# Taking of evidence

Italia



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## 1 The burden of proof

### 1.1 What are the rules concerning the burden of proof?

It should first of all be pointed out that, in the Italian legal system, evidence is governed by two different regulations: the procedural rules are set out in the Code of Civil Procedure, under Sections 228 and 229, while the so-called 'substantive' rules are set out in the Civil Code, under Sections 2730 to 2735. The reason why the system is separated into substantive rules and procedural rules is down to the legal arrangement that was previously in force and in keeping with the Napoleonic Code, in which the notion that evidence should be considered from both a static perspective and from a dynamic perspective (purely procedural) was prevalent. The Report on the Civil Code explains, in line with the reasons that have just been given, that evidence is used to enforce or in general defend one's rights, and not only in legal proceedings, but also outside such proceedings and prior to their initiation: hence the positioning of evidence in the codification of rights. The burden of proof is governed by the aforementioned text and not by the Code of Civil Procedure.

The distribution of the burden of proof is governed, generally speaking, by the Civil Code, which provides, under Section 2697, that *'those intending to enforce a right before a court shall provide evidence of the facts supporting their claim. A party challenging the validity of those facts, or claiming that the right has changed or is exhausted, shall provide evidence of the facts supporting such objection'*. These principles therefore require the applicant to prove the facts on which his or her claim is based, i.e. the facts that have the legal effects claimed. The defendant, on the other hand, must provide evidence of facts precluding liability, or showing that a right has been exhausted or changed in such a way that the applicant's claim should be dismissed. If the applicant is unable to substantiate his or her claim, the application is dismissed, irrespective of whether the defendant submits arguments and supporting evidence in defence. Section 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 applicant 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?

Section 115 of the Code of Civil Procedure (as amended by Law No 69 of 2009) allows the court to consider facts to have been proven, regardless of the evidence submitted by the party making the claim, if they have not been specifically disputed by the appearing opposing party. Thus, by way of derogation from Section 2697 of the Civil Code, a fact is deemed to have been proven if it is not promptly disputed. This rule does not apply in cases of *in absentia*: if the defendant does not appear, the facts alleged by the applicant are not deemed to be 'undisputed', since said rule governing trials *in absentia 'goes against the traditions of Italian procedural law, under which a party who fails to appear or makes a belated appearance has never been deemed to have made an implicit confession'* (Constitutional Court (*Corte Costituzionale*), judgment No 340 of 12 October 2007). In other words, under Italian civil procedure, if a party fails to appear, then he or she is not considered to have made an implicit confession, but rather to have implicitly disputed a claim. In exceptional circumstances, however, the law expressly provides for scenarios in which a party's failure to appear constitutes specific conduct that is considered to be presumed: e.g. under Section 789 of the Code of Civil Procedure, if none of the parties involved explicitly contests a project, then this equates to its approval (see judgment No 3810 of the Supreme Court of Cassation (*Corte Suprema di Cassazione*), Civil Division, Chamber II, of 6 June 1988).

The burden of proof is mitigated in the event 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 (Section 2727 of the Civil Code). Presumptions are divided into: (1) 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; (2) simple presumptions, which the court must assess at its discretion, accepting only serious, precise and consistent presumptions; simple presumptions are not admitted in relation to facts in respect of which the law does not allow witness evidence (Section 2729 of the Civil Code). The burden of proof is also mitigated in the case of well-known facts, i.e. facts which are generally known at the time and place of the ruling, so that they are not open to any doubt (Section 115 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 must assess evidence at its own discretion, except where the law provides otherwise; it may also infer evidence from the answers given to it by the parties, from their unjustified refusal to allow any inspections ordered by the court and, in general, from the behaviour of the parties themselves during the proceedings (Section 116 of the Code of Civil Procedure). 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 way of presumption. The court's judgment may not be based on unproven facts, even where they are possible or highly likely.

## 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*), as laid down in Section 115(1) of the Code of Civil Procedure: the court must base its judgment on the evidence submitted by the parties, 'apart from those cases specified by law'. However, certain exceptions to this rule are set out in the following sections of the Code of Civil Procedure:

- Section 117, which allows the informal questioning of the parties;
- Section 118, which allows inspections of persons and objects to be ordered;

- Sections 61 and 191, which allow the court to request expert opinions;
- Section 257, which allows the court to summon a witness who has been mentioned by another witness; and
- Section 281-ter, which 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 principle that the scope of the proceedings is determined by the parties may be replaced by a system marked by inquisitorial elements, specifically under the following provisions:
- Section 420, which provides for the free questioning of the parties during the hearing on the case; and
- Section 421, which provides that the court may, at any time, on its own initiative, order the admission of any type of evidence, even beyond the limits set by the Civil Code. In proceedings relating to parental responsibility, the court may order the taking of evidence on its own initiative, including inspections conducted by the tax police (*polizia tributaria*), but only with respect to orders relating to minors. During divorce proceedings, if there are any disputes, the general court shall arrange for investigations to be carried out on the parties' income, assets and actual standard of living, and shall also call upon the tax police if necessary.

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

If one party applies for the taking of evidence, the opposing party can apply for the taking of contrary evidence. 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?**

Evidence is traditionally defined as a means capable of making a fact known and therefore of providing a demonstration of that fact and establishing its certainty, or as an instrument for convincing the judge of the facts in question. In order to be allowed into the proceedings, the preliminary application must be 'admissible' and 'relevant'. To be admissible, a preliminary application must not run counter to a prohibition set out by law (e.g. Section 2726 of the Civil Code, relating to payments): in other words, the court must determine whether the specific measure of inquiry put forward is against the law. So-called 'atypical' evidence, which is not characterised by the Civil Code, is also subject to the prohibitions set out under law. Relevance, conversely, is examined from another perspective, and relates to 'the fact forming the subject of the evidence'. For the preliminary application to be admitted, the court must ascertain whether the fact that is being sought to be proven will have an actual impact on the judgment of the case. Consequently, facts which would have no influence on the application being either accepted or rejected are not admitted, even if they have been proven. To allow the court to assess the relevance of the evidence, the legislature requires the application to meet minimum levels of specificness, and therefore to give at least three different types of information: topical: WHERE; historical: WHEN; and functional: TO WHAT END. Facts that have not been specifically disputed do not need to be proven (Section 115 of the Code of Civil Procedure).

**2.4 What different means of proof are there?**

Italian law distinguishes between documentary and non-documentary evidence. Evidence governed by the Civil Code is referred to as 'typical'.

Documentary evidence includes:

public documents (Sections 2699 *et seq.* of the Civil Code);

private documents (Sections 2702 *et seq.* of the Civil Code);

telegrams (Sections 2705 *et seq.* of the Civil Code);

domestic files and records (Section 2707 of the Civil Code);

accounting records of businesses (Section 2709 of the Civil Code);

mechanically produced copies (Section 2712 of the Civil Code);

copies of documents and contracts (Sections 2714 *et seq.* of the Civil Code).

Computer documents also constitute evidence.

Non-documentary evidence includes:

witness evidence (Sections 2721 *et seq.* of the Civil Code);

written witness statements (Section 257-*bis* of the Code of Civil Procedure);

confessions (Sections 2730 *et seq.* of the Civil Code);

formal questioning (Section 230 of the Code of Civil Procedure);

sworn statements (Sections 2736 *et seq.* of the Civil Code);

inspections (Sections 258 *et seq.* of the Code of Civil Procedure).

There are also expert reports, which provide the court with the technical knowledge it lacks. In the Italian procedural system, there is no closing provision on the obligatory nature of means of proof, since their production is, in principle, not prohibited. However, under Italian case-law, so-called 'atypical' evidence cannot circumvent prohibitions or preclusions imposed by rules that are either substantive or procedural in nature; if this were not the case, then it would be possible to introduce surreptitiously items of evidence that would not have otherwise been admitted, or would have required suitable formal guarantees in order to be admitted.

**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 (Section 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 court bailiff 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. The provision allows the court, with the parties' consent, to take evidence in writing (Section 257-*bis* of the Code of Civil Procedure). Expert witnesses are appointed by the court, which gives them questions they are asked to answer; they will also appear at the hearing and swear to tell the truth. 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 (not beyond the time limits assigned to the hearing in accordance with Section 183 of the Code of Civil Procedure, for ordinary fact-finding procedures).

**2.6 Are certain methods of proof stronger than others?**

The Italian legal system attaches the greatest weight to public documents and to irrebuttable presumptions. Public documents (Sections 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. Irrebuttable presumptions (Section 2727 of the Civil Code) are even more effective, as they do not admit any proof to the contrary.

**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 required to testify, unless the law provides otherwise. There are provisions covering the following cases: incapacity to testify; bans on certain persons giving testimony; and the option to refrain from giving evidence. The witness's obligation to give evidence stems indirectly from the power that Section 255 of the Code of Civil Procedure gives to the court, if the witness fails to appear, to order that the witness be brought to court and to impose a fine.

**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 Section 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.

**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, because their interest means that they might be entitled to join the proceedings as a party (Section 246 of the Code of Civil Procedure). With respect to **parties involved in disputes, who obviously cannot serve as witnesses**, the Italian legal system provides for **formal questioning**, which is a form of evidence aimed at extracting a judicial confession from a party (Section 228 of the Code of Civil Procedure) and must respect the general rules governing evidence and, more specifically (Sections 230 *et seq.* of the Code of Civil Procedure), must be put forward by means of separate and specific items. The party in question must respond in person and may not read from notes, unless this proves necessary and has been authorised by the court. The questions put to parties undergoing formal questioning must relate to the facts put forward as evidence and authorised in the order upholding formal questioning. However, questions relating to other facts may also be asked if the parties mutually agree to them and the court deems them to be useful. If a party fails to attend formal questioning without any justification or refuses to undergo formal questioning, this may result in the facts forming the subject of the evidence being admitted, if the court considers that they should be admitted in the light of other items of evidence. According to settled case-law, if a party refuses to answer or fails to appear, this does not automatically constitute an implicit confession but rather a circumstance which, when assessed within the framework of the other items of evidence acquired during the proceedings, may provide the court with the means for drawing its conclusion on the facts put forward during the questioning.

The court does not have any coercive powers other than those described above.

**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 allowed as relevant to the proceedings and any questions on the same facts requested by the parties' lawyers during the examination.

Video-conferencing, while not expressly provided for by the Code of Civil Procedure, is not excluded. Section 202 of the Code of Civil Procedure provides that, when ordering the taking of evidence, the court shall 'establish the time, place and manner of obtaining evidence', and this allows a court to order the hearing of a witness via video-conferencing. Section 261 of the Code of Civil Procedure also provides that the court may order video recording requiring the use of mechanical means, tools or procedures.

## 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.

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

Any statements provided by a party that are favourable to him or her do not count as evidence. However, a confession statement (thus having negative connotations) made during **formal questioning** (see paragraph 2.11) will count as negative evidence against the party who has made it.

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