Taking of evidence

Belgium

1 The burden of proof

1.1 What are the rules concerning the burden of proof?

The Belgian legal system differentiates between civil law and commercial law. Commercial law is the specific law that applies to traders, whereas civil law is the ordinary law.

The rules on evidence under civil law can be found in Article 1315 et seq. of the Civil Code (*Code civil*/*Burgerlijk Wetboek*). This is a closed system, where the forms of evidence are strictly regulated (see question 5a below for more details).

The rules on evidence under commercial law can be found in Article 25 of the Commercial Code (*Code de commerce*/*Wetboek van Koophandel*). Their main features are the openness of the system and the relative freedom with regard to forms of evidence in commercial matters. Article 25 of the Commercial Code states: 'In addition to the forms of evidence permitted under civil law, commercial commitments can be proven by witness evidence in all cases where the court takes the view that this should be allowed, subject to the exceptions made for specific cases. Purchases and sales can be proven by means of an accepted invoice, without prejudice to other forms of evidence permitted under commercial law'.

The procedural and technical aspects of evidence in civil and commercial matters are governed by Article 870 et seq. of the Judicial Code (*Code judiciaire*/*Gerechtelijk Wetboek*). Article 876 of the Judicial Code requires the court to judge the dispute before it in accordance with the rules of evidence that apply to the type of dispute. The dispute is either civil or commercial.

Evidence of a fact, postulate or allegation must be submitted by the party relying on it. A party requesting performance of an obligation must provide evidence of that obligation. Conversely, a party asking to be freed from an obligation must submit evidence of the payment or act extinguishing the obligation (Article 1315 of the Civil Code). In legal proceedings, each party must submit evidence of the facts that it alleges (Article 870 of the Judicial Code: *'actori incumbit probatio')*. It is then for the opposing party to rebut the probative value of these facts, where this is possible and permitted.

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?

Provided that there are no objections on grounds of public policy or national security, evidence can be produced for any material facts. However, there are three restrictions on the right to produce evidence during the proceedings. Firstly, the fact to be proven must be relevant to the case. Secondly, the fact must be convincing, in other words it must be such as to satisfy the court as to the decision to be made. Thirdly, the evidence of the fact must be legally admissible: privacy, professional confidentiality and the confidentiality of correspondence must not be infringed.

Presumptions can generally be rebutted by the opposing party. Only irrebuttable (*juris et de jure*) presumptions cannot be challenged; indeed it is illegal to produce evidence to rebut them. Rebuttable ('*juris tantum*') presumptions can be challenged by evidence to the contrary. The forms of evidence that are acceptable in this case are regulated under civil law, but not under commercial 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?

The court must be satisfied by the evidence submitted by the parties on the basis of its value and credibility. If the court comes to the conclusion that the evidence submitted can help to settle the dispute and that it reliably reflects the truth of the matter, it assigns it probative value. It is only once the court has assigned it probative value that the evidence can properly be regarded as proof.

Probative value (*valeur probante*/*bewijswaarde*) is somewhat subjective, whereas the status of proof given to a class of evidence (*force probante*/*bewijskracht*) is strictly objective. The status of proof derives from the level of reliability that can be expected of that class of evidence. The law gives certain evidence the status of proof, but only where it considers that the class of evidence has a sufficient level of reliability, because by doing so it takes away the discretion of the court. This is the case with documentary evidence. If the court interprets the content of a lawfully obtained document in a manner incompatible with its actual wording, it infringes the status of proof possessed by documentary evidence. The aggrieved party can use this infringement to lodge an appeal on points of law with the Court of Cassation (*Cour de cassation*/*Hof van Cassatie*).

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 party making an allegation must be able to prove it. In some cases, the court can order a party to produce evidence, for example by putting a person under oath (Article 1366 of the Civil Code). Subject to strict conditions, the court can require a party to give a sworn statement, either because the outcome of the case will depend on it or simply to determine the amount of the award.

The court can question the parties and order witnesses to be questioned, except where this is prohibited by law (Article 916 of the Judicial Code). It can also order experts to make findings of fact or give a technical opinion (Article 962 of the Judicial Code).

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

Applications for the taking of evidence must be made by one of the parties either in their main application or in an additional application in the course of proceedings. The court can approve or refuse the application, giving its reasons.

Where a document has to be verified (Article 883 of the Judicial Code) or it is claimed that a document is false (Article 895 of the Judicial Code), the court orders the parties to appear before it, with or without legal representation, and to produce any documents and papers for comparison, or the document that is alleged to be false. The court can hear and rule on the matter immediately or order the document to be filed with the registry, following which it can itself order measures of inquiry or have them carried out by experts. The court then rules on the verification of documents or the claim of falsehood.

Where a party proposes to provide evidence of a fact through one or more witnesses, the court may allow this evidence to be taken where it is admissible (Article 915 of the Judicial Code). Except where the law prohibits it, the court may order witnesses to be questioned. Witnesses are called by the court clerk at least eight days before the date of their hearing. They must swear an oath and are questioned individually by the judge. The judge may put questions to the witness of his or her own motion or at the request of one of the parties. The testimony is taken down in writing, read out, corrected and supplemented if necessary, and the hearing of the witness is then closed.

The court can order an expert report in order to resolve or avoid a dispute. The expert report must confine itself to findings of fact and technical opinions (Article 962 of the Judicial Code). The expert carries out his or her work under the supervision of the court. The parties provide the expert with all necessary

documents and meet all the expert's reasonable requests. The report must be submitted by a date set by the court order. If the court is satisfied to the contrary, it is not obliged to abide by the expert's opinion.
Of its own motion or at the request of the parties, the court can order an inspection of a place referred to in the proceedings (Article 1007 of the Judicial Code). This inspection, which may or may not be carried out in the presence of the parties, is conducted by the judge who ordered it or by a person officially appointed for the purpose. An official record of all the actions taken and findings made is drawn up and served on the parties.

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

The court is under no obligation to approve a party's application for the taking of evidence. However, if a court is asked to take a measure of inquiry by another judicial authority it must do so (Article 873 of the Judicial Code).

2.4 What different means of proof are there?

There are five types of evidence under ordinary civil law: documentary evidence, witness evidence, presumptions, admissions by parties, and sworn statements (Article 1366 of the Civil Code).
Documentary evidence (Article 1317 of the Civil Code) can take the form of a public document (*acte authentique*/*authentieke akte*) or a private document (*acte sous seing privé*/*onderhandse akte*). A public document is a document drawn up in the prescribed form by a public officer authorised for the purpose (for example a notary or registrar) and constitutes full proof, between the parties and with regard to third parties, of the agreement that it contains. A private document that is acknowledged and signed by all the parties concerned, in as many copies as there are parties, constitutes full proof between the parties. A public or private document must be drawn up for all matters involving a sum or value above €375 (Article 1341 of the Civil Code).
Witness evidence (Article 1341 of the Civil Code) that contradicts or adds to the content of formal documents is inadmissible. However, where there is only rudimentary evidence in writing or where documentary evidence cannot be produced, witness evidence is admissible.
Presumptions (Article 1349 of the Civil Code) are conclusions by which the law or the court infers an unknown fact from a known fact. Presumptions cannot add to the content of documents, but can, like witness evidence, form *prima facie* evidence to be supplemented by written evidence and replace documents that cannot be produced.
Admissions by parties (Article 1354 of the Civil Code) are either judicial or extrajudicial. A judicial admission (*aveu judiciaire*/*gerechtelijke bekentenis*) is a statement made before the court by a party or its authorised representative, and constitutes full proof against the person making it. An extrajudicial admission (*aveu extrajudiciaire*/*buitengerechtelijke bekentenis*), however, is not subject to any formal requirements.
One party may be required by the other to swear an oath (a 'decisive oath' (*serment décisoire*/*beslissende eed*)) (Article 1357 of the Civil Code), or may be ordered to do so by the court. In the case of a decisive oath, the statement is conclusive evidence only for or against the person making it.
Evidence in commercial matters is unregulated (Article 25 of the Commercial Code), but there is one form of evidence specific to commercial matters, namely the accepted invoice in the case of contracts of sale. A trader can always use an accepted invoice as valid evidence, whereas all other written documents can serve as evidence only if they emanate from the opposing party.

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 regarded as an independent form of evidence by the Civil Code. The procedural and technical aspects are governed by the Judicial Code. An expert report is only one form of evidence among others and is governed by the Judicial Code. The parties can ask the court to call witnesses, but they cannot appoint experts on their own initiative; only the court can do that.
Documentary evidence has the status of proof, and the court must respect its content, but the same does not apply to expert reports and opinions. If the court is satisfied to the contrary it is not bound by the findings of a report or opinion (Article 962 of the Judicial Code).

2.6 Are certain methods of proof stronger than others?

There is a hierarchy among the regulated forms of evidence. Admissions and sworn statements rank highest. Written documents always rank higher than witness evidence and presumptions. Public documents constitute full proof between the parties and with regard to third parties, whereas an acknowledged private document constitutes full proof between the parties. Witness evidence and presumptions may be relied on only if the documentary evidence is incomplete or if documentary evidence of the agreement to be proven cannot be produced.

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

Depending on whether the case is a civil or commercial one, the admissible forms of evidence are regulated or unregulated. Under civil law, a public or private document must be drawn up for all matters involving a sum or value above €375 (Article 1341 of the Civil Code). Only such documents can serve as evidence; witness evidence and presumptions are not admissible. In commercial matters, by contrast, witness evidence and presumptions that contradict or add to the content of documents are admissible.

2.8 Are witnesses obliged by law to testify?

Witnesses are heard at the request of the parties or by order of the court (Articles 915 and 916 of the Judicial Code).
The appearance of witnesses is governed by Article 923 et seq. of the Judicial Code.

2.9 In which cases can they refuse to give evidence?

If a witness is called to appear, but claims that there is a legitimate reason for him or her to be excused, the court rules on the matter. One legitimate reason, for example, might be that the witness is bound by an obligation of professional confidentiality (Article 929 of the Judicial Code).

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

A person called as a witness is obliged to appear. If he or she fails to appear, the court may at the request of one of the parties order the witness to be summoned through notice served by a bailiff (*huissier de justice*/*gerechtsdeurwaarder*) (Article 925 of the Judicial Code). A witness who has been summoned and fails to appear is liable to a criminal fine (Article 926 of the Judicial Code).

2.11 Are there persons from whom evidence cannot be obtained?

Witness evidence is not valid where it is given by someone who is not legally capable of testifying (Article 961(1) of the Judicial Code).
A minor under the age of 15 cannot give evidence under oath. Any statements they make can serve only as information (Article 931, first paragraph, of the Judicial Code).
Minors have the right to be heard by a court in matters concerning the exercise of parental authority, living arrangements and rights of access. Where the court decides to hear a minor, the minor can refuse to give evidence (Article 1004/1 of the Judicial Code).
Children and other relatives in the descending line cannot give evidence in cases where their parents or relatives in the ascending line have opposing interests (Article 931, second paragraph, of the Judicial Code).

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 parties cannot interrupt witnesses during their testimony or question them directly, but must always address the judge (Article 936 of the Judicial Code). The judge may, of his or her own motion or at the request of a party, put any question to the witness that may clarify or supplement the witness's testimony (Article 938 of the Judicial Code).

Hearsay evidence is admissible; it is not prohibited by any legal provision or principle. In addition, Article 924 of the Judicial Code authorises a court to decide that if a witness can show that they are unable to appear in person their evidence can be taken wherever they may be.

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 that has been unlawfully obtained cannot be used in legal proceedings. In its decision, therefore, the court must disregard such evidence. Evidence obtained in a way that constitutes a breach of privacy, professional confidentiality or the confidentiality of correspondence is unlawful and inadmissible.

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

Documents issued by a party cannot be used as evidence in that party's favour. Under commercial law, however, an invoice for a commercial transaction that was issued by a trader but accepted by the customer can be used as valid evidence by the trader to prove the relevant facts. Properly kept accounts can be accepted by the court as evidence of transactions between traders.

A judicial admission is a statement made before the court by a party or its authorised representative, and constitutes full proof against the person making that admission.

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