Taking of evidence

Portugal

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The rule regarding the burden of proof is that the party on which the burden falls has to demonstrate the truth of the facts alleged so that the validity of the argument presented in court can be assessed.

As regards the distribution of the burden of proof, i.e. which party should bear the burden of proof, Article 342 of the Civil Code lays down the fundamental rule. Under that article, the person who invokes a right must prove the facts constituting the right, and the party against whom the right is invoked must demonstrate facts impeding, modifying or terminating the right. Impeding facts are those which act as obstacles to the effective establishment of the right. Modifying facts are those which alter the scope of the right that has been established. Terminating facts are those which, after the right has been established as valid, cause it to end. In the event of doubt, the facts must be considered as constitutive.

In the case of negative assessment proceedings, 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 (the party against whom the case has been brought) to prove the elements constituting the right which is being claimed.

In court actions which must be brought within a certain time limit following the date on which the plaintiff (the party initiating the action) has become aware of a certain fact, it is up to the defendant to prove that the time limit has already expired, unless there is another solution especially established by law.

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) or to an initial deadline (moment in time after which the right may arise), it is up to the applicant to prove that the condition has been met or that the initial deadline has been passed. If the right is subject to a termination condition (an uncertain event in the future on whose occurrence the parties have made the cessation of the effects of the legal transaction dependent) or to a final deadline (moment in time after which the right ends), it is up to the defendant to prove that the condition has been met or that the final deadline has passed.

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. 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.

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. 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 decisions arising from the law in relation to the proof are based on reasons of public policy, such agreements are invalid under all circumstances.

Where evidence is presented by the party on which the burden of demonstrating a particular fact falls, the opposing party can present counter-evidence with a view to raising doubts. If there is sufficient doubt, then the decision must go against the party which had the obligation to prove the fact in question.

Full legal evidence may only be countered by evidence proving that the fact that gave rise to it is not true, without prejudice to other restrictions specifically determined by law.

Anyone invoking customary, local or foreign law is responsible for proving its existence and content, but the court should strive *ex officio* to obtain the respective knowledge. The court is also responsible for *ex officio* knowledge whenever it has to decide based on 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. If it is unable to determine the contents of the applicable law, the court will use the rules of Portuguese common law.

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 such rules.

Proof is not required for well-known facts, in other words those of public knowledge.

Proof is also not required for 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.

Similarly, a party which has a legal presumption (defined above) in its favour does not need to prove the presumed fact.

Legal presumptions may be rebutted by the presentation of counter-proof, except in cases where the law does not allow this.

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 freely assesses the evidence and the judge makes his decision on the basis of his prudent belief regarding each fact.

Free assessment of evidence does not cover facts for which the law requires special formalities to prove them, or those that can only be proven by documents or are fully proven, either by documents or by agreement or confession of the parties.

The court must consider all the evidence, whether or not it has come from the party who should produce it, without prejudice to provisions that declare evidence of a fact to be irrelevant if it is not produced by a certain interested party.

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.

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?

The law allows for the task of obtaining evidence to be carried out on the initiative of the judge.

It is the judge's responsibility to carry out or order, including *ex officio*, all the actions necessary to determine the truth and the true nature of the dispute with regard to the facts that should be known.

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.

It is the responsibility of the court, on its own initiative or at the request of either of the parties, to request information, technical opinions, plans, photographs, drawings, objects or other documents necessary for clarifying the truth. Such requests can be made to official bodies, the parties disputing the case or third parties.
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 the intimacy of private and 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.
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.
The judge may, *ex officio*, order evidence to be given by experts.

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

Evidence is generally offered with pleadings. At the end of the application, the applicant must submit the list of witnesses and request other forms of evidence; if the defendant contests, they must submit the list of witnesses with their response and request other forms of evidence. The applicant is allowed to change their original application to obtain evidence, and may do so in their response, where applicable, or within 10 days of being notified of the defence. In the event that the defendant submits a counterclaim and the applicant responds, the defendant is allowed to amend their original application to obtain evidence within 10 days of being notified of the response.
As a general rule, evidence is taken at the final hearing. On an exceptional basis evidence can be given at an earlier stage. Evidence can be the testimony of people, expert evidence or evidence obtained through judicial examination. For early presentation of such proof to be made, there must be a well-founded fear that it may be impossible or very difficult to collect testimony from certain people during the actual court case or to verify certain facts by expertise or inspection.
After applications to obtain evidence have been admitted during the preliminary hearing, where they may be amended, or if this does not apply to the competent order, the final hearing is called after the legal representatives have been heard.
The list of witnesses may also be added or amended up to 20 days before the date on which the final hearing is held and the other party is notified to make use of this possibility, if they so wish, within five days.
Except in cases where circumstances justify the judge changing the order of legal events, at the final hearing the taking of evidence starts with the parties making their statements.
Then, should the evidence include films or sound recordings, these are exhibited.
This may then be followed by verbal clarifications by experts who have been called to appear in court at the request of either of the parties or the court itself, followed by an examination of the witnesses.
After the evidence has been taken, the facts of the matter are debated. In these debates the lawyers establish the conclusions, both *de facto* and *de jure*, that they have drawn from the evidence produced, with each lawyer able to respond once.
On conclusion of the final hearing, the case is sent to the judge for the handing down of a judgment within 30 days. If the court believes that it is not sufficiently informed, it can return to the courtroom to hear the people it wishes to and to order the necessary steps to be taken to clarify the matter in doubt.

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.
An application to obtain evidence may be rejected in whole or in part even if it is submitted in a timely manner, in the following circumstances: the number of witnesses for a certain type of procedure is exceeded (those which exceed the limit must be rejected); the judge feels an application for expert evidence to be irrelevant or dilatory; someone who could testify as a party is enlisted as a witness; statements made by a party involving dishonest or criminal facts of which the party in question is accused are requested; or the party is requested to testify regarding facts that do not involve a confession. Other evidence which is not acceptable is evidence involving the violation of State or professional secrecy or the secrecy to be observed by public servants, which may, however, be lifted in accordance with the legally established terms.
Thereafter, during the final hearing and after the witness has sworn the oath, the judge will carry out a preliminary examination, which seeks to identify the witness and find out whether they are a relative, friend or enemy of any of the parties, whether they are in any kind of dependent relationship with the said parties and whether they have any interest, directly or indirectly, in the case. If the answers prove that the declaring party is unable to act as a witness or they are not the person who was put forward, the judge will not admit them to testify. Only those who do not suffer from psychiatric disorders and have the physical and mental aptitude to testify regarding the facts to be proven are able to testify as witnesses, and the judge is responsible for assessing the natural ability of people enlisted as witnesses in order to assess the admissibility and credibility of their evidence.
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. Testimonial evidence is also not admitted when the event has been fully proven by documents or by other means with full probative force. 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.

2.4 What different means of proof are there?

The following means of proof exist:

a) Documents;
b) Proof by confession;
c) The statements of the parties in the case;
d) Expert reports;
e) Judicial inspection;
f) The testimony of witnesses;
g) Proof via presentation of objects;
h) Presumptions.

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?

Differences in the demonstrative effectiveness of means of proof do not depend on whether it is oral or written.
The court is only bound by evidence with legally pre-determined probative force, and under the terms and limits specified: proof by authentic or private documents, whose authenticity is established by recognised means (cf. Articles 362 to 387 of the Civil Code), confession (cf. Articles 352 to 360 of the Civil Code) and legal presumptions (Articles 349 to 350 of the Civil Code).

Assessment of the remaining evidence is carried out in accordance with the principle of free assessment of evidence, without being subject to any rules apart from the rules of experience, i.e, the general and abstract judgments of causal succession. Evidence will be considered in accordance with the conviction that the judge has formed about the facts, taking these rules into account.

2.6 Are certain methods of proof stronger than others?

The law does indeed attribute different degrees of demonstrative force to the various means of proof.

The free assessment of evidence is set aside and some means of proof take precedence over others where the law attributes a specific degree of importance to a particular means of proof or where it demands some special formality for the existence or proof of a legal fact. In cases of negative legal proof the law forbids the use of certain types of evidence by the judge in reaching a decision.

With regard to the taking of evidence through the collection of witness testimony, verbal hearing of experts (as a general rule, experts are only heard at the final hearing if it is necessary to provide verbal clarifications, since the results of their investigations are given in written reports), judicial inspections, investigation reports and documents not defined by law as having any special significance, the court freely assesses all such evidence.

The demonstrative effectiveness of witness testimony is freely considered by the judge. However, witness testimony cannot be used to substitute a document required under the law or to go against or add to the content of certain documents.

The strength of the evidence given in the replies of experts is assessed freely by the court and the same applies as regards the results of judicial investigations.

Authentic documents (that is, those set down in writing by a competent public authority or official in the exercise of their powers) are considered to fully prove the facts they refer to as having been carried out by such agents together with the facts which are attested to in them on the basis of the understanding of the documenting entity (that is, such documents represent a demonstration of proof which can only be rebutted by proof to the contrary). Private documents, in which the signatures or handwriting, or just the signature, are recognised or not contested by the party against whom the document is submitted, or when, in spite of the signature and handwriting having been attributed to them, they declare not to know if they belong to them, or they are deemed to be authentic, both legally and judicially, and private documents, with signatures or handwriting that have been authenticated by a notary public can be used as proof of declarations attributed to their writer, but this does not prevent arguments or proof of falsity being lodged with regard to such documents. The facts included in the declaration are considered as proven in so far as they are contrary to the interests of the declaring party. The declaration must, however, be considered in its entirety. Private documents authenticated under notarial law have the force of proof of authentic documents, but do not replace them when the law requires such documents for the validity of the act.

A written judicial confession has full probative force against the confessor. 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.

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.

Non-written judicial confessions and non-judicial confessions made to a third party or contained in a will are freely considered by the court.

A confession is not evidence against the confessor: a) if it is declared insufficient by law or relies on facts whose recognition or research is prohibited by law; b) if it relies on facts relating to inalienable rights; c) if the confessed fact is impossible or clearly non-existent.

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

Yes, this is the case in Portuguese law.

When the law demands, as a form of business declaration, a document with a certain formality, such a document cannot be substituted by another means of proof or by another document except if this has greater probative force.

When the law demands any special formality for the existence or proof of a legal fact, this cannot be dispensed with.

2.8 Are witnesses obliged by law to testify?

All persons, whether or not they are parties in 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 decided on.

2.9 In which cases can they refuse to give evidence?

Witnesses may refuse to give evidence, except in proceedings aimed at verifying a child's birth or death:

Relatives in the ascending line in cases involving descendents, and adoptive parents in cases involving the adopted children, and vice-versa;

A father-in-law or mother-in-law in cases 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;

Whoever lives or has lived in a common-law marriage 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.

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.

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

In accordance with the previous answer, people who refuse to testify are not sanctioned or required to cooperate with the court, as this is their legal right.

2.11 Are there persons from whom evidence cannot be obtained?

Yes, there are persons from whom evidence cannot be obtained.

These are people who are unable to testify due to psychiatric disorders and those who are not physically or mentally fit to testify on the facts to be proven.

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.

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, 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 them to appear in court;

The prerogative to testify in writing is used.

The witness must testify in an accurate manner, indicating the reason and circumstances which justify his knowledge of the facts; as far as possible, the reason invoked for the knowledge will be set out in detail and will be well-founded.

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.
The judge must prevent the lawyers from being impolite to the witnesses and from putting questions or considerations which are irrelevant, suggestive, deceitful or offensive.
Questioning and cross-questioning are carried out by representatives of the parties, without prejudice to the information requested by the judge or the fact the judge may pose questions which they believe to be appropriate for determining the truth.
The judge will carry out the questioning himself where this is necessary to ensure the witness's composure or to put an end to inappropriate cross-questioning.
Before the witness answers the questions put to him he can consult the case, demand that he be shown certain documents forming part of the case, or present documents aimed at corroborating his testimony; only documents which the respective party could not have offered are received and placed on file.

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?

Evidence obtained illegally cannot be considered by the court.

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

Yes, in addition to the testimony of the party referred to above, Portuguese procedural law also gives parties the option of providing statements.
Indeed, the parties may, until the start of oral pleadings in the first instance, request permission to provide statements regarding facts in which they have been personally involved or of which they have direct knowledge.
The court freely considers the statements of the parties, except where they involve a confession.
In this regard, please also see the answer to question 2.6

Related links

Applicable legislation

Civil Code
Code of Civil Procedure

Related links

Ministry of Justice
Attorney General's Office
Official Journal
Legal Document Database

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