Taking of evidence

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European Judicial Network
(in civil and commercial matters)

Italy

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The burden of proof is governed by the principles set out in Article 2697 of the Civil Code, which states that: 'Those intending to enforce a right before a court shall provide evidence of the facts supporting the claim. A party challenging the validity of those facts, or claiming that the right has changed or is extinguished, shall provide evidence of the facts supporting such objection.'

Therefore, in general, anyone wanting to make use of a specific legal action must provide evidence of the facts supporting that claim. For example, a claimant seeking payment due under a contract must prove the existence, validity, and expiry of the time limits of the contract. The defendant wishing to deny the payment must prove the modifying, precluding or extinguishing facts put forward in their opposing claim, such as payment already having been made, discharge of debt, or a higher debt being due to them.

If the applicant is unable to substantiate his or her claim, the application is dismissed, irrespective of whether the defendant submits supporting evidence or arguments in their defence. The same rule also applies to a defendant who, in turn, makes a counterclaim against the plaintiff (*domanda riconvenzionale*).

Article 2698 of the Civil Code renders null and void any agreement intended to transfer or alter the burden of proof in respect of an inalienable right, or which makes it overly difficult for either of the parties to exercise their rights.

Insufficient evidence harms the case of the party – be it the claimant or the defendant – who has to prove or disprove the facts, as insufficient evidence is considered to be equivalent to no evidence.

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?

The burden of proof does not apply in the following cases:

- In the case of presumptions, i.e., where the law itself determines the evidential value of certain facts, or allows the court to draw conclusions about an unknown fact from a known fact (Article 2727 of the Civil Code).

Presumptions are divided into:

- legal presumptions: those established by law, which may be rebuttable (*iuris tantum*), meaning that they may be overthrown if evidence is produced to the contrary, or irrebuttable (*iuris et de iure*), meaning that they cannot be overthrown by seeking to produce contrary evidence in court;

- simple presumptions: left to the careful consideration of the court, which is to admit only serious, precise and consistent presumptions. Moreover, facts for which the law does not allow witness evidence cannot be admitted

as simple presumptions (Article 2729 of the Civil Code);

- Facts of common knowledge (*fatti notori*), i.e. facts which are generally known at the time and place of the ruling and which cannot be disputed (Article 115 of the Code of Civil Procedure);
- Uncontested or admitted facts, i.e. facts put forward by both parties or admitted – even tacitly – by the party that might have an interest in challenging them, provided that that party appeared in court (Article 115(1) of the Code of Civil Procedure).

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?

The court's decision to uphold a claim or any objections against it must be based purely on facts that are fully proven, either directly or by presumption. In civil actions, the court must hold that a fact is more probable than the contrary, based on evidence presented in court.

The court's judgment may not be based on unproven facts, even where they are plausible (Article 115(1) of the Code of Civil Procedure).

2 The taking of evidence

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

Under the Italian legal system, the taking of evidence is governed by the principle that the scope of the proceedings is determined by the parties (*principio dispositivo*), laid down in Article 115(1) of the Code of Civil Procedure under which the court must base its judgment on the evidence submitted by the parties, 'except in situations provided for by law'.

However, certain exceptions to this rule are set out in the following sections of the Code of Civil Procedure:

- Article 117: allows the informal questioning of the parties;
- Article 118: allows inspections of persons and objects to be ordered;
- Articles 61 and 191: allow the court to request expert opinions;
- Article 257: allows the court to summon a witness who has been mentioned by another witness;
- Article 281-ter: allows a general court (*tribunale*) sitting with a single judge to order the taking of witness evidence if the parties' account of the facts mentions individuals who would appear to be acquainted with the facts.

In labour disputes, the Code gives the judge more powers, specifically in:

- Article 420: provides for the free questioning of the parties during the hearing on the case;
- Article 421: provides that the court may at any time on its own initiative order the admission of any type of evidence, except 'deciding oath' (*giuramento decisorio*), even beyond the limits set by the Civil Code. This power cannot be exercised to prove facts that have not been put forward by the parties within the time limits laid down by law. In the event that evidence of its own motion is admitted, the parties have the right to submit evidence to the contrary.

For cases involving people, minors and families, Article 473-bis(2) provides that the court may order evidence outside the limits of admissibility under the Civil Code, in line with the adversarial principle and the right to evidence to the contrary. The court may order asset investigations, including through the police.

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

If a party requests proof of the facts, the other party is allowed to request proof to the contrary, provided that the claims have been made within the legally established time limits. The court will grant both applications if it has reason to believe that the facts submitted will be relevant for the purposes of arriving at its judgment.

If the court admits the evidence, it will then proceed to hear it.

After the evidence has been taken, the case will be adjudicated.

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

The court will reject an application for the taking of evidence where the evidence would be valueless or inadmissible under the law (for example, if a claim based only on witness statements is made regarding a contract that is required in written form by law), or where the facts to which the application refers would be irrelevant for the purposes of the judgment (for example, testimony concerning a fact unrelated to the subject matter of the dispute). The court may also exclude overwhelming evidence for facts which are already sufficiently substantiated.

2.4 What different means of proof are there?

Italian law distinguishes between documentary and non-documentary evidence.

Documentary evidence includes:

- public documents (Articles 2699 et seq. of the Civil Code);
- private documents (Articles 2702 et seq. of the Civil Code);
- telegrams (Articles 2705 et seq. of the Civil Code);
- domestic files and records (Article 2707 of the Civil Code);
- accounting records of businesses (Article 2709 of the Civil Code);
- mechanically reproduced copies (Article 2712 of the Civil Code);
- copies of documents and contracts (Articles 2714 et seq. of the Civil Code).

Non-documentary evidence includes:

- witness evidence (Articles 2721 et seq. of the Civil Code);
- confessions (Articles 2730 et seq. of the Civil Code);
- sworn statements (Articles 2736 et seq. of the Civil Code);
- inspections (Articles 258 et seq. of the Code of Civil Procedure).

There are also expert reports, which provide the court with the technical knowledge it lacks.

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?

Witness evidence is admitted by the court (Article 245 of the Code of Civil Procedure); the court’s order requires the witness to appear to give evidence on pain of coercive measures and a fine if he or she fails to appear.

The court establishes the place, time and manner of the taking of evidence. On the request of the concerned party, the judicial officer serves the summons on the witness. The witness reads out a commitment to tell the truth, and is then questioned by the judge — the parties may not question witnesses directly.

Expert witnesses are appointed by the court, which asks them questions and invites them to appear at the hearing and provide a sworn statement. Recently, the possibility has been introduced for expert witnesses to send a digitally signed sworn statement, thereby avoiding having to attend the hearing (Article 193 of the Code of Civil Procedure).

As a rule, expert witnesses prepare a written report, but the court may also order them to appear and be questioned orally at the hearing (Section 195 of the Code of Civil Procedure).

Written evidence forms part of the proceedings once it is placed on the party’s file, at the time of first appearance or later, subject to the time limits laid down in law.

2.6 Are certain methods of proof stronger than others?

In Italy, a distinction is made between evidence that can be freely assessed by the court and legal evidence. Legal evidence takes precedence over any other form of evidence. Legal evidence includes public documents,

sworn statements and confessions.

Public documents (Articles 2699 et seq. of the Civil Code) are documents drafted, with the required formalities, by a notary (*notaio*) or other public official authorised to confirm their public status in the place where the document was prepared. Public documents have full value as evidence unless they are shown to be false. Barring this challenge, they constitute absolute and unconditional proof of facts that the public official certifies having carried out personally or which took place in their presence. However, the veracity of the statements made by the parties in public documents are to be freely assessed by the court (i.e. it cannot be proved by other evidence that the statement was not made, but it can be proven that the contents thereof are false).

1. A confession (Article 2730 of the Civil Code) is a declaration made by one party attesting to the veracity of facts that are unfavourable to themselves and in favour of the other party.

An oath (Article 2736 of the Civil Code) is a sworn statement by the party on the truth of a fact. It can be provided at the request of the other party to influence a ruling or at the request of the court when a fact is only partially proved or where the economic value of an item cannot be ascertained otherwise. In practice, it is very rarely used.

2. Furthermore, irrebuttable presumptions (*presunzioni iuris et de iure*) (Article 2727 of the Civil Code) are even more effective, as evidence submitted in rebuttal is not admissible.

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

The law requires that certain facts be proven only by means of specific forms of evidence, in some cases requiring public documents, and in other cases requiring written documents that may be public or private.

2.8 Are witnesses obliged by law to testify?

Witnesses are obliged to testify, with criminal consequences in the event of refusal, providing a false testimony or withholding evidence (Article 372 of the Criminal Code), unless the law provides otherwise. Certain people are exempt from giving testimony and have the option to refrain from giving evidence.

2.9 In which cases can they refuse to give evidence?

In the cases laid down in the Code of Criminal Procedure, to which the Code of Civil Procedure refers: these cover individuals who may refuse to give evidence because they are bound by professional secrecy, official secrecy or State secrecy.

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

Under Article 256 of the Code of Civil Procedure, a witness who attends court but refuses to testify without proper justification, or who gives good reason to suspect that he or she is giving false testimony or withholding evidence, will be reported to the public prosecutor by the court by forwarding a copy of the minutes of the hearing.

Furthermore, if the witness fails to appear, Article 255 of the Code of Civil Procedure empowers the court to order that the witness be forcibly brought to court by the police and to impose a fine.

2.11 Are there persons from whom evidence cannot be obtained?

Individuals having a personal interest in the facts of the case cannot give evidence, even if they have not officially taken part in the proceedings as a party (Article 246 of the Code of Civil Procedure).

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?

The judge examines the witness, asking direct questions concerning the facts, which are admitted as being relevant to the proceedings and any questions on these same facts requested by the parties’ lawyers during the examination.

Videoconferencing, while not expressly provided for by the Code of Civil Procedure, is not excluded. Article 202 of the Code of Civil Procedure provides that when the investigating judge orders evidence to be taken, they 'shall stipulate the time, place and means of taking' that evidence.

Recently, the possibility for hearings to take place via remote audiovisual connections, under certain conditions, has been introduced into Italian law (Article 127-bis of the Code of Civil Procedure). In Italian civil proceedings, a hearing via remote audiovisual connections may be ordered by the judge where only the defence counsel, the parties, the public prosecutor's office and the auxiliary members of the court are to be present. However, if witnesses are to be heard, it is obligatory for them to appear in person before the court.

In foreign proceedings, where a foreign court is authorised to take evidence directly, that court may examine a witness by videoconference, if that is provided for by the procedural law of that court. In the event that evidence is taken by an Italian court, the witness must appear in person before the court, as Italian law does not allow testimony by videoconference. If authorised, the requesting foreign court may attend the taking of evidence, including by videoconference.

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?

The court takes no account of any evidence which was not formally submitted and admitted.

In civil proceedings, illegally-obtained documents are normally admitted, except when there are legal provisions that provide otherwise. The criminal liability of the party who committed the offence to obtain the document remains unaffected.

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

Any statements provided by a party that is favourable to itself does not count as evidence. However, a confession (thus having negative connotations) made during formal questioning will count as negative evidence against the party who has made it. Declarations that are unfavourable to the party who made them are also relevant when made outside of the proceedings, such as in a letter.

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.

Italy does not recognise any other authority outside the court.

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