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Dariusz Chrapoński*
ORCID no: 0000-0003-2506-0563

IMPORTANCE OF DOCUMENTARY EVIDENCE IN SEPARATE PROCEEDINGS IN COMMERCIAL CASES

ZNACZENIE DOWODU Z DOKUMENTU W ODRĘBNYM POSTĘPOWANIU W SPRAWACH GOSPODARCZYCH

Summary: Documentary evidence plays an important role in separate proceedings in commercial cases, which is reflected in the regulation contained in Article 458[11] of the Code of Civil Procedure. It stipulates that all material factual circumstances related to a change in civil law relations that affect the resolution of the case can only be proven by documentary evidence. In contrast, the taking of evidence from other sources of evidence would be inadmissible. Such an interpretation, however, would mean that documentary evidence in commercial proceedings is the exclusive evidence to prove the circumstances referred to in this provision. A proper interpretation of this provision should lead to the conclusion that documentary evidence has primacy over other evidence in the sense that the court shall first take evidence from such evidence and, and if all the circumstances relevant to the case have not been clarified, from other types of evidence.

Keywords: evidence, document, procedure, civil, commercial

Streszczenie: Dowód z dokumentu odgrywa istotną rolę w postępowaniu odrębnym w sprawach gospodarczych, czego wyrazem jest regulacja zawarta w art. 458[11] k.p.c. Wynika z niego, że wszystkie istotne okoliczności faktyczne związane ze zmianą stosunków cywilnoprawnych, które wpływają na rozstrzygnięcie sprawy, mogą być wykazane wyłącznie za pomocą dowodu z dokumentów. Przeprowadzenie natomiast dowodów z innych źródeł dowodowych byłoby niedopuszczalne. Taka interpretacja oznaczałaby jednak, że dowód

* Doctor of Legal Sciences, judge of the Court of Appeal in Katowice, lecturer at the National School of Judiciary and Public Prosecution, Humanitas University in Sosnowiec. Publication funding sources: author's own funds; e-mail: dariusz.chraponski@gmail.com

z dokumentu w postępowaniu gospodarczym jest dowodem wyłącznym dla wykazania okoliczności, o których mowa w tym przepisie. Właściwa interpretacja tego przepisu winna prowadzić do wniosku, że dowód z dokumentu ma prymat nad innymi dowodami w tym znaczeniu, że sąd w pierwszej kolejności przeprowadza postępowanie dowodowe z takich środków dowodowych, a jeśli nie zostały wyjaśnione wszystkie okoliczności mające znaczenie dla sprawy – z innych rodzajów dowodów.

Słowa kluczowe: dowód, dokument, procedura, cywilny, gospodarczy

INTRODUCTION

Modifications to the rules of evidence in separate proceedings in commercial cases ‑ in terms of evidence – are introduced by Article 458[9] of the Code of Civil Procedure[1] which normalizes the agreement of evidence, Article 458[10] of the Code of Civil Procedure which regulates the admissibility of evidence from witnesses, and Article 458[11] of the Code of Civil Procedure which limits to documents the possibility of proving the transactions of the parties to the trial relating to broadly defined changes in civil law relations. The purpose of the legislative amendments made under Article 1, point 56 of the Law of July 4, 2019 on Amendments to the Law ‑ Code of Civil Procedure and certain other acts[2] was to streamline the commercial process by eliminating from it such means of evidence that, due to its nature, are not very authoritative for the resolution of a dispute and, moreover, prolong it. According to the drafter, the source of delays in the recognition of commercial cases is not documenting the facts from which entrepreneurs derive their claims and allegations[3]. At the forefront of the amendments made is the is Article 458[11] of the Code of Civil Procedure according to which a party's action, in particular a statement of will or knowledge, with which the law links the acquisition, loss or change of a party's entitlement to a particular legal relationship, can only be demonstrated by the document referred to in Article 77[3] of the Civil Code, unless the party demonstrates that it cannot produce the document for reasons beyond its control. The lexical wording of this provision indicates that the legislator prefers documentary evidence as an instrument of evidence in commercial cases. This justifies the need to assess whether the norm contained in Article 458[11] of the Code of Civil Procedure breaks the general rule that a participant in civil proceedings may prove the facts from which he

[1] Act of November 17, 1964 – Code of Civil Procedure (uniform text, Journal of Laws 2021, item 1805); (hereinafter: the Code of Civil Procedure).

[2] Journal of Laws 2019, item 1469.

[3] Rządowy projekt ustawy o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw (Government Bill on Amendments to the Act – Code of Civil Procedure and Certain Other Acts), Print No. 3137, https://www.sejm.gov.pl/sejm8.nsf/druk.xsp?nr=3137, p. 105 (hereinafter referred to as: *Government Bill...*).

derives legal effects by any means of evidence permitted by civil procedure. This is a consequence of the adoption of the principle that there is no hierarchy of evidence in civil proceedings. In essence, it is a question of whether this regulation creates the principle of exclusivity of documentary evidence, and if not, what should be the interpretation of the legal norm in question. This, in turn, will make it possible to draw conclusions about the effects of the regulation under discussion in the area of efficiency of the proceedings and the right of the parties to defend themselves in the trial. Such undertaking requires first defining the concept of a document to which the regulation in question applies, and then assessing the nature of documentary evidence and the rules of evidence.

THE CONCEPT OF A DOCUMENT

The Code of Civil Procedure does not lay down a universal definition of a document, confining itself to the characteristics of an official document (Article 244 of the Code of Civil Procedure) and a private document (Article 245 of the Code of Civil Procedure). In the doctrine it is assumed that a document is an externalized thought in a permanent way, represented by understandable signs (such as the alphabet, numbers or other characters), which can be repeatedly reproduced in the future[4]. Civil procedure uses the document as a means of evidence, the purpose of which is for a party to prove claims that are relevant to the case from the point of view of its interests that are the subject of the proceedings. The document in a trial also involves a system of presumptions derived from it and the manner in which evidence is taken. Given the lack of a general definition of a document in civil procedure, it was justified for the legislature to turn to the concept of a document in private law.

The definition of a document is contained in Article 77^3 of the Civil Code according to which it is a medium of information that makes it possible to read its contents. To be considered a document within the meaning of this provision, three elements must be present cumulatively. The first is the medium of information which is understood as the material substrate in the form of any tool, or object which makes it possible to record and reproduce the content contained therein. The term medium includes any form, whether traditional (e.g., written) or electronic. Information, on the other hand, is the intellectual content of this medium, which can also take any form, especially text, graphics, sound or information. *Lege non distinguente* the content of the medium is not limited to statements of knowledge or will, although the location of Article 77^3 of the Civil Code in the part of the Civil Code regulating the form of legal transactions would suggest the conclusion that the carrier should contain a statement of will.

[4] T. Ereciński, *Z problematyki dowodu z dokumentu w sądowym postępowaniu cywilnym*, [in:] M. Jędrzejewska, T. Ereciński, *Studia z postępowania cywilnego. Księga pamiątkowa ku czci Zbigniewa Resicha*, Warszawa 1985, p. 77.

Meanwhile, the legislator only requires a declaration of intent in a medium in Article 77^2 of the Civil Code, which regulates the documentary form. For the correct determination of the meaning of a document, it is necessary to look through the prism of its function, and not the form of legal transactions which Article 77^3 of the Civil Code does not regulate. The *ratio legis* of this provision is to record specific content in order to present it in the future for the needs of specific factual or legal situations. Therefore, the information contained in the medium may take the form of statements of will or knowledge or other content that is not statements of will or knowledge[5]. These can be, for example, regulations, general terms and conditions of contracts, instructions, etc., as long as they contain information of significant evidentiary value within the meaning of Article 227 of the Code of Civil Procedure. At the same time, the information recorded on the medium does not have to be linked to a specific person[6]. Also in the jurisprudence it is accepted that when defining a document, the legislator used a subject-functional wording. A document is a medium insofar as it contains information and makes it possible to read its contents. A document in the formal sense, as a medium of information, can be not only, traditionally, paper, but also, for example, IT media (for example, for information in electronic form, the media are a computer hard drive, a server, e.g., e-mail, CDs, DVDs, a portable disk, a flash drive, a floppy disk, a Blu-ray disc or so-called cloud computing which allows the reproduction of information). The constitutive feature of a document is information because the medium itself without information is not a document[7]. The third element of a document is the objective possibility of reading the content contained therein, including through the use of appropriate tools for reading it.

The unlimited forms under which a document can appear means that it can be in written form (both ordinary and qualified), documentary or electronic. The capacity of the definition contained in Article 77^3 of the Civil Code makes it impossible to make a precise division of the types of documents, but the literature, nevertheless, distinguishes the following categories of them: traditional (paper) documents containing text and signed with a handwritten signature, and documents in electronic form, containing text and bearing a qualified electronic signature; documents (both traditional and in electronic form) containing text, signed neither with a handwritten

[5] B. Kaczmarek-Templin [in:] *System postępowania cywilnego. Dowody w postępowaniu cywilnym*, Volume 2, edited by Ł. Błaszczak, Warszawa 2021, p. 1077; K. Górska, *Pojęcie dokumentu w prawie cywilnym – głos w dyskusji nad istotą regulacji art. 77³ k.c.*, „Przegląd Ustawodawstwa Gospodarczego" 2021, no. 5, p. 59; cf. differently J. Sadomski [in:] *Kodeks cywilny. Komentarz*, Volume I. General Part, Articles 1-125 (part 2), ed. by J. Gudowski, Warszawa 2021, p. 552, which limits the concept of document, only those that contain statements of will or knowledge.

[6] J. Grygiel, *Kilka uwag o nowej definicji dokumentu i formy dokumentowej*, „Monitor Prawniczy" 2016, No. 5, p. 238.

[7] See judgements: Court of Appeal in Poznań of February 22, 2022, I AGa 323/20, LEX; Court of Appeal in Warszawa of October 25, 2018, V ACa 1480/17, LEX; Court of Appeal in Poznań of February 22, 2022, LEX, I AGa 323/20 and Court of Appeal in Szczecin of March 4, 2021, I ACa 647/20, LEX.

signature nor with a qualified electronic signature, in relation to which it is possible to identify the issuer (establish his identity); documents containing text, prepared on atypical material media (wood, stone, metal, etc.); documents conveying information by means other than writing, such as in the form of images or sound[8]. In summary, Article 458[11] of the Code of Civil Procedure uses the concept of a document in two aspects – substantive, the limits of which are set by the content of Article 77[3] of the Civil Code, and procedural, as a means of evidence, the manner of which evidence is taken and its evidentiary significance is determined by the rules of civil procedure.

THE NATURE OF DOCUMENTARY EVIDENCE

A grammatical interpretation of Article 458[11] of the Code of Civil Procedure indicates that a party to a civil trial may prove the circumstances covered by its hypothesis only by a document unless he demonstrates that he cannot submit the document for reasons beyond his control. It is legitimate in such a situation to consider whether it is only procedural or also substantive in nature, despite the fact that in the explanatory memorandum to the bill it was emphasized that the norm in question is only procedural and does not change the substantive law rules on the form of legal transactions[9]. Indeed, the explanatory memorandum of the bill cannot determine the content of the legal norm interpreted from the enacted provision, which can only be one way of extra-linguistic interpretation[10]. The issue presented here is important in that it impinges on how to resolve the consequences of failure to comply with the requirements of Article 458[11] of the Code of Civil Procedure. The interpretative difficulty of this provision arises from the fact that its disposition expresses the prohibition of taking evidence other than documents for the circumstances described by its hypothesis. It is undermined only if the party could not present such evidence for reasons beyond its control. The substantive meaning of this provision would manifest itself in the prohibition of evidence from other sources, thus falling into collision with Article 74 § 4 of the Civil Code, which excludes the consequences of the entrepreneur's failure to observe the form of a legal transaction in the form of *ad probationem*. With regard to the nature of Article 458[11] of the Code of Civil Procedure, a number of different views are presented by the doctrine. It seems that M. Machnikowska recognises the substantive nature of this legal norm by stating that it constitutes *lex specialis* to Article 74 § 4 of the Code of Civil Procedure[11]. On the other hand, T. Szanciło believes that Article 458[11] of the

[8] B. Kaczmarek-Templin, *System…*, p. 1119.
[9] *Rządowy Projekt…*, p. 106.
[10] Cf. The judgment of the Supreme Court: of January 16, 2007, IV CSK 290/07, LEX, and the resolution of the Supreme Court of April 11, 2008, III CZP 130/07, LEX.
[11] A. Machnikowska [in:] *System postępowania cywilnego. Postępowania odrębne. Volume 6* (ed.), M. Machnikowska, Warszawa 2022, p. 260.

Code of Civil Procedure has a purely procedural value and refers only to the issue of proving certain events by means of the evidence indicated therein, being, however, in disputes between entrepreneurs *lex specialis* to Articles 74 § 2 and 4 of the Civil Code which do not apply then[12]. Other views expressed by the doctrine recognize the contradiction between Article 458[11] of the Code of Civil Procedure and Article 74 § 4 of the Civil Code, which should be resolved by giving primacy to the application of the former in commercial cases[13]. Other - similar to this position, without evaluating the relationship between these provisions, only indicate that the evidentiary limitation of Article 458[11] of the Code of CivilProcedure is procedural only and does not change the substantive law rules on the form of legal transactions[14]. A different view on this issue is presented by M. Giaro whose opinion is that Article 458[11] of the Code of Civil Procedure is not substantive and specific to Article 74 § 4 of the Civil Code, and its interpretation should be in accordance with the provisions governing the form of *ad probation* and the consequences of the failure to observe it[15].

The analysis of the cited opinions of doctrine leads to the conclusion, even for supporters of the thesis of the procedural meaning of Article 458[11] of the Code of Civil Procedure, that its dependence on Article 74 § 4 of the Civil Code is expressed by the relationship of the special provision - the general provision. In assessing the nature of this norm, at the beginning it is reasonable to emphasize that the regulation in question is contained in the legal act regulating legal proceedings, which is, after all, a set of norms for the judicial realization of legal protection arising from substantive law. Conflict rules between regulations in terms of *lex specialis – lex generalis* can be applied only on the grounds of specific norms regulating the matter in question in terms of either substantive or procedural law. This is because the subject matter and scope of the regulations must be taken into account. Based on this assumption, the norm of procedural law cannot be special to the norm of substantive law due to the separate subject matter of regulation. It is a fact that the nature of a legal norm is determined not so much by its location in a particular piece of legislation, but by its content, but nevertheless the principles of correct legislation require that a distinction be made between procedural and substantive regulations. It would be possible to read Article 458[11] of the Code of Civil Procedure as a sub-

[12] T. Szanciło [in:] *Kodeks postępowania cywilnego. Volume I. Commentary. Art. 1-505[39]*, (ed.) T. Szanciło, Warszawa 2019, pp. 1584-1585; alike A. Arkuszewska, *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw*, (ed.) J. Gołaczyński, D. Szostek, Warszawa 2019, p. 345.

[13] B. Kaczmarek-Templin, *System...*, p. 1164; K. Knoppek, *Dowody i postępowanie dowodowe w sprawach cywilnych po nowelizacji Kodeksu postępowania cywilnego*, „Palestra" 2019, no. 11-12, p. 76.

[14] R. Kulski [in:] *Kodeks postępowania cywilnego, Volume I. Commentary. Art. 1-505[39]*, (ed.) A. Marciniak, Warszawa 2020, p. 116; P. Feliga [in:] *Kodeks postępowania cywilnego. Komentarz*, (ed.) P. Rylski, Legalis 2022, article 458[11] comment 9.

[15] M. Giaro, *Artykuł 458[11] KPC na tle unormowania formy czynności prawnych*, „Monitor Prawniczy" 2021, no. 8, pp. 420-421.

stantive law norm if it was assumed that is shapes the rights and obligations of the addressees of the norm contained therein on the basis of substantive relations. Only in such a situation would it be legitimate to consider that it is a substantive law norm contrary to Article 74 § 4 of the Civil Code, and consequently the need for derogatory procedures between these provisions would be reafirrmed.

In the author's assessment, there is no concurrence of the norms of Article 458^{11} of the Code of Civil Procedure and Article 74 § 4 of the Civil Code, since the former is not substantive in nature. The justification for this position should begin with the second of these provisions whose meaning should be viewed through the prism of the entire content of Article 74 of the Civil Code. It has the character of a supplementary norm to Article 73 § 1 of the Civil Code, stating the premise that if the act reserves for a legal transaction the written, documentary or electronic form, the transaction performed without observing the reserved form does not automatically lead to its invalidity. The sanction under the first sentence of Article 74 § 1 of the Civil Code for the failure to comply with the proper form of a legal transaction shall be the inadmissibility of evidence of the parties or witnesses on the fact of the legal act (*ad probationem* reservation). The legal effect indicated here is liberalized in the cases specified in § 2-4. The latter concerns the failure to observe the form of legal transactions in civil law relations between entrepreneurs, stipulating that failure to observe the relevant form does not result in evidentiary sanctions. Article 458^{11} of the Code of Civil Procedure does not regulate an analogous issue – the form of a legal act – but only the method of evidence in a commercial trial. This is confirmed by the reference to the concept of document in the understanding of Article 77^3 of the Civil Code, and not to the documentary form of the legal transaction (Article 77^2 of the Civil Code). Moreover, its hypothesis is broader than Article 74 § 1 and 4 of the Civil Code, since it regulates the admissibility of evidence not only of the conclusion of a contract, but also of any factual circumstances relevant to the emergence or cessation of legal effects related to legal events relevant to the case. This further leads to the conclusion that Article 458^{11} of the Code of Civil Procedure does not exclude the application of Article 74 § 4 of the Civil Code on the principle of *lex specialis derogat legi generali*[16]. The above deductions also give rise to the conclusion that Article 458^{11} of the Code of Civil Procedure is a purely procedural norm. The problem relating to the possibility of evidence in commercial proceedings circumstances related to the acquisition, loss or change of a party's entitlement to a particular legal relation can only be solved at the procedural level.

[16] Alike M. Giaro, *Artykuł…*, p. 422.

RULES OF DOCUMENTARY EVIDENCE

The problem mentioned at the beginning boils down to the question of whether documents in commercial proceedings are the exclusive evidence for proving circumstances related to the acquisition, loss or change in the legal relationship that is the subject of the trial. If, on the other hand, the answer to this question is negative, the issue of when it is possible to take evidence from other procedural means has to be addressed. Against the background of the interpretation of Article 458[11] of the Code of Civil Procedure, four positions have been expressed in the literature. According to the first of them, documentary evidence in commercial cases is exclusive evidence with respect to statements of intent and knowledge resulting in a change in the legal position of a party to those proceedings[17]. To accept this concept would be mean accepting that the legislator in this provision made an exception from the principle of free evaluation of evidence, which is dominant in civil proceedings, in favour of formal (legal) rules of evidence, which means that the court can use only the means of evidence specified in the law and assess their strength on the basis of strictly marked criteria[18]. As a result, taking any other evidence would be inadmissible[19]. A different interpretation of this standard was carried out by P. Feliga who recognizes the admissibility of evidence other than documents by deducing it from the "inability to provide evidence". According to this author, this premise *implicite* assumes that the document exists or existed, but the party did not produce it due to the occurrence of events beyond its control. The hypothesis of the commented regulation does not extend to the case of failure to create a document. Therefore, the reasons for the failure to produce a document showing a party's activities are not subject to examination by the court, but rather the reasons for the failure to present the document created. If a document with which the performance of an activity could be demonstrated has not been produced, the limitations on the examination of facts provided for in Article 458[11] of the Code of Civil Procedure[20]will not apply. M. Giaro, on the other hand, believes that it has only procedural significance. In his opinion, the action performed by the entrepreneur still at the pre-trial stage, will not yet be an action of a party to the trial within the meaning of Article 458[11] of the Code ofCivil Procedure. The evidentiary limitation specified therein will be valid only against the entrepreneur from the moment he acquires, in accordance with the rules of civil procedure, the status of a party to the trial. This author referred to Article 458[4] § 1 of the Code of Civil Procedure according to which a party who is not replaced by a professional attorney is instructed by the

[17] K. Knoppek, *Dowody…*, p. 75.

[18] J. Gudowski [in:] *Kodeks postępowania cywilnego. Koszty sądowe w sprawach cywilnych. Dochodzenie roszczeń w postępowaniu grupowym. Przepisy przejściowe. Komentarz do zmian.* Volume II, (ed.) T. Zembrzuski, Warszawa 2020, p. 1140.

[19] M. Muliński, *Ograniczenia dowodowe w postępowaniu odrębnym w sprawach gospodarczych*, „Dyskurs Prawniczy i Administracyjny" 2021, no. 1, p. 67.

[20] P. Feliga, *Komentarz...*, Article 458[11] of the Code of Civil Procedure, comment 23.

court, among other things, about Article 458[11] of the Code of Civil Procedure. Such an instruction would be pointless if Article 458[11] of the Code of Civil Procedure were to cover transactions performed earlier, constituting an alleged source of the obligation to document them for future possible disputes. A party would not have the opportunity to retroactively document an activity in order to comply with a subsequent instruction to it[21]. The last group of views excludes the exclusivity of a document as a means of proving the circumstances listed in Article 458[11] of the Code of Civil Procedure. According to T. Szanciło, this provision only provides for "proving activities by a document", which does not mean that when there is a private document whose veracity will be denied by the opposing party, the rules set forth in Article 253 of the Code of Civil Procedure (and for an official document in Article 252 of the Code of Civil Procedure) do not apply. It cannot be interpreted to mean that if a party submits documents that, in the court's opinion, improperly demonstrate a particular fact, the court should dismiss all other evidentiary requests that seek to prove that fact. The obligation to submit a document does not mean the complete exclusion of other means of evidence[22].

The adoption of the first concept presented is not legitimate. Demonstrating the circumstances indicated in Article 458[11] of the Code of Civil Procedure with documents – exclusive evidence – would mean proving them, both in amount and in principle. Thus, probability would not be sufficient. Such an obligation would be placed on both the claimant and the defendant, particularly with regard to proving the factual basis for the claim, counterclaim or allegation to set-off. It would be necessary to demonstrate and other factual circumstances involving a change in broad legal relations that are relevant to the outcome of the trial. The order to prove only with documents the circumstances relevant to the outcome of the case may be impossible to fulfil in many cases, for example, due to undermining them by a opposing party who is not constrained by any limitations on procedural means in this regard. One has to bear in mind the fact that Article 458[11] of the Code of Civil Procedure refers to an unlimited range of documents from Article 77[3] of the Civil Code, and the only criterion for evidentiary limitation is the lack of intellectual content from the perspective of the subject matter of the trial. Only official documents (Article 244 of the Code of Civil Procedure) and private documents and equivalent electronic documents bearing a qualified electronic signature (Article 245 of the Code of Civil Procedure) enjoy a presumption of their authenticity. Only the former, however, narrowed down to narrative documents enjoy the presumption of conformity with the actual state of affairs. In contrast, such an attribute cannot be attributed to private documents[23]. Other documents referred to in Article 77[3] of the Civil Code, including those that meet the characteristics of documentary form,

[21] M. Giaro, *Artykuł…*, p. 423.
[22] T. Szanciło, *Komentarz…*, p. 1584.
[23] See the judgment of the Supreme Court of February 28, 2007, V CSK 441/06, LEX.

do not benefit from the indicated presumption in legal proceedings. This means that if a opposing party denies the facts contained in the document, the document's user will be obliged to prove by other means of evidence the claims he presents. It would be impossible in such a situation to assume that evidence other than documents would be inadmissible to prove the facts arising from the documents. This is because it would lead directly to the conclusion that a party has failed to prove the claims from which it derives favourable procedural consequences. One must keep in mind the assumption that Article 458^{11} of the Code of Civil Procedure does not change the rules of substantive force of documents which are evaluated by the court under the authority of Article 233 § 1 of the Code of Civil Procedure[24].

The second concept is also not convincing. The result of its adoption would be different treatment of an entrepreneur who documented commercial activities from the one who did not. The entrepreneur who neglected to document commercial activities would not be limited with regard to the documentary evidence. On the other hand, the one who documented commercial activities could be accused of failing to do so adequately, which could ultimately lead to negative procedural consequences for him. The third concept also does not lead to satisfactory results. The duty to inform under Article 458^{4} § 1 of the Code of Civil Procedure is incumbent on the court with respect to a party to the trial not represented by a professional attorney. It takes effect on the date of filing a statement of claim or a statement of defense, and it is connected with another obligation – instructions on burdens of preclusion under Article 458^{5} § 1 of the Code of Civil Procedure. By serving instructions, the presiding judge calls on the party to present all claims and evidence within the prescribed period, while informing about the obligation to present documents to prove the circumstances under Article 458^{11} of the Code of Civil Procedure. Claims and arguments in support of the legal position of the parties inherently relate to events that occurred before the trial, since the vast majority of the trial is conducted on the basis of facts that arose before the dispute was pending. The circumstances that may arise in the course of a trial are rare and involve changes in fact and law, usually made as a consequence of a party's exercise of formative rights (e.g., rescission, set-off, statute of limitations). In addition, the concept presented does not work for the parties to the trial represented by a professional attorney because in such a case the aforementioned duty to inform is excluded (Article 458^{4} § 2, third sentence of the Code of Civil Procedure).

It seems that the interpretation of Article 458^{11} of the Code of Civil Procedure should go in the direction mentioned in the fourth concept presented according to which documents are not exclusive evidence, and one can only raise the priority of such evidence, without giving it absolute evidentiary power[25]. One must consider

[24] Alike the Supreme Court in its judgment of September 15, 2011, II CSK 712/10, LEX.

[25] T. Szczurowski, *Specyfika nowego postępowania w sprawach gospodarczych*, „Przegląd Ustawodawstwa Gospodarczego 2021, no. 11, p. 44.

the problem of what meaning to give to the categorical statement that the circumstances indicated in this provision can only be demonstrated by a document, unless the party could not submit it for reasons beyond his control. Solving this matter reaffirms the need to depart from the principles of linguistic interpretation, and such an interpretive procedure is justified by the conclusion that the exclusivity of the document as a means of evidence in commercial cases would give such proceedings a formalistic character, even if *prima facie* a different state of facts would emerge from other evidence. Adopting such a restrictive meaning of document evidence could lead to degeneration of procedural outcomes which in many cases would deviate from reality. In such a situation, one must turn to the axiological interpretation of Article 458^{11} of the Code of Civil Procedure, the purpose of which is to speed up the process and to base it on evidence that inherently serves to describe economic activities. Certainly such evidence includes documents, which, unlike human memory, are a faithful and undistorted by the passage of time record of the information contained therein. From this point of view, every entrepreneur should document factual and legal transactions relating to his own commercial and professional activity, so that in a potential lawsuit he can use them to prove his case. The point is that it is not possible to record in the form of documents all commercial activities and it is only feasible in case of the ones that are typical and characteristic of the given profile of a business activity. One cannot also overlook the situational context, i.e. what were the factual opportunities to record the occurrence of a factual or legal event. Therefore, it can be considered that the claimant or the defendant has the burden of proving the facts or legal events in the manner specified in Article 458^{11} of the Code of Civil Procedure in a manner typical of the type of commercial relations taking into account the realities of the case, unless it is impossible for reasons beyond his control. At the same time, this does not relieve either party of the procedural burden to indicate other evidence, as required by Article 458^{5} § 1 of the Code of Civil Procedure. In conclusion, the interpretation of this provision should lead to the conclusion that the court should first take documentary evidence in accordance with the principle of their primacy. Subsequently – other evidence, if all the circumstances of the case had not been clarified, and in particular if the opposing party disputes the claims based on the content of the documents. In other words, the court may not take other evidence in lieu of documentary evidence and it can only do so when, in light of the claims and supporting evidence given by the parties, all circumstances relevant to the outcome of the case have not been clarified. In such an outlined concept, it will be reasonable to make the conclusion, already expressed in the doctrine, that the evidence referred to in Article 458^{11} of the Code of Civil Procedure will correspond in meaning to the beginning of evidence in writing[26]. As is accepted in

[26] T. Szczurowski, *Specyfika…*, p. 44.

case law, the beginning of evidence in writing is a specific document that directly or indirectly by its content indicates the performance of an action[27]. This view is fully authoritative for interpreting Article 458[11] of the Code of Civil Procedure.

SUMMARY

Article 458[11] of the Code of Civil Procedure was intended by the drafters to meet the aspirations of streamlining the commercial process and basing it on documentary evidence used in recording factual and legal transactions taken in the course of commercial activity. It is rational to conclude that this kind of evidence, especially archiving complex commercial processes, is more reliable than other evidence, especially from witness testimony or the hearing of parties, which, due to the passage of time, may not accurately reflect past events. Despite legitimate intentions, legislative intentions have not been realized due to the fact that the provision in question raises serious questions of interpretation. Inadmissible, first of all, is a situation in which a provision of procedural law is in conflict with the provisions of substantive law – in this case – Article 74 § 4 of the Code of Civil Procedure, as is the case with Article 458[11] of the Code of Civil Procedure. This casts a shadow on the fundamental issue - the admissibility of their evidence than documents for the circumstances listed therein. The strengthening in case law of the view of the exclusivity of this evidence would lead to undesirable and even harmful consequences. This would violate the principle of equivalence of evidence for the evaluation of procedural events, according to which a party to a trial to prove his position in the case can present any procedural means, and all of them are subject to a uniform criterion of judicial evaluation on the basis of the directives contained in Article 233 § 1 of the Code of Civil Procedure. A restrictive interpretation could also lead to a violation of the right to a court whose element is to shape the procedural law in such a way that it meets the requirements of justice[28]. With such an interpretation, Article 458[11] of the Code of Civil Procedure would establish the principle of inequality among participants in civil law transactions. A sole proprietor who took advantage of the possibility to exclude the application of the rules on commercial proceedings (Article 458[6] § 1 of the Code of Civil Procedure) would be treated differently. In contrast, another entrepreneur would be treated differently, as he cannot exercise his right to exclude the examination of the case to the exclusion of these provisions. Undeniably, the introduction of an obligation to document commercial activities in business proceedings contributes to its efficiency. However, it should be emphasised that the efficiency of the proceedings cannot be at the expense of the parties to the trial, and such a result would occur if the linguistic interpretation

[27] See the judgment of the Supreme Court of September 29, 2004, II CK 527/03, LEX.
[28] Cf. the justification of the judgment of the Constitutional Tribunal of July 10, 2000, SK 12/99, OTK 2000, No. 5, item 143.

of Article 458[11] of the Code of Civil Procedure were to be perpetuated in the judicature. Its result would be the issuance of judgments that deviate from the facts of the case. Therefore, it is advisable to adopt the concept of interpretation presented earlier that it is not a substantive law standard, thus not coming into conflict with Article 74 § 4 of the Civil Code. The procedural significance of this provision is that the court is obliged to take evidence of the document in the first place and may not replace it with other procedural means. If, on the other hand, all the facts relevant to the case have not been clarified by documents, the court may turn to other evidence. In order to dispel the doubts of interpretation of Article 458[11] of the Code of Civil Procedure, *de lege ferenda* normative content should be transferred to Article 458[10] of the Code of Civil Procedure, and the latter provision to Article 458[11] of the Code of Civil Procedure. In addition it would be appropriate to remove from the provision under review the reference to the exclusivity of this evidence and the conditions for taking other evidence. Such a modified arrangement of the provisions and their modified content would give rise to the conundrum that in the first place the court shall take documentary evidence, and in the absence thereof or failure to clarify the relevant circumstances by other evidence, it would be permissible to take evidence from witnesses. In addition, it would be possible to take other evidence on general principles.

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