taken only when it turns out that the other evidence will not lead to clarification of facts relevant to the resolution of the case. A situation is admitted in the literature that if the evidence thesis of the application for the hearing of a witness shows that such testimony will not explain the disputed circumstances of the case, because only the parties have relevant knowledge in this regard, the commercial court may disregard the evidence from the witness testimonies, and in its place take evidence from the cross-examination of the parties.<sup>15</sup>

Further still in limiting the possibility of using personal evidence in commercial proceedings goes the provision of Article 458<sup>11</sup> of the Code of Civil Procedure. This regulation provides that an act of a party, in particular a declaration of will or knowledge, which in the law is connected with an acquisition, loss, or change of the party's entitlement in the scope of a given legal relationship, may be demonstrated only by a document

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<sup>15</sup> Małgorzata Manowska, "Commentary on Article 458(10)," in *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–477(16)* [Code of Civil Procedure. Updated Commentary. Vol. I. Articles 1–477(16)], ed. Małgorzata Manowska (Warsaw: Wolters Kluwer, 2022), nt 2.



referred to in Article 77<sup>3</sup> of the Civil Code,<sup>16</sup> unless the party proves that it is unable to present the document for reasons beyond its control. It needs to be emphasized that the possibility of taking evidence other than a document will always depend on the prior demonstration (and not just substantiation) of the party's inability to present the adequate document. The party requesting the taking of evidence from the testimony of a witness or evidence from the hearing of the parties should therefore, in advance, in the manner provided for by the procedural law, prove, for example, that the relevant document was, for example, destroyed or lost.

The objective scope of the analyzed provision covers every activity of a party that is in the law connected to the acquisition, loss, or change of the right, and as a rule, it will be about the conclusion, change, or termination of a contract or agreement. It is worth noting that this provision concerns the right, i.e. the content of a specific legal relationship, and does not apply to actual actions related to the exercise of these rights, e.g. fulfillment of a non-cash benefit or a request for payment.<sup>17</sup>

In conclusion, it is worth recalling the thesis of the judgment of the Court of Appeal in Poznań of 29 September 2022, I AGa 334/21, according to which "evidence from the testimonies of witnesses in commercial cases is to be admitted on a subsidiary basis, i.e. only when, after exhausting other means of evidence, or in the absence thereof, facts relevant to the resolution of the case remain unexplained."<sup>18</sup> For the reasons described above and due to the capacious wording of Article 458<sup>11</sup> of the Code of Civil Procedure this thesis remains valid also in relation to the possibility of taking evidence from the hearing of the parties in commercial proceedings.

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<sup>16</sup> Within the meaning of Article 773 of the Civil Code, a document should be perceived as any information carrier that makes it possible to familiarise oneself with its content. Thus, it may be any object or device that allows the content of the statement contained in the document to be recorded and subsequently reproduced.

<sup>17</sup> Manowska, "Commentary on Article 458(11)," in *Kodeks postępowania cywilnego*, nt 2, 4; See: Gudowski, "Commentary on Article 458(5)," nt 3.

<sup>18</sup> LEX no. 3435717.

## 5. Evidence Agreement – Essence, Goals, and Legal Effects

A novelty in the Polish civil procedure was the introduction to the Code of Civil Procedure of the institution of the evidence agreement.<sup>19</sup> The main motive justifying the implementation of this mechanism was the high level of professionalism achieved in recent years in commercial transactions.

Although the introduction of another factor influencing the course of the proceedings carries an undoubted risk of complication in the conduct of court cases in which this factor will appear as indicated by the drafters:

there should be no doubt that the parties should have the right to limit the scope of proceedings to take evidence by the exclusion of certain types of evidence. This will emphasize the principle that the parties are the hosts of the proceedings and may contribute to a more efficient resolution of the dispute – and that is the reason, not just for the sake of conducting itself, why proceedings to take evidence are conducted. The proportions between the possible benefits and losses seem to prevail in favor of the former, especially in commercial cases, where the professionalism of the parties and the extensive use of professional legal assistance, also in out-of-court transactions, allow minimizing the risk of problems related to the evidence agreement.<sup>20</sup>

In other words, the primary purpose of the evidence agreement, as intended by the legislator, was to ensure faster and more efficient examination of commercial cases. As practice shows, this goal has not been fully achieved, and there are many reasons for this state of affairs.

In the theory of procedural law, the very essence of the evidence agreement raises serious doubts. As such an agreement contains both substantive and procedural elements, the mutual relations between these two components become unclear. The legislator did not resolve this problem directly

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<sup>19</sup> On procedural agreements, refer to Władysław Siedlecki, “Czynności procesowe” [Process Activities], *Państwo i Prawo*, vol. 11 (1951): 709 et seq.; Siedlecki, “Ciężar dowodu w polskim procesie cywilnym [The Burden of Proof in Polish Civil Proceedings],” *Państwo i Prawo*, vol. 7 (1953): 73; Jerzy Jodłowski, *Z zagadnień polskiego procesu cywilnego [From the Themes of the Polish Civil Process]* (Warsaw: Państwowe Wydawnictwo Naukowe, 1961), 63; Kamil Stefko, “Postępowanie dowodowe w polskim procesie cywilnym [Proceedings of Evidence in Polish Civil Proceedings],” *Przegląd Notarialny*, no. 1–3 (1951): 15.

<sup>20</sup> Justification of the government bill amending the Act – Code of Civil Procedure and some other acts, Sejm Paper No. 3137, p. 107.

in the content of the Code of Civil Procedure, and this omission caused significant practical problems.

The representatives of the doctrine rightly point out that:

the normative location of the provision on the evidence agreement does not determine whether it is a purely procedural agreement or an agreement in which procedural elements predominate. In many cases, the aspects of the validity and effectiveness of the said agreement will require a thorough analysis of several of provisions of substantive law, e.g. Articles 5, 56, 58 of the Civil Code, etc. On the other hand, one cannot ignore the fact that both the content and the form of the evidence agreement have been specified in the procedural regulations, and the fact that it is the commercial court that controls the validity and effectiveness of the concluded agreement as part of the ongoing proceedings. The indicated circumstances seem to support the thesis of a double – substantive and procedural nature of the analyzed agreement.<sup>21</sup>

As regards the formal requirements of the evidence agreement, the legislator decided that it requires a written form under pain of nullity, or an oral form – limited to declarations of the will of the parties submitted at the hearing for the record. In case of doubt, the subsequent evidence agreement shall be deemed to maintain those provisions of the earlier agreement which can be reconciled with it. An evidence agreement concluded on condition or subject to a deadline is invalid (Article 458<sup>9</sup>(2) and (3) of the Code of Civil Procedure).

Taking into account the wording of the above-mentioned regulation, one can seriously doubt the effective conclusion of the eponymous agreement.

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<sup>21</sup> Maciej Rzewuski, “Umowa dowodowa w postępowaniu gospodarczym – między teorią a praktyką [Evidence Agreement in Commercial Proceedings – Between Theory and Practice],” *Dyskurs Prawniczy i Administracyjny*, no. 1 (2021): 86–7. See: Łukasz Błaszczak, “Umowa dowodowa jako przykład nowej instytucji w Kodeksie postępowania cywilnego (art. 458(9) k.p.c.) [Evidence Agreement as an Example of a New Institution in the Code of Civil Procedure (Art. 458(9) of the Code of Civil Procedure],” *Palestra*, no. 11–2 (2019): 128 et seq.; Aneta Arkuszewska, “Commentary on Article 458(9),” in *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz innych ustaw [Code of Civil Procedure. Commentary to the Act of 4 July 2019 Amending the Act – Code of Civil Procedure and Other Acts]*, ed. Jacek Gołaczyński and Dariusz Szostak (Warsaw: C.H. Beck, 2019), 338.

As indicated in the literature:

first, justified interpretation doubts may be raised by the very phrase “the evidence agreement is concluded in writing under pain of nullity or orally before the court,” used in Article 458<sup>9</sup> § 2 of the Code of Civil Procedure. It is not clear whether in the course of the proceedings, the parties can continue using the written form of the agreement, or whether – due to the fact of the pending proceedings – they are limited in form to submitting oral statements for the record. Some authors assume that due to the lack of clear temporal limitations in the Code, both forms of evidence agreement are acceptable in this case.<sup>22</sup> Others argue that during the ongoing court proceedings, only the oral form of the agreement may be considered.<sup>23</sup> Secondly, due to the ambiguity of the wording of Article 458<sup>9</sup> § 2 of the Code of Civil Procedure, a doubt arises whether an evidence agreement may be concluded at the stage of appeal proceedings and whether it is permissible to refer to such an agreement only in the course of the appeal (...). Thirdly, the legislator did not directly regulate the issue of whether the evidence agreement concluded before the court in the course of the trial may concern only what is the subject of the pending proceedings, or whether the subject matter may go much further, and include, for example, court disputes pending in parallel between them or that may arise in the future from the marked legal relationship. Also in this respect, there is no unanimous position of the doctrine, although due to the lack of relevant statutory prohibitions in this matter – the view allowing for a broad redaction of the subject aspect of the analyzed agreement seems more convincing.<sup>24</sup>

It seems that the above-mentioned basic problems in the practical use of the evidence agreement effectively discourage entrepreneurs from concluding this type of agreement, and then from using contractual provisions to prevent, or at least make it difficult for, the other party to the proceedings to prove its case before the commercial court.

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<sup>22</sup> Ibid., nt 9.

<sup>23</sup> Broadly in: Błaszczak, “Umowa dowodowa jako przykład nowej instytucji,” 128 et seq.

<sup>24</sup> Likewise: Rzewuski, “Umowa dowodowa w postępowaniu gospodarczym,” 92. See: Szancilo, “Commentary on Article 458(4),” nt 13.

## 6. Conclusions

The research carried out shows that procedural law theory often seems to diverge from practice. The attempt to achieve one objective (e.g. expediting the adjudication of commercial cases) may lead to the limitation of other procedural principles (e.g. the principle of material truth).

The reanimation of separate proceedings in commercial cases, and in particular the introduction of specific legal institutions such as evidence limitation, the primacy of documentary evidence, or the evidence agreement, have complicated the entrepreneur's path to the exercise of their rights by using state coercion.

Undoubtedly, one may disagree with the originator, who, when deciding to introduce the new solutions, was guided by the overriding and socially desirable goal of streamlining the recognition of commercial cases. It is difficult to argue with the accuracy of this postulate. Unfortunately, practice reveals further weaknesses of the recent amendments to the Code of Civil Procedure, which seem to effectively discourage entrepreneurs from using the new institutions of separate proceedings and indirectly restrict them in their right to a court and their pursuit of the material truth, whose qualities as such cannot be overestimated.

## References

- Arkuszevska, Aneta. "Commentary on Article 458(9)." In *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.07.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz innych ustaw* [Code of Civil Procedure. Commentary to the Act of 4 July 2019 Amending the Act – Code of Civil Procedure and Other Acts], edited by Jacek Gołaczyński and Dariusz Szostak, 336–40. Warsaw: C.H. Beck, 2019.
- Błaszczak, Łukasz. "Umowa dowodowa jako przykład nowej instytucji w Kodeksie postępowania cywilnego (art. 458(9) k.p.c.) [Evidence Agreement as an Example of a New Institution in the Code of Civil Procedure (Art. 458(9) of the Code of Civil Procedure)]." *Palestra*, no. 11–2 (2019): 128–64.
- Flejszar, Radosław. *Postępowanie w sprawach gospodarczych. Komentarz* [Proceedings in Commercial Cases. Commentary]. Warsaw: C.H. Beck, 2007.
- Gudowski, Jacek. "Commentary on Article 458(5)." In *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń*

- w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian [Code of Civil Procedure. Court Costs in Civil Cases. Pursuing claims in group proceedings. Transitional provisions. Commentary on amendments], vol. II, edited by Tadeusz Zembrzuski, 1–13. Warsaw: C.H. Beck, 2020.
- Jakubecki, Andrzej. “Koncentracja materiału procesowego w postępowaniu cywilnym A.D. 2019 – dyskrecjonalna władza sędziego czy prekluzja? [Concentration of Procedural Material in Civil Proceedings A.D. 2019 – Judge’s Discretionary Power or Preclusion?].” In *Praktyka wobec nowelizacji postępowania cywilnego. Konsekwencje zmian* [Practice Towards the Amendment of Civil Procedure. Consequences of Changes], edited by Marcin Dziurda and Tadeusz Zembrzuski, 27–46. Warsaw: Wolters Kluwer, 2021.
- Jodłowski, Jerzy. *Z zagadnień polskiego procesu cywilnego* [From the Themes of the Polish Civil Process]. Warsaw: Państwowe Wydawnictwo Naukowe, 1961.
- Manowska, Małgorzata. “Commentary on Article 458(10).” In *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–477(16)* [Code of Civil Procedure. Updated Commentary. Vol. I Articles 1–477(16)], edited by Małgorzata Manowska, 1–3. Warsaw: Wolters Kluwer, 2022.
- Manowska, Małgorzata. “Commentary on Article 458(11).” In *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1–477(16)* [Code of Civil Procedure. Updated Commentary. Vol. I Articles 1–477(16)], edited by Małgorzata Manowska, 1–4. Warsaw: Wolters Kluwer, 2022.
- Rzewuski, Maciej. “Zarzut naruszenia reguł prekluzji dowodowej [Allegation of Violating the Rules of Evidentiary Exclusion].” In *Środki obrony pozwanego w postępowaniu przed sądem I instancji* [Defence Measures of the Defendant in Proceedings Before the Court of First Instance], edited by Maciej Rzewuski, 223–46. Warsaw: Wolters Kluwer, 2022.
- Rzewuski, Maciej. “Umowa dowodowa w postępowaniu gospodarczym – między teorią a praktyką [Evidence Agreement in Commercial Proceedings – Between Theory and Practice].” *Dyskurs Prawniczy i Administracyjny*, no. 1 (2021): 83–95.
- Rzewuski, Maciej. *Nowa procedura gospodarcza – reforma KPC* [New Commercial Proceedings. The Reform of the Code of Civil Procedure]. LEX/el. 2019.
- Siedlecki, Władysław. “Czynności procesowe [Process Activities].” *Państwo i Prawo*, vol. 11 (1951): 609–710.
- Stefańska, Ewa. “Commentary on Article 205(3).” In *Kodeks postępowania cywilnego. Komentarz. Tom I. Art. 1–477(16)* [Code of Civil Procedure. Commentary. Vol. I Articles 1–477(16)], edited by Małgorzata Manowska, 1–22. Warsaw: Wolters Kluwer, 2021.

- Stefko, Kamil. "Postępowanie dowodowe w polskim procesie cywilnym [Proceedings of Evidence in Polish Civil Proceedings]." *Przegląd Notarialny*, no. 1–3 (1951): 9–35.
- Szanciło, Tomasz. "Commentary on Article 458(4)." In *Kodeks postępowania cywilnego. Komentarz do Art. 1–505(39)* [*Code of Civil Procedure. Commentary to Articles 1–505(39)*], vol. I, edited by Tomasz Szanciło, 1–6. Warsaw: C.H. Beck, 2019.
- Wiśniewski, Tadeusz. "Commentary on Article 458(4)." In *Kodeks postępowania cywilnego. Komentarz. Tom. II. Artykuły 367–505(39)* [*Code of Civil Procedure. Comment. Vol. II. Articles 367–505(39)*], edited by Tadeusz Wiśniewski, 1–7. Warsaw: C.H. Beck, 2021.
- Siedlecki, Władysław. "Ciężar dowodu w polskim procesie cywilnym [The Burden of Proof in Polish Civil Proceedings]," *Państwo i Prawo*, vol. 7 (1953): 56–75.
- Zembrzuski, Tadeusz. "Commentary on Article 205(3)." In *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian* [*Code of Civil Procedure. Court costs in civil cases. Pursuing claims in group proceedings. Transitional provisions. Comment on amendments*], vol. I, edited by Tadeusz Zembrzuski, 1–40. Warsaw: Wolters Kluwer, 2020.

