

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

Preliminary remark: the general rules on admissible evidence, its probative value, burden of proof and the form of production of evidence are laid down in the provisions of the Portuguese Civil Code and Code of Civil Procedure indicated below. The links to the consolidated Portuguese version of these two legal documents are provided at the end of this factsheet.

Pursuant to Article 342 of the Portuguese Civil Code,

as a rule, the person who invokes a right must prove the facts constituting the right

the party against whom the right is invoked must demonstrate facts impeding, modifying or terminating the right

in the event of doubt, the facts must be considered as constitutive.

In the case of negative assessment proceedings (Article 10(3)(a) of the Portuguese Code of Civil Procedure and Article 343 of the Portuguese Civil Code), where one party is not seeking a judgment against the other party but merely wishes the court to establish the non-existence of a right or fact, it is up to the defendant to prove the elements constituting the right that is being claimed.

In court actions that must be brought within a certain time limit following the date on which the plaintiff has become aware of a certain fact, it is up to the defendant to prove that the time limit has already expired, unless another solution is specifically established by law (Article 343(2) of the Portuguese Civil Code).

If the right invoked by the plaintiff is subject to a suspensive condition (an uncertain event in the future on whose occurrence the parties have made the effects of the legal transaction dependent – Article 270 of the Portuguese Civil Code) or to a start date (point in time from which the right is triggered – Article 278 of the Portuguese Civil Code), it is up to the applicant to prove that the condition has been met or that the start date has passed (Article 343(3) of the Portuguese Civil Code).

If the right invoked by the plaintiff is subject to a resolutive condition (an uncertain event in the future on whose occurrence the parties have made the cessation of the effects of the legal transaction dependent – Article 270 of the Portuguese Civil Code) or to an end date (point in time after which the right no longer applies – Article 278 of the Portuguese Civil Code), it is up to the defendant to prove that the condition has been met or that the end date has passed (Article 343(3) of the Portuguese Civil Code).

The above rules are reversed where there is a legal presumption (consequence or inference which the law deduces from a known fact to establish an unknown one), exemption or release from the burden of proof or a valid agreement to that effect, and, in general, wherever the law so determines (Article 344 (1) of the Portuguese Civil Code). The burden of proof is also reversed if the opposing party has intentionally made it impossible for the proof to be presented by the party which should produce it (Article 344(2) of the Portuguese Civil Code).

An agreement to reverse the burden of proof is invalid:

where an inalienable right is involved (one which a party cannot waive merely by making a statement that it wishes to do so) or where it might make it excessively difficult for one of the parties to exercise the right (Article 345(1) of the Portuguese Civil Code).

Similarly, an agreement to exclude any legal means of proof or to allow a means of proof other than that provided for by law is also invalid. If the legal decisions on the proof are based on reasons of public policy, such agreements are invalid under all circumstances (Article 345(2) of the Portuguese Civil Code).

Where evidence is presented by the party on which the burden of demonstrating a particular fact falls, the opposing party can present counter-evidence to cast doubt on those facts. If there is sufficient doubt, then the decision must go against the party which had the obligation to prove the fact in question (Article 346 of the Portuguese Civil Code).

Full proof may be countered only by evidence demonstrating that the fact on which it is based is not true, without prejudice to other restrictions specifically determined by law (Article 347 of the Portuguese Civil Code).

Anyone invoking customary, local or foreign law is responsible for proving its existence and content, but the court must endeavour to obtain the respective knowledge of its own motion (Article 348(1) of the Portuguese Civil Code). The court is also responsible for ascertaining facts of its own motion whenever it has to decide on the basis of customary, local or foreign law and none of the parties has invoked it, or the opposing party has acknowledged its existence and content or has not lodged any opposition (Article 348(2) of the Portuguese Civil Code). If it is unable to determine the content of the applicable law, the court applies the rules of Portuguese common law (Article 348(3) of the Portuguese Civil Code).

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, there are rules which exempt certain facts from the burden of proof.

Under Article 412(1) of the Portuguese Code of Civil Procedure, proof is not required for:

well-known facts that are common knowledge;

facts which the court is aware of by virtue of the exercise of its functions; when the court calls upon these facts, documentary proof of the facts must be attached to the case.

Portuguese law allows presumptions to be made from conclusions drawn by the law or judge from a known fact to establish an unknown fact (Article 349 of the Portuguese Civil Code).

A party which has a legal presumption in its favour does not need to prove the presumed fact (Article 350(1) of the Portuguese Civil Code).

Legal presumptions may be rebutted, that is, counter-evidence may be presented, except in cases where the law does not allow this, i.e. where counter-evidence may not be presented (Article 350(2) of the Portuguese Civil Code).

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 value of each means of proof varies according to its nature.

Authentic documents have full probative force in respect of certain facts, which can only be rebutted by proof to the contrary (Articles 369 to 372 of the Portuguese Civil Code).

Private documents have full probative force if the handwriting and signature, or just the signature, are recognised or not contested, unless challenged as false (Articles 373 to 379 of the Portuguese Civil Code).

There are special provisions regarding the probative force of records, written documents, notes, certificates, extracts of certificates, authenticated copies and photocopies (Articles 380 to 387 of the Portuguese Civil Code).

The court freely assesses evidence from expert witnesses, evidence obtained from judicial inspections and testimonial evidence (Articles 389, 391 and 396 of the Portuguese Civil Code).

Legal presumptions are permitted only in the same cases and conditions as permitted for testimonial evidence (Article 351 of the Portuguese Civil Code).

The free assessment of evidence by the court does not cover facts for which the law requires special formalities to prove them, or those that can be proven only by documents or that are fully proven, either by documents, by agreement or confession of the parties (Article 607(5) of the Portuguese Code of Civil Procedure).

The court must consider all evidence produced, whether or not originating from the party that should have produced it, without prejudice to the provisions declaring the statement of a fact to be irrelevant if it is not made by a certain interested party (Article 413 of the Portuguese Code of Civil Procedure).

Any doubt about the reality of a fact or the burden of proof is resolved against the party which stands to benefit from the fact (Article 414 of the Portuguese Code of Civil Procedure).

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?

Portuguese law sets out the 'inquisitorial principle', namely the judge's duty to carry out or order, of its own motion, all actions necessary to determine the truth and fair settlement of the dispute with regard to the facts that he or she is lawfully entitled to examine (Article 411 of the Portuguese Code of Civil Procedure).

The judge may, at any stage in the proceedings, call for the parties to appear in person to give evidence regarding the facts which are of relevance for the decision in question (Article 452(1) of the Portuguese Code of Civil Procedure).

It is the responsibility of the court, on its own initiative or at the request of one of the parties, to request information, technical advice, plans, photographs, drawings, objects or other documents needed for clarifying the truth. Such requests can be made to official bodies, the parties disputing the case or third parties (Article 436(1) and (2) of the Portuguese Code of Civil Procedure).

The court, whenever it considers it appropriate to do so, can, on its own initiative or at the request of either of the parties, investigate things or people. This must be done in such a way as to safeguard privacy, family life and human dignity and should be aimed at clarifying any fact which is relevant for the decision in question. The court can carry out an on-the-spot visit or can order a reconstruction of events to be undertaken, if it believes this is necessary (Article 490(1) of the Portuguese Code of Civil Procedure).

When, in the course of a court case, there are reasons to presume that a person who has not been called as a witness has knowledge of facts which are important for making a correct decision in the case, the judge should order that that person be summoned to give evidence in court (Article 526(1) of the Portuguese Code of Civil Procedure).

The judge may also, on their own initiative, order evidence to be given by experts (Article 477 of the Portuguese Code of Civil Procedure).

The duty of cooperation of all persons to uncover the truth is enshrined in Article 417 of the Portuguese Code of Civil Procedure.

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

Evidence is generally stated by the parties in their pleadings, particularly in the statement of claim and in the statement of defence (e.g. Articles 552 and 572 of the Portuguese Civil Code).

The evidence application may be amended at the pre-trial hearing and the list of witnesses may be changed up to 20 days before the trial (Article 598 of the Portuguese Code of Civil Procedure).

At the pre-trial hearing or by order, as applicable, the court determines which means of proof are admissible and can be adduced (Articles 591 and 593 of the Portuguese Code of Civil Procedure).

As a general rule, evidence is taken at the final hearing. On an exceptional basis, however, the court may allow evidence to be given at an earlier stage (Article 419 of the Portuguese Code of Civil Procedure).

Except in cases where the judge changes the order of legal events, pursuant to Article 604(3) of the Portuguese Code of Civil Procedure evidence is taken in the following order:

- the parties' statements;
- videos or sound recordings;
- verbal clarifications by experts;
- examination of witnesses.

If, after the trial is over, the judge believes that they do not have sufficient information, they may reopen the trial to hear the people they wish to or to order the production of other means of proof (Article 607(1) of the Portuguese Code of Civil Procedure).

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

The application to obtain evidence can be rejected if it is presented outside the time limit laid down by law for this purpose or if the evidence is inadmissible. Below are some examples that can give rise to rejection, in whole or in part, of an application to obtain evidence:

if the number of witnesses exceeds the number permitted by law, the number of witnesses that exceed the limit will not be admitted, without prejudice to the judge allowing the questioning of witnesses exceeding the established legal limit, under exceptional circumstances (Article 511 of the Portuguese Code of Civil Procedure);

if a party is listed as a witness (Article 496 of the Portuguese Code of Civil Procedure);

if, during the preliminary examination of a witness, the judge finds that they are unfit to testify (Article 513 of the Portuguese Code of Civil Procedure);

if the party is requested to testify regarding facts they are not in a position to state (Article 454 of the Portuguese Code of Civil Procedure);

in general, if the judge, exercising their discretion, feels that the evidence is irrelevant or dilatory (Article 6 of the Portuguese Code of Civil Procedure).

Under Article 417(2) of the Portuguese Code of Civil Procedure, where a means of proof results in the violation of the physical or moral integrity of a person, intrusion into their private or family life, home, correspondence or telecommunications, or violates professional secrecy, the confidentiality of civil servants or State secrets, the person called to testify may refuse to cooperate with the court. However, if that refusal is based on a duty of confidentiality, the court may check whether the refusal is justified and release the person from that duty of confidentiality.

Therefore, if a Portuguese court is requested to produce evidence which could result in a breach of confidentiality, the court in the Member State of origin must indicate in the application form that it wishes the Portuguese court to take the initiative to waive the duty of confidentiality.

2.4 What different means of proof are there?

The following means of proof exist:

- (a) Presumptions (Article 349 of the Portuguese Civil Code);
- (b) Confessions obtained from the testimony of a party (Article 352 of the Portuguese Civil Code);
- (c) Statements by a party that differ from confessions obtained (Article 466 of the Portuguese Code of Civil Procedure);
- (d) Documents (Article 362 of the Portuguese Civil Code and Article 423(1) of the Portuguese Code of Civil Procedure. Documentary evidence includes the opinions of lawyers, jurists or experts that are not obtained from expert evidence ordered by the court (Article 426 of the Portuguese Code of Civil Procedure);
- (e) Expert evidence (Article 388 of the Portuguese Civil Code and Article 467(1) of the Portuguese Code of Civil Procedure);
- (f) Judicial inspections (Article 390 of the Portuguese Civil Code and Article 490(1) of the Portuguese Code of Civil Procedure). Evidence obtained from judicial inspections includes non-qualified judicial assessment (Article 494 of the Portuguese Code of Civil Procedure);
- (g) Testimonial evidence (Article 392 of the Portuguese Civil Code and Article 495(1) of the Portuguese Code of Civil Procedure);
- (h) Presentation of objects (Article 416(1) of the Portuguese Code of Civil Procedure).

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?

Portuguese civil procedure law is based on oral proceedings and immediacy. As such, and as a rule, it is during the hearing and trial that:

the witnesses and parties (Articles 452, 456, 457, 466, 500, 501, 503, 506, 518 and 520 of the Portuguese Code of Civil Procedure) are heard in person by the presiding judge. If they reside outside of the place where the court is located, the witnesses and parties are heard via videoconferencing. In specific situations (e.g. illness or extreme difficulty in appearing), the witnesses and parties may be heard by telephone, by any other means of direct communication indicated by the court, or in writing, or the court may go to the place where they are located to question them. Exceptionally, some witnesses enjoy the prerogative of providing written testimony;

the court may call experts to provide oral clarification during the hearing. Experts from official establishments may also be heard by videoconferencing from their place of work (Article 486 of the Portuguese Code of Civil Procedure);

the court may carry out on-site inspections or order the re-enactment of the facts, in which case the judge will be accompanied by a specialist if deemed appropriate (Article 490 and 492 of the Portuguese Code of Civil Procedure);

the closing arguments by the lawyers are made orally before the judge.

By contrast, expert reports, documents, opinions and written evidence in general, photographs, videos, sound recordings, and the presentation of moveable objects are included in the case files beforehand so that they may be challenged and examined during the trial (Article 416 of the Portuguese Code of Civil Procedure).

Fixed or movable objects that are unable to be included in proceedings may be inspected by the court during the final hearing or it may order an expert examination or non-qualified judicial assessment thereof (Article 416 of the Portuguese Code of Civil Procedure).

In urgent and justified situations, the judge may order the early production of any means of proof (Article 419 of the Portuguese Code of Civil Procedure).

Where persons to be heard reside abroad, they may be questioned before the hearing, by letters rogatory or, when Portuguese nationals, by letters rogatory sent to the Portuguese consulate (Article 500(b) of the Portuguese Code of Civil Procedure). Where evidence is obtained abroad via videoconferencing, it is usually taken during the trial.

2.6 Are certain methods of proof stronger than others?

Yes, probative value varies depending on the nature of each means of proof (see answer to question 1.3).

Below are some examples where certain means of proof are stronger than others.

Testimonial evidence is not admitted if the business declaration, by law or as stipulated by the parties, must be in writing or must be evidenced in writing (Article 393(1) of the Portuguese Civil Code).

Testimonial evidence is also not admitted when the event has been fully proven by documents or by other means with full probative force (Article 393(2) of the Portuguese Civil Code).

Testimonial evidence is inadmissible if it is based on any agreements that are contrary or additional to the content of authentic or private documents with full probative force, whether the agreements took place prior to the creation of the document, at the same time, or subsequently (Article 394(1) of the Portuguese Civil Code).

A written judicial confession has full probative force against the confessor (Article 358(1) of the Portuguese Civil Code).

A non-judicial confession, in the form of an authentic or private document, is considered as proven under the terms applicable to these documents and, if it was made to the other party or their representative, has full probative force (Article 358(2) of the Portuguese Civil Code).

A non-judicial confession that does not take the form of a document may not be proven by witnesses in cases where testimonial evidence is not admitted; when this is admitted, the court freely considers its probative force (Article 358(3) of the Portuguese Civil Code).

Non-written judicial confessions and non-judicial confessions made to a third party or contained in a will are freely considered by the court (Article 358(4) of the Portuguese Civil Code).

A confession is not evidence against the confessor (Article 354 of the Portuguese Civil Code) if: it is declared insufficient by law or relies on facts whose recognition or examination is prohibited by law; it relies on facts relating to inalienable rights; the confessed fact is impossible or clearly non-existent.

Testimonial evidence about a sham agreement or transaction is not admissible when invoked by the perpetrators of the sham (Article 394 of the Portuguese Civil Code).

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

Yes, specifically in the following cases:

when the law requires, as a form of business declaration, a document with a certain level of formality, such a document cannot be substituted by another means of proof or by another document unless this has greater probative force (Article 364(1) of the Portuguese Civil Code);

when the law requires a specific formality for the existence or proof of a legal fact, this cannot be dispensed with (Article 220 of the Portuguese Civil Code).

2.8 Are witnesses obliged by law to testify?

All persons, whether or not they are parties to the case, are required to cooperate in the discovery of the truth. They must answer what they are asked, submit to the necessary investigations, supply what they are requested to, and carry out acts that are stipulated (Article 417(1) of the Portuguese Code of Civil Procedure).

2.9 In which cases can they refuse to give evidence?

The following persons may refuse to give evidence, except in proceedings aimed at verifying a child's birth or death (Article 497(1) of the Portuguese Code of Civil Procedure):

relatives in the ascending line in cases involving their descendants, and adoptive parents in cases involving their adopted children, and vice versa;
a father-in-law or mother-in-law in a case involving their son-in-law or daughter-in-law, and vice versa;
any spouse or ex-spouse in cases where one of the parties is the other spouse or ex-spouse;
anyone who lives or has lived in cohabitation in similar conditions to those of spouses with either of the parties in the case.

It is the responsibility of the judge to advise the people referred to above that they can refuse to testify (Article 497(2) of the Portuguese Code of Civil Procedure).

Witnesses bound by professional secrecy, the secrecy incumbent on public employees and State secrecy can legitimately refuse to testify in relation to facts covered by such secrecy (Article 497(3) of the Portuguese Code of Civil Procedure).

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

Refusal to take an oath is treated as a refusal to testify and, in either case, the court may impose a fine on the witness (Articles 417(2), 459 and 513 of the Portuguese Code of Civil Procedure).

If a witness unjustifiably fails to appear, the court may impose a fine or order the witness to appear under custody (Article 508(4) of the Portuguese Code of Civil Procedure).

Providing false testimony is a crime (Article 360 of the Portuguese Criminal Code).

2.11 Are there persons from whom evidence cannot be obtained?

People who are not mentally fit to testify on the facts to be proven may not serve as witnesses (Article 495 of the Portuguese Code of Civil Procedure). It is the responsibility of the judge to assess the competence of the people summoned to testify as witnesses.

People who may give testimony as parties in the case are forbidden to testify as witnesses (Article 496 of the Portuguese Code of Civil Procedure).

People with legal capacity, assisted adults, child carers, legal persons and companies may give testimony as parties, in accordance with Article 453 of the Portuguese 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?

Witnesses testify at the final hearing in person or by videoconferencing (Article 500 of the Portuguese Code of Civil Procedure), except in the following circumstances:

when evidence is taken at an earlier stage (this can be done where there is a well-founded fear that it may be impossible or very difficult to collect testimony from a certain person);

evidence is taken by letters rogatory sent to a Portuguese consulate;

evidence is taken in a person's residence or service headquarters (prerogative granted to the President of the Republic and foreign diplomatic agents under conditions of reciprocity);

it is impossible for the person to appear in court;

the prerogative to testify in writing is used.

The witness must testify in an accurate manner, indicating the reasons and circumstances which justify their knowledge of the facts; the reason invoked for the knowledge must, insofar as possible, be set out in detail and well-founded (Article 516(1) of the Portuguese Code of Civil Procedure).

The questioning is done by the lawyer of the party which called the witness. The lawyer of the other party can, with regard to the facts covered in the testimony, put questions to the witness to complete or clarify the testimony (Article 516(2) of the Portuguese Code of Civil Procedure).

The judge must prevent the lawyers from being impolite to the witnesses and from putting questions or considerations which are irrelevant, loaded, misleading or mischievous (Article 516(3) of the Portuguese Code of Civil Procedure).

Questioning and cross-examination are carried out by representatives of the parties, without prejudice to any information requested by the judge or any questions the judge may deem it appropriate to ask in order to establish the truth (Article 516(4) of the Portuguese Code of Civil Procedure).

The judge carries out the questioning himself or herself where this is necessary to ensure the witness's composure or to put an end to inappropriate cross-questioning (Article 516(5) of the Portuguese Code of Civil Procedure).

Before the witness answers the questions put to them they can consult the case file, demand that they be shown certain documents forming part of the case file, or present documents aimed at corroborating their testimony; only documents which the respective party could not have offered are received and placed in the case file (Article 516(6) of the Portuguese Code of Civil Procedure).

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?

Yes, in particular in the situations provided for in the following articles of the Portuguese Code of Civil Procedure:

- 421 - limits on the extra-procedural value of the evidence
- 444, 446 and 451 - objecting to documents, challenging the authenticity of documents and falsity of judicial acts
- 464 - declaring a confession invalid
- 490 - violating the right to privacy and family life and human dignity
- 514 - challenging testimonial evidence on the same grounds on which the judge must object to the testimony.

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

Yes, a confession whereby the party recognises a fact that is detrimental to him or her and benefits the counter party is obtained through the testimony of the party (Article 352 of the Portuguese Civil Code and Article 452 of the Portuguese Code of Civil Procedure).

The same applies to statements requested from a party by the parties, until the start of pleadings in the first instance, regarding facts in which they have been personally involved or of which they have direct knowledge (Article 466(1) of the Portuguese Code of Civil Procedure).

The court freely considers the statements of the parties, except where they involve a confession (Article 466(3) of the Portuguese Code of Civil Procedure).

In this regard, please also see the answer to question 2.6

Related links

[Portuguese Civil Code](#)

[Portuguese Code of Civil Procedure](#)

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