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Taking of evidence

 Malta

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European Judicial Network
(in civil and commercial
matters)

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The burden of proof is on the person making an allegation, as is clear from Section 562 of the Code of Organisation and Civil Procedure (*Kodiċi ta' Organizzazzjoni u Proċedura Ċivili*): 'the burden of proving a fact shall, in all cases, rest on the party alleging it'.

1.2 Are there rules which exempt certain facts from the burden of proof? In which cases? Is it possible to produce evidence in order to prove that a specific legal presumption is not valid?

Yes, these rules exist and are found in Section 627 *et seq.* of the Code of Organisation and Civil Procedure. Section 627 mentions documents that may be brought as evidence and need no proof of authenticity, including:

- acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate, or in their absence, by the deputy, assistant or other officer next in rank, authorised to sign such acts;
- registers of any department of the Government of Malta;
- all public acts signed by the competent authorities and contained in the Government Gazette;
- acts of the Government of Malta printed under the authority of the Government and duly published;
- the acts and registers of courts of justice and ecclesiastical courts in Malta;
- certificates issued from the Public Registry Office and the Land Registry;
- sea-protests made under the authority of the Civil Court, First Hall;
- other documents mentioned in the Merchant Shipping Act (including registration certificates signed by the registrar or other authorised official and any other thing written down on the registration certificate which appears signed by the registrar or other authorised official).

There are other documents that may be brought the content of which is exempt from the burden of proof, but which require proof of authenticity. These include:

- acts and registers of any establishment, or public body, authorised or recognised by law or by the Government;
- parochial acts and registers relating to births, marriages and deaths, and the dispositions made according to law in the presence of a parish priest;
- acts and registers of notaries public in Malta;
- books of traders kept according to law, only with regard to an agreement or other transaction of a commercial nature;
- books of public brokers kept according to law, with regard to anything which may have taken place between contracting parties in commercial matters.

Evidence may be produced that runs counter to the contents of these types of documents.

Apart from these documents, there is another presumption regulated by Chapter 16 of the Laws of Malta (the

Civil Code), i.e. that a child born in wedlock is the issue of the wife's husband. This legal presumption may be proven to be no longer valid by means of a sworn application in the Civil Court (Family Section) and the production of evidence that such a presumption is not valid.

1.3 To what extent must the court be convinced of a fact in order to base its judgment on the existence of that fact?

In order to pass sentence in civil cases, a court must be satisfied that sufficient proof on a balance of probabilities has been produced.

2 The taking of evidence

2.1 Does the taking of evidence always require the application by a party, or can the judge in certain cases also take evidence on his/her own initiative?

Every party in a court case, whatever their interest might be, may testify, either at their own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court. When proceedings commence by means of a sworn application, a list of witnesses must be drawn up. The same applies to the sworn reply – it must include this list of witnesses. Only if a party needs to produce a witness who has not been so indicated must the relevant application be filed.

2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?

Once an application to obtain evidence has been accepted, the witnesses are summoned to appear by means of a subpoena issued on the basis of an application by the party wishing to have them summoned. Requests for the issue of such a subpoena in the Court of Magistrates (Malta) and in the Courts of Magistrates (Gozo) in its inferior jurisdiction may be made verbally.

2.3 In which cases can the court reject an application by a party to obtain evidence?

A court may reject an application by a party to obtain evidence when the person summoned is a lawyer, a legal procurator or a priest. Moreover, as a rule, no person present during a hearing may be produced as a witness in the same case. However, it is left to the court's discretion to dispense with this rule in particular cases, if there are good reasons for doing so. In such cases, special laws also apply which regulate official secrecy and do not permit the disclosure of secret and confidential information. Furthermore, the request may be dismissed if the court believes that the witness is not relevant.

2.4 What different means of proof are there?

There are three means of proof that may be produced: documents, *viva voce* and affidavits.

2.5 What are the methods of obtaining evidence from witnesses and do these differ from the means employed to obtain evidence from expert witnesses? What are the rules in relation to the submission of written evidence and expert reports/opinions?

The general rule is that witnesses are examined in case hearings in open court and *viva voce*. However, the law provides for other methods of taking of evidence that may be used:

- Evidence may be produced by affidavit, both for witnesses resident in Malta and those resident abroad.
- In cases where a person is going to leave Malta, or is ill or elderly, or is likely to die or become incapacitated before the hearing of the case, or who cannot appear at the hearing, the court may engage a judicial assistant to hear that person. In such cases, the questions put to the witness, together with their answers, are put in writing, and the witness signs the document or marks a cross instead of their signature.
- The court may also nominate a Supplementary Judge to hear a particular witness, especially in cases where the witness cannot leave their house because of their age.
- If a witness resides abroad, a lawyer may apply for a hearing by means of a letter of request (rogatory

request). The party requesting the hearing of this witness must produce written questions and submit the name and address of the person to appear on their behalf during the hearing of the witness.

- If the court considers it appropriate, it may permit a tape or video recording to be made of the evidence required from the witness.
- The court may engage legal experts, giving them the power to hear witnesses and administer oaths.

When a legal expert is engaged to take evidence, they have the same means at their disposal as courts have.

2.6 Are certain methods of proof stronger than others?

All means of proof are considered of to be equal importance.

2.7 In order to prove certain facts, are certain methods of proof obligatory?

No, but the best proof must always be produced.

2.8 Are witnesses obliged by law to testify?

Yes, the law obliges all summoned witnesses to testify. However, a witness cannot be compelled to answer questions that may result in them being the subject of criminal prosecution.

2.9 In which cases can they refuse to give evidence?

The husband or wife of any party in a court case are competent witnesses and may be compelled to testify in a case at the request of any of the parties. However, the husband cannot be compelled to reveal anything that his wife may have told him in confidence during their marriage, and vice versa, nor can one spouse be compelled to answer questions which may result in the other spouse being the subject of criminal prosecution.

Other exempt facts include those entrusted to lawyers, legal procurators or priests. However, if a lawyer or a legal procurator obtains his client's consent, or the priest obtains the consent of the person who confessed, they may be questioned about matters that came to their knowledge (subject to consent); the lawyer and the legal procurator regarding what has been entrusted to them by the client for the purposes of the case, and the priest for those facts he becomes aware of under the seal of the confessional or through a confession.

Except by court order, accountants, doctors, social workers, psychologists and marriage counsellors may not be asked to reveal information given to them by their clients under professional secrecy or information of which they have gained knowledge in their professional capacity. This privilege is also extended to any interpreter engaged to convey such secret information.

Witnesses bound by professional secrecy may not reveal secret and confidential information, except in certain circumstances according to the particular law applicable to the case.

2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?

If a duly summoned witness does not appear when called, they are guilty of contempt of court and are immediately convicted and fined. The court may also, by means of a warrant of escort or arrest, compel the witness to appear and testify in a subsequent hearing. However, the court may waive the fine given if the failure to appear is justified to its satisfaction.

2.11 Are there persons from whom evidence cannot be obtained?

Any person of sound mind may be produced as a witness, if there are no exceptions regarding their competence. A witness of any age may be produced as long as they are aware of the fact that giving false evidence is wrong.

2.12 What is the role of the judge and the parties in the hearing of a witness? Under what conditions can a witness be heard via videoconferencing or other technical means?

At any point during the examination or cross-examination, the court may ask the witness any question it deems necessary or expedient. On the other hand, each party in the case, whatever their interest, may testify at their own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court.

In cases involving minors, the judge generally hears the minor *in camera* or a Children's Advocate is appointed to hear the minor.

Witnesses living outside Malta are heard in video conference.

3 The evaluation of the evidence

3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?

If evidence has not been obtained by illegal means, the court has no restrictions when delivering its judgment. The only exception is that, as a rule, the court does not take cognisance of facts that the witness says they learnt from others, or of facts stated by other parties who can be produced to testify accordingly.

3.2 As a party to the case, will my own statement count as evidence?

Yes, statements made by a party to a case are admissible.

4 Has this Member State in accordance with Article 2(1) of the Taking of Evidence Regulation specified other authorities that are competent to take evidence for the purposes of judicial proceedings in civil or commercial matters under the Regulation? If so, what proceedings are they competent to take evidence in? Can they only request taking of evidence or also assist in the taking of evidence on the basis of a request from another Member State? See also notification under Article 2(1) of the Taking of Evidence Regulation.

No.

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