Taking of evidence

Romania

1 The burden of proof

The main legal basis is provided by:

Articles 249-365 of the Code of Civil Procedure (*Codul de procedură civilă*).

1.1 What are the rules concerning the burden of proof?

An assertion made in the course of the proceedings must be proved by the party making it, except in certain cases expressly provided for by law. An applicant must prove his or her case. For objections put forward by the defendant, the burden of proof lies with the defendant. But if a presumption comes into play the burden of proof may switch from the party who otherwise bore it to the opposing party.

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?

No one is required to prove what the court must necessarily know.

The court is assumed to have knowledge of the law in force in Romania. But law that is not published in the Romanian official gazette (*Monitorul Oficial*) or by some other means, international conventions, treaties and agreements applicable in Romania but not incorporated into legislation, and customary international law have to be proved by the interested party. Rules laid down in classified documents may be proved and consulted only subject to the conditions laid down by law. The court may of its own motion take notice of the law of a foreign state provided that it has been cited before the court. Foreign law has to be proved in accordance with the provisions of the Civil Code (*Codul civil*) that deal with the substance of foreign law.

If a fact is generally known or is not challenged, the court may decide that in the circumstances of the case it does not have to be demonstrated. Usages, rules of conduct and practices established between the parties must be proved by the party that relies upon them. Local rules and regulations must be proved by the party relying on them only if the court so requests.

A presumption is a conclusion that the law or the court draws from a known fact in order to establish an unknown fact. A legal presumption (*prezumţiă legală*) exempts the person benefiting from it from the burden of proving the fact that the law deems to be proved. A legal presumption may be rebutted by evidence to the contrary, unless otherwise provided for by law.

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?

Evidence must be admissible and must be relevant to the outcome of the proceedings. After the court has allowed evidence for particular facts, the question whether those facts have been demonstrated is decided freely by the court, at its own discretion, except where the law determines otherwise.

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?

Evidence must be proposed by the applicant in his or her application, and by the defendant in his or her defence, unless otherwise provided for by law; otherwise the evidence may be barred. If the proposed evidence is not sufficient for the full resolution of the case, the court will order the parties to supplement it. The court may of its own motion draw the parties' attention to the need for further evidence, and may order that further evidence be taken even if the parties do not agree.

The parties can apply for the following evidence to be taken: documents, expert's reports, witness testimony, inspection *in situ*, and questioning of a party if the opposing party asks that that party be called to testify. The new code of civil procedure also regulates physical evidence; this could be relevant in certain categories of civil actions (e.g. divorce actions).

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

The court first considers whether the evidence proposed by the parties is admissible, and then makes an order setting out the facts which must be proved, the evidence allowed, and the parties' obligations in regard to the taking of the evidence. As far as possible, the evidence will be taken at the same sitting where it is allowed.

The taking of evidence is governed by some essential rules: the evidence is taken in the order determined by the court; as far as possible, evidence should be taken at the same sitting; evidence is taken before argument on the merits; evidence and counterevidence are taken at the same time in so far as this is possible.

Evidence is taken, in camera (*în camera de consiliu*), in the court trying the case, unless otherwise provided for by law. If, for objective reasons, evidence can be taken only in another place, it may be taken on the basis of letters rogatory by a court at the same level, or by a lower court if there is no court of a similar level in that locality.

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

Evidence may be used only if it meets certain conditions regarding its legality (legalitate), plausibility (verosimilitate), relevance (pertinenţă) and cogency (*concludenţă*). As far as legality is concerned, the evidence proposed must constitute evidence under law and must not be prohibited by law. In terms of plausibility, the requested evidence must not be contrary to the natural laws universally recognised. In terms of relevance, *the evidence* must be related to the subject-matter of the trial, i.e. to facts that need to be demonstrated in support of the application or the defence put forward by the parties. In order to be admissible the evidence must be also plausible and conducive to a determination of the dispute.

The court has to reject an application to adduce a document where the content of the document concerns strictly personal matters related to a person's dignity or privacy; where the act of adducing the document would be inconsistent with an obligation of confidentiality; or where it would give rise to criminal proceedings in regard to the party, the party's spouse, or any blood relative or relative by marriage up to and including the third degree of kinship.

Witness evidence is not admissible for proving legal transactions of a value above RON 250, for which the law requires evidence in written form. Also, witness evidence is inadmissible if it is contrary to the content of a formal document.

Evidence is proposed by the applicant in the application or by the defendant in the defence. Evidence not proposed in this way can be called for and allowed by the court in any of the following situations: the need for the evidence arises out of a modification of the claim; the need for the evidence arises in the course of the proceedings, and the party could not have foreseen it; the party shows the court that, for good reason, it was unable to adduce the requested evidence within the time permitted; the taking of evidence does not lead to a deferral of the trial; all parties have expressly consented.

2.4 What different means of proof are there?

A legal transaction or a fact can be proved by documents, witnesses, presumptions, an admission of either party (on his or her own initiative or in response to questioning), expert's reports, physical evidence, inspection *in situ* or any other form of evidence provided for by law.

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?

Witnesses are proposed by the parties, either by the applicant in the application or by the defendant in the defence. After allowing witness evidence, the court will summon the witnesses for hearing.

If the court finds it advisable to obtain the opinion of specialists in order to clarify the facts, at the parties' request or of its own motion, it will appoint one or three experts, and make an order setting out the aspects in regard to which they are to give their opinion and the timelimit for their work. The experts' conclusions are recorded in an experts' report. A fresh report by another expert may be sought, giving reasons, at the request of the parties or of the court.

As regards documentary evidence, each party may submit the documents he or she wishes to use during the trial in duly certified copy. The party must also have the original with him or her and be able to produce it in court on request, failing which no account will be taken of that document. The court may order the production of a document in the possession of a party if the document is common to the parties to the trial, if the party itself has made reference to the document during the trial, or if the party is under an obligation to adduce it. If a document is held by a party and cannot be produced in the court, a judge may be delegated in whose presence the parties can examine the document where it is to be found. If a document is held by a third party, that party may be summoned as a witness and requested to bring the document.

The evidence is taken in camera by the court with jurisdiction. When evidence is to be taken in another place, it will be taken by a delegated court at the same level, or by a lower court if there is no court of the same level in that locality. If the type of evidence allows it and the parties consent, the court that takes the evidence may dispense with summoning the parties.

2.6 Are certain methods of proof stronger than others?

The methods of proof are equally strong, except in the cases expressly provided for by law.

Documents in authentic form (*forma autentică*) are often accepted by the parties owing to the advantages they have, including a presumption of authenticity, which means that a person relying on an authentic document is freed from the burden of proof.

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

As proof of a legal transaction with a value of more than RON 250 only documentary evidence is admitted, though there are certain exceptions where witness evidence is also accepted.

Until such time as it may be declared false, a document in authentic form provides conclusive proof, in dealings with any person, of the findings of fact made personally by the person who authenticated the document in accordance with law. But statements made by the parties and recorded in an authentic document stand as proof only until proof of the contrary.

Where there are presumptions left to the discretion of the court, the court may rely on them only if they have the weight and strength to render the alleged fact probable; such presumptions may be accepted only where the law admits witness evidence.

2.8 Are witnesses obliged by law to testify?

Please see the answer to question 2.11.

2.9 In which cases can they refuse to give evidence?

The Code of Civil Procedure does not lay down grounds on which a witness might refuse to testify, but merely specifies persons who cannot be heard as witnesses and persons who are exempt from appearing as witnesses. Please see the answer to question 2.11.

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

The court will fine a witness who fails to appear or refuses to testify. When a witness fails to appear in response to the first summons, the court may issue a warrant to have the person brought into court (*mandat de aducere*). In urgent matters, the court may issue such a warrant even for the first hearing.

If a person fails to appear or refuses to answer questions, the court may take that as a full admission or only initial evidence in favour of the party who proposed that the witness be called.

2.11 Are there persons from whom evidence cannot be obtained?

The following cannot be witnesses: blood relatives and relatives by marriage up to and including the third degree of kinship; spouses, former spouses, persons engaged to be married or cohabiting partners; persons in relations of enmity or in relations of interest with either party; persons subject to a court order depriving them of the right to manage their property (*sub interdicţie judecătorească*); and persons convicted of perjury. In lawsuits concerning filiation, divorce and other family relations, the court may hear blood relatives and relatives by marriage, with the exception of descendants.

The following are exempt from appearing as witnesses:

ministers of religion, healthcare practitioners, pharmacists, lawyers, notaries public, bailiffs, mediators, midwives and nurses, and any other professionals bound by law to observe confidentiality or professional secrecy with regard to facts coming to their knowledge in the performance of their duties or the practice of their profession, even after they have ceased their activity;

judges, prosecutors and public officials, even after they have ceased their duties, regarding confidential circumstances coming to their knowledge during their term of office;

persons who through their answers would expose themselves, their relatives, their spouse, former spouse etc. to criminal prosecution or to public contempt.

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 court summons witnesses and determines the order in which they are to be heard. Before being heard, the witness is identified and required to take an oath. Each witness must be heard separately. The witness first answers questions asked by the president of the court and then, with the permission of the president, questions asked by the party who proposed him or her and by the opposing party. A witness who cannot appear before the court may be heard in the place where he or she is to be found .

There are no legal provisions governing audio or video recordings of testimony, but such recordings are admissible. They may subsequently be transcribed at the request of an interested party made in accordance with law.

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 the party who submitted a document insists on using it even though it has been alleged to be false and that allegation has not been withdrawn, and if there has been an indication of the author of the forgery or an accomplice, the court may suspend the trial and at once forward the allegedly false document to the responsible prosecutor's office, with a report drawn up for the purpose, in order to have the forgery investigated. Where criminal proceedings cannot be brought or continued, the inquiry into the forgery will be conducted by the civil court itself.

On the other hand, the court will impose a fine on the author of a challenge made in bad faith to the writing or signature of a document or to the authenticity of an audio or video recording.

In assessing witness statements, the court will take into account the witnesses' sincerity and the circumstances in which the facts that form the subject-matter of their statements came to their knowledge. If from the proceedings the court suspects that a witness committed perjury or was bribed, it will draw up a report and refer the matter to the responsible prosecution body.

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

If either party admits a fact which the opposing party used as grounds for their application or defence, the admission is evidence. An admission made in court is full evidence against the person who made it; the court must take account of the entire admission, and cannot separate parts of it unless they relate to separate facts that have no connection with each other. Outofcourt admissions can be freely assessed by the court. They are subject to the admissibility and evidencetaking requirements governing other evidence under the ordinary law.

The court may agree to have either party summoned to be questioned regarding their own actions if that is relevant to a decision in the case.

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