Taking of evidence

Francja

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

Pursuant to Article 1353 of the Civil Code (*code civil*), persons requesting enforcement of an obligation must prove its existence. Similarly, persons who claim to be no longer bound by an obligation must prove that it has been extinguished.

In principle therefore, each of the litigants must provide proof of the alleged facts. For example, Article 9 of the Code of Civil Procedure (*code de procédure civile*) provides that 'each party must prove, according to the law, the facts necessary for the success of their claim.'

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?

In certain cases, there are presumptions that give exemption from providing proof of a fact that is impossible or difficult to establish.

Legal presumptions reverse the burden of proof incumbent on the person who has to prove the existence of the alleged fact. In general, presumptions are said to be 'rebuttable': evidence can be provided to rebut them. Example: where a child is born during a marriage, the mother's husband is presumed to be the father, but an action may be brought to contest paternity.

In rarer cases, presumptions are said to be 'irrebuttable': in these cases, no evidence to the contrary is admissible. Example: the authority of a court decision prevents evidence to the contrary being brought against that decision.

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 may base its decision only on proven or uncontested facts.

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?

Measures of inquiry may be ordered by the judge at the request of one of the parties, but the judge may also take the initiative.

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

If the judge orders a measure of inquiry at the request of one of the parties, the registry of the court informs the appointed specialist of the scope of their task; the specialist calls on the parties to be present during all the processes undertaken. In the case of an expert opinion, this will not begin until the relevant party has paid a sum of money (a deposit), to be decided by the judge, which will guarantee payment for the expert. All measures of inquiry are carried out in the presence of the parties.

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

The judge may refuse a request for a measure of inquiry on the grounds that it would have the effect of mitigating the inaction of the party bearing the burden of proof or that it is unnecessary.

2.4 What different means of proof are there?

French civil law draws a distinction. For facts (for example, an accident), proof is discretionary and may therefore be provided by any means (documents, witness testimony, etc.). For legal transactions (contract, donation, etc.), written evidence is required in principle, but the law provides for exceptions (for example, for transactions relating to a sum below a certain amount, as defined by decree, or if it is impossible to produce a written document). It should be noted that, between traders, the principle of evidence by any means applies, including for legal transactions.

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 testimony can be gathered in two separate forms: orally, through an investigative procedure, or in writing, in the form of statements which must be drafted in compliance with certain formalities. The written statement must state in particular the identity of the witness and, if applicable, their family relationship or relationship through marriage, subordination, collaboration or shared interest with either of the parties. The statement must also indicate that it has been drawn up for use in legal proceedings and that its author is aware that false testimony can give rise to criminal sanctions. It is also possible to gather witness testimony in the form of affidavits (these are documents drawn up by a public official containing the declarations made by several witnesses on the facts to be proved).

Expert opinion differs from witness testimony in that it is a measure of inquiry consisting in entrusting a particularly competent person with the task of giving a purely technical opinion, after having invited the parties to provide explanations. The expert gives an opinion, orally or in writing. Written opinions are drawn up in the form of a report containing, in particular, the written observations of the parties. The judge is not bound by the expert's opinion.

2.6 Are certain methods of proof stronger than others?

A public document (*acte authentique*), drawn up by a public official (notary, bailiff) in the course of their duties, is deemed to be authentic unless a plea of forgery is entered.

A private document (*acte sous-seing privé*), drawn up without the involvement of a public official, by the parties themselves and with their signatures only, is deemed to be authentic in the absence of evidence to the contrary.

Witness testimony and other methods of proof are left to the judge's discretion.

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

As explained under 2.4, written proof is necessary to prove the authenticity of a legal transaction the value of which exceeds EUR 1 500. In contrast, proof of a fact may take any form.

2.8 Are witnesses obliged by law to testify?

Every person is obliged to cooperate in legal proceedings with a view to establishing the truth.

2.9 In which cases can they refuse to give evidence?

Persons in possession of information gathered in the practice of their profession and covered by professional secrecy must refuse to testify, failing which they are liable to criminal sanctions. Furthermore, witnesses may refuse to testify at any time if they can prove a legitimate impediment (examples: impossibility of travel, illness, professional reasons). The judge will assess the legitimacy of this impediment.

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

Defaulting witnesses and those who, without legitimate cause, refuse to give evidence or to take an oath may be ordered to pay a civil fine of up to EUR 10 000.

It should also be noted that perjury is punishable as a criminal offence.

2.11 Are there persons from whom evidence cannot be obtained?

Any person may be heard as a witness, except the parties themselves and persons who are not competent to testify in court, which includes those who lack capacity (minors and protected adults) or with certain criminal convictions (deprivation of civil rights). However, the judge may question them for information purposes, without requiring them to take an oath. Furthermore, in divorce or legal separation proceedings, the descendants of the spouses may never give evidence or testify concerning the grievances raised by the spouses.

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 conducts the examination of witnesses and puts questions to them. In the absence of a reasoned decision of the judge, the parties must be present at the hearing. They may not interrupt witnesses or address them directly so as not to influence them. If the judge deems it necessary, they will ask any questions that the parties wish to put to the witness.

Nothing prevents the judge from arranging an audio, visual or audio-visual recording of the preparatory inquiries, when the circumstances so demand (as in the case of geographical remoteness).

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 judge will not admit any evidence obtained by fraudulent means (hidden camera, recording of a telephone conversation without the speaker’s knowledge) or in a way that does not respect privacy.

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

Declarations made by parties to the case have no evidential value.

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. The only competent authorities are the courts.

Last update: 11/07/2023