## Dokazování

Podáte-li návrh na zahájení soudního řízení, je k prokázání vašeho nároku obvykle nezbytné předložit soudu důkazy.

**Chcete-li získat podrobné informace týkající se některé země, zvolte si její vlaječku.**

Dokazování v občanském soudním řízení není omezeno hranicemi jednoho členského státu. Někdy může být nutné provést dokazování v jiném členském státě, než je členský stát, kde máte bydliště. Například může být nutné vyslechnout svědky nebo znalce v jiných členských státech nebo může být zapotřebí, aby soud pro ohledání navštívil místo, které se nachází v jiném členském státě. Pokud jde o přeshraniční dokazování v rámci Evropské unie, justiční spolupráce mezi soudy členských států při dokazování v občanských nebo obchodních věcech je upravena nařízením (EU) 2020/1783 ze dne 25. listopadu 2020, které od 1. července 2022 nahrazuje nařízení (ES) č. 1206/2001 ze dne 28. května 2001.

Decentralizovaný informační systém jako povinný komunikační prostředek, který se má používat pro předávání a přijímání žádostí, formulářů a jiných sdělení, se však začne používat až od 1. května 2025 (první den měsíce následujícího po uplynutí tří let ode dne vstupu prováděcího aktu uvedeného v článku 25 v platnost (další podrobnosti viz článek 35 nařízení (EU) 2020/1783)).

**Související odkazy**

Dokazování – oznámení členských států a vyhledávač příslušných soudů nebo orgánů

Dokazování prostřednictvím videokonference

Praktická příručka pro uplatňování nařízení z roku 2001 o dokazování PDF (74 Kb) en

Praktická příručka o používání videokonferencí při dokazování v občanských a obchodních věcech PDF (724 Kb) en

Poslední aktualizace: 03/04/2024



## 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.

Last update: 14/02/2019



# Taking of evidence - Bulgaria

## 1 The burden of proof

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

For an assertion made by a litigant to be recognised by the court, it must be proved by the party making reference to it by any admissible means of proof envisaged by law. This means that a body of procedural actions of various types exists, grouped into categories depending on the stage of the judicial proceedings.

Article 153 of the Civil Procedure Code (GPK) requires all disputable facts of relevance for the adjudication of a dispute and links between them to be proved, and Article 154 of the GPK requires each party must establish the facts on which its claims and objections are based.

**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?**

Under current national law facts for which a legal presumption has been established by law are exempt from the burden of proof. Evidence produced in order to prove that a specific legal presumption is not valid is admissible in all cases, except when prohibited by law (Article 154(2) of the GPK).

In addition, the exemption from the burden of proof applies to facts that are ostensibly known by the public and the court on an *ex officio* basis of which the court must inform the parties (Article 155 of the GPK).

In connection with this, upon the commencement of proceedings the court must draw up a list detailing the facts to be proved, indicating the parties that must prove them and on whom the burden of proof lies. The court also rules on the applications for evidence filed by the parties and admits evidence that constitutes pertinent, admissible and necessary proof (Article 146 of the GPK).

**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 facts to which the parties make reference in support of their claims must be substantiated by the relevant means of proof prescribed by law. The court must consider each item of evidence in order to determine its weight in the case (i.e. the difference between an official and a private document).

## 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 in a lawsuit is taken on the basis of a written application from the relevant party or on a motion made verbally in a hearing in accordance with the rules for application of the principle of free disposition.

However, when the court finds that certain evidence is relevant to a dispute, it may order that evidence be taken on its own motion.

In its application for evidence, the party indicates the facts and the means of proof it will use to substantiate those facts.

In the application seeking permission to interview a witness the party must indicate the questions that will be put to the witness, the full name and address of the witness, and the date on which the party wishes that the witness be summoned.

The application to put questions to the opposing party must contain the questions which the party will be asked to answer.

The application for admission of expert testimony must indicate the area of special expert knowledge, the subject-matter of the expert opinion and the task of the expert witness.

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

When the court grants the evidentiary motion, it issues a ruling setting a period for evidence taking. The period commences at the time of the court hearing in which it was set, including for a party that did not appear in court despite being duly summoned.

Under Articles 131(1) and 127(2) of the GPK, the parties must indicate the evidence and the concrete circumstances substantiated by that evidence and present all written evidence available to them at the time of lodging the application and at the time of receipt of the respondent's rejoinder.

Under Article 158 of the GPK, when the gathering of certain items of evidence is in doubt or presents a particular challenge, the court may set a period for evidence gathering and proceed to hear the case without the evidence in question, if it is not furnished within the period specified. The evidence may be taken later in the proceedings, provided that it does not cause an unreasonable delay in proceedings.

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

The court may reject applications to obtain evidence by a dedicated ruling if the facts which the party wishes to prove have no bearing on the case and if the applications to obtain evidence were not submitted in a timely manner. When a party asks that several witnesses be heard in order to establish a fact, the court may admit only some of the witnesses proposed. If the fact in dispute is not established, the other witnesses are called (Article 159 of the GPK).

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

The Civil Procedure Code provides for the following means of evidence:

witness statements, which are governed by the provisions of Articles 163 to 174;

explanations of the parties:

acknowledging a specific fact;

provided in reply to specific questions;

The statements made by the parties are governed by the provisions of Articles 175 to 177 of the GPK;

written evidence, which is governed by the provisions of Articles 178 to 194 of the GPK:

official documents;

private documents.

Written evidence may be presented by both parties, but it may also be required by the court. Written evidence may be presented on paper or in electronic form. In the latter case, in addition to a printout the court may require that the document be submitted in electronic form. If a party presents a copy of a document, it may be instructed to also present the original of the document (Article 183 of the GPK).

Documents are ordinarily submitted in Bulgarian. Where submitted in a foreign language, the documents must be accompanied by an accurate translation into Bulgarian, which the party has certified.

Under Article 187 of the GPK, if the court can obtain printed materials without any difficulty, it is sufficient to indicate the place where the materials are published.

The court may order that certain written evidence be provided by the parties or third parties not involved in the case. Under Articles 190 and 192 of the GPK, each party may ask the court to do so, and the court bases its decision on all the evidence available to it. In order to obtain written evidence from an outside party, a dedicated written application must be submitted to the court. A copy of the application is made available to the third party in question.

Although the parties have a legal obligation to present evidence, they may decline to do so if a document concerns their personal life or that of a member of their family, or if presenting the evidence would expose them to opprobrium or criminal prosecution. In this case, if certain conditions are met, the court may instruct the party to present excerpts from the document.

Under national law the parties may dispute the authenticity of a written document submitted by the opposing party but must to do so by the time a reply to their submission is received. If the document is produced in a hearing, it must be challenged before the end of the hearing. If the opposing party wishes to use the document challenged, the court orders an inquiry into its authenticity. The burden of proof lies on the party disputing the authenticity of the document. If the document challenged does not bear the signature of the party that is contesting its authenticity, the burden of proof lies on the party that presented the document. Having conducted an investigation to ascertain the authenticity of the challenged document, the court decides whether it is genuine or false. The court may incorporate this determination into its judgment in the case (Articles 193 and 194 of the GPK).

The rules on expert witnesses are laid down in Articles 195 to 203 of the GPK.

Expert witnesses are appointed at the request of the parties or by the court acting on its own initiative. Expert witnesses present their reports at least one week before the scheduled date of the hearing in which the report must be admitted.

If the conclusion of the expert witness is challenged, the court may appoint one or more other expert witnesses. The court may also ask the expert witness to revise or provide a second opinion on the matter.

The rules for visual inspection and certification are laid down in Articles 204 to 206 of the GPK.

At the request of the parties or at its own discretion, the court may order that moveable or immoveable property be visually inspected or that a person be certified with or without the involvement of witnesses and court-appointed experts.

Visual inspections and certification are methods for gathering and verifying evidence. They are within the purview of the entire court and may be delegated to a member of the court or to another court.

The court notifies the parties of the date and place of the visual inspection. A record of the visual inspection is drawn up, detailing the findings of the inspection, the explanations provided by the expert witnesses and the statements made by witnesses interviewed on the inspection site.

**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?**

Evidence from witnesses is obtained through witness interviews. Witness statements submitted in writing are inadmissible. The conclusions of expert witness are submitted in writing at least one week before the scheduled date of the hearing and are then heard in court and admitted as evidence. The court and the parties may put questions to the expert witnesses.

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

National procedural law does not accord some types of evidence greater weight than others. Evidence is considered on its own merit and in its entirety as at the date of assessment of the proven facts, which determine the cause of action.

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

In certain cases expressly stipulated by the law, for example the validation of legal transactions for which a written act is required, solely written evidence is permissible. Witness statements are inadmissible in the following cases: refutation of the content of an official document; ascertainment of circumstances for which evidence must be provided in the form of a written act; validation of contracts of a value exceeding BGN 5000, unless the contract was concluded between spouses, ascendants or descendants in the direct line, relatives up to the fourth degree of consanguinity or relatives by marriage up to and including

the second degree of affinity; settlement of monetary obligations established by a written decision; validation of written agreements to which the litigant seeking witness admission is a party or the modification or cancellation of such agreements; refutation of the content of a private document originating from the party.

**2.8 Are witnesses obliged by law to testify?**

No one may refuse to give testimony unless expressly exempted from doing so by law.

**2.9 In which cases can they refuse to give evidence?**

In addition to the attorneys of the parties or the mediators in the dispute, the following parties may refuse to testify: the parties' ascendants or descendants in the direct line of kinship, their siblings, relatives by marriage in the first degree of affinity, spouses, former spouses or common-law partners (Article 166 of the GPK). The court assesses witness testimony in light of all other information available in the case, taking into account any vested interest a witness may have in the case.

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

Under Article 163 of the GPK, witnesses must appear in court and testify. If a witness has valid reasons not to testify or answer certain questions, they must declare those reasons to the court in writing before the hearing at which they are to testify, providing the necessary supporting evidence. (Article 167 of the GPK). Failure to comply with a summons and appear in court carries a fine and the court may also order that the witness be brought to court by the judicial police.

**2.11 Are there persons from whom evidence cannot be obtained?**

Evidence may be obtained from all parties other than those listed in point 6B, even if they are incapacitated or have an interest in the outcome of the dispute. The court assesses witness testimony by taking into account the incapacity or vested interest of the witness.

**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 are admitted at the request of the parties or by the court acting on its own initiative. A witness summons is served at the address given by the party calling the witness. If the address is incorrect, the court sets a deadline by which that party must indicate a new address.

Each witness who has been duly summoned and appears in court is interviewed separately in the presence of the parties. A witness may be interviewed more than once. The court assesses the testimony of the witness in light of all other evidence gathered in the case. Under Article 170 of the GPK, before hearing a witness the court advises them of the liability for perjury and takes down their personal details. When the court has a compelling reason to do so, it may hear the witness before the scheduled date of the hearing or conduct the examination out of court. The parties are summoned to attend the examination. There is no provision in the Civil Procedure Code for witness examination by way of videoconference or other technical means. When evidence must be gathered in another judicial district , the court may delegate this task to the local district court (*rayonen sad*) (Article 25 of the GPK).

## 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 unlawfully or proved false following a challenge raised against it in accordance with the procedure for contesting written documents is ignored in the deliberation of the judgment. Such evidence may be excluded from the case. The same procedure applies to presented evidence found to be irrelevant to the dispute.

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

A statement made by a party may be admitted as evidence if given in accordance with the procedure laid down in Article 176 of the GPK, i.e. when the court has ordered the party to appear in person and provide explanations relevant to the circumstances of the case.

Last update: 11/02/2020



# Taking of evidence - Czechia

## 1 The burden of proof

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

The burden of proof stems from the 'burden of allegation', which is essentially determined by the legal provision on the basis of which a right is to be enforced before a court; in particular, it is the set of facts which must be claimed in a specific case. The Code of Civil Procedure provides that each party is required to prove its claims by specifying the relevant evidence – this obligation is known as the 'burden of proof'. As a general rule, all persons who make a claim that is relevant to a particular case are subject to the burden of proof.

All parties must fulfil the obligation of the burdens of allegation and proof to the extent of their claims. If the facts claimed by a party and the proposed evidence are incomplete, the court is obliged to advise the party of this fact.

If the court holds that facts claimed by any of the parties have not been proved in contentious proceedings, it is required to advise that party that evidence must be proposed in support of all claims and that if the party fails to fulfil this obligation it could lose the case. However, the court is required to provide this advice only during hearings, not in court documents sent to the parties (e.g. in a writ of summons).

**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?**

Evidence need not be produced for facts which are generally known (i.e. facts known to a large group of people in a particular place and at a particular time) or are known to the court from its activities, as well as legislation published or notified in the Collection of Laws of the Czech Republic. The court may become aware of foreign law through its own study, through a statement from the Ministry of Justice at the court's request or by means of an expert opinion, or through a request in accordance with international treaties. All these facts may be rebutted with the proposal of evidence.

For certain categories of facts, the law may lay down a presumption. There may be rebuttable presumptions that admit evidence to the contrary and, exceptionally, non-rebuttable presumptions that do not admit evidence to the contrary. In the case of a rebuttable presumption, the court shall consider it proven if none of the parties proposes evidence to rebut the presumption and thus prove facts to the contrary in the proceedings. With some rebuttable presumptions, the contrary may be proven only within a statutory time limit.

The court is bound by decisions of competent authorities that a crime, offence or another administrative infraction has been committed which is punishable under special regulations, and decisions on who committed it. The court is also bound by decisions on personal status. However, the court is not bound by a decision that an offence has been committed or by a decision on who committed it if the decision was made in on-the-spot proceedings. No other verdicts under a criminal judgment or decisions on administrative delicts are binding on the court.

A special type of rebuttable presumption is facts claiming that a party has been directly or indirectly subject to discrimination on grounds of sex, race, faith or other circumstances. The burden of proof is then borne by the counterparty, who is required to prove that the party was not discriminated against.
Instruments issued by the courts of the Czech Republic or other State authorities within the scope of their competence and instruments declared public by legislation confirm that they constitute a regulation or statement of the authority which has issued the instrument (unless proven otherwise), and also confirm the veracity of the facts certified or confirmed therein. Where facts are proven by public instruments, the burden of proof is borne by the party which wants to refute the authenticity of such instruments. In contrast, where private instruments are involved, the burden of proof is borne by the party invoking them. If a party substantiates their claims with a private instrument and the counterparty challenges its authenticity or correctness, the burden of proof passes back to the party to the dispute having proposed this evidence, who must then substantiate its claims in another way.
As a rule, identical claims by parties need not be proven and the court views them as its findings.

**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 principle of free evaluation of evidence is applied in judicial proceedings, i.e. the law does not provide the precise limits determining when a court must accept a fact as proven or not. The Code of Civil Procedure provides that 'the court evaluates evidence at its discretion, each piece of evidence separately and all evidence in its mutual context; the court shall take due account of everything which comes to light in proceedings, including the facts presented by the parties'.
The court passes judgment on the basis of its findings. Findings represent a situation in respect of which there are no reasonable or legitimate doubts.
In general, if considerations in the evaluation of evidence lead to the conclusion that the veracity of claims cannot be confirmed or denied, the judgment will be unfavourable for the party who was to prove the veracity of their claims.

## 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?**

In contentious proceedings, the general principle is that the court only takes evidence proposed by the parties. However, the court may decide that certain evidence will not be taken – typically if it deems the fact in question to be proved. The court may also take evidence other than that proposed by the parties in cases where it is necessary to establish the facts and if it follows from the content of the file. If the parties do not identify the evidence needed to substantiate their claims, the court shall base its examination of the facts on the evidence that has been taken. The court may also consider identical claims by the parties as its findings.
Conversely, in non-contentious proceedings, i.e. in matters in which proceedings may be initiated of the court's own motion, as well as in certain other proceedings, the court is obliged to also take evidence necessary to establish the facts other than that proposed by the parties.

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

The court takes evidence during hearings. If it is practical, another court may be asked to take the evidence, or the presiding judge, with the chamber's mandate, may take the evidence outside the hearing (this also depends on the type of evidence, etc.). The parties have the right to be present when evidence is taken. The results of the taking of evidence must always be communicated after the hearing. The parties have the right to comment on any piece of evidence that has been taken.

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

It depends on the court which evidence it takes. The court's decision not to take particular proposed evidence must be duly substantiated. Generally speaking, the court will not take evidence that, in the court's opinion, cannot help clarify the case (i.e. to prevent the unnecessary taking of evidence), nor will the court take evidence that would require expense disproportionate to the amount of the claim which is the subject of the dispute, or if the amount of the claim cannot be determined at all. In order for the court to evaluate clearly which evidence to take, the parties are obliged to propose specific evidence, i.e. to specify witnesses by name and other identification information, and to state the claims in respect of which the proposed witness will testify; the parties are also obliged to specify documentary evidence or state the scope of an issue that an expert is to address in an expert opinion.

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

All means that can be used to determine the facts of a case may be used as evidence. These include, in particular, the interviewing of witnesses, expert opinions, reports and statements of authorities and natural and legal persons, notarial and enforcement officer's records and other instruments, examination and interviewing of the parties.

**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?**

Any natural person who is not a party to proceedings is obliged to appear in court if summoned, and to testify as a witness. A witness testifies about what they have experienced and observed. They must tell the truth and not conceal anything. Witnesses may only refuse to testify in cases where such testimony would result in the risk of criminal prosecution for him or persons close to him; the court decides whether the reasons for refusing to give testimony are justified. At the beginning of an examination, the identity of the witness must be determined along with circumstances which could affect their credibility. Witnesses should also be informed of the significance of their testimony, of their rights and obligations and of the criminal consequences of a false testimony.
The presiding judge asks witnesses to describe everything they know about the subject of examination. The judge then asks questions necessary to supplement and clarify their testimony. Questions may also be asked by members of the chamber and, with the permission of the presiding judge, by parties and experts.
The presenting of evidence through experts is different mainly because in most cases experts draw up a written expert opinion and then typically provide oral comments on this opinion. Evidence by means of an expert opinion is taken in cases where it is necessary to evaluate circumstances which require expert knowledge. An expert opinion has three parts: the finding, in which the expert describes the circumstances they have examined; the opinion, which contains the expert assessment (expert's conclusions), and the expert's clause. As a rule, experts address specific questions defined by the court, unless an opinion is subject to statutory requirements (especially in the field of company law). Experts are appointed by the court which selects them from a register of experts and interpreters (kept by regional courts). Experts are entitled to financial compensation for the preparation of an expert assessment or expert opinion, if so provided by relevant legislation.
The presiding judge may order a party or another person to appear before an expert, present to him the necessary items, give him the necessary explanations, undergo a medical examination or a blood test, or do or suffer something if it is necessary for the submission of an expert opinion.
An expert opinion may also be submitted by a party to the proceedings. If an expert opinion submitted by a party to the proceedings has all the statutory elements and includes an expert's clause stating that they are aware of the consequences of a deliberately false expert opinion, the evidence shall be taken as if it were an expert opinion requested by the court. The court shall allow an expert whom one of the parties has asked for an expert opinion to consult the file or otherwise allow him to become familiar with the information needed to draw up the expert opinion.
Witnesses provide testimony on facts they noticed directly, whereas experts express opinions only in areas where an assessment of the facts depends on expert knowledge. The conclusions reached by an expert are not subject to a court evaluation in terms of their correctness; the court evaluates the persuasiveness of the opinion as regards its completeness in relation to the set requirements, internal consistency and compliance with other evidence taken.

Documentary evidence is taken in such a manner that the document or part thereof is read out, or the content is communicated, during the hearing by the presiding judge. The presiding judge may require that a party possessing an instrument needed as evidence present this instrument, or may obtain this instrument from another court, authority or legal person.

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

There is no preference in terms of the methods applied, although some means of evidence may be applied only after the taking of statutory evidence becomes impossible (as a rule, various acts in an obligatory written form – only if, for example, they are destroyed, can evidence be obtained by other means, e.g. by examining witnesses). Evidence obtained by examining a party on their claims may be ordered in contentious cases only if the fact at issue cannot be proved by other means (except for consent to an examination). Therefore other evidence takes precedence.

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

In some cases, the law may provide which evidence needs to be obtained; it depends on the specific dispute (e.g. in proceedings on permission to enter into matrimony both betrothed persons need to be examined).

Certain facts may be proved only in a particular manner, e.g. a bill or cheque order may be issued solely upon the production of the original bill, a decision on the redemption of the bill or another instrument; a writ of execution may be enforced only upon the production of an enforceable decision or execution title etc.).

For the establishment of certain obligations or in-rem rights (especially in relation to property), the law requires a written contract – the method of presenting evidence is then derived from this requirement.

**2.8 Are witnesses obliged by law to testify?**

Yes, all persons are required by law to appear before a court as a witness if summoned and to testify; they cannot be represented by another person. Witnesses who fulfil their obligation to testify are entitled to a 'witness allowance' (the reimbursement of cash expenses and lost earnings).

**2.9 In which cases can they refuse to give evidence?**

Witnesses may refuse to testify in cases where such testimony would give rise to the risk of criminal prosecution of the witness or persons close to him; the court decides whether the reasons for refusing to give testimony are justified. The court must also respect the statutory obligation of witnesses to maintain confidentiality of classified information protected by a special law and other confidentiality obligations provided by law or recognised by the State (e.g. facts specified in the health documentation of a patient – 'medical secrets', banking secrets, etc.). In these cases, a person may be examined only if the examinee has been released from that obligation by the competent authority or by the person in whose interest that obligation exists.

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

The fulfilment of the witness obligation may be enforced by having the person brought before the court by the Police of the Czech Republic or, in extreme cases, by imposing a fine.

**2.11 Are there persons from whom evidence cannot be obtained?**

Generally speaking, there are no categories of persons who may not be required to give testimony; however, there are types of facts about which certain persons may not testify (see question 2.9).

**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?**

Only a judge (the presiding judge) has the right to examine a witness and leads the examination. Other members of the chamber and other parties or experts may ask a witness further questions only with the permission of the presiding judge; the presiding judge may refuse a specific question which, for example, is a leading question, one intended to entrap, or a question which is not appropriate or practical.

The use of modern technologies (including videoconferencing) allowing remote examination is currently permitted in those courts that have the necessary technical equipment.

## 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?**

Yes. If a party proposes evidence to prove their claims that has been obtained or procured by the party in contravention of generally binding legislation, and the obtaining or procurement of the evidence has resulted in an infringement of the rights of another natural or legal person, the court shall not take such evidence due to its inadmissibility.

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

The court may order evidence to be taken by examination of the parties if the fact at issue cannot be proved otherwise and if the party to be examined agrees therewith. This rule shall not apply in non-contentious proceedings, i.e. in proceedings which may be initiated of the court's own motion (see paragraph 2.1), and in divorce proceedings or proceedings on the dissolution, invalidation or non-existence of a partnership. Only the examination of parties which the court has ordered separately as procedural evidence to prove claimed facts is considered a means of evidence.

## 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.

There are no such bodies in the Czech Republic.

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# Taking of evidence - Germany

## 1 The burden of proof

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

In principle, in civil proceedings, each party bears the burden of proof for facts pertaining to the conditions of a rule of law in its favour. For this reason, the distribution of the burden of proof is often based on the provisions of substantive civil law, such as the Civil Code (*Bürgerliches Gesetzbuch*, BGB); these provisions contain bases of claim, auxiliary rules, legal defences and other objections. If a legal principle is fulfilled which assigns facts as a legal consequence to a claim (for example: Section 433 of the Civil Code on the conclusion of a contract of sale), it is generally the party deriving the claim from this (in the example, payment of a purchase price) which must present these facts (principle of production of evidence) and – if the opposing party contests them – must prove them. On the other hand, the opposing party must assert and prove entitlement to any opposing rights or objections (e.g. performance). If there is still doubt about an essential factual point after all the procedurally admissible evidence has been exhausted, a decision has to be taken about where

the burden of proof lies. The party which, according to the rules of the burden of proof, has to adduce evidence of the fact at issue loses the case if it fails to discharge this burden.

**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?**

German law provides for various forms of relaxation of the burden of proof up to reversal of the burden of proof. In particular:

1. Reversal of the burden of proof

In civil proceedings, the burden of proof can be reversed if the basic rule that each party must prove the facts in its favour is reversed. Reversal of the burden of proof results in the opposing party having to disprove a fact in favour of the other party. For example, Section 477 of the Civil Code contains clauses on reversal of the burden of proof in sales law. The first sentence of Section 477(1) of the Civil Code states as follows: 'If, within one year after the date of the passing of the risk, it becomes apparent that the condition of the goods contravenes the requirements of Section 434 or Section 475b of the Civil Code, it is presumed that the goods were already defective when risk passed, unless this presumption is incompatible with the nature of the goods or of the defective condition thereof. […]' In this case, the buyer does not have to prove that a defect was already present at the time of delivery, but the onus is on the seller to prove that a defect was not present at that time.

2. Relaxation of the burden of proof

a. The statutory presumption (*gesetzliche Vermutung*) orders by law that, in certain circumstances (basis for presumption), the existence of further circumstances is to be assumed and that these are to be taken as a basis for the legal assessment. Statutory presumptions relax the burden of proof on one of the parties, which has to plead and prove only the facts that justify the presumption. The opposite may be admissibly proven pursuant to Section 292 of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO). Statutory presumptions may relate to facts, an example being the presumption that a mortgage certificate has been transferred to the creditor by virtue of possession of the certificate (Section 1117(3) of the Civil Code). They may also relate to rights, an example being the presumption that the holder of a certificate of inheritance has the status of heir (Section 2365 of the Civil Code).

b. A factual assumption (*tatsächliche Vermutung*) exists if a court – on the basis of its own or expert experience – can conclude unproven facts from proven facts (Circumstantial evidence). For example, it can be concluded from the circumstantial evidence that the temperature at a specific time was well above zero, and therefore, based on general experience, that a specific person could not have slipped on black ice at that time. The opposing party can challenge the assumption by means of facts that cast serious doubt on whether the occurrence was indeed typical in the ordinary course of events.

3. Case-law is increasingly defining the burden of proof on the grounds of equity and a fair balancing of interests in specific areas of risk. The most significant examples are as follows:

Product liability (pursuant to Section 823(1) of the Civil Code)

The burden of proving that a product is defective, that legal rights have been infringed and that there is a causal relationship between the two falls on the injured party. On the other hand, the burden of proof lies with the manufacturer that it has complied with the obligations incumbent upon it in terms of organisation, instructions, post-marketing surveillance and hazard prevention, and therefore that no fault can be attributed to it.

Duties to inform and advise

If specific contractual or pre-contractual obligations to inform and advise are not satisfied, the party at fault has the burden of proving that the damage would have occurred even if they had complied with their obligations. There is a presumption that the injured party acted in accordance with the information provided.

**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?**

Section 286 of the Code of Civil Procedure lays down the fundamental principle under the law of civil procedure of the free assessment of evidence (*Freiheit der Beweiswürdigung*). Under this principle, the court has to make its own decision about whether an alleged fact is true or false in the light of the entire content of the proceedings and the conclusions it draws from any evidence.

A preponderant or high degree of probability alone is not sufficient to prove a fact, but on the other hand all doubt does not have to be excluded. There must be a degree of certainty which is sufficient in practice and which silences any remaining doubt, without necessarily ruling it out entirely.

There is an exception regarding the necessary degree of proof in cases where the law accepts that prima facie evidence suffices (for example, in the case of interim relief). An allegation is prima facie correct if there is a preponderant probability that it is correct. In proving prima facie correctness, the parties are not obliged to follow the strict rules of proof (witnesses, documents, inspection by the court, expert evidence or examination of the parties). For example, an affidavit is also admissible (Section 294 of the Code of Civil Procedure).

## 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 principle in civil proceedings is that it is for the parties alone to put forward the issues and the relevant evidence. The court may not itself identify material and use it as a basis for its decision. At most, the court has the duty to inform and advise under Section 139 of the Code of Civil Procedure.

In some cases, the court may exceptionally take evidence of its own motion, contrary to the principle of party presentation, but it must do so with a view to a well-founded presentation of the case by the parties, and may not seek to investigate the facts itself.

Hence the court may, of its own motion, order inspections, reports and the consultation of experts (Section 144 of the Code of Civil Procedure), the presentation of documents (Section 142) and the further questioning of a party (Section 448). A party may also be questioned by the court of its own motion (Section 448). However, there must be a certain degree of initial probability for the fact to be proved.

In non-contentious proceedings (such as guardianship and inheritance cases) and in family matters (such as child custody and parentage cases) which are not disputes (i.e. are not governed by the law of evidence under the Code of Civil Procedure), the principle of ex officio investigation applies (Section 26 of the Act on Proceedings in Family Matters and in Non-contentious Proceedings (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit*, FamFG)). This means that the court, of its own motion, establishes the facts relevant to the decision and takes the necessary evidence in a suitable form, at its discretion. In this respect, the court is not bound by the submissions of the parties. Different rules apply in marital cases (such as divorce proceedings) and contentious family matters (such as certain maintenance proceedings) (Section 113 of the Act).

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

Formal evidence:

Where the facts are disputed by the parties, the Code of Civil Procedure orders the formal evidence procedure, which allows the taking of evidence by the following means of proof: expert testimony, visual inspection by the court, documents, witness testimony and examination of the parties (see below). After a party has offered evidence, the court orders the taking of evidence on facts that need to be proved. This is generally done without specific formality at the hearing or by an order for evidence under Section 358 of the Code of Civil Procedure. According to Section 359 of the Code, the order for evidence must specify the facts in dispute for which evidence is to be taken, must specify the evidence to be taken and state the names of the witnesses and experts to be questioned or of the party to be questioned, and must specify the party that is relying on the evidence.

Evidence is then taken in accordance with the relevant legal provisions (Sections 355 to 484 of the Code of Civil Procedure). In particular, the principles that evidence should be taken directly (Section 355) and that the parties may attend (Section 357) must be observed.
The first of these principles provides that the evidence must be given before the trial court itself, because it is this court that has to assess the evidence. Exceptions apply only where, in accordance with statute, responsibility for taking evidence can be transferred to one member of the trial court (Section 361 of the Code of Civil Procedure) or to another court (Section 362). Under the principle that parties may attend, the parties have a right to be present during the hearing of witnesses and also have the right to question witnesses (Section 397).
Under Section 285 of the Code of Civil Procedure, the results of the evidence are then debated in the oral proceedings. Under Section 286 of the Code, the court must establish the facts on the basis of the entire content of the proceedings, including the evidence taken; in doing so, it assesses the evidence freely.
Informal taking of evidence:
In contrast to formal evidence, informal taking of evidence allows the facts to be established by any means of proof considered necessary by the court and may take place largely without formal requirements. Under Section 284 of the Code of Civil Procedure, informal taking of evidence in civil proceedings is admissible only if the parties have given their consent.
If, in proceedings subject to the Act on Proceedings in Family Matters and in Non-contentious Proceedings, the taking of formal evidence is not required by law, the court may take evidence formally or informally to convince itself of the facts (Sections 29 and 30 of the Act). The parties may refer possible evidence to the court, but the court alone decides, at its discretion, on the necessity and extent of the taking of evidence and the nature of the taking of evidence.

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

An application to admit evidence can be rejected on procedural grounds or under the rules governing evidence if:
the facts do not have to be proved by evidence, i.e. the facts have already been proved, or are obvious or undisputed;
the facts are not material, i.e. cannot have any influence on the decision;
the evidence is unsuitable for proving the fact alleged (this is rare, as evidence may not be assessed before it is taken);
the evidence cannot be obtained;
the evidence is inadmissible, e.g. as a result of an unsubstantiated allegation in abuse of process or a conflicting confidentiality obligation of the witness (unless they are released from this obligation);
the taking of evidence is at the court's discretion, e.g. in the assessment of damages in accordance with Section 287 of the Code of Civil Procedure;
the fact was established finally in other proceedings and is binding on both parties;
the application was not submitted in time (Section 296(1) of the Code of Civil Procedure);
the taking of evidence is hampered by an obstacle of uncertain duration, the relevant time limit has elapsed and the proceedings would otherwise be delayed (Section 356 of the Code of Civil Procedure).

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

The five types of formal taking of evidence are:
Visual inspection by the court, Sections 371-372a of the Code of Civil Procedure
This consists of any direct, sensory inspection by the judge for evidential purposes. Contrary to the somewhat misleading term used, '*Augenschein*', 'visual inspection', it may also include sensory inspection by touching, smelling, listening and tasting. Consequently, sound and video recordings and data storage media are also included.
Witness testimony, Sections 373-401 of the Code of Civil Procedure
Witnesses can testify to past events which they themselves have observed. Only a person who is not a party to the dispute may be a witness.
If the witness must have specialised knowledge in order to understand the facts, the witness is referred to as an expert witness (*sachverständiger Zeuge*, Section 414 of the Code of Civil Procedure): an example would be the statement of an emergency doctor in the case of injuries sustained in an accident.
Expert testimony, Sections 402-414 of the Code of Civil Procedure
The expert (*Sachverständiger*) provides the judge with the specialised knowledge the latter needs to assess the facts. Experts do not establish the facts themselves. They are expected to give their assessment purely on the basis of the facts referred to them (*Anschlusstatsachen*).
Only if specialist expert knowledge is required to establish the facts themselves can an expert be asked to give their own conclusions. An example would be a doctor's diagnosis.
A private expert report commissioned by one of the parties may be admitted as expert evidence only in exceptional cases and only with the consent of both parties.
Documentary evidence, Sections 415-444 of the Code of Civil Procedure
Documents within the meaning of the Code of Civil Procedure are written declarations, which are capable of providing evidence for disputed submissions of a party. In terms of evidential value, the law draws a distinction between public documents (Sections 415, 417 and 418 of the Code) and private documents (Section 416).
Examination of the parties, Sections 445-455 of the Code of Civil Procedure
The questioning of parties is subsidiary to other forms of evidence and admissible only in order to present the main evidence (Section 445(2) of the Code of Civil Procedure). In principle, the party with the obligation to provide evidence can only file the petition that the opposing party be examined (Section 445, first sentence). Apart from that, the parties may be questioned only with the consent of the other side or of the court.
On the other hand, in the informal taking of evidence, the court may take the necessary evidence in a suitable manner. No decision on evidence or date for the hearing of evidence is needed for evidence to be taken. In addition to the formal means of evidence (see above), the evidence may include, for instance, the obtaining of official information and reports from authorities, informal telephone or written inquiries, use of sound and video recordings and data recordings. The court may make use of any conceivable means of acquiring knowledge to convince itself of the facts; its ability to do so is limited only in situations in which scientific knowledge and principles of logic imply that no further insights will be gained or in which certain evidence must be excluded. In cases subject to the Act on Proceedings in Family Matters and in Non-contentious Proceedings the results of the taking of evidence are to be placed into the record (Section 29(3) of the Act).

**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?**

All evidence has equal status, because of the principle that the court is free to assess the evidence; there are no differences in evidential value. The only differences are in the types of evidence-gathering:
Witnesses
Each witness must be examined individually and not in the presence of witnesses who are to be heard subsequently (Section 394(1) of the Code of Civil Procedure). Witnesses whose testimonies conflict may be brought face to face (Section 394(2)).

Before witnesses are questioned, they are warned that they must tell the truth and that they may subsequently be required to swear an oath (Section 395(1)). Witnesses are first asked to give their personal details (Section 395(2)) and are then questioned on the subject-matter of the case (Section 396). The court tries to ensure that their testimony remains relevant to the matter on which they are being questioned. It may also put further questions to witnesses to clarify points or to ensure testimonies are complete.
Parties have the right to be present when witnesses are questioned and to put questions to them. Generally, the parties themselves, in proceedings with mandatory representation by a lawyer, are only allowed to submit questions to be put to witnesses, whereas legal counsel can question a witness directly (Section 397).
The rules governing the questioning of witnesses apply to evidence provided by expert witnesses and to the questioning of the parties themselves (Sections 402 and 451).

Documents
In principle, documentary evidence is presented by submitting the document. If the party presenting the evidence does not have the document in question, but the document is in the possession of the opposing party or a third party, the party presenting the evidence may request that the opposing party or third party be required to produce the document (Sections 421 and 428 of the Code of Civil Procedure). The obligation to produce documents is a requirement of civil law and applies where the person presenting the evidence is entitled to demand that the opposing party or a third party surrender or produce a document (Section 422). There must be prima facie grounds to justify this obligation (Section 424(5), second sentence). Written expert reports or opinions are documents within the meaning of the Code of Civil Procedure.

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

In principle, no. Under the principle that the court is free to assess the evidence, in accordance with Section 286 of the Code of Civil Procedure, all evidence has equal status. All the evidence gathered provides a basis for the assessment to be made by the court. Only in exceptional cases do binding rules of evidence have to be observed by judges: examples are those applying to the evidential value of the record of the proceedings under Section 165 of the Code of Civil Procedure, or of the judgment under Section 314, or of other documents under Sections 415 to 418.

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

No, the Code of Civil Procedure in principle does not stipulate any obligatory forms of evidence to prove particular facts.
There are exceptions in certain types of proceedings. In proceedings relating to deeds and bills of exchange, evidence establishing the facts on which the claim is based may be given only in the form of documents, and evidence of all other facts only in the form of documents or by questioning the parties (Sections 592 et seq. of the Code).
In certain proceedings involving in-depth intervention in terms of fundamental rights, the law provides for the mandatory obtaining of an expert opinion, for instance prior to the appointment of a custodian or prior to an involuntary commitment measure (Sections 280 and 312 of the Act on Proceedings in Family Matters and in Non-contentious Proceedings).

**2.8 Are witnesses obliged by law to testify?**

All witnesses who are subject to the jurisdiction of the German courts and have been properly summoned are required to attend court hearings, to testify and to swear an oath.
A witness's duty to testify also includes a duty to check what he or she knows on the basis of documents and to refresh his or her memory (Section 378 of the Code of Civil Procedure). Witnesses are not obliged to inquire into facts of which they are unaware.

**2.9 In which cases can they refuse to give evidence?**

The Code of Civil Procedure draws a distinction between the right of witnesses to remain silent on personal grounds (Section 383 of the Code of Civil Procedure) and on material grounds (Section 384). The witness's right to refuse to testify under Section 383 of the Code of Civil Procedure is based on the witness's family relationship or obligation of professional trust. It is intended to avoid conflicts of interest.
The right of witnesses to remain silent on personal grounds applies to betrothed persons (No 1), spouses (No 2) and parties in a civil union (No 2a) for the duration of, and even after the end of, their marriage or civil union. Any person who is or was directly related to a party, either by blood or by marriage, or who is or was related as a collateral relative to the third degree, or who is or was a collateral relative by marriage to the second degree, cannot be obliged to testify either (No 3). Collateral relationship means not directly related, but descended from the same third person. The degree of blood relationship or of relationship by marriage is determined by the number of intermediary births.
Under Section 383(1) No 4 of the Code, clerics, people who are or have been involved professionally in the preparation, production or distribution of periodicals or radio and TV programmes (No 5), and persons who, by virtue of their office, position or profession, are entrusted with information which cannot be disclosed because of its nature or by virtue of a legal provision (No 6), are not obliged to testify.
The right of witnesses to refuse to testify for professional reasons covers all information known to the persons referred to above by virtue of their particular position.
On the other hand, a witness's right not to testify under Section 384 of the Code of Civil Procedure is intended to protect witnesses from adverse consequences of having to testify. It gives them only the right not to reply to particular questions, but does not entitle them to refuse to testify at all.
The right not to testify pursuant to Section 384 applies where answering the question would cause direct financial damage to the witness or a person with a family relationship listed in Section 383 of the Code (No 1), or would expose them to dishonour or entail the risk of criminal or administrative prosecution (No 2). Nor do witnesses have to answer questions if this would oblige them to disclose a trade or business secret (No 3).
Section 385 of the Code of Civil Procedure sets out a number of exceptions to the witnesses' rights not to testify described. Particular importance is attributed to Section 385(2), which releases clerics and persons who are required not to testify under substantive law in accordance with Section 383(1) No 6 from their obligation to remain silent, and consequently restores their obligation to testify.

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

Yes. If a witness who has been properly summoned does not attend, the court will impose an administrative fine under Section 380(1) of the Code of Civil Procedure, and if this is not paid it will impose a custodial sentence. The fine is €5 to €1,000 (Section 6(1) of the Act introducing the Criminal Code ( *Einführungsgesetz zum Strafgesetzbuch*)), and the custodial sentence is one day to six weeks (Section 6(2) of the same Act). Witnesses are also required to pay the costs occasioned by their failure to attend.
A witness who fails to attend for a second time can be forcibly brought to the hearing under Section 380(2) of the Code of Civil Procedure, as well as incurring an administrative penalty. These measures will not be enforced if the witness provides an adequate explanation of his or her absence in good time. If no such explanation is received in good time, the witness will have to show that he or she was not responsible for the delay (Section 381 of the Code).

If a witness refuses to testify or to swear an oath without giving a reason, or gives a reason that has been finally declared to be irrelevant, the same measures can be taken under Section 390(1) of the Code of Civil Procedure as those applying to a witness who fails to attend without explanation. If a witness refuses to testify a second time, he or she may, on application, be detained in order to compel him or her to testify, but only for the duration of the current trial (Section 390(2) of the Code).

**2.11 Are there persons from whom evidence cannot be obtained?**

No, there is no general disqualification from being a witness. Any person who has the maturity to make factual observations, to understand questions about them and to answer can be a witness, irrespective of their age or ability to enter into legal transactions.

There are no special rules for people who have previously been punished for deliberately making false statements or committing perjury.

However, a person cannot be a witness if they are directly involved in the proceedings, as a party or as the legal representative of a party. There is an exception for joint parties in relation to facts which solely concern other joint parties. In certain circumstances, an agent may be a witness if the subject-matter of the examination is outside the scope of the agency relationship. A registered representative may, for example, testify in relation to facts that are not related to their duties in proceedings to which the person they represent is a party.

The relevant time at which a person must qualify to appear as a witness is always the time at which they are to be heard.

**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 are questioned by the judge or judges. The examination of witnesses may also be allocated to one member of the trial court or to another court, if in particular it can be assumed from the outset that the trial court will be able to assess the result of the evidence appropriately even without a direct impression of the course of the taking of evidence.

Each witness must be examined individually and not in the presence of witnesses who are to be heard subsequently (Section 394(1) of the Code of Civil Procedure). Witnesses whose testimonies conflict may be brought face to face (Section 394(2)).

Parties have the right to be present when witnesses are questioned and to put questions to them. Generally, the parties themselves, in proceedings with mandatory representation by a lawyer, are only allowed to submit questions to be put to witnesses, whereas legal counsel can question a witness directly (Section 397).

Witnesses may be heard via videoconferencing if the court permits this on application by (only) one of the parties, Section 128a(2) of the Code of Civil Procedure.

## 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?**

In principle, legislation that prohibits the court from considering particular evidence does not exist in civil procedure. The only exception is that a court may not consider judgments which have been removed or which are to be removed from the Federal Central Register (Section 51 of the Act governing the Federal Central Register (*Bundeszentralregistergesetz*)).

However, the court may be prohibited from considering evidence in civil proceedings under the case-law of the Federal Constitutional Court ( *Bundesverfassungsgericht*) if there is unlawful interference in the constitutionally protected fundamental positions of the party contesting the evidence – in particular human dignity and general personal rights – which is not justified by way of exception. It is necessary to weigh up the benefits and interests, taking into account all circumstances of the individual case.

Under this case-law, for example, the court may not generally hear evidence obtained by means of secret sound recordings, the use of mini-transmitters, directional microphones or intercoms to listen in to conversations, and the use in evidence of illegally obtained personal records, such as diaries or intimate letters.

However, in all these cases, it may be decided on a case-by-case basis that by way of exception there are counterbalancing rights that justify the admission of illegally obtained evidence, always provided that this does not impinge on the core area of private life.

The question whether evidence must be excluded as a result of the infringement of a procedural rule must be decided separately for each such rule.

Deficiencies affecting the proceedings and the way the hearing is conducted can be remedied under Section 295(1) of the Code of Civil Procedure. The examination of a particular party as a witness is, for example, a procedural deficiency that can be waived, i.e. the evidence can be used if the parties waive the rule or have not raised an objection against the error by the end of the subsequent hearing. Failure to provide information about a witness's right to refuse to give evidence may also be remedied under Section 295(1) of the Code.

Compliance with rules in the public interest cannot, however, be waived (Section 295(2)). Examples include all points to be considered by the court of its own motion, such as the requirements for the proceedings, the admissibility of an appeal or the disqualification of people to be judges.

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

As has already been explained at 2.4, the examination of parties may under certain circumstances be admitted as evidence. The weight given to such evidence is left to the court's discretion (Section 286 of the Code of Civil Procedure).

## 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.

Last update: 11/03/2024



# Taking of evidence - Estonia

## 1 The burden of proof

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

The burden of proof is governed by Section 230 of the Code of Civil Procedure (*tsiviilkohtumenetluse seadustik*), which states that, in actions, each party is to prove the facts on which their claims and objections are based, unless otherwise provided for by law. Furthermore, unless otherwise prescribed by law, the parties may agree on a division of the burden of proof different from that provided for by law, and agree on the nature of evidence for proving certain facts.

Unless otherwise provided for by law, the court may take evidence at its own initiative in a matrimonial matter, filiation matter, a dispute related to the interests of a child or proceedings on petition.

**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?**

A fact that the court deems to be common knowledge need not be proved. A fact concerning which reliable information is available from sources outside the proceedings may be declared as common knowledge by the court. Furthermore, an argument made by a party concerning a fact need not be proven if the opposing party admits the fact. Admission means unconditional and express agreement to a factual allegation by means of a written statement addressed to the court, or made in a court session where the agreement is recorded in the minutes. Admission may be withdrawn only with the consent of the opposing party or if the party withdrawing the admission proves that the allegation concerning the existence or absence of the fact is incorrect, and that admission was caused by an incorrect understanding of the fact. In such cases the fact is not deemed to be admitted. Admission is assumed as long as the other party has not explicitly disputed a claim made regarding a factual circumstance, and the intention to dispute a fact is not evident from the party's other statements.

**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 evaluates all evidence pursuant to law from all perspectives, thoroughly and objectively, and decides, according to the conscience of the court, whether or not an argument presented by a participant in a proceeding is proven considering, amongst other factors, any agreements between the parties concerning the provision of evidence.

## 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?**

Although Section 236(2) of the Code of Civil Procedure states that, in general, the concerned parties should request the court to take the evidence, Section 230(3) of the Code of Civil Procedure provides for cases where the court may take evidence on its own initiative. In particular, unless otherwise provided for by law, the court may take evidence on its own initiative in matrimonial matters, filiation matters, disputes related to the interests of a child or proceedings on petition.

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

If the taking of additional evidence is required in order to evaluate evidence, the court will organise this by means of a court ruling which is communicated to the participants in the proceedings. If evidence has to be taken from outside the territorial jurisdiction of the court conducting proceedings in a matter, the court hearing the matter may send a letter of request in order to make a ruling for performance of a procedural act by the court within whose territorial jurisdiction the evidence may be taken. In addition, evidence may be taken outside Estonia.

After making a ruling, evidence is to be taken in line with the provisions governing the taking of evidence, depending on the type of evidence, in Chapters 27–32 of the Code of Civil Procedure.

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

The court may reject a request for the taking of evidence if:

the evidence has no relevance to the matter (above all, if the fact proven need not be proved or if the court deems that enough evidence has already been provided in proof of the fact);

if pursuant to law or based on an agreement between the parties, a fact must be proven by evidence of a certain type or form, but the taking of evidence of another type or form is requested;

the evidence is not accessible, above all if the witness's details or the location of a document is unknown, or if the relevance of the evidence is disproportionate to the time needed to take the evidence or any other related difficulties;

the request for the taking of the evidence is made late;

the need for taking evidence is not substantiated;

the participant in the proceedings requesting the taking of evidence fails to make an advance payment demanded by the court in order to cover the costs incurred when taking the evidence.

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

According to Section 229(1) of the Code of Civil Procedure, evidence in a civil matter is any information which is in a procedural form provided by law and on the basis of which the court, pursuant to the procedure provided by law, ascertains the existence or lack of facts on which the claims and objections of the parties are based and other facts relevant to the just adjudication of the matter.

Under subsection 2, evidence may be the testimony of a witness, statements given under oath by the participants in the proceedings, documentary evidence, physical evidence, an inspection or an expert opinion. In proceedings on petition and simplified proceedings, the court may also deem other means of proof, including a statement of a participant in the proceedings that is not given under oath, to be sufficient to prove the facts.

**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?**

1) Witness testimony

According to Section 251(1) of the Code of Civil Procedure, any person who may be aware of the facts relevant to a matter may be heard as a witness unless the person is a participant in the proceedings or a representative of a participant in the proceedings in the matter. Witnesses are to provide information regarding the facts they have directly perceived. A person summoned as a witness is required to appear in court and give truthful testimony before the court with regard to the facts known to them. Instead of witnesses attending a hearing, they may be required to provide written statements, if appearing before the court would be an unreasonable burden on the witness and, taking account of the contents of the questions and the personal characteristics of the witness, giving written testimony is, in the court's opinion, sufficient for providing proof. Alternatively, the court may use the record of a hearing in other court proceedings, if this clearly simplifies the proceedings and the court may be presumed able to assess the record to the necessary extent without directly questioning the witness.

Every witness is heard individually and witnesses who have not been heard are not permitted to be present in the courtroom during the hearing of the matter. If a court has reason to believe that a witness is afraid or has some other reason not to speak the truth before the court in the presence of a participant in the proceedings or if a participant in a proceedings leads the testimony of a witness by interference or in any other manner, the court may remove that person from the courtroom while the witness is heard. In such cases, after the return of that person the testimony of the witness is read to the participant in the proceedings and the participant in the proceedings has the right to question the witness. If the testimony of the witnesses is contradictory, the court may hear and question a witness several times in the same court session.

In the event of written statements, participants in the proceedings have the right to submit written questions to witnesses through the court. The court determines which questions the witness is required to answer. If necessary, the court may summon a witness to a court session in order to give oral testimony.

If a person is unable to appear in court due to illness, old age or disability or for any other valid reason, or if it is necessary for another reason, the court may go to the witness to hear their testimony.
The court examines evidence directly (Section 243(1) of the Code of Civil Procedure). In order to verify the reliability of witness statements, the court may rely on the various methods specified in Sections 262(1) and (8) of the Code of Civil Procedure, e.g. under subsection 1 the court ascertains the identity of a witness and his or her area of activity, education, place of residence, connection to the matter and relationships with the participants in the proceedings. Before giving testimony, the court explains the obligation of a witness to tell the truth and the procedure for refusing to give testimony; under subsection 8, the court shall, if necessary, pose additional questions during the entire questioning in order to clarify or supplement the testimony, or to establish the basis for the witness's knowledge.
2) Expert opinion
In order to clarify circumstances relevant to a matter which require specific expertise, the court has the right to obtain the opinion of experts at the request of a participant in the proceedings. In order to ascertain the law in force outside the Republic of Estonia, international law or common law, the court may ask the opinion of an expert in legal matters at the request of a participant in the proceedings or on the initiative of the court. The provisions concerning the hearing of witnesses apply to hearing persons with specific expertise with the aim of proving a circumstance or event that requires specific expertise in order to be correctly interpreted. If a participant in the proceedings has submitted the written opinion of a person with specific expertise to the court and the person is not heard as a witness, these opinions are considered as documentary evidence. Instead of ordering an expert assessment, the court may use an expert opinion submitted at the order of the court in another court proceedings or an expert opinion prepared at the order of the body conducting proceedings in criminal or misdemeanour proceedings if this simplifies the proceedings and if the court is presumed to be able to evaluate the expert opinion to the necessary extent without organising a new expert assessment. In such cases, the expert may be posed additional questions or summoned to court for questioning.
An expert assessment is conducted by a forensic expert or other qualified person employed by a state forensic institution, by an officially certified expert or by another person with specific expertise appointed by the court. The court may appoint a person as an expert if the person has the knowledge and experience necessary to provide an opinion. If an officially certified expert is available for conducting an expert assessment, other persons are appointed as experts only with good reason. If the parties agree on an expert, the court may appoint that person as an expert if they are able to act in the capacity of an expert pursuant to law.
A participant in the proceedings has the right to pose questions to an expert through the court. The court determines which questions require an expert opinion. The court must set out its reasons for rejecting any such questions. Experts are to submit their expert opinion to the court in writing, unless the court orders them to provide this orally or, with the expert's consent, in another form. An expert opinion should contain a detailed description of any examinations carried out, the conclusions reached as a result of those examinations and reasoned answers to the court’s questions.
Experts are to provide a correct and reasoned opinion on the questions posed to them. In order to provide an expert opinion, an expert may examine any material from the case which is necessary, participate in the examination of evidence in court and request reference materials and additional information from the court.
An expert opinion is disclosed during a court session. Unless the expert opinion is submitted in writing or in a format that can be reproduced in writing, the expert provides their opinion in a court session. The court may summon an expert who has submitted an expert opinion in writing or in a format which can be reproduced in writing to a court session for questioning. The court may also summon an expert who has provided an expert opinion to a court session if this is requested by one of the concerned parties.
After examining an expert opinion, the participants in the proceedings may pose questions to the expert in a court session in order to clarify the opinion, provided that the expert has been summoned to court. The questions may also be submitted to the court beforehand and then forwarded to the expert by the court. The court will exclude any questions that are irrelevant or beyond the competence of the expert.
The provisions concerning the hearing of witnesses also apply to the hearing of experts.
3) Written evidence
Documentary evidence takes the form of a written document or any other document or similar data medium that is recorded by way of photography, video, audio, electronic or other data recording, contains information on the facts relevant to the adjudication of a matter and can be submitted in a court session in a perceptible form.
Official and personal correspondence, decisions from other cases and the opinions of any persons with specific expertise submitted to the court by participants in the proceedings are also deemed to be documents.
Any written documents submitted should be originals or transcripts. If participants in the proceedings submit original documents together with a transcript, the court may return the original documents and include in the file a copy of the transcript certified by the judge. At the request of persons submitting written documents, the original documents included in the file may be returned after the court decision has come into force and the proceedings have been concluded. The transcript is kept in the file. The court may set a deadline for the examination of a submitted document, after which the court is to return the document. In such cases, the transcript of the document is to be kept in the file. If a document has been submitted in the form of a transcript, the court has the right to request that the original document be submitted or the circumstances preventing the original document from being submitted be substantiated. If the demands of the court are not complied with, the court is to decide on the probative value of the transcript of the document.

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

In civil procedures, the general rule of the free assessment of evidence applies, but limitations may be applied with the agreement of the concerned parties. In particular, Section 232(2) of the Code of Civil Procedure states that no evidence has predetermined weight for a court, unless otherwise agreed by the parties. Thus, the parties may agree to assign a decisive weight to certain pieces of evidence.

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

Yes. It may arise from law or an agreement between the parties that a certain fact may be proven only with evidence of certain type or in a certain form.

**2.8 Are witnesses obliged by law to testify?**

Yes. Under Section 254 of the Code of Civil Procedure, a person summoned as a witness is required to appear in court and give truthful testimony before the court with regard to the facts known to him or her.

**2.9 In which cases can they refuse to give evidence?**

The following persons have the right to refuse to give testimony as witnesses:
the descendants and ascendants of the plaintiff or defendant;
a sister, stepsister, brother or stepbrother of the plaintiff or defendant, or a person who is or has been married to a sister, stepsister, brother or stepbrother of the plaintiff or defendant;
a step parent or foster parent or a step child or foster child of the plaintiff or defendant;
an adoptive parent or an adopted child of the plaintiff or defendant;
the spouse or cohabitant of the plaintiff or defendant, and the parents of the spouse or cohabitant, even if the marriage or cohabitation has ended.

A witness may also refuse to give testimony if the testimony may incriminate them or a person specified above in a criminal offence or misdemeanour.
A witness has the right to refuse to give testimony concerning any facts to which the State Secrets and Classified Information of Foreign States Act (*riigisaladuse ja salastatud välisteabe seadus*) applies.
Any person processing information for journalistic purposes has the right to refuse to give testimony concerning any facts that would make it possible to identify the person who provided the information.
Regardless of the above, a witness is not permitted to refuse to give testimony concerning:
the performance and content of a transaction which he or she was invited to witness;
the birth or death of a family member;
a fact related to a proprietary relationship arising from a relationship under family law;
an act related to a disputed legal relationship which the witness performed themselves as the legal predecessor or representative of a party.

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

Yes. If a witness refuses to give testimony without good reason, the court may impose a fine or detain the witness for up to 14 days. The witness is to be released immediately if they give the testimony or if the hearing of the matter ends or the need for the witness to be heard ceases to exist.
In addition, a witness bears the procedural expenses caused by his or her refusal to give testimony without good reason.

**2.11 Are there persons from whom evidence cannot be obtained?**

Section 256 of the Code of Civil Procedure sets out which persons are not permitted to be heard as witnesses. In particular, ministers of a religious association registered in Estonia or their support staff shall not be heard or questioned with regard to circumstances confided to them in the context of spiritual care. The following are not to be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed:
representatives in civil or administrative matters, counsels in criminal or misdemeanour matters and notaries with regard to facts which have become known to them in the performance of their professional duties;
doctors, pharmacists or other health care providers, with regard to facts which a patient has confided in them, including facts related to the ancestry, artificial insemination, family or health of a person;
other persons who, due to their occupation or professional or economic activities, have been party to confidential information which they are not permitted to disclose pursuant to law.
Professional support staff of the persons referred to above may also not be heard as witnesses without the permission of the person in whose interests the duty to maintain confidentiality is imposed.

**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?**

Section 262 of the Code of Civil Procedure sets out the procedure for hearing witnesses. The hearing of a witness is to start with the court explaining the object of the hearing to the witness and urging the witness to disclose everything that they know concerning the object of the hearing. Thereafter, the participants in the proceedings have the right to submit questions to the witness through the court. With the permission of the court, participants in the proceedings may also pose questions directly.
The court excludes any leading questions and questions that are not relevant to the matter, as well as any questions posed with the aim of revealing new facts that have not been presented before and repeated questions. If necessary, the court has the right to pose additional questions at any point during questioning in order to clarify or supplement the testimony, or to establish the basis for the witness's knowledge.
Under Section 350 of the Code of Civil Procedure, the court may organise a session in the form of a procedural conference so that the participants in the proceedings or their representative or adviser have the opportunity to be in another place at the time of the court session and perform the procedural acts in real time at that place. A witness or expert who is in another place may also be heard, and a participant in the proceedings who is in another place may pose questions to them via a court session held in the form of a procedural conference.
In a court session organised in the form of a procedural conference, the right of every participant in the proceedings to file petitions and applications and to formulate positions on the petitions and applications of other participants in the proceedings is to be guaranteed in a technically secure manner, and the conditions of the court session in respect of the real time transmission of images and sound from the participants in the proceedings not present in court premises to the court and vice versa must be technically secure. With the consent of the parties and the witness and, in proceedings on petition, with the consent of the witness alone, the witness may be heard by telephone in a procedural conference. The Minister of Justice may establish specific technical requirements for conducting a court session in the form of a procedural conference.

## 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?**

Under Section 238(3)(1) of the Code of Civil Procedure the court may refuse to accept evidence and return the evidence if the evidence has been obtained by a criminal offence or unlawful violation of a fundamental right.

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

According to Section 267 of the Code of Civil Procedure, a party who has not been able to prove, by any other evidence, a fact which needs to be proven by him or her or who has not provided any other evidence, has the right to request that the opposing party or a third party be heard under oath in order to prove the fact. In the case of a legal person, a representative thereof may be heard under oath.
The court may also hear, under oath, a party required to provide evidence concerning a disputed fact if one party requests it and the other party agrees.
Regardless of the parties' requests and the division of the burden of proof, the court may at its own initiative hear under oath either or both parties if, on the basis of the earlier proceedings and the evidence provided and taken, the court is not able to form a position on the truth of a stated fact that is to be proven.
The court may also hear a party under oath on its own initiative if the party required to provide evidence wishes to give statements under oath, without the consent of the opposing party.
In simplified proceedings and in proceedings on petition, the court may also deem a statement from a participant in the proceedings that has not been given under oath to be sufficient in order to prove a fact, unless it arises from the regulation of the relevant type of proceedings on petition that only statements given under oath by participants in the proceedings are admissible. In an action, a decision may not be based on any statement given by a party which was not given under oath.

Last update: 18/04/2023

# Taking of evidence - Ireland

## 1 The burden of proof

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

The burden of proving that a particular claim generally rests on the party who makes the assertion or claim in question. For example, in a negligence action, the onus of proving negligence rests on the plaintiff and the burden of proving contributory negligence rests on the defendant. Generally, proof of the facts necessary to establish a cause of action will rest on the plaintiff whilst proof of a defence to the action will lie on the defendant and if the defendant makes a counterclaim, then the defendant will bear the burden of proof in respect of that claim. However, certain statutory requirement sometimes put the onus of proof on a defendant. For example, in unfair dismissal claims, the burden of proof falls on the defendant employer i.e. the employer must show that there were substantial grounds justifying the dismissal. [See the **Unfair Dismissals Act 1977** as amended].

### 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?

It is not necessary to prove facts which are admitted. Judges may rely on their general knowledge or take judicial notice of facts which are clearly established or well known or part of common knowledge, and therefore evidence of such facts is unnecessary. The law makes certain presumptions which may be rebutted by evidence. These include presumptions as to the legitimacy of children, the validity of marriages, the mental capacity of adults and the presumption of death where a person has not been seen or heard from in over 7 years despite all appropriate enquiries having been made. The rule of *res ipsa loquitur* applies where a presumption of negligence is made in circumstances where the cause of the accident is shown to have been under the control of the defendant or his servants or agents at the time of the accident and the accident was such that in the ordinary course of events would not have happened if those in control had used proper care. When the maxim of *res ipsa loquitur* is invoked, it shifts or moves the burden of proof onto the defendant and he or she must then show that he or she was not negligent. However, the burden of proving causation still rests with the plaintiff. Of note is the fact that the doctrine *res ipsa loquitur* does not have to be pleaded or set out in the plaintiff's claim in order for a plaintiff to be able to rely on it at the hearing of the case if the facts show that the doctrine is clearly applicable.

### 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?

In a civil case, a party will succeed on an issue if he or she satisfies the court in relation to that issue on the balance of probabilities. Thus, if a party fails to satisfy the court that his or her version of events is more probable than his or her opponent's version, then he or she will lose the case. It is a flexible standard and the courts will generally require more proof in certain cases, such as cases involving a claim of fraud, because of the seriousness of the allegation.

## 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 is obtained in civil proceedings through discovery of documents, disclosure and through the testimony of witnesses.

**Discovery:** In High Court actions, discovery is obtained by application by one party to the other in writing requesting that discovery be made voluntarily. The court will only order discovery where the other party has failed or refused to make the discovery voluntarily or has ignored the request for discovery. [See Rules of the Superior Courts, Ord. 31, r. 12 as amended]. Any discovery sought must be relevant and necessary to the facts in issue in the action. It is also possible to seek discovery of documents from a non-party to the action.

**Disclosure:** Any party to a personal injuries action must disclose to the other party, without the necessity for any court application, any medical reports prepared by experts who will be called as witnesses to give evidence at the trial. [See Rules of the Superior Courts, Ord. 39, r. 46 as amended]. Both parties must also exchange lists of the names and addresses of all witnesses intended to be called and the plaintiff must furnish a full statement of all items of special damages or out of pocket expenses associated with the loss or injury the subject matter of the claim.

**Witnesses of Fact:** Parties do not need the permission of the court to adduce witness evidence in support of their cases, with the exception of proceedings in the Commercial List of the High Court, where a party who wishes to rely on the evidence of a witness must serve a witness statement signed by the witness setting out the witness's evidence and must call the witness to give oral evidence at the trial. If a party fails to provide a witness statement before the trial in the High Court Commercial List, that party may not call the witness without the permission of the court. The court also has wide powers to control the evidence which is admitted and may exclude evidence which would otherwise be admissible or limit the cross-examination of a witness. In certain circumstances, a party may also apply for a court order to allow a witness's evidence to be given in a sworn deposition taken by a court-appointed examiner prior to the hearing of the action. In general, the judge's function is to hear all of the evidence adduced by the parties and not to engage in a fact-finding mission. Generally, a judge has no right to call a witness without the consent of the parties, although he or she may do so in cases of civil contempt or in certain child care proceedings. A judge also has the power to recall a witness previously called by a party.

**Expert Witnesses:** Parties do not generally need the permission of the court to adduce expert evidence in support of their cases. Where expert evidence is to be adduced the parties should exchange any expert reports in advance of the trial. In proceedings in the Commercial List of the High Court, a judge may, as part of the pre-trial procedure, direct any expert witnesses to consult with each other for the purposes of identifying the issues in respect of which they intend to give evidence, reaching agreement on the evidence that they intend to give in respect of those issues and considering any matter which the judge may direct them to consider. Such expert witnesses may be directed by the court to prepare a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, which will contain the outcome of their meetings and consultations. Any such outcome of expert witness consultations shall not be binding on the parties. [See Rules of the Superior Courts, Ord. 63A, r. 6(1)(ix)].

The court may, of its own motion, appoint an expert as an assessor to assist the court in relation to the issue to be tried. The court may direct the assessor to prepare a report, copies of which are provided to the parties, and to attend the trial to advise or assist the court.

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

**Discovery:** An order for discovery will only be made by a court where the party from whom discovery is sought has failed, refused or neglected to make the discovery sought on a voluntary basis. Therefore, if the court orders discovery, the party who sought the discovery will usually be awarded the costs of having made the application. If a party to an action is ordered to make discovery of certain documents in their power or possession, they must make copies of those documents available to the other side. An order for discovery is complied with by the swearing of an affidavit of discovery setting out the relevant documents by way of exhibits to the affidavit. Failure to comply with an order for discovery may lead to the action being dismissed or the defence being struck out so as to ensure that parties to litigation comply with orders for discovery.

**Witnesses of fact:** Parties do not need the permission of the court to adduce witness evidence in support of their cases. In circumstances where the court orders that a witness's evidence is to be taken in a deposition, the witness will give evidence orally before a court-appointed examiner. The examination will be conducted as if it were a trial, with a full opportunity to cross-examine the witness and with a transcript of the evidence being produced.

**Expert Witnesses:** Parties do not generally need the permission of the court to adduce expert evidence in support of their cases. Experts may prepare written reports where they set out their findings and give their impartial, expert opinion. Where expert reports are prepared they should be exchanged in advance of the trial. The expert's overriding duty is to the court and not to either of the parties to the proceedings, although the expert will be paid by the party instructing him or her.

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

The court may reject an application of a party seeking to obtain or adduce certain evidence if the court is of the view that that evidence is irrelevant, unnecessary or inadmissible. According to the "best evidence rule", the best and most direct evidence of a fact must be adduced or if the best evidence is not available, its absence must be accounted for. For example, the best evidence as to the contents of a particular letter is the production of the letter itself, rather than the giving of oral evidence as to its contents. In general, all evidence relevant to any of the facts in issue is admissible. However, certain evidence is inadmissible such as privileged communication (for example evidence of confidential communication between a client and solicitor). Therefore, the admissibility of evidence will be decided in each case by the judge.

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

Facts may be proved by evidence, by presumptions and inferences which arise from evidence, and by the court taking judicial notice of certain known facts. The types of evidence which may be relied upon in civil proceedings are witness testimony, documents and real evidence. Documents can include paper documents, computer records, photographs, and video and sound recordings.

**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?**

In principle, witnesses of fact give their evidence orally at trial where they are asked to confirm the truth and accuracy of their statements.

Expert witnesses give their evidence in written reports unless the court orders otherwise. An expert report must set out its conclusions, the facts and assumptions upon which it is based, and the substance of the expert's instructions. The court will decide whether it is also necessary for an expert to attend trial to give oral evidence.

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

The court has a wide discretion as to the weight or credibility which should be attached to any piece of evidence. For example, hearsay evidence, while it may be admissible in civil proceedings, will often carry less weight than direct testimony, particularly if the maker of the statement could have been called himself or herself to give evidence.

Certain documents and records are accepted as authentic. For example, the records of businesses and public authorities are accepted as authentic if certified as such by an officer of the business or public authority and various types of official documents (such as legislation, by-laws, orders, treaties and court records) may be proved by printed or certified copies without any further proof.

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

Certain transactions must be effected in writing and documentary evidence is therefore required for proof of such transactions. Examples include contracts for the sale of land.

**2.8 Are witnesses obliged by law to testify?**

As a general rule, if a witness is competent he or she can be compelled to attend court and give evidence. A party who wishes to secure the attendance of a witness at trial prepares a witness summons requiring the witness to attend the court to give evidence. Once issued by the court and properly served, the summons binds the witness to attend the hearing. A person who disobeys a witness summons is guilty of contempt of court.

**2.9 In which cases can they refuse to give evidence?**

The general rule that competent witnesses may be compelled to testify does not apply to foreign sovereigns and their households, foreign diplomatic agents and consular officials, representatives of certain international organisations and judges and jurors, in relation to their activities in those capacities. Spouses and relatives of the parties may be compelled to give evidence in civil proceedings. A witness is obliged to answer a question except in circumstances where they would lose the privilege against self-incrimination. In other words, a witness is obliged to answer a question unless he or she can establish that there are reasonable grounds to fear that the answer will tend to incriminate him or her.

Witnesses who may generally be required to give evidence are nevertheless entitled to withhold certain documents from inspection and refuse to answer certain questions on the grounds of privilege. The main types of privilege are legal professional privilege, "without prejudice" communication, and, as mentioned above, the privilege against self-incrimination.

Evidence may also be withheld on the grounds of public interest immunity if its production would be contrary to the public interest. The evidence which may be covered by the immunity includes evidence relating to national security, diplomatic relations, the workings of central government, the welfare of children, the investigation of crime and protection of informants. In addition, journalists are not required to disclose their sources unless disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

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

A witness who refuses to testify, having been served with a witness summons, may be committed to prison for contempt of court until such time as she or he purges his or her contempt, or may be required to pay a fine. A failure to comply with a witness summons is in effect a failure to comply with a court order and so any refusal to testify may be a contempt of court.

**2.11 Are there persons from whom evidence cannot be obtained?**

Adults are not competent to give evidence in civil proceedings if they are incapable of understanding the oath or incapable of giving rational testimony. A child witness may not be competent to give evidence if he or she does not understand the duty to speak the truth or have sufficient understanding to justify his or her evidence being heard and it is up to the particular trial judge to decide this issue.

**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 initially give their evidence-in-chief and are then cross-examined by the opposing barrister. During cross-examination, leading questions may be put to the witness. Sometimes, the witness is again re-examined by the side that called them initially after cross-examination has ceased. The judge may also ask question of the witness, for example to receive clarification on certain matters.

Provision has been made to allow witnesses to give evidence by live television link in certain cases. In proceedings concerning the welfare of a child or a person with a mental disability, the court may hear evidence from a child though a live television link and questions to the child may be put through an intermediary. Live television link evidence may also be received where the witness in question lives outside the jurisdiction of Ireland.

## 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?**

Illegally obtained evidence is not necessarily inadmissible. It is admissible if it is relevant but the trial judge has discretion to exclude it. If it appears to the trial judge that public policy requires the evidence to be excluded, then even if it is relevant to the facts in issue, the evidence will not be admitted.

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

Witness statements given by the parties to the proceedings are admissible in evidence to the same extent as statements given by non-parties.

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Last update: 16/04/2024



## Taking of evidence - Greece

### 1 The burden of proof

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

On matters of proof, Greek law follows the principle of party prosecution (*archí tis diáthesis*). This means that the court acts only on the application of a party and decides on the basis of the factual claims made and demonstrated by parties and of the applications that they submit. Procedural steps are taken on application by a party, unless the law provides otherwise. Each party is required to demonstrate only the facts which have a bearing on the judgment of the case and which are necessary to support his or her independent claim or counter-claim. An application that is not demonstrated is rejected.

**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?**

Where the law requires evidence for the existence of a fact, counter-evidence is allowed unless there is a rule to the contrary. Facts which are so well-known that there can be no reasonable doubt that they are true, or which are known to the court from other judicial proceedings, are taken into consideration automatically, and do not need to be proven. The court will take account automatically of the lessons of common experience, without requiring evidence. The court will likewise take notice of the laws, customs and usages of other countries of its own motion, though it may require evidence if it is not familiar with them.

**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 judges the evidence freely and decides at its own discretion whether the statements made are true. In its decision it sets out the reasons that led it to conclude as it has. Where the law lays down that the case can be determined on the balance of probabilities alone, e.g. on an application for interim measures (*asfalistiká métra*), the court is not obliged to apply the rules governing the taking of evidence, the admissible forms of evidence and the force of the evidence that may be brought forward, but may take into consideration anything it deems appropriate in order to arrive at an opinion as to the 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?**

The basic principle is that evidence is proposed and supplied by the parties. However, the court may of its own motion order the submission of any evidence allowed by law, even if it has not been adduced by a party.

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

After the taking of evidence the court decides on the substance of the case, unless it finds that the evidence was insufficient, in which case it may order new, additional evidence to be submitted.

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

If it finds that the existing evidence is sufficient or if the party has not managed to submit it within the legal deadline.

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

Evidence, under the Code of Civil Procedure (*Kódika Politikís Dikonomías*), comprises admissions, inspections, expert reports, documentary evidence, the hearing of parties, witnesses' statements, presumptions of fact and affidavits.

**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?**

Expert witnesses (*pragmatognómones*) assist the court by delivering an opinion on questions put to them by the court. If necessary, the court requires the expert witnesses to be present when all or certain judicial steps are carried out. Each court keeps a list of expert witnesses. Orders issued upon a proposal from the Minister for Justice lay down how the lists are drawn up and kept. The court trying the case gives expert witnesses the necessary instructions on how they are to carry out their tasks, and lays down in particular (a) whether it considers it necessary that they be present at any stage in the judicial proceedings, and (b) whether the expert opinion is to be given in court or drawn up by the expert witnesses alone. Unless determined otherwise by the court trying the case, the same powers can be exercised by another court that acts on a request or a reference to take some judicial step relating to the expert opinion, or by a delegated judge (*entetalménos dikastís*). If a written opinion is ordered, the court lays down a time-limit within which the expert witnesses must deliver their opinion. The judge, or, in the case of a bench of judges the president of the court, may extend the time-limit at the request of the expert witnesses and without the parties having been previously summoned, if the expert witnesses consider that the time allowed is not adequate for the preparation of the opinion. If there is more than one expert witness, they carry out all the actions needed for the preparation of an expert report and draw up their written opinion jointly. They meet at the invitation of any one of them. A written opinion must state the actions they have carried out and give the views of each of them, with reasons, and must be signed by them. If any of the expert witnesses is not present when the opinion is drawn up, or refuses to sign it, this is stated in the opinion. The expert witnesses or a person authorised by them for the purpose submit the written opinion to the registry of the court that appointed them and that fact is recorded. If the opinion is submitted to the registry of a court acting on a request or reference from the delegated judge's court, the report is forwarded immediately to the registry of the court trying the case. The court always assesses the expert witnesses' opinion freely.

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

An oral or written admission (*omología*) made by a party in court or before the delegated judge constitutes full proof against the person making it; admissions made outside court, like other evidence, are assessed freely.

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

Contracts and acts of a collective nature cannot be proven by witness evidence if the value of the transaction is over EUR 20 000, and witness evidence is not allowed against the content of documentary evidence even if the value of the transaction is less than GRD 2 million or EUR 20 000. But the evidence of witnesses is nevertheless admitted in the following cases: (a) where there is rudimentary evidence provided by a document with evidential value that makes it appear likely that the transaction was indeed entered into (the 'beginnings of written evidence', *archí éngrafis apódeixis*); (b) if there is a physical or moral reason why the document cannot be produced; (c) if it is shown that a document was drawn up but has been accidentally lost; (d) if the evidence of witnesses is justified by the nature of the transaction or the specific conditions under which it was entered into, and especially if it concerns commercial dealings.

**2.8 Are witnesses obliged by law to testify?**

Anyone who is called to be examined as a witness must appear and state the facts within his or her knowledge. If the person fails to appear, without justification, the court will order him or her to pay the expenses caused by his or her absence, and may also impose a fine.

**2.9 In which cases can they refuse to give evidence?**

The following persons have the right to refuse to be examined as witnesses: (1) ministers of religion, lawyers, notaries, doctors, pharmacists, nurses, midwives, their assistants, and the party's counsel, in respect of facts that have come to their knowledge in the practice of their profession; (2) persons related to the parties by blood, marriage or adoption up to the third degree of kinship, in the direct line or a collateral line, unless they are related in the same way to all the parties, and spouses, former spouses, and persons engaged to be married. Furthermore, a witness is not obliged to testify to (1) facts that might lead to prosecution of an offence committed either by the witness or by a person related to him or her within the meaning of Article 401(2) of the Code of Civil Procedure, or which might reflect on the witness's honour or the honour of such a person, (2) facts that constitute a professional secret.

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

A witness who appears but refuses to testify, even when required to do so, can be ordered by the court to pay a fine.

**2.11 Are there persons from whom evidence cannot be obtained?**

The following cannot be examined as witnesses:

priests, in respect of anything they have learned under the seal of confession;

persons who, at the time of the events in question, did not have the mental capacity to comprehend them or are unable to communicate what they perceived;

persons who, at the time of the events in question, were in a state of mental disorder that effectively limited the operation of their judgment and their will or who are in such a state when they are to be examined;

lawyers, notaries, doctors, pharmacists, nurses, midwives, their assistants, and the party's counsel, in respect of facts which have been confided to them or which came to their knowledge in the practice of their profession for which they have a duty of confidentiality, unless the person who confided them and to whom they owe the duty of confidentiality allows them to testify;

public officials and serving military personnel in respect of facts for which they have a duty of confidentiality, unless the responsible minister allows them to be examined;

persons who may have an interest in the outcome of the trial.

**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?**

Before he is examined a witness is put under oath (by swearing a religious oath or by making an affirmation). Witnesses are examined separately and only if it is deemed essential can they be confronted with other witnesses or with the parties. Witnesses give their evidence orally. Witnesses must state how the evidence they are giving came to their knowledge, and in the case of hearsay evidence they must state the person who gave them the information. The court may disallow questions put to witnesses by parties or their counsel if they are clearly pointless or irrelevant, and it declares the examination of a witness to be ended when it considers that he or she has stated everything he or she knows of the facts to be proved. The court may decide that a videoconference should be held in a specific case, of its own motion or on application by a party. The court decides whether or not to accept such an application after determining whether the use of the technology is necessary for the effective conduct of the proceedings. Having regard to the circumstances of the case, the court may allow an application for videoconferencing while requiring additional guarantees for the proper conduct of the proceedings. The judge, the registrar and the other persons participating in the videoconference must be present in the respective rooms before the scheduled time of connection. The court will consider on a case-by-case basis whether there should be a judge involved at the remote location. The equipment is handled by the judge or authorised court staff. In the case of a consular authority, the equipment is handled by a person authorised by the head of delegation. A hearing by videoconference is carried out in accordance with the provisions of the Code of Civil Procedure governing the judicial step concerned. The judge determines the number of persons who may be present in the rooms. He or she conducts the hearing and provides the necessary guidance to the persons who are present in both places. Each member of the court or participant in the trial is entitled, with the permission of the judge who conducts the hearing, to put questions to the parties, the witnesses and the expert witnesses present. In order to establish the identity of the person in the remote room, the judge is assisted by the registrar or by a person at the remote location who has been authorised by the consul. The judge who conducts the hearing decides when the videoconference comes to an end. The hearing of witnesses, expert witnesses and parties by videoconference is deemed to take place before the court and has the same evidential force as a hearing in open court.

**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 can consider legal evidence only. The concept of 'legal' evidence (*nómima endeiktiká mésa*) includes the means by which the evidence was obtained. Evidence obtained illegally is illegal, and is not taken into consideration.

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

Yes, the examination of parties is accepted as evidence.

**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.**

Greece has not designated any other authorities competent to take evidence in judicial proceedings in civil or commercial matters under the Regulation.

Last update: 05/04/2023



## Taking of evidence - Spain

**1 The burden of proof**

To have a right recognised before a court, evidence must be provided of the facts being alleged. This involves recourse to a procedural activity, the steps and timing of which are regulated.

The parties taking part in the proceedings must prove the facts that they are alleging and on which their claims are based. Therefore, the plaintiff must provide evidence of the facts in his or her application, while the defendant must be able to prove facts preventing, cancelling or weakening the legal effectiveness of the facts in the application.
The party with the burden of proof suffers the prejudicial consequences of a lack of proof. Thus, if when it comes to issuing the judgment or similar decision, the party has not proven the facts he or she is alleging, the court will dismiss the claims. In order to attribute lack of proof of a certain fact to either party, the court will take into account the ease with which each party can prove that fact.
It is essential for all persons wishing to resort to the courts to analyse beforehand their chances of being able to prove what they are alleging in order to avoid wasting time and money (legal costs) if they are unable to do so. To this end, it is necessary to have some knowledge, even if very general and basic, of the rules governing the evidential stage of proceedings.

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

The evidential stage in Spanish law is regulated by Chapters V and VI of Title I, Volume II (Articles 281 to 386) of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*) (Law 1/2000 of 7 January 2000). The Code of Civil Procedure contains general comments on evidence in Section XI of the introduction (technically known as the preamble) which may be of interest to anyone wishing to find out how the Spanish legislator views the evidential stage of proceedings.
Some proceedings have special rules on the taking of evidence which alter the general rules, such as proceedings involving minors or families. Evidence can also be taken in the Court of Second Instance (*Juzgado de Segunda Instancia*). This is normally evidence that could not be taken in the Court of First Instance (*Juzgado de Primera Instancia*) for reasons that are not attributable to the applicant.

**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?**

Traditionally, a distinction has been made at the theoretical level between proof of facts and proof of law, although in reality the law is not a matter to be proved since it must be known by the judge. An exception is foreign law, which may need to be proved. Proof of foreign law is regulated by the Law on international legal cooperation in civil matters (*Ley de cooperación jurídica internacional en materia civil*), according to which the judge may request reports on a foreign law matter, normally through the Spanish central authority. If foreign law is not proven, Spanish law may be applied, although the judge will make use of this power only under exceptional circumstances.
It is not necessary to prove facts that are completely and generally known or facts on which the parties are agreed, except in cases in which the subject matter of the proceedings is beyond the control of the parties; in other words, proceedings on the legal capacity of persons, parentage, marriage and minors.
The presumptions laid down by the law exempt the party benefiting from the presumption from providing proof of the presumed fact. In the case of such presumptions, evidence to the contrary is admitted unless expressly prohibited by law. Presumptions laid down by the law include the joint ownership of property and money acquired by either or both spouses after marriage, except where it can be proven that they belong exclusively to either one of the spouses, the presumption that spouses live together, and the presumption that a missing person was alive until the time when his or her death was declared.
As a general rule, the defending party's lack of a response to the application and failure to appear do not exempt the applicant from the burden of proving the facts that support his or her claims. However, there are exceptions where a lack of objections from the defendant results in the judge issuing a judgment supporting the claims of the plaintiff. This is the case, for example, in small claims proceedings and in proceedings for eviction due to non-payment.

**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 facts alleged by the parties in their statements of claim and defence must be proven, and the court must carry out its evaluation on the basis of the circumstances of the case, bearing in mind all of the evidence taken and its nature (for instance, a public document does not have the same value as a statement by one of the parties). The evaluation of the evidence and the reasons why the judge reaches certain conclusions must be set down in the judgment. In addition to direct evidence, there is also indirect evidence, which means that once a fact has been admitted or fully proven, the court may presume that another fact is true provided that there is a precise and direct link between the two facts. The court must set down in the decision the reasoning which led it from the proven fact to the presumed 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?**

According to the principle that the court must rule only on the issues submitted to it (*principio dispositvo*) which governs civil proceedings, the parties must propose to the court the evidence they intend to put forward during the proceedings. However, the court may decide on its own motion that certain evidence can only be taken in the cases laid down by the law. Thus, during the preliminary hearing in ordinary civil proceedings, if the judge considers that the evidence proposed by the parties is insufficient to clarify the disputed facts, he or she may inform the parties of the fact which could be affected by the insufficiency of the evidence, and also indicate the evidence the parties may propose.
In proceedings concerning the legal capacity of persons, parentage, marriage and minors, the judge may, regardless of the evidence that the parties or the prosecution service request, take whatever evidence he or she deems necessary to decide the proceedings depending on the type of proceedings in question.

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

In oral proceedings (claims up to €6 000), following the proposal and admission of evidence during the hearing, the judge proceeds to take evidence in the actual proceedings.
In ordinary proceedings (claims exceeding €6 000), following the admission of evidence in the preliminary hearing (in which procedural issues are also settled), a date is set for the proceedings and the taking of evidence is postponed until then. The parties are summonsed to make statements, the witnesses that the parties themselves were unable to bring to court are summonsed, experts are summonsed when the parties wish to obtain clarification or explanations concerning the opinions expressed, and institutions holding documents that the parties were unable to enclose with the claim and defence are approached, provided that the parties have indicated the archives where the documents are located. Any evidence that does not need to be taken during the proceedings (such as visits to certain places) is taken prior to the proceedings. In the event that the only evidence admitted in the preliminary hearing is documents, and they have not been challenged, or when an expert's report is produced and no party has asked for the presence of the expert in the preliminary hearing, the court will issue a judgment following the preliminary hearing, without having to set a date for proceedings.
The general rule is that evidence is taken by the same judge or court hearing the case, even when the witness does not reside in the district and must travel to the seat of the court on the day summonsed (although with the right to claim the corresponding compensation from the party who proposed him or her as established by the court clerk and without prejudice to the subsequent right of that party to claim it from the other party if he or she wins legal costs). Only in exceptional cases, such as the considerable distance involved, can judicial assistance be requested in order to receive the statement in the court of the place of residence of the witness. In this case, a letter of request is addressed to the other court (at the national level) or a mechanism set up by the rules on

international judicial cooperation is used, depending on where the statement is to be received. In the latter case, the parties must hand over the questions to be asked in writing. Videoconferencing is being increasingly used and in such cases, it is not necessary to formulate questions in advance. It is enough to request a videoconference from the court of the place where it is to be carried out.

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

Evidence of indisputable facts or evidence that is not relevant to the subject of the proceedings will not be admitted, nor evidence that, according to reasonable and certain rules and criteria, will not contribute to clarifying the disputed facts. In no case will the court admit any evidence which is obtained illegally, which is contrary to fundamental rights or which seeks the court's assistance to obtain documents available to the parties.

In general, the evidence must be proposed in the oral proceedings or in the preliminary hearing. Evidence proposed out of time will not be admitted.

In proceedings involving legal capacity, family and minors, new facts may be introduced after the claim and defence, and particularly in the Court of Second Instance when an appeal is lodged against the judgment or the appeal is contested. New evidence may be proposed in such cases, provided that the period for issuing the judgment has not commenced. In other proceedings, when the period for submitting arguments has ended and a significant new fact arises, the parties may make it known to the court in writing and also request the taking of evidence if the other party does not recognise the fact as true.

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

The means of proof that may be used in proceedings are: examination of the parties; public documents; private documents; expert opinions; judicial examination; examination of witnesses; and means of reproduction of words, sounds and images, as well as instruments that permit the storage, retrieval and reproduction of words, data, figures and mathematical operations carried out for accounting purposes or other purposes that are relevant to the proceedings.

**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: there is no need to mention witnesses in the claim or defence, since in oral proceedings, each party must appear on the date indicated for the hearing with the persons who are to testify in the proceedings. The parties must ask the court to summons the witnesses they were unable to bring themselves, ordering them to appear within the three days following receipt of the summons. In ordinary proceedings, witnesses are identified at the preliminary hearing, when in addition to procedural issues, the disputed facts of the case are determined and the evidence relating to them proposed and admitted.

Witness testimony is always oral and is taken on the day of the proceedings (as are the clarifications deemed necessary to be requested from experts). However, there is one exception to this rule of hearing witnesses: when it is necessary for legal persons or public entities to provide information on the significant facts of the proceedings, but it is not necessary to hear natural persons individually. In this case, instead of an oral statement, a list of questions which the parties wish to have answered and which the judge deems pertinent is submitted to the entity. The reply is made in writing.

EXPERT TESTIMONY: expert opinions are always given in writing. After having submitted them and read those of the other side, the parties must decide whether or not it is necessary for the expert to come to the proceedings to provide any clarifications or explanations that might be necessary.

If the parties wish to make use of expert testimony, the expert opinion on which their claims are based must be submitted with the claim or defence, except where this is not possible, in which case, they must indicate the opinions they intend to use. Furthermore, they must produce the opinions as soon as they are available, and in any case, five days before the preliminary hearing starts in ordinary proceedings, or five days before the hearing in oral proceedings. Notwithstanding this, the parties may ask that a court expert be appointed when submitting the claim or defence, in which case, the opinion is issued subsequently (usually in the period between the preliminary hearing and the proceedings, but sufficiently in advance so that the parties can study it before the hearing).

An intermediate figure between the witness and the expert is the expert witness, which is a witness that is capable of providing information on technical issues related to the proceedings. Normally, expert witnesses are authors of reports submitted with the claim or with the defence as documentary evidence, and not as expert testimony.

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

Yes. Public documents provide full proof of the fact, act or state of affairs they are describing, as well as the date on which the documentation was produced and the identity of the notaries and persons involved in producing it. If the authenticity of a public document is challenged, it is verified and compared with the original, wherever it may be. Notwithstanding this, the following provide full legal proof without any need to verify or compare, except if there is evidence to the contrary or a comparison of handwriting, where possible: old public documents which do not have a notary's protocol and any public document for which the original is missing or for which there is no record for the purpose of checking or comparing.

Private documents also provide full proof in proceedings when they are not challenged by the party for whom they are prejudicial. If a private document is challenged, the party who produced it can ask for a comparison of handwriting or any other means of proof that would verify its authenticity. If it is not possible to prove the authenticity of the private document, it will be evaluated in accordance with the rules of sound criticism, which are also followed when evaluating the rest of the evidence being taken. If, following a challenge, it turns out that the document is authentic, the party who challenged it may be ordered to pay not only the costs involved, but also a fine.

Lastly, if the rest of the evidence does not demonstrate otherwise, the judgment will consider as true any facts that a party has recognised as such in the parties' statements if that party personally took part in them and their establishment as true is entirely prejudicial to him or her.

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

In principle, there is no rule indicating which evidence must be used to prove certain facts, but it is logical that, for instance, in the case of a claim for an amount of money arising from commercial relations between the parties, the existence or settlement of the debt will basically be determined by means of documentary evidence. Expert testimony will be required when scientific, artistic, technical or practical knowledge is needed to evaluate the facts or circumstances that are relevant to the matter or to gain greater certainty about them.

**2.8 Are witnesses obliged by law to testify?**

Witnesses who are summonsed are obliged to appear at the proceedings or hearing indicated. Should they fail to do so, they are liable for a fine of €180 to €600, subject to a five-day period during which they may be heard. If the witness does not appear when summonsed for the second time, the sanction is no longer simply a fine: the witness is then in contempt of court, something which witnesses are warned about at the outset.

**2.9 In which cases can they refuse to give evidence?**

The general principle that obliges witnesses to testify does not apply to witnesses who, because of their status or profession, have a duty to keep secret the facts they are being questioned about, in which case they must state this, giving reasons, and the court, taking into account the grounds for the refusal to testify, will decide what should happen as regards their examination, and may release them from the obligation of replying. If the witness is released from replying, this must be recorded.

If it is alleged by the witness that the facts on which he or she is being questioned relate to a matter that has been legally declared or classified as confidential, the court will, in the cases in which it considers this necessary in the interests of administering justice, ask the competent body on its own motion

for an official document confirming this. Once the court has checked that the allegation of confidentiality is correct, it will order that the document be placed in the records, including the questions covered by official secrecy.
Moreover, before their statements, witnesses must be questioned by the court regarding their personal circumstances (family ties or friendship with or enmity towards the parties, personal interest in the matter, etc.), and in the light of their answers, the parties may submit comments to the court on their impartiality.

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

Witnesses are obliged to appear if summonsed by the court and they are obliged to take an oath or pledge to tell the truth, being warned of the sanctions laid down for the crime of perjury in civil proceedings. Witnesses are obliged to testify in the manner laid down in Article 366 of the Code of Civil Procedure. If a witness refuses to testify, he or she could be in contempt of court, which is subject to a fine, or, depending on its seriousness, the refusal could potentially constitute a crime.

**2.11 Are there persons from whom evidence cannot be obtained?**

Anyone may be a witness, except for those permanently deprived of reason or of the use of their senses (sight, hearing, etc.) with respect to facts which they could only know about by using these senses.
Minors under the age of fourteen may act as witnesses if, in the opinion of the court, they have the necessary level of maturity to know and to speak the truth.
Under Spanish law, the traditional concept of witness refers to natural persons, but this does not prevent legal representatives of legal persons from appearing as witnesses to provide information on facts with which they are familiar because of their position. In the case of legal persons and public entities, the possibility of informing the court in writing is expressly provided for, as already mentioned (Article 381 of the Code of Civil Procedure).

**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 questions that have been admitted by the court are put directly by the parties' lawyers, starting with the party that proposed the witness. Once the questions put by the lawyer of the party who proposed the witness testimony have been answered, the lawyers of any of the other parties may ask the witness any new questions they consider useful to clarify the facts. The judge may also question the witness to obtain clarifications and additional information.
On its own motion or at the request of any of the parties, the court may allow a witness who has made a statement that seriously contradicts that of another witness or of any of the parties previously examined to be confronted with that witness or party.
The witness may be examined by videoconference if requested and if the court agrees. This will be the case when the statement via videoconference is the most appropriate and proportionate way to take evidence given the circumstances involved (basically, considerable distance between the residence of the witness and the seat of the court), always ensuring the adversarial system and the right of defence of the parties.

### 3 The evaluation of the evidence

This is the activity by which the judge determines the efficacy of the evidence taken overall, following the rules of sound criticism. However, as indicated above, there are some types of evidence whose evaluation is established by the law; for example, with regard to public and private documents and the examination of the parties, in some cases.

**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 obtained illegally cannot be admitted. Moreover, evidence obtained directly or indirectly by violating fundamental rights or freedoms has no effect. Such evidence will therefore be ignored by the court when deciding the case.
If one of the parties believes that fundamental rights were infringed in obtaining or discovering any evidence that has been admitted, he or she must state this immediately, notifying the other parties where appropriate. The judge will then decide on the legality of this evidence.
If the judge him- or herself believes that a fundamental right has been infringed when obtaining evidence, he or she will dismiss the evidence ex officio.
This matter, which may also be raised by the court of its own motion, will be settled in the proceedings or, in the case of oral proceedings, at the beginning of the hearing, before starting to take the evidence.

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

If a party is called to testify by the other party, the evaluation of his or her statement will depend on the content of the answers given. Thus, if the rest of the evidence does not demonstrate otherwise, the judgment will consider as true any facts that a party has recognised as such if that party personally took part in them and their establishment as true is entirely prejudicial to them. In all other regards, the court will evaluate the content of the statement according to the rules of sound criticism.
Likewise, the court may accept as true personal facts about the parties if they do not appear to testify or, having appeared, refuse to testify or provide evasive answers, provided that they are facts in which the party being examined has personally taken part and their establishment as true would be fully or partially prejudicial to them. In addition, any party who does not appear is liable to a fine of between €180 and €600.

Last update: 30/10/2020



## Taking of evidence - France

### 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



# Taking of evidence - Croatia

## 1 The burden of proof

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

The rules regarding taking of evidence and presenting, selecting, collecting, examining and assessing the items of evidence in civil proceedings are set out in Articles 219 to 276 of the Civil Procedure Act (*Zakon o parničnom postupku*) (*Narodne novine* (NN; Official Gazette of the Republic of Croatia) Nos 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 148/11 – consolidated text, 25/13, 89/14 – Decision of the Constitutional Court of the Republic of Croatia (*Ustavni sud Republike Hrvatske*), 70/19, 80/22, 114/22 and 155/23 (ZPP)).

The general rule is that each party must set out the facts and present the evidence on which their claim is based, or by which they contest the statements and evidence of the opposing party, which means that in Croatian (civil) procedural law the principle of the right to be heard predominates in the collection of facts and presentation of evidence.

Therefore, each party has to prove the veracity of statements on the existence of facts that are favourable to them, on which their claims (and objections) are based, unless otherwise provided by law.

As a rule, the court is authorised to establish only the facts that the parties have set out and to take only the evidence that the parties have presented. By way of exception, the court is authorised (and obliged) to establish the facts which the parties have not set out and to take evidence which the parties have not presented only if it suspects that the parties are intending to assert claims which they are not permitted to assert.

If, on the basis of the evidence produced (Article 8 of the ZPP), the court cannot establish a fact with certainty, it will decide on the existence of the fact by applying the rules on the burden of proof.

### 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?

The evidence includes all facts of importance for issuing a decision.

It is not necessary to prove the facts that the party has acknowledged before the court in the course of proceedings, but the court may also order the presentation of evidence for these facts if it deems that, in acknowledging them, the party is seeking to assert a claim which it is not permitted to assert (third paragraph of Article 3 of the ZPP).

Moreover, legal rules are exempt from evidence because they are covered by the rule that the court is deemed to know the law (*iura novit curia*).

It is not necessary to prove facts which are common knowledge. However, it is admissible to prove that a certain fact is not common knowledge.

Facts whose existence is assumed by the law do not need to be proven, but it may be proven that they do not exist, unless otherwise provided by law.

Accordingly, the rules on rebuttable presumptions (*praesumptiones iuris*) facilitate evidence because the party that relies on a legally relevant fact is not required to prove the existence of such a fact directly; it is sufficient to rely on a general legal rule included in a rebuttable presumption, and a party that claims that the general rule included in the rebuttable presumption cannot be applied to a particular case must prove it.

However, there are cases in which the law does not allow the non-existence of facts presumed by the law to be proven (*praesumptiones iuris et de iure*) when the court is obliged to conclude that the legally relevant fact in question exists.

### 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's task is to convince itself of the existence or non-existence of the facts on which the application of the law relies. The ZPP does not include explicit provisions on probability, but the degree of probability should increase in proportion to the importance of the action to be taken, taking into account the stage of the proceedings at which a particular procedural issue is discussed and decided and the procedural consequences that will follow if certain facts are found to exist or not.

Under the general rule on the free assessment of evidence, the court decides according to its own conviction which facts it finds to be proven, based on conscientious and careful assessment of all the evidence, presented individually and as a whole, and taking into consideration the results of the entire proceedings.

## 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?

As has been previously stated, the Croatian (civil) procedure is predominantly inter partes, which means that the parties may collect facts and take evidence of their own motion, and the court is authorised to establish facts not set out by the parties and to take evidence only if it suspects that the parties intend to assert claims that they are not permitted to assert (third paragraph of Article 3 of the ZPP).

Once the preparatory hearing has been held, the court adopts a decision terminating the preliminary ruling proceedings.

The court will terminate the preliminary ruling proceedings and hold and conclude the main hearing at the preparatory hearing if it considers that it is possible to do so in the light of the circumstances of the case.

If the court considers that it is not possible to terminate the preliminary ruling proceedings and hold and conclude the main hearing at the preparatory hearing, it will draw up a plan for the management of the proceedings.

The plan for the management of the proceedings must contain:

- a summary of the questions of fact and law at issue;
- the evidence for establishing the facts at issue;
- the deadline for obtaining further evidence required;
- the deadline for the parties to submit written observations on the submissions of the opposing party and on the findings and opinion of experts;
- the date and time of the hearing for the main hearing.

If the main hearing requires several hearings, the court will consult the parties before setting dates and times for all the subsequent hearings for the main hearing, while seeking to ensure that the proceedings are of reasonable duration.

The court adopts the plan for the management of the proceedings by means of a decision, usually at the first hearing in the proceedings. Before adopting the decision on the plan for the management of the proceedings, the court will allow the parties to give their views on the plan at a hearing.

By way of exception, if one of the parties is not present at the hearing at which the plan for the management of the proceedings is discussed, the court may establish a plan for the management of the proceedings without consulting the absent party.

As the litigation progresses, the court may amend the plan for the management of the proceedings, provided that it has given the parties the opportunity to make their views known on this matter. If the changes to the plan do not affect the deadlines for action by the parties, the court may amend the plan without consulting the parties beforehand.

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

The court decides which items of evidence presented are to be taken to establish the decisive facts.

If the court has accepted the offer of evidence from the party, it will, as a rule, begin with the taking of that evidence.

In disputes heard by a chamber (*vijeće*), the evidence is taken at the main hearing before the chamber, but the chamber may, for important reasons, decide that certain evidence is to be taken before the president of the chamber or the judge of the requested court (the requested judge). In this case, a record of evidence taken is read out at the main hearing.

The single judge, or the president of the chamber, conducts the main hearing, questions the parties and takes evidence, but the court is not bound by the decision on the conduct of the hearing, which means, inter alia, that it is not bound by the decision accepting or dismissing the offers of evidence submitted by the parties.

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

Under the provisions of the ZPP, the court dismisses evidence produced that it does not find relevant and states the reason for dismissal in the decision.

The ZPP does not contain special provisions on the possibility of dismissal of inadmissible evidence or evidence which cannot be taken cost-effectively.

However, in disputes before a municipal court (*općinski sud*) with a value not exceeding 10 000 Croatian kuna and in disputes before a commercial court ( *trgovački sud*) with a value not exceeding 50 000 Croatian kuna, the court may, if it deems that establishing facts important for the settlement of the dispute would lead to disproportionate difficulties and costs, decide on the existence of such facts on the basis of a free assessment, taking into account the documents that the parties have submitted and their testimony if the court adduced evidence by hearing of the parties.

Also, the provisions of the ZPP provide for a time limit for the parties to set out all facts and to submit offers of evidence. In the course of ordinary civil proceedings, each party must, in the application and in the response to the application, at the preparatory hearing at the latest, set out all the facts substantiating their claim, present the evidence necessary for establishing the facts that they have submitted and declare their position on the statements of facts and evidence offered by the opposing party. During the main hearing, the parties may present new facts and evidence only if, through no fault of their own, they were unable to provide or present them before the previous proceedings were concluded.

The court does not take into account new facts and evidence which, through their own fault, the parties provide or present during the main hearing.

For more information on evidence and the taking of evidence in small claims procedures, see the information sheet entitled ‘Small claims – Republic of Croatia’.

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

The ZPP provides for the following items of evidence: on-site inspection, documentary evidence, witnesses, experts and hearing of the parties.

**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?**

A witness is any natural person who is capable of giving information about the facts which are being proven. Witnesses are heard individually and without the presence of other witnesses who are to be heard later, and they are obliged to give their answers orally.

A witness is first advised that they are obliged to speak the truth and that they must not omit anything. Afterwards, they are warned of the consequences of giving false testimony. Moreover, a witness is always asked how they know the facts they are testifying about.

An expert witness must possess the same qualities as a witness, that is, they must be capable of observing, remembering and recounting, and, in addition, they must also possess professional expertise.

Certain expert witnesses who are summoned by the court must obey the summons and submit their findings and an opinion.

Accordingly, the task of expert witnesses implies establishing findings and opinions. The court determines whether the expert witness will only present their findings and opinions orally at the hearing or also submit them in writing before the hearing. The court sets a time limit for the submission of written findings and opinions, which may not exceed 60 days.

The expert witness must always explain their opinion.

The court delivers to the parties the written findings and opinions no more than 15 days before the hearing at which they are to be heard.

The ZPP makes no distinction between the procedure for hearing ‘ordinary’ and expert witnesses, and lays down no special procedural provisions in that regard.

In relation to written evidence, the parties themselves must submit the document on which they rely as proof of their statement.

A document which has been issued in the prescribed form by a state authority within its sphere of responsibility and a document issued by a legal or natural person in that form, acting in the exercise of its public powers assigned to it by law or a regulation based on law (a public document), is deemed to prove the veracity of what it certifies or regulates.

Other documents have the same evidential value if, under special regulations, their evidential value is equivalent to that of public documents.

It is admissible to prove that facts stated in public documents are false or that the document has been incorrectly drawn up.

If the court doubts the authenticity of the document, it may request the authority from which it is supposed to have originated to express an opinion about it.

Unless otherwise specified in an international agreement, foreign public documents which are duly authenticated have, subject to the condition of reciprocity, the same evidential value as domestic public documents.

The ZPP also lays down rules on the delivery of documents (the duty to provide documents), which depend on whether the document is with the party referring to it, with the opposing party, with a state body or organisation exercising a public authority, or with a third person (natural or legal person).

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

According to the general rule on the free assessment of evidence applied in Croatian (civil) procedural law, the court decides, according to its own conviction, which facts it finds proven, based on a conscientious and careful assessment of all the evidence, presented individually and as a whole, and taking into consideration the results of the entire proceedings.

Accordingly, there is no rule according to which certain items of evidence are of greater weight or importance than others, although, in practice, documents are considered more reliable (but not more important) than other evidence (witnesses, hearings).

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

No, the ZPP does not provide that certain methods of proof are obligatory in order to prove certain facts. In accordance with the inter partes principle, the parties are authorised to present evidence and the court assesses which items of evidence presented it takes for the purpose of establishing relevant facts.

**2.8 Are witnesses obliged by law to testify?**

Every person summoned as a witness is obliged to obey the summons and, unless otherwise provided by the ZPP, is required to testify. Therefore, testifying, which implies a duty of attending court, giving evidence and telling the truth, is a general obligation of every person. Witnesses who due to old age, illness or severe physical impairments are unable to obey the summons are heard in their own home.

**2.9 In which cases can they refuse to give evidence?**

A person who would, by their testimony, violate the obligation of confidentiality in respect of official or military secrets must not be heard as a witness until the competent authority relieves them of such responsibility.

A witness may refuse to give evidence:

• about something the party has confided to them as their authorised representative;

• on matters which the party or another person has confessed to them as a religious confessor;

• about facts which the witness has learned as an attorney, doctor, or in the performance of any other calling or any other activity, if there exists an obligation to keep confidential what is learned in the performance of that calling or activity.

The single judge or the president of the chamber informs these persons of the possibility to refuse to give evidence.

A witness may refuse to answer individual questions due to compelling reasons, in particular, if by responding to such question, they would expose themselves, or their lineal blood relative up to any degree, or a collateral blood relative up to the third degree, including their spouse, or relatives by marriage to the second degree – even if the marriage has ended – and their guardian or ward, adopted parent or child, to serious disgrace, significant material damage or criminal prosecution.

The single judge or the president of the chamber informs the witness that they may refuse to give answers to the questions asked.

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

Yes, it is possible. If a witness who has been properly summoned fails to attend without explanation, or if such a witness leaves the place where they are to be heard without permission or any justified reason, the court may order them to be forcibly brought back, at their expense, and may also impose a monetary fine ranging from 500 to 10 000 Croatian kuna.

If the witness appears and refuses to give evidence or to respond to certain questions after being informed of the consequences arising therefrom, and the court deems their reasons for refusing to answer unjustified, it may impose on them a monetary fine ranging from 500 to 10 000 Croatian kuna; if the witness still refuses to give evidence, the court may detain them. The witness is detained until they agree to give evidence or until their testimony becomes unnecessary, but for no longer than one month.

If the witness subsequently provides an explanation for their absence, the court will rescind its decision on the fine, and it may relieve the witness from settlement of costs in full or in part. The court may also rescind its decision on a fine if the witness subsequently agrees to give evidence.

**2.11 Are there persons from whom evidence cannot be obtained?**

For information on exemption from the general duty to testify in respect of official or military secrets, i.e. on the right of persons performing specific activities to refuse to give evidence and the right to refuse to answer specific questions, see point 9.

As a general rule, only the persons who are able to provide information on facts that are being proved may be heard as witnesses, and the court decides on a person’s ability to testify on a case-by-case basis.

A person cannot be a witness if they are directly involved in the proceedings, as a party or as the legal representative of a party, whereas an authorised representative of the party may be heard as a witness.

**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?**

Each witness must be examined individually, and not in the presence of witnesses who are to be heard subsequently. The witness is obliged to give their answers orally.

A witness is first advised that they are obliged to speak the truth and that they must not omit anything. Afterwards, they are warned of the consequences of giving false testimony.

The witness will then be asked to state their first name, surname, personal ID number, their father’s name, their occupation, address, place of birth, age and relationship to the parties.

After these general questions the witness is asked to state everything they know about the facts they are to testify about, and afterwards, they may be asked questions for the sake of confirmation, addition or explanation. It is not permitted to ask questions which already contain the answer to the question.

The witness is always asked how they know the facts about which they are testifying.

Witnesses whose testimonies conflict in relation to important facts may be brought face to face. They are questioned individually on each circumstance for which there is a conflict and their answers are recorded in the minutes.

The Republic of Croatia has no special provisions stipulating the taking of evidence via videoconferencing. However, the provisions of Articles 126a to 126c of the ZPP represent a basis for such a method of hearing, i.e. court hearings may be audio recorded. The decision to record is taken by the court on its own initiative or at the request of the parties. The method of storage and transmission of an audio recording, the technical conditions and the manner of recording are regulated by the Rules of the Procedure of the court.

**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?**

Under the ZPP a court decision must not be based on illegally obtained evidence (inadmissible evidence).

A court may adopt a decision authorising the taking of inadmissible evidence and may examine such evidence if it considers it necessary in order to establish a material fact. When deciding on the admissibility of evidence, the court will weigh up the infringement resulting from the taking of inadmissible evidence against the interest of establishing the facts fully and accurately in the proceedings.

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

Parties to the proceedings cannot be heard as witnesses; however, the provisions of the ZPP provide for the hearing of the parties as one of the items of evidence in the absence of other evidence or if, notwithstanding the other evidence adduced, the court deems it to be necessary for establishing important facts.

The provisions of the ZPP on the taking of evidence from witnesses apply to the hearing of the parties, unless specified otherwise.

**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.**

Courts are the only authorities specified by the Republic of Croatia as being competent to take evidence for the purposes of judicial proceedings in civil and commercial matters, in accordance with Article 2(1) of the Taking of Evidence Regulation.

# Taking of evidence - Italy

## 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.

Last update: 21/07/2022



## Taking of evidence - Cyprus

### 1 The burden of proof

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

In general the burden of proof in civil proceedings rests upon the party that seeks relief, i.e. the plaintiff or claimant, as the case may be.

In exceptional cases, the burden may be transferred to the defendant or respondent. A typical example is that where an action is brought for negligence if it is proved that the plaintiff does not know, or does not have the means to find out, how an accident happened, the damage was caused by an object which was under the sole control of the defendant and the damage is linked to the defendant's failure to take reasonable care rather than the taking of that care, in which case the *res ipsa loquitur* (the thing itself speaks) principle applies, where the burden of proof is transferred to the defendant.

In general the plaintiff or claimant must prove by producing relevant witness evidence all the facts necessary for supporting/founding his/her claim.

The court is expected to assess the evidence and render a judgment according to conclusions drawn from the facts of the case. If, under the circumstances, the court is unable to reach conclusions on a certain fact of the case which is important for the determination of the claim, the claim raised by the party that is based on that fact should be dismissed.

**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?**

There are certain facts that need not be proved by evidence. These include certain facts which are undoubted and clear, of which the court may be deemed able to have 'judicial knowledge'. For example, these may include facts relating to units of measurement, monetary issues, the annual calendar and the time difference between countries. Other examples are facts that are common knowledge and are presumed based on human experience, such as the increase in road accidents, problems faced by a widow with underage children, etc. Similarly, historic, scientific and geographic facts are widely known and need not be proved by producing evidence.

Moreover, there are presumptions in certain cases. Presumption means a conclusion which can or must be drawn given that certain facts have been proved. These presumptions may be rebuttable or irrebuttable.

Irrebuttable are those presumptions that are made by law and cannot be rebutted by evidence to the contrary. Irrebuttable presumptions are rare. An example is included in Article 14 of the Criminal Code, which stipulates that a child under the age of 14 is presumed not to bear any criminal liability for any of its actions or omissions. Rebuttable presumptions are much more common. These can be rebutted by evidence to the contrary. For example, a child born in a legal marriage is presumed to be the husband's child unless proved otherwise.

**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 standard of proof in civil cases is the 'balance of probabilities'. In other words, the court will find that a fact is established if satisfied by evidence that the fact is more likely to have occurred than not.

### 2 The taking of evidence

**2.1 Does the taking of evidence always require an application from a party, or can the judge in certain cases also take evidence on his/her own initiative?**
In civil proceedings the parties to the case will choose what witness evidence to produce to the court. Each party will summon those witnesses that are deemed useful for its case. The court does not have the power to summon witnesses on its own initiative without consent from the parties.
**2.2 If the application by a party concerning the taking of evidence is approved, what steps follow?**
The procedure is simple. The party wishing to summon a witness will request the court to issue a subpoena. The court will then issue the subpoena, to be served on the witness. Any person on whom such a subpoena has been served is under a legal obligation to appear before the court on such date and time as indicated in the subpoena.
**2.3 In which cases can the court reject an application by a party to obtain evidence?**
At the request of a party to the case, the subpoena will be issued in most cases. A party's request for a subpoena may be refused in rare and exceptional cases, if the request is proven frivolous and constitutes abuse of the court proceedings.
**2.4 What different means of proof are there?**
There are two types of proof: verbal witness testimony presented before the court, and written or documented evidence presented by submitting documents to the court.
**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?**
There are no settled rules that govern the obtaining of evidence from expert witnesses. The party producing the evidence should decide whether the expert witness will present his/her testimony in person or the evidence will be presented in written form.
**2.6 Are certain methods of proof stronger than others?**
There is no general rule pointing to a certain type of witness as being better or more reliable or more convincing than other types of evidence. All the evidence produced during the trial will be assessed by the court in the light of the specific circumstances at hand in each case.
**2.7 In order to prove certain facts, are certain methods of proof obligatory?**
No, there are no such rules.
**2.8 Are witnesses obliged by law to testify?**
If a subpoena is served on a person calling him/her to appear and testify before a court, he/she is obliged by law to do so. Failure or refusal to do so constitutes contempt of court and is punished accordingly.
**2.9 In which cases can witnesses refuse to give evidence?**
Witnesses may not refuse to give evidence. However, witnesses may, in exceptional cases, refuse to answer certain questions or withhold certain documents on the grounds of privilege, such as professional confidentiality.
**2.10 Can a person who refuses to testify be sanctioned or forced to give evidence?**
See the answer to subparagraph (a) above.
**2.11 Are there persons from whom evidence cannot be obtained?**
All persons are competent to give evidence in any civil proceedings unless the court decides that, due to youth, mental disability or other similar cause, a person is incapable of appreciating his/her obligation to tell the truth, or understanding the questions addressed to him/her, or giving rational answers to these questions (according to Article 13 of the Evidence Act).
**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?**
A witness will be examined during the main examination by the party who called him/her. Upon completion of the main examination, the witness will be cross-examined by the other party. Finally, the court may ask questions where further clarification on certain issues is deemed to be necessary.
A witness may give evidence by teleconferencing or other technical means if his/her physical presence before the court is impossible, provided that the court is capable of providing such technical facilities. Any specific conditions imposed will depend on the specific circumstances of the case at hand.

## 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?**
Any evidence which is obtained illegally, in breach of constitutionally protected rights, will be excluded from any court proceedings, and the court may not rely on that evidence. A typical example of that is the illegal recording of a personal conversation.
**3.2 As a party to the case, will my own statement count as evidence?**
A statement made by a person who is a party to the case does count as evidence. The fact that such a statement comes from a person who has a direct interest in the outcome of the case is just one of the numerous facts to be taken into account by the court in assessing or evaluating the overall evidence.
Last update: 07/12/2023


# Taking of evidence - Latvia

## 1 The burden of proof

A party is responsible for proving the facts on which that party's claims or objections are based. The plaintiff must substantiate his or her claims and the defendant must substantiate his or her objections.
**1.1 What are the rules concerning the burden of proof?**
Evidence is submitted by the parties to the case and by other interested parties. If a party to the case or other interested party is unable to produce certain evidence, and makes a reasoned request to that effect, the court may require the evidence to be produced.
**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?**
If the court acknowledges a fact to be common knowledge, it need not be proved.
Facts established in a judgment that has taken legal effect in one civil dispute need not be proved again in other civil disputes involving the same parties.

A court judgment which has taken legal effect in a criminal case is binding on a court adjudicating a case regarding the civil liability of the person who was the subject of the criminal judgment, but only with respect to the question whether there was a criminal act, or failure to act, and the question whether it was committed or permitted by that person.
Facts which are deemed to be established by law need not be proved. Such presumptions may be rebutted in accordance with the ordinary procedure.
A party need not prove facts which are not disputed by the other party in accordance with the procedures laid down in the Law on 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?**

A court must assess the evidence to its own satisfaction, on the basis of evidence that has been thoroughly, completely and objectively examined in court, and in accordance with a judicial approach founded on logical principles, scientific findings and observations drawn from every-day experience. A court must set out in its judgment why it has given preference to one item of evidence in preference to another, and has found certain facts to be proven and others not.
No evidence has a predetermined effect binding upon the court.

## 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 of Civil Procedure states that the parties are responsible for submitting evidence, but it also provides for certain cases where the court may require evidence on its own initiative (for instance where the interests of a child are involved). If the court finds that no evidence has been submitted to substantiate a fact or facts on which a party's claims or objections are based, it notifies the parties accordingly, and if necessary sets a timelimit within which the evidence can be submitted.

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

Written and material evidence is submitted to the court by the parties. Where the parties make reference to oral evidence the court invites the witnesses indicated by the parties to a court hearing to hear their testimony. The court adds the evidence to the case file.

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

The court allows only evidence that is provided for by law and of relevance to the case. The court may refuse to accept evidence submitted later than 14 days prior to the court hearing, unless the judge has set a different timelimit for the submission of evidence. While a case is being adjudicated, evidence may be submitted at the reasoned request of a party to the dispute or another interested party, if this does not delay the adjudication of the case, or the court has accepted that there are valid reasons why the evidence was not submitted in good time, or the evidence concerns facts that have come to light in the course of the proceedings.
Witness testimony based on information from unknown sources, or on information obtained from other persons, unless such persons have been examined, are not admissible in evidence.

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

Observations submitted by parties to the dispute and by interested third parties which include information about facts on which their claims or objections are based, if corroborated by other evidence verified and assessed at a court hearing;
the testimony of witnesses and experts;.
written evidence, consisting of documents or other texts in which information on facts that are relevant to the matter is recorded by means of letters, figures and other written symbols or other technical means, and any corresponding recording media (audio or video tapes, diskettes, etc.);
material evidence;
expert reports;
expert opinion;
reports by public bodies.

**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?**

There is no substantial difference: the testimony of experts and other witnesses is evidence, and written statements by experts are also evidence. A witness or an expert has to appear in court when summoned by the court to provide true testimony regarding the circumstances known to them (witnesses) or to provide an objective opinion in their own name regarding the scientific, technical, artistic or other facts they have investigated.

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

No evidence has a predetermined effect binding upon the court, but in its judgment the court has to explain why it has given preference to some evidence over other evidence, and has found certain facts to be proven and others not.

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

Yes. Facts which by law can be proved only by certain forms of evidence cannot be proved using any other form of evidence.
The court admits only the forms of evidence provided for by law.

**2.8 Are witnesses obliged by law to testify?**

A witness who has been summoned to court does not have the right to refuse to give evidence except in cases provided for by law.

**2.9 In which cases can they refuse to give evidence?**

The following persons may refuse to testify:
relatives in the direct line and of the first or second degree in a collateral line, spouses, relatives by marriage of the first degree, and family members of the parties;
guardians and trustees of parties, and persons under the guardianship or trusteeship of the parties;
persons involved in litigation in another matter against one of the parties.

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

A witness who has reached 14 years of age who refuses to testify for reasons which the court finds to be invalid, or who intentionally gives false testimony, commits an offence under the Criminal Law.
If a witness, without proper cause, fails to appear in response to a summons by a court or a judge, the court may impose a fine not exceeding EUR 60 or have the witness compelled to come to court.

**2.11 Are there persons from whom evidence cannot be obtained?**

Ministers of religion are not required to give evidence regarding facts that have come to their knowledge through hearing confessions, and persons whose position or profession does not permit them to disclose certain information entrusted to them are not required to give evidence regarding such information;
minors are not required to testify regarding facts which constitute evidence against their parents, grandparents, brothers or sisters;
persons whose physical or mental deficiencies render them incapable of properly assessing circumstances relevant to the case are not required to give evidence;
children under the age of seven are not required to give evidence.

**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?**

A person summoned as a witness must appear in court and give true testimony regarding any fact of which they have knowledge. A witness must answer questions asked by the court and the parties. A court may question a witness at the witness's place of residence, if the witness is unable to attend pursuant to a court summons because of illness, old age or invalidity or for another valid reason. A witness may also be questioned by videoconference in court, depending on the witness's whereabouts, or at a place specially equipped for such a purpose.

### 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 parties to a dispute may dispute the veracity of written evidence.

Written evidence may not be disputed by the person who himself or herself has signed such evidence. Such a person may dispute the evidence by bringing a separate action, if their signature was obtained under the influence of duress, threat or fraud. A party may also submit a substantiated application alleging forgery of written evidence. If the court finds that the evidence has been forged, it will exclude the evidence and notify a public prosecutor of the forgery. In order to examine an application alleging forgery of written evidence, the court may order an expert report or require other evidence. If the court finds that a party has initiated a dispute regarding the forgery of written evidence without good cause, it may impose a fine.

The Law on Civil Procedure requires a person summoned as a witness to appear in court and give true testimony regarding any fact of which they have knowledge. If a party wants to prove certain circumstances by witness testimony, the party must in their request to the court seeking to have the witness questioned indicate what important aspects of the case the witness would be able to confirm.

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

Observations by parties to the dispute and third parties which include information about the facts on which their claims or objections are based are admitted as evidence if corroborated by other evidence that is verified and assessed at a court hearing. If one party admits the facts on which the claims or objections of the other party are based, a court may find such facts to be proven, provided the court has no doubt that the admission was not made as a result of fraud, violence, threat or error, or in order to conceal the truth.

Last update: 18/12/2023



## Taking of evidence - Lithuania

### 1 The burden of proof

Parties must prove the facts underlying their claims and replications except in the cases in which they do not have to be proved (see 1.2).

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

Under the Code of Civil Procedure of the Republic of Lithuania (*Lietuvos Respublikos civilinio proceso kodeksas*), the burden of proof lies with the parties in a case. They must prove the facts underlying their claims and replications except in the cases in which they do not have to be proved in accordance with the Code of Civil Procedure.

All courts consider civil cases according to the adversarial principle. Each and every party must prove the facts underlying their claims and replications except in the cases in which they do not have to be proved.

**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?**

Article 182 of the Code of Civil Procedure lists the following types of facts as being exempt from the burden of proof:

facts acknowledged by the court as being common knowledge;

facts established in effective judgements in other civil or administrative proceedings where participants were the same persons, except in cases where a court judgement gives rise to legal consequences for other persons who are not involved in the proceedings (prejudicial facts);

the consequences of personal acts constituting an offence where such consequences have been adjudged in an effective judgement in criminal proceedings (prejudicial facts);

facts that are presumable under the law and are unchallenged under the general procedure;

facts admitted by the parties.

A party has a right to admit to facts underlying another party's claim or replication. The court may consider an admitted fact to be established if it believes the admission is consistent with circumstances of the case and is not stated by the party for the purposes of deception, violence or threat, or has been made by mistake or in order to suppress the truth.

It should also be noted that such circumstances may be challenged by submitting evidence under the general 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?**

If evidence submitted permits the court to conclude that there is a stronger probability that a certain fact existed than not, the court will acknowledge that fact as established.

### 2 The taking of evidence

Evidence in civil proceedings means any actual data serving as a basis for the court to determine under the statutory procedure the existence or non-existence of facts substantiating the claims and replications of the parties as well as any other facts relevant to reaching a fair and just decision in the case. Such data may be established by the following means: statements of the parties or third persons (directly or through a representative), testimonies of witnesses, written evidence, material evidence, inspection protocols, expert reports, legally obtained photographs, video and audio recordings and other forms of proof.

A court may also request an EU Member State to gather evidence or to take it directly in accordance with Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters in order to improve, simplify and accelerate cooperation between courts in 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?**

Under Article 179 of the Code of Civil Procedure, parties and other participants in the proceedings shall present evidence. Where the evidence submitted is not sufficient, a court may ask the parties and other participants in the proceedings to provide the court with corroborative evidence and fix a time-limit for presenting it. A court is also entitled to collect evidence on its own initiate (*ex officio*), but only in cases provided for by law.

A court is entitled under the Code of Civil Procedure to collect evidence on its own initiate while hearing family or employment cases if, in its opinion, this is essential in order to decide a case fairly (Articles 376 and 414).

In addition, Article 476 of the Code of Civil Procedure stipulates that a court preparing to hear cases concerning the declaration of a minor to be of full capacity (emancipated) shall:
appoint a state child-protection institution at the minor's place of residence to submit its conclusion on the minor's readiness to independently enforce all the civil rights or perform duties;
request data as to whether the minor has been convicted or has committed an infringement of administrative or other law;
if it is necessary to establish the level of the minor's physical, moral, spiritual or mental development, order a forensic psychological and/or psychiatric examination and request any of the minor's medical documents or other material necessary to perform the examination;
perform any other actions necessary to prepare for hearing the case.
Article 582 of the Code of Civil Procedure also stipulates that when a matter of permission to transfer a title to the family property, mortgage the family property or otherwise encumber the rights thereto is being considered, a court, while taking into account the circumstances of the case, has a right to demand evidence from the applicant of the financial situation of the family (income, savings, other property, liabilities), data on the family property being transferred, data from the children's rights protection service on the child's parents, the preliminary terms and conditions and prospects of the performance prospects of the future transaction, the prospects of the rights of a child being protected if the transaction is not performed and other evidence.

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

In order to gather evidence (in accordance with Articles 199 and 206 of the Code of Civil Procedure), a court may require a legal or natural person to present written or material evidence, which must be submitted directly to the court within fixed time-limits. Where the natural or legal persons are unable to submit the requested written or material evidence or are unable to do this within the fixed time-limit, they must advise the court thereof and indicate the reasons. A court may issue a person requesting written or material evidence with a certificate entitling the person to obtain the evidence so that it can be submitted to the court.
During preparations for a court hearing, a judge also performs other procedural activities that are necessary to properly prepare a case for a court hearing (demands evidence that cannot be obtained by participants in the proceedings, collects evidence on their own initiative where the court is entitled to do so under the Code of Civil Procedure, etc.).

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

A court may reject evidence in the following circumstances:
where it is inadmissible;
where evidence does not confirm or disprove facts relevant to the case (Article 180 of the Code of Civil Procedure);
where evidence could have been presented earlier and later presentation thereof will delay the proceedings (Article 181(2) of the Code of Civil Procedure).
Any documents or other evidence on which the plaintiff is basing claims, proof that a court fee has been paid and applications to demand evidence which the plaintiff is unable to submit, indicating reasons as to why evidence cannot be submitted, should be annexed to the statement of claim in order to be accepted by a court (Article 135 of the Code of Civil Procedure).
It should also be noted that a court of appeal will refuse to accept new evidence that could have been submitted to a court of first instance except in cases where a court of first instance wrongly refused to accept the evidence or where the need to submit the evidence arose subsequently (Article 314 of the Code of Civil Procedure).

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

As defined in the Code of Civil Procedure, evidence in civil proceedings means any actual data serving as a basis for a court to find under the statutory procedure whether or not circumstances substantiating the claims and replications of the parties exist as well as other circumstances relevant to reaching a fair and just decision in the case. These data can be obtained as follows: statements of the parties or third persons (directly or through a representative), testimonies of witnesses, written evidence, material evidence, inspection protocols and expert reports.
Legally obtained photographs and audio and video recordings may also serve as evidence.

**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?**

Articles 192 to 217 of the Code of Civil Procedure lay down the following rules regulating methods of obtaining evidence from witnesses and expert witnesses:
The witness examination procedure
Each witness is summoned to a courtroom and examined individually. Unexamined witnesses may not remain in the courtroom during the hearing. Examined witnesses must remain in the courtroom until the hearing has ended. If examined witnesses so request, the court may allow them to leave the courtroom after the opinions of participants in the proceedings have been heard.
A witness may be examined *in situ* if they cannot appear upon summons before a court because of illness, old age, disability or other substantial reason recognised by a court and a participant in the proceedings who initiated the calling of the witness cannot ensure the appearance of that witness before a court.
The court must identify the witness and explain the witness's rights and duties as well as their liability for oath-breaking and non-fulfilment or improper fulfilment of any other of their duties.
Before undergoing examination, a witness shall take an oath by putting a hand on the Constitution of the Republic of Lithuania (*Lietuvos Respublikos Konstitucija*) and saying: "I, (full name), honestly and faithfully swear to tell the truth without suppressing, adding to or changing anyevidence". A sworn witness shall sign the wording of the oath. The signed oath is attached to the documents of the case.
Having determined the witness's relationship to the parties and third persons and other circumstances relevant to the evaluation of their evidence (education, occupation of the witness, etc.), the court shall instruct the witness to tell the court all they know about the case and to avoid disclosing information if the witness is unable to specify its source.
After giving evidence, a witness may be asked questions. A witness will first be examined by the person who requested that they be summoned and by a representative of that person. The witness will then be examined by other participants in the proceedings. A witness summoned on the court's initiative will first be examined by the plaintiff. The judge must disregard leading questions and questions irrelevant to the case. The judge is entitled to put questions at any time during the examination of the witness.
If required, at the request of a participant in the proceedings or on its own initiative, the court may re-examine a witness at the same hearing, call the examined witness to another hearing of the same court or confront witnesses against each other.
In exceptional cases where it is impossible or difficult to examine a witness at court, the court hearing a case is entitled to examine written testimony if, in court's opinion and in consideration of the identity of the witness and the substance of the of circumstances about which testimony is to be given, this will not have a detrimental effect on establishing the essential facts of the case. On the initiative of the parties, a witness may be summoned to an additional examination in court if that is necessary to establish the facts of the case in greater detail. Before giving evidence, the witness must sign the text of the oath

set out in Article 192(4) of the Code of Civil Procedure and is warned upon signed acknowledgement that giving false evidence is a criminal offence. Written testimony must be given in the presence of a notary and is certified by the notary.

Examination of experts

Expert opinion is read out loud in a court hearing. Before the expert opinion is read, the expert (experts) giving the expert opinion and participating in the court hearing must take an oath by putting a hand on the Constitution of the Republic of Lithuania and saying: “I, (full name), swear to perform the duties of an expert in the proceedings with honesty and to produce an impartial and reasoned expert opinion based on my full expertise”. If an examination is conducted outside a court hearing, the wording of the oath signed by the expert constitutes an integral part of the expert report. Experts included in the List of Court Experts of the Republic of Lithuania (*Lietuvos Respublikos teismo ekspertų sąrašas*) who took an oath at the time of being entered into that List do not have to take an oath at court and are deemed to have been warned about their liability in the event that they give a false opinion and statements.

A court is entitled to ask an expert to explain their opinion orally. The oral explanation of an expert opinion is included in the minutes of the court hearing. Experts may be asked questions to explain or supplement the expert opinion. The person requesting their appointment has the first opportunity to put questions. Then an expert may be questioned by other participants in the proceedings. If an expert is appointed by the court on its own initiative, the plaintiff has the first opportunity to put questions to an expert.

Judges are entitled to put questions to an expert at any time of their examination.

Expert opinion is provided only at the request of a court (and must be submitted in writing in the form of an expert report). An expert report must include a detailed description of investigation carried out, the conclusions drawn on the basis of the findings, and reasoned answers to the questions asked by the court.

If a court asks for an expert opinion without an expert report, the expert opinion is considered to be written evidence submitted by an expert (similar to other participants in the proceedings) or that is requested by the court under the procedure laid down by the Code of Civil Procedure.

Article 198 of the Code of Civil Procedure lays down the following rules for the submission of written evidence:

Written evidence may be submitted by participants in the proceedings or be requested by a court in accordance with the procedure stipulated by the Code. Written evidence must be submitted in the form prescribed by the Code of Civil Procedure: a participant in proceedings who substantiates the contents of a procedural document with written evidence must attach the originals or copies (digital copies) thereof, as certified by a court, a notary (or other person who is authorised to perform notary actions), a lawyer taking part in the proceedings or the person who issued (received) the document. A court may require, on its own initiative or at the request of a participant in the proceedings, that the original documents be submitted. A request by a participant in the proceedings for original documents to be submitted shall be presented with their claim, counterclaim, statement of defence or other procedural documents of participants in the proceedings. Participants in the proceedings may lodge such a request at a later date where the court recognises the reasons for failing to submit a request earlier to be compelling or where the granting of the request in question will not delay resolution of the case. In cases where only part of a document is related to the contents of procedural documents, only the relevant parts (excerpts, extracts) may be submitted to the court.

All procedural documents and appendices thereto must be submitted to the court in Lithuanian except in the case of certain exceptions laid down by legislation. Where participants in the proceedings to whom procedural documents have to be served do not understand Lithuanian, translations of these documents into a language they can understand must be submitted to the court. Where the documents to be submitted are required under the Code to be translated into a foreign language, the participants in the proceedings must submit certified translations thereof to the court in compliance with the established legal procedure.

Original documents in a case file may be returned at the request of submitters. In that case copies of the documents to be returned, certified in accordance with the procedure stipulated by the Code, must be retained in the file.

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

Under Article 197 of the Code of Civil Procedure, documents issued by state and municipal authorities which have been approved by persons authorized by the state within the limits of their competence and in compliance with requirements applied to the form of particular documents may be considered to be official written evidence and shall have stronger evidentiary effect. Facts indicated in official written evidence are considered to be fully proved until they are disproved by other evidence in the proceedings, except for witness evidence. A ban on the use of witness evidence does not apply where it would contradict the principles of good faith, fairness and reasonableness. The evidentiary value of official written evidence may also be conferred upon other documents as well by legislative acts.

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

Circumstances of a case which are required by law to be proved by particular means of evidence cannot be proved by any other means of evidence (Article 177(4) of the Code of Civil Procedure).

**2.8 Are witnesses obliged by law to testify?**

A person summoned as a witness must appear before the court and give truthful evidence. A person summoned as a witness is liable under the law for failure to fulfil the duties of a witness (Article 191), i.e. a fine may be imposed on them.

**2.9 In which cases can they refuse to give evidence?**

A witness may refuse to give evidence where such evidence would constitute evidence against oneself, family members or close relatives.

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

Where witnesses, experts or interpreters fail to appear at a hearing, the court will ask the persons participating in the proceedings whether they case may be heard in the absence of witnesses, experts or interpreters and rule that the court hearing be continued or deferred. Where a summoned witness, expert or interpreter fails to appear in court without valid reason, they may be liable for a fine of up to one thousand litas. A witness may also be forcefully brought to court on the basis of a court ruling (Article 248 of the Code of Civil Procedure).

**2.11 Are there persons from whom evidence cannot be obtained?**

The following persons may not be examined as witnesses:

representatives in civil and administrative proceedings or defence counsel in criminal proceedings, about circumstances of which they learnt in their capacity as representative or defence counsel;

persons who are unable to understand circumstances relevant to the case or give fair evidence because of physical or mental handicaps;

priests, about circumstances obtained in confession;

the medical profession, about circumstances covered by professional secrecy;

mediators, about circumstances of which they learnt during a conciliatory mediation procedure.

Other persons may also be defined by law.

**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?**

Having clarified the witness's relation to the parties, third persons and other circumstances relevant to the evaluation of testimonial evidence (the witness's education, occupation, etc.), the court will invite the witness to tell the court all they know concerning the case and to avoid any information if the witness is unable to specify its source.
After giving witness evidence, a witness may be asked questions. A witness will first be examined by the person who requested that the witness be summoned and by a representative of that person, and then by other participants in the proceedings. A witness summoned on the court's initiative is first examined by the plaintiff. The judge must disregard leading questions and questions irrelevant to the case. The judge is entitled to put questions at any time during the examination of the witness. If required, at the request of a participant in the proceedings or on its own initiative, the court may re-examine a witness at the same hearing, call the examined witness to another hearing of the same court or confront witnesses against each other.
In exceptional cases where it is impossible or difficult to examine a witness at court, the court hearing a case is entitled to examine written testimony where in the court's opinion and in consideration of the witness's identity and the substance of the of circumstances about which testimony is to be given, this will not have a detrimental effect on establishing the essential facts of the case. On the initiative of the parties, a witness may be summoned to an additional examination in court where that is necessary to establish the facts of the case in greater detail. Before giving evidence, a witness must sign the predetermined text of the oath and is warned upon signed acknowledgement that giving false evidence is a criminal offence. Written testimony must be given in the presence of a notary and is certified by the notary.
Participation in court hearings by participants in the proceedings and witness examination *in situ* may be ensured by means of information and electronic communication technologies (via videoconferencing, teleconferencing, etc.). When using such technologies in compliance with the procedure set by the Minister of Justice, it must be ensured that participants in the proceedings are identified in a reliable manner and that the data (evidence) is recorded and submitted objectively.
In addition, Article 803 of the Code of Civil Procedure provides for the possibility for courts of the Republic of Lithuania to request a court of another state to use communication technologies (videoconferencing, teleconferencing, etc.) while gathering evidence.

### 3 The evaluation of the evidence

A court evaluates evidence in proceedings in accordance with its own conviction based on the comprehensive and unbiased examination of the facts presented in the proceedings and in compliance with the law.

**3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?**

Factual data is established by the following means: statements by the parties and third persons (directly or through a representative), witness testimonies, written evidence, material evidence, inspection protocols, expert conclusions, legally obtained photographs, video and audio recordings and other pieces of evidence. Factual data constituting a state or professional secret normally cannot serve as evidence in civil proceedings until it is declassified in compliance with the statutory procedure. Data received during a conciliatory mediation procedure cannot serve as evidence in civil proceedings except in cases provided by the Law on Conciliatory Mediation in Civil Disputes.
It should also be noted that in accordance with Article 185 of the Code of Civil Procedure, a court must evaluate evidence in the proceedings in accordance with its own conviction based on the comprehensive and unbiased examination of the facts presented in the proceedings and in compliance with the law. No evidence shall have any predefined effect on a court, except where this is provided for in the Code of Civil Procedure.

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

Yes (see 2.4).

Last update: 15/05/2018



## Taking of evidence - Luxembourg

### 1 The burden of proof

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

Under Luxembourg law, the basic principle is that persons requesting enforcement of an obligation must prove their case. Similarly, persons who claim to be no longer bound by an obligation must prove that they have made the payment or performed the act which relieved them of their obligation.

**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 Luxembourg law provides for presumptions which release a person from having to provide evidence of a fact that would be difficult or impossible to prove. Presumptions are conclusions which the law or a court draws about an unknown fact from a known fact.
The law distinguishes between two kinds of presumption. Firstly, there are legal presumptions, which are attached to certain acts or facts by a specific law. Then there are presumptions which are not established by law and which are left to the discretion of the court, which will accept only presumptions that are serious, precise and consistent.
Generally speaking, it is possible to provide evidence to rebut presumptions. For example, where a child is born to a married couple the mother's husband is presumed to be the child's father. An action may nevertheless be brought to contest paternity.
More rarely, presumptions can be irrebuttable, meaning that it is not possible to produce evidence against them.

**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?**

Appraisal of the facts is left to the court's discretion, which is absolute. If there is any doubt, the court will ascertain whether there is serious, precise and consistent evidence and will accept or reject the evidence depending on the plausibility of the facts alleged.

### 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 taking of evidence can be ordered by a court at the request of a party. In certain cases, however, courts may also take evidence of their own motion.

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

The court informs the designated expert of the nature of the task. The parties to the case and any third parties who are required to assist the inquiry are summoned by the expert. In accordance with the adversarial principle, evidence must be taken in the presence of the parties.

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

The taking of evidence can be ordered whenever a court does not have enough information on which to base a decision.

The taking of evidence in respect of an alleged fact can be ordered only if the party making the allegation does not have sufficient evidence to prove it. In no circumstances may the taking of evidence be ordered in order to compensate for a party's negligence in assembling the evidence.
Courts must also limit the choice of measure to what is sufficient for resolving the dispute; they must opt for the simplest and least expensive solution.

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

The different means of proof are documentary evidence, oral evidence, presumptions, admission, and sworn evidence.

**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?**

Methods of obtaining evidence from witnesses and from expert witnesses:
When witness evidence is admissible, the court may take evidence from third parties who, because of their personal knowledge of the facts at issue, may be able to shed light on them. This evidence may take the form of statements or be gathered by investigative methods, depending on whether it is written or oral.
The court may ask for clarification to be provided by anyone it chooses, in the form of statements, consultations, or an expert opinion on a matter of fact that requires elucidation by an expert. If the opinion does not need to be in writing, the court may allow expert witnesses to give their opinion orally at a hearing; a record of this opinion is drawn up and is signed by the judge and the clerk of the court.
Rules applying to the presentation of written evidence and written reports or opinions by expert witnesses:
Written evidence:
A party relying on a document is obliged to make it available to any other party to the case. It is made available against receipt or by lodging with the court registry (*greffe*). Documents must be made available without prompting.
Experts' written reports or opinions:
Experts lodge their reports with the court registry. A single report is drawn up, even if there are several experts; if they disagree, each expert gives his or her opinion. If the expert has asked for an opinion from another expert in a specialisation differing from his or her own, that opinion is annexed to the record of the hearing or to the file, depending on the case.

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

Some methods of proof are stronger than others:
A public document (*acte authentique*) drawn up by a public official (notary, bailiff, etc.) acting in his or her official capacity constitutes proof unless shown to be false.
A private document (*acte sous seing privé*) drawn up by the parties themselves and signed by them, without involving a public official, constitutes proof in the absence of evidence to the contrary.
Oral evidence and other methods of proof are left to the court's discretion.

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

Written proof is necessary to substantiate a legal transaction (contract) the value of which exceeds €2 500. Proof of a fact (e.g. an accident), however, may take any form.

**2.8 Are witnesses obliged by law to testify?**

The law requires witnesses to cooperate in legal proceedings with a view to discovering the truth.

**2.9 In which cases can they refuse to give evidence?**

People who can prove that they have good cause may be exempted from giving evidence. Parents or other direct relatives of one of the parties may refuse to give evidence, as may a party's spouse, even if they are divorced.

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

Defaulting witnesses may be summoned to appear, at their own expense, if their testimony is felt to be required. Defaulting witnesses and persons who, without good cause, refuse to give evidence or to take an oath may be subject to a civil penalty (*amende civile*) of between €50 and €2 500.
The penalty and any costs may be waived if the person concerned can prove that he or she was unable to attend on the day stipulated.

**2.11 Are there persons from whom evidence cannot be obtained?**

Anyone can be called to testify as a witness except persons who are judged unfit to do so.
People who are unable to testify may nevertheless be heard under the same conditions, but without taking an oath. However, children and other descendants may never give evidence regarding the facts relied on by spouses in an application for divorce or separation.

**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?**

Role of the court and the parties when hearing a witness
Courts hear evidence from witnesses separately, in the order decided by the court, when the parties are present or have been called. Witnesses may not read from a script.
The court may hear evidence from or question witnesses on any matter on which evidence may be taken by law, even if such matters are not mentioned in the decision ordering the taking of evidence. They may recall witnesses, confront them with each other or with the parties, and, if necessary, hear their evidence in the presence of a technical expert.
The parties may not interrupt, question or attempt to influence witnesses who are giving evidence, or address them directly, under pain of exclusion. After the judge has finished questioning a witness the judge may, if he or she considers it necessary, put further questions to the witness that have been submitted to the judge by the parties.
Videoconferencing or other technical measures
Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is intended to improve, simplify and accelerate cooperation between the courts of the Member States in the taking of evidence. There is no specific provision for videoconferencing in Luxembourg law. Videoconferencing is subject to the ordinary rules of the New Code of Civil Procedure on the hearing of witnesses, personal appraisal by the court, and appearance in person. Courts are equipped with the necessary technical equipment. On the date set for a videoconference, a judge, a registrar, an interpreter and a technician are present.
The court may have an audio or video recording made of all or part of the preparatory inquiries. The recording is kept at the court registry. Either party may ask for a copy or a transcription at their own expense.

## 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 will not accept evidence obtained by unlawful means, such as a hidden camera or a telephone tap of which the person was unaware.

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

Generally speaking, statements made by a party to the case have no evidential value.

**Related links**

http://www.legilux.lu/

Last update: 13/05/2020



# Taking of evidence - Hungary

## 1 The burden of proof

The burden of proof rests on the party whose interests are affected negatively if the effort to provide evidence is unsuccessful.

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

It is the obligation of the parties to assert the relevant facts of the case and to provide evidence in support of their assertions, unless otherwise provided for by law. Unless otherwise provided by for law, the relevant facts in a case must be proven by the party having an interest in the fact being accepted by the court as the truth, and the consequences of lack of evidence for or failure to prove such a fact are borne by the same party. In a labour dispute the employer has to prove the content of any collective agreement, any internal rules and instructions that are necessary for deciding the claim and any document produced as part of the operations of the employer that is necessary for deciding on the legal dispute, the correctness of calculations related to the claimed benefits, if disputed, and the payment of any benefit, in the case of a wage dispute.

In a dispute concerning a public service employment relationship, the public sector body has to prove the content of the generally applicable provisions and instructions that are necessary for deciding the claim and any documents produced as part of the public sector body's operations that are necessary for deciding on the legal dispute, the correctness of the contested calculations related to the claimed benefits, and the payment of any benefit, in the case of a wage dispute.

### 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?

If there is incapacity to prove, the fact to be proven by the party affected by such incapacity may be accepted by the court as the truth, if it does not have any doubt regarding its veracity. A statement of fact may be accepted by the court as the truth if it does not have any doubt regarding its veracity and, if it is acknowledged by the opposing party, it is presented by the parties identically, it is not disputed by the opposing party despite the court calling on him or her to do so, or it is to be considered as undisputed under this Act. Facts which are considered by the court to be commonly known, or which the court has official knowledge of, are taken into account by the court even if they are not invoked by any of the parties. The court takes statutory presumptions into account *ex officio*, including circumstances which, by virtue of law and unless proven otherwise, are to be considered as true. For example, in family law, there is a limited number of irrebuttable presumptions and facts that the law does not allow to be rebutted.

### 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 Hungarian rules of civil procedure do not provide for any minimum degree of certitude by the court. Unless the law provides otherwise, the court is not restricted to the application of specific formal rules, methods or means of evidence and is free to rely on evidence from the parties or any other evidence which is suitable to establish the facts of the case. This, however, does not apply to statutory presumptions, including legislative provisions stipulating that certain facts must be regarded as true unless evidence is provided to the contrary. The court establishes the relevant facts of the case by comparing, and individually and jointly evaluating the statements and conduct of the parties during the proceedings, as well as the evidence discovered during the hearing and other data related to the action, according to its conviction.

## 2 The taking of evidence

The court takes evidence to establish the facts necessary for a decision on a dispute.

### 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?

Unless otherwise provided by law, the relevant facts in a case must be proven by the party having an interest in the fact being accepted by the court as the truth, and the consequences of lack of evidence for or failure to prove such a fact are borne by the same party. In civil proceedings, the court may order the taking of evidence *ex officio*, if doing so is permitted by law.

In administrative proceedings, the court may order the taking of evidence *ex officio* with regard to facts or evidence in support of circumstances which it must take into account *ex officio*, if reference is made to an infringement jeopardising a minor or a person entitled to disability benefits or if the law so provides.

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

Witnesses are heard, opinions are obtained from experts and, if needed, experts are heard, inspections are conducted, holders of documents, video recordings, sound recordings, sound and video recordings or other material evidence are ordered to present them.

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

The court is not bound by any application to present evidence submitted by a party or by its decision regarding the provision of evidence. The court may reject an application for the provision of evidence if the application for the provision of evidence was not submitted according to the provisions of Act CXXX of 2016 on the Code of Civil Procedure, unless otherwise provided for by law, or the party obliged to advance the costs of taking evidence has not fulfilled his or her obligation to pay the advance, in spite of having been called upon to do so. The court rejects an application for the provision of evidence or discontinues the taking of evidence already ordered if this is not necessary for passing a judgment on the legal dispute.

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

In particular, means of proof include evidence obtained from witnesses, expert opinions, documents, video recordings, sound recordings, video and sound recordings and other material evidence. Means of proof cannot be admitted if excluded by law or if subject to conditions, unless the conditions are met. Evidence may be taken by inspection. No declarations on oath may be made in the proceedings.

### 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?

In accordance with the principle of direct evidence, as a general rule witnesses and experts give evidence at a hearing. If a party wishes to prove his or her allegations with documents, he or she must attach the document to his or her application or must present them at the hearing. At least a simple Hungarian translation of the document must be attached to a document in a foreign language. If any doubt arises concerning the accuracy or completeness of the translated text, a certified translation must be used, in the absence of which the court will disregard the document. At the request of the party presenting evidence, the court may oblige the party with opposing interests to make available any document that is in his or her possession and which he or she would be obliged to release or present anyway under the rules of civil law. In particular, the party with opposing interests is subject to such an obligation if the document was issued in the interest of the party presenting evidence or attests a legal relationship concerning the latter party, or is related to a hearing pertaining to such a legal relationship. If the document is in the possession of a person who is not participating in the action, the court will have the document

made available by applying the rules on inspection. If a motion to present evidence is submitted by a party, the court arranges to obtain documents or data held by a court, notary, other public authority, administrative body or other organisation, provided that the release of the document or data may not be requested by the party directly. It is not necessary to obtain the original document if there is no need to inspect it and the party presents a certified or simple copy of it during the hearing. The sending of a document may only be refused if it contains classified information.

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

Generally not.

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

There is no such obligation, in general. In exceptional cases, for example in proceedings to declare a person's incapacity, the court is required to invite a medical psychiatric expert to assess the defendant's mental state.

**2.8 Are witnesses obliged by law to testify?**

Yes, but in certain cases they may refuse to testify.

**2.9 In which cases can they refuse to give evidence?**

The following persons may refuse to give evidence:

relatives of either party;

a person who would in his or her testimony incriminate himself/herself or a relative of having committed a criminal offence with respect to the relevant issue;

a person who is committed to secrecy by his/her profession if their testimony would mean violating their secrecy obligation, unless the party concerned exempts them from that obligation;

a person bound to confidentiality of business secrets with respect to matters in which giving evidence would mean violating that confidentiality obligation, unless the data concerned by the testimony do not qualify as business secrets under the Act on the accessibility of data of public interest and data accessible on public interest grounds, or if the subject-matter of the proceeding is to decide whether or not the given data is of public interest or is accessible on public interest grounds;

the mediator/expert in mediation proceedings involved in the dispute, providers of media content and persons in an employment or similar relationship with such providers, with respect to issues in which their testimony would mean revealing the identity of the person who provided them with information in the context of his/her activity as a provider of media content.

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

Witnesses, court-appointed experts, owners of a document or item subject to inspection, and other persons whose participation in taking evidence is considered necessary by the court (hereinafter jointly: 'contributors') are obliged to contribute to evidence being taken. If a contributor fails to perform his or her obligation without requesting in advance to be excused for a good reason that he or she is able to substantiate, the court will oblige the contributor to reimburse the costs incurred, may impose a fine on the contributor, may order the contributor's compulsory appearance, may reduce the contributor's remuneration, and may inform the superior, supervisor or employer of the contributor of his or her failure to attend. The court may apply more than one of these coercive measures at a time.

Coercive measures cannot be applied against a minor below the age of fourteen, but his or her legal representative may be required to reimburse the costs incurred and may be subject to a fine.

If a contributor performs his or her obligation or applies to be excused for a good reason that he or she is able to substantiate after the application of any coercive measure, the order on the coercive measure will be set aside by the court.

A witness may file a separate appeal against the decision obliging him or her to testify. The appeal suspends the hearing of the witness. If the witness' refusal to testify is clearly unfounded, the court deciding on the appeal may impose a fine on the witness, and the court proceeding in the action may oblige the witness to reimburse the costs incurred.

**2.11 Are there persons from whom evidence cannot be obtained?**

The legal representative of a witness cannot be heard as a witness, unless the natural person represented by him or her is competent to participate in the proceedings.

A person cannot be heard as a witness if he/she acted as a counsel for the defence regarding a matter he/she learned about in his/her capacity as a counsel for the defence, or if he/she was not exempted from the obligation of confidentiality in a matter regarding classified information.

A minor person below the age of fourteen may only be heard as a witness if the evidence expected from his/her testimony cannot be provided in any other way.

**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 witnesses appear at the hearing by summons of the court where in principle they will be heard by the presiding judge, or in the case of a single judge, the judge proceeding in the case.

The presiding judge may allow the party initiating the hearing of the witness, at his or her request, to be the first to directly ask questions of the witness, before allowing the opposing party to ask questions, if the opposing party has made a request to this end. In such cases the presiding judge and the other members of the panel may ask the witness questions after questioning by the parties.

## 3 The evaluation of the evidence

The court establishes the relevant facts of the case by comparing, and individually and jointly evaluating the statements and conduct of the parties during the proceedings, as well as the evidence discovered during the hearing and other data related to the action, according to its conviction.

**3.1 Where evidence has not been obtained legally by a party, are there restrictions placed on the court in reaching its judgment?**

A means of proof, or any separable part of it, is unlawful and may not be used in the action, if

*a)* it was obtained or presented by violating or threatening a person's right to life and physical integrity;

*b)* it was produced by any other unlawful method;

*c)* it was obtained in an unlawful manner;

*d)* its submission to the court would violate personality rights.

Except if it was obtained or presented by violating or threatening a person's right to life and physical integrity, an unlawful means of proof may be taken into account by the court exceptionally and with due regard to the specific circumstances and extent of the violation of law, the legal interest affected by the violation of law, the impact of the unlawful piece of evidence on discovering the facts, the weight of other available pieces of evidence, and all other circumstances of the case.

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

A party's statement is not considered as evidence; however, the court also evaluates the parties' claims when establishing the facts of the case, as described under Question 3.

# Taking of evidence - Malta

## 1 The burden of proof

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

The burden of proof is on the person making an allegation, as is clear from section 562 of the Code of Organisation and Civil Procedure: “the burden of proving a fact shall, in all cases, rest on the party alleging it”.

**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, these rules exist and are found in section 627 *et seq.* of the Code of Organisation and Civil Procedure. Section 627 mentions documents requiring no proof of authenticity other than that which they bear on the face of them, including:

the acts of the Government of Malta, signed by the Minister or by the head of the department from which they emanate, or in his absence, by the deputy, assistant, or other officer next in rank, authorised to sign such acts;

the registers of any department of the Government of Malta;

all public acts signed by the competent authorities, and contained in the Government Gazette

the acts of the Government of Malta printed under the authority of the Government and duly published;

the acts and registers of the courts of justice and of the ecclesiastical courts, in Malta;

the certificates issued from the Public Registry Office and the Land Registry;

the sea-protest made under the authority of the Civil Court, First Hall;

other documents mentioned in the Merchant Shipping Act (including registration certificates signed by the registrar or other authorised official and any other thing written down on the registration certificate which appears signed by the registrar or other authorised official)

There are other documents that can be produced and their content is exempt from the burden of proof, however their authenticity must be proved and these include:

the acts and registers of any establishment, or public body, authorised or recognized by law or by the Government;

the parochial acts and registers relative to births, marriages and deaths, and the dispositions made according to law in the presence of a parish priest;

the acts and registers of notaries public in Malta;

the books of traders kept according to law, only with regard to any agreement or other transaction of a commercial nature;

the books of public brokers kept according to law, with regard to anything which may have taken place between contracting parties in commercial matters.

Evidence may be produced that runs counter to the contents of these types of documents.

Apart from these documents, there is another presumption regulated by Cap 16 of the Laws of Malta, the Civil Code, namely that a child born in wedlock is the issue of the wife’s husband. This legal presumption may be proven to be no longer valid by means of a sworn application in the Civil Court (Family Section) and the production of evidence that such a presumption is not valid.

**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?**

In order to pass sentence in civil cases, a court must be satisfied that sufficient proof on a balance of probabilities has been produced.

## 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?**

Every party in a court case, whatever his interest might be, may testify, either at his/her own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court. When proceedings commence by means of a sworn application, a list of witnesses must be drawn up. The same applies to the sworn reply – it must include this list of witnesses. If a party needs to produce a witness who has not been so indicated, the relevant application must be filed.

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

Once an application for the taking of evidence has been accepted, the witnesses are summoned to appear by means of a subpoena issued after an application by the party wishing to produce them. Requests for the issue of this subpoena in the Court of Magistrates (Malta) and in the Courts of Magistrates (Gozo) in its inferior jurisdiction may be made verbally.

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

A court may reject an application by a party to obtain evidence when the person summoned is a lawyer, a legal procurator or a priest. Moreover, as a rule, no person present during a sitting can be produced as a witness in the same case. However, it is left to the court’s discretion to dispense with this rule in particular cases if there are good reasons for doing so. There are also special laws which regulate official secrecy and do not permit the disclosure of secret and confidential information. Furthermore, the claim may be dismissed if the court believes that the witness is not relevant.

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

There are three means of proof that can be produced and these are: documents, *viva voce* and affidavits.

**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?**

The general rule is that the examination of witnesses in the hearing of cases is made in open court and *viva voce*. However, the law provides for other methods of taking of evidence that can be used:

Evidence may be produced by affidavit both for witnesses resident in Malta and those resident abroad.

In the case of a person who is going to leave Malta or is ill or elderly, or who is likely to die or become incapacitated before the hearing of the case, or cannot appear in a sitting, the court may engage a judicial assistant to hear that person. In that case, the questions directed at the witness, together with his answers, shall be put in writing, and the witness shall sign the evidence or put the mark of a cross instead of the signature.

The court may also nominate a Supplementary Judge to hear a particular witness in the case of witnesses who cannot leave their house because of their age.

If a witness resides abroad, a lawyer, by means of application, may request a hearing through letters of request (rogatory request) – the party requesting the hearing of this witness shall produced written questions, and submit the name and address of the person who shall appear on his behalf during the hearing of the witness;
If the court considers it appropriate, it may permit a tape or video recording to be made of the evidence required from the witness;
The court may engage legal referees giving them the power to hear witnesses and administer oaths.
When a legal referee is engaged to take evidence, he has the same means that courts have at their disposal.

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

All means of proof are considered of to be equal importance.

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

No, but the best proof must always be produced.

**2.8 Are witnesses obliged by law to testify?**

Yes, the law obliges all summoned witnesses to testify. However, a witness cannot be compelled to answer questions that may result in him being the subject of criminal prosecution.

**2.9 In which cases can they refuse to give evidence?**

The husband or wife of any party in a court case are competent witnesses and may be compelled to testify in a case at the request of any of the parties. However, the husband cannot be compelled to reveal anything that his wife may have told him in confidence during their marriage, and vice versa, nor can one spouse be compelled to answer questions which may result in the other spouse being the subject of criminal prosecution.
Other exempt facts include those entrusted to lawyers, legal procurators or priests. However, if a lawyer or a legal procurator obtains his client's consent, or the priest obtains the consent of the person who confessed, they may be questioned about matters that came to their knowledge (subject to consent); the lawyer and the legal procurator regarding what has been entrusted to them by the client for the purposes of the case, and the priest for those facts he becomes aware of under the seal of the confessional or through a confession.
Except by court order, accountants, doctors, social workers, psychologists and marriage counsellors cannot be asked to reveal information given to them by their clients under professional secrecy or if they became aware of such information in their professional capacity. This privilege is also extended to the interpreter engaged to convey such secret information.
A witness bound by professional secrecy cannot reveal secret and confidential information, except in certain circumstances according to the particular law applicable to the case.

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

If a regularly summoned witness does not appear when called, he is guilty of contempt of court and is immediately condemned and fined. The court can also, through a warrant of escort or arrest, compel him to appear and testify in a subsequent sitting. However, the court may waive the fine imposed if good reasons are provided for the failure to appear.

**2.11 Are there persons from whom evidence cannot be obtained?**

Any person of sound mind, if there are no exceptions regarding his competence, may be produced as a witness. A witness of any age may be produced as long as he is aware of the fact that giving false evidence is wrong.

**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?**

During the examination or cross-examination, the court may ask the witness any question it deems necessary or expedient. On the other hand, each party in the case, whatever his interest, may testify at his/her own request, at the request of another party in the case, or when summoned to do so *ex officio* by the court.
In cases involving minors, the judge generally hears the minor *in camera* or a Children's Advocate is appointed to hear the minor.
Witnesses living outside Malta may be heard in video conference.

## 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 evidence has not been obtained by illegal means, the court has no restrictions when delivering its judgement. The only exception is that, as a rule, the court does not take cognizance of evidence regarding facts that the witness says he became aware of from others, or of facts stated by other parties who can be produced to testify accordingly.

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

Yes, statements made by a party to a case are admissible.

Last update: 22/03/2017



# Taking of evidence - Netherlands

## 1 The burden of proof

The Dutch law of procedure is based on the principle that 'whoever asserts a fact must prove it'. In other words, the party relying on the facts or rights it alleges for legal purposes will bear the burden of proving those facts or rights. However, the burden of proof may shift as a result of a specific legal rule or the principles of reasonableness and fairness.

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

The statutory rules of evidence in the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*) apply in proceedings initiated by writ of summons and in proceedings initiated by application, unless the nature of the case is such as to preclude this. They are not mandatory in interlocutory proceedings and do not automatically apply in arbitration cases either. However, in arbitration cases the parties may agree to apply those rules.
The statutory rules of evidence can be found in Articles 149 to 207 of the Code of Civil Procedure.

**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?**

Facts that are alleged by one of the parties and not (sufficiently) disproved by the opposing party must be treated by the court as proved. However, there is an exception, namely situations where accepting this would entail legal consequences that are not freely available to the parties. In that event the court can demand evidence.

Evidence is not required of facts or circumstances that are deemed to be universally known or of rules of general experience. These may be used by the court whether or not they are alleged by the parties. ‘Facts or circumstances that are deemed to be universally known’ means facts or circumstances that any normal person knows or can know. ‘Rules of general experience’ means the knowledge and experience that every citizen in Dutch society has. Likewise, there is no need to prove facts of which the court itself acquires knowledge during the proceedings (trial facts).
Sometimes a presumption is provided for by law. Certain facts or circumstances are regarded as being so probable that a party pleading them does not need to provide (further) proof of them. The court can also use rules of general experience to arrive at a presumption on the basis of certain facts that are pleaded before it. In that case, the opposing party does have the possibility of rebutting the presumption. A number of special cases also apply. Two examples would be: under road traffic law, a motorist who runs over a cyclist or pedestrian must compensate for injury, unless it can be proved that the accident was due to force majeure. Another example would be a case in which a worker claims compensation for an injury suffered at work. In that case, the employer will be obliged to compensate the worker for such injury unless evidence can be adduced that there was no deficiency in the required care or that the worker was guilty of deliberate action or wilful recklessness.

**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 is free to evaluate the evidence unless the law provides otherwise. This exception concerns rules about the conclusive evidential value of evidence. In cases of conclusive evidence the court is under an obligation to accept as true certain forms of evidence, or at least acknowledge their value. But here again there is a possibility of rebuttal.
The courts can base their decisions only on facts that adequately comply with the rules of evidence.

## 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?**

In certain cases (inspection of accounts, witness testimony), at the request of one of the parties, the court places the duty to provide evidence on the other party. The court may also do so of its own motion, i.e. on its own initiative.
Likewise, at the request of one of the parties or of the court’s own motion, the court can order an expert report or a visit to or inspection of premises. It is the court that appoints the expert, with the expert reporting to the court, and it is the court that undertakes visits to premises. The parties are under a duty to assist with expert reports.
The parties are entitled to make their views known and to present requests in the case both of an expert report and of a visit to premises.

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

The party allowed by the court to provide evidence or which bears the burden of proof has the duty to provide evidence of the alleged facts and/or circumstances. The opposing party may always provide evidence to the contrary, unless the law precludes this.

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

The court declines to admit evidence if this evidence is not relevant to the case, is not sufficiently specified (too vague), is out of time (too late) or is frivolous. Evidence submitted may not be disregarded on the grounds of the presumed result thereof.

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

In the Netherlands the freedom-of-evidence rule applies, that is to say that in principle evidence may be supplied in any appropriate form, unless the law provides otherwise. The law also specifies a number of forms of evidence (non-exhaustive): They are:
deeds and judgments;
inspection of accounts, records and documents;
witness testimony;
formal or oral reports by experts and
inspections of and visits to premises.

**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 must be allowed by the law and is given at the request of one of the parties or is imposed on one of the parties of the court’s own motion. The parties can also give evidence as witnesses (see point 3 below). Where witness evidence is to be given, it is the parties who call the witnesses.
Witness evidence is given in the form of testimony. It is taken when the court is in session in the form of oral testimony. A witness statement is admissible as evidence only if it relates to facts of which the witness has personal knowledge. A party who asks to be allowed to present witness evidence will be allowed to do so if the facts to be proved are in dispute and can help to resolve the case.
At the request of one of the parties or of the court’s own motion, experts can present written or oral reports (Article 194 of the Code of Civil Procedure). In the event of a written report, the court sets a deadline for presentation. In the event of an oral report, the expert gives evidence on the date set for the trial.

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

There is a distinction between conclusive and non-conclusive evidence. In the event of conclusive evidence, the court is required to accept the content of the evidence as true or to recognise the strength of that form of evidence as determined by the law. Counter-evidence may also be offered in the event of conclusive evidence, unless the law precludes it. Authentic deeds and judgments by the criminal courts are examples of conclusive evidence. The court is free to determine the evidential value of non-conclusive evidence.

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

In certain circumstances a document constitutes perfect proof. In certain circumstances the document is also essential for a specific right to come into being. An example of this might be a prenuptial agreement or a will. Evidence of the existence of a prenuptial agreement or a will drawn up by a notary is provided by submitting a notarial act. A codicil may also serve as proof. A codicil is a handwritten, dated and signed document setting out the wishes of the testator. These wishes may relate to the bequeathing of, inter alia, clothing, jewellery and specified household effects and specified books. A codicil does not require validation by notarial act.

**2.8 Are witnesses obliged by law to testify?**

The basic principle is that anybody who is called on by law to give evidence is under a duty to do so. The duty is to appear at the trial and make the required statements truthfully in court.

**2.9 In which cases can they refuse to give evidence?**

In certain circumstances it is possible to be released from the duty to testify.
Individuals who have a close personal relationship with one of the parties may claim exemption from the duty to testify. These include (ex-)spouses or (ex-) registered partners of the party, relations by blood or marriage of a party or that person’s spouse or registered partner up to and including the second degree – e.g. parents, children, grandparents, grandchildren, brothers and sisters.

Witnesses can also invoke the exemption when answering specific questions if the answer would expose the witness or a relative by blood or marriage in the ascending or descending line or a collateral relative in the second or third degree, or that person's (ex-)spouse or (ex-)registered partner to the risk of criminal prosecution (Article 165(3) Code of Civil Procedure).
There is also an exemption on a functional basis. This is available to people who, by virtue of a privileged relationship on account of their profession, occupation or other status (such as clergy, doctors, advocates and notaries), have a duty of secrecy.

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

If a witness has been summoned to appear by registered letter and fails to appear at the trial, the court may set a date at the request of the party concerned on which the witness may be summoned by writ (service by bailiff). If the witness still fails to appear, the court may order him/her to be brought to court by the police. If a witness appears but refuses to make a statement, the relevant party may ask the court to remand him/her in custody for contempt of court. The requesting party will then have to pay the costs of the remand in custody. The court will make a custody order only if it believes that this is justified with a view to ascertaining the truth.

**2.11 Are there persons from whom evidence cannot be obtained?**

In principle, everybody is under the duty to give evidence, except for those who are entitled to the exemption (see point 2.9).

**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 are heard and questioned by the court. Parties and their lawyers can also put questions to the witnesses. The court, of its own motion or at the request of one of the parties, may confront witnesses with each other and with the parties. After the witness has testified, the court may put questions to the parties and the parties may put questions to each other.
The Dutch rules of evidence contain no specific provisions on videoconferencing. Dutch law does not exclude this procedure and there are no practical difficulties in carrying out videoconferencing. It is for the court to decide on this matter.

## 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?**

Illegal evidence can be subdivided into evidence illegally obtained and evidence illegally used. If evidence has been obtained illegally, this does not mean that its use is always illegal. It is always at the discretion of the court whether or not the evidence should be regarded as illegal.

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

Parties can be heard as parties in the case, but then the statements they make will not be treated as evidence in favour of the party heard as a witness, unless the testimony serves to clarify other inadequate evidence (Article 164(2) of the Code of Civil Procedure).

Last update: 09/02/2022



# Taking of evidence - Austria

## 1 The burden of proof

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

In principle, each party is required to list all the factual claims justifying their application (burden of allegation – *Behauptungslast*) and to provide the appropriate evidence (Sections 226(1) and 239(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung*). If the facts of the case remain unclear (a *non liquet* situation), the court must nevertheless reach a decision. In such cases, the rules on the burden of proof come into play. Each party carries a burden of proof to ensure that all the conditions of the rules favourable to it are met. Under normal circumstances, the claimant must assert all the facts in support of their claim and the defendant must assert all the facts which justify their objections. The claimant also bears the burden of proving that the procedural requirements are met.

**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?**

Facts which are material to the judgment must be proved, unless they are exempt from the burden of proof. There is no need to prove facts which have been conceded (Sections 266 and 267 of the Code of Civil Procedure), obvious facts (Section 269) or legally presumed facts (Section 270).
A conceded fact is one which a party accepts to be a correct claim by the opposing party. The court is in principle required to accept a conceded fact as correct and to reach its decision without further examination.
A fact is obvious if it is common knowledge (i.e. known or reliably perceptible at any time to a large number of people) or known to the court (known to the trial court on the basis of its own official findings or clearly apparent from the files).
The court is required *ex officio* to take account of obvious facts in its ruling; they need not be claimed or proved.
A legal presumption results directly from the law and has the effect of reversing the burden of proof. The opposing party of the party benefiting from such a presumption must provide evidence to the contrary. It must prove that, despite there being a basis for a legal presumption, the presumed facts or legal situation do not exist.

**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 purpose of court proceedings is to convince the judge of a fact. Generally speaking, a 'substantial likelihood' must be assumed and 'absolute certainty' is not required in order to convince the judge.
Degrees of the standard of proof are established by statutory or case law, resulting in it being raised from 'significant likelihood' to 'likelihood bordering on certainty' or reduced to 'overwhelming likelihood'. In the latter case, satisfactory proof or a certificate is sufficient as a standard of proof under Section 274 of the Code of Civil Procedure. Prima facie evidence also leads to a reduction of the standard of proof and plays a role in overcoming difficulties in providing evidence in damages actions. If there is a typical course of events for which life experience suggests a specific causal link or fault, these conditions are deemed to be proved on the basis of their being prima facie even in individual cases.

## 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 may be taken by the court on its own motion or following the application of a party. In proceedings of a purely investigative nature (where the court is required to establish the decisive facts of the case on its own motion), there is no need for an application by the parties. In standard proceedings under the Austrian Code of Civil Procedure, judges are able on their own motion to take any evidence expected to clarify material facts (Section 183 of the Code of Civil Procedure). The judge may instruct the parties to produce documents, require an on-site inspection to be carried out or order scrutiny in the form of expert opinions or an examination of the parties. However, documentary evidence may be presented only if at least one of the parties has referred to it;

documentary evidence must not be admitted or witnesses heard if this is opposed by both parties. In all other cases, evidence is taken on an application to obtain evidence by one of the parties.

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

In principle, evidence is taken in the oral proceedings. During the 'preparatory' meeting (Section 258 of the Code of Civil Procedure), a trial schedule is drawn up jointly by the court and the parties and/or their representatives which also contains a schedule for the taking of evidence. Where necessary, however, a further discussion concerning the progress of the proceedings may take place at any time. Once evidence has been taken, the outcome is discussed with the parties (Section 278 of the Code of Civil Procedure). Evidence must in principle be taken directly by the judge, who will decide on the matter. In those cases expressly covered by law, evidence may also be taken during the mutual legal assistance procedure. The parties must be summoned for the taking of evidence and have various participatory rights, such as the right to put questions to witnesses and experts. Evidence is always taken on the court's own motion, in principle even if, despite being called, the parties are not present.

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

An application by a party to obtain evidence must be rejected if the court considers it to be irrelevant (Section 275(1) of the Code of Civil Procedure) or if it is submitted with the intention of delaying proceedings (Sections 178(2), 179 and 275(2) of the Code of Civil Procedure). It is also possible to set a time limit for taking evidence that is likely to delay the proceedings (Section 279(1) of the Code of Civil Procedure). Once this has expired, the application to take evidence may be rejected. It may also be rejected if it is unnecessary because the court has already been convinced or the fact does not need to be proved or the taking of evidence is prohibited. Where the taking of evidence gives rise to costs (e.g. expert evidence), an advance payment must be obtained from the applicant party. If this is not paid within the deadline set, the evidence may only be given at a later date if this will not cause a delay in the proceedings.

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

The Austrian Code of Civil Procedure provides for five 'classical' means of proof: documents (Sections 292 to 319), witness testimony (Sections 320 to 350), expert evidence (Sections 351 to 367), on-site inspection (Sections 368 to 370) and hearing the parties (Sections 371 to 383). In principle, any source of information may be admitted in evidence and will be classified as one of the above means of proof according to the form it takes.

**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 heard individually in the absence of witnesses to be heard subsequently. This prevents them from influencing each other's testimony. If the testimony of witnesses is contradictory, they may be examined concurrently. Examination of witnesses begins with general questioning to establish if they are disqualified from testifying for any reason, have the right to remain silent or whether there are any factors preventing them from taking oath. Once a witness has been cautioned to tell the truth and advised of the consequences under criminal law of giving false testimony, the examination proper begins with the witness being asked to provide their personal identification data. The witness is then questioned on the case itself. The parties may take part in the witness examination and, with the agreement of the court, put questions to witnesses. The judge may reject inappropriate questions. Witnesses must in principle be examined directly before the trial court. Under certain conditions, however, it is possible to examine witnesses by way of mutual legal assistance (Section 328 of the Code of Civil Procedure).

Expert witnesses are deemed to 'assist' the court. While witnesses gives testimony concerning facts, expert witnesses provide knowledge which the judge cannot possess. Expert evidence must in principle be taken directly before the trial court. An expert witness may also be called on the judge's own motion, without restriction. Expert witnesses must submit their findings and a report. Expert witnesses must deliver an oral report during the oral hearing. Written reports must be explained by expert witnesses during the oral hearing if this is requested by one of the parties. The findings and the report must be substantiated. Private reports are not considered to be expert reports within the meaning of the Code of Civil Procedure. They have the status of a private document.

Austrian law does not allow proceedings to be conducted entirely in writing. However, since the means of proof are not in any way limited, the possibility exists of witnesses giving their testimony in writing. Written witness statements are, however, treated as documentary evidence and are subject to independent assessment by the court. If the court deems it necessary, the witness must appear before the court, unless both parties object to the examination of that witness.

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

The principle of the 'free assessment of evidence' applies (Section 272 of the Code of Civil Procedure). The assessment of evidence is the examination of the results of the evidence by the judge. In carrying out this assessment, judges are not bound by any statutory rules regarding the evidence but must judge in accordance with their personal conviction whether or not the evidence is sufficient. There is no hierarchy applicable to means of proof. Written evidence is deemed to be documentary evidence unless it is an expert report. Public documents issued in Austria are presumed to be authentic, i.e. it is assumed that they are indeed attributable to the issuer indicated. They also establish full proof of the correctness of the contents. As long as they are signed, private documents are also fully accepted as evidence that the statements they contain were made by the person who signed them. Their accuracy is always subject to the free assessment of evidence.

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

The Austrian Code of Civil Procedure does not require particular types of evidence to be considered in specific cases. The amount of the claim has no bearing on the choice of means of proof.

**2.8 Are witnesses obliged by law to testify?**

Witnesses are obliged to appear in court, to give testimony and, if asked, to take an oath. If a duly summoned witness fails to attend an oral hearing without sufficient reason, the court must first impose an administrative fine and, if they fail to attend a second time, order that they be brought to the hearing by force. If a witness refuses to testify without giving any reason or gives an unjustified reason for not testifying, they may be forced to testify. False testimony by a witness before the court will result in criminal proceedings.

**2.9 In which cases can they refuse to give evidence?**

Where there are grounds for refusing to give evidence (Section 321 of the Code of Civil Procedure), the witness is entitled to refuse to answer a question or individual questions. There is no complete right to refuse to give evidence. Such grounds are scandal or the risk of criminal prosecution for the witness or a person close to them, a direct financial disadvantage for the same people, state-recognised obligations to remain silent, the obligation of lawyers, a statutory representative body or a professional association capable of entering into collective agreements to remain silent about labour and social security matters, the potential disclosure of artistic or business secrets and the use of a voting right which has been declared secret by law. The court must advise witnesses of these grounds before they are examined. Witnesses who wish to exercise their right to remain silent must state their reasons.

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

The court must decide whether the refusal by a witness to give evidence is lawful. Witnesses who refuse to testify without giving any reason or who give reasons which the court considers unjustified may be forced to testify (Section 354 of the Enforcement Code – *Exekutionsordnung*). This may be done by means of fines or, to a limited extent, imprisonment. Such a witness is also liable vis-à-vis the parties for any damage caused as a result of an unjustified refusal to give evidence.

**2.11 Are there persons from whom evidence cannot be obtained?**

Evidence cannot be obtained from persons who were or are unable to witness the facts to be proved or to communicate what they have witnessed. They are considered to have an 'absolute' physical inability to testify (Section 320, point (1), of the Code of Civil Procedure). In the case of minors or mentally ill persons, the court must decide on a case-by-case basis whether they are unable to give evidence. If the person to be heard is a minor, the court may, following an application or *ex officio*, waive all or part of its examination if the examination would jeopardise the well-being of the minor, taking into account their mental maturity, the subject of the examination and their relationship to the litigants (Section 289b(1) of the Code of Civil Procedure). This also applies in non-contentious proceedings (Section 35 of the Non-contentious Proceedings Act (*Außerstreitgesetz*)). There are also three cases of 'relative' incapacity to testify (Section 320, points (2) to (4), of the Code of Civil Procedure): religious professionals in respect of information given to them during confession or otherwise covered by confidentiality arising from their position, state officials in respect of confidential information in connection with their office (unless an exemption is made), and mediators in respect of information entrusted to or otherwise obtained by them during the course of mediation.

**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 must ask witnesses appropriate questions about the facts to be proved by their testimony and about the circumstances under which they obtained their knowledge. The parties may participate in the examination of witnesses and, with the agreement of the court, ask them questions to clarify or complete their testimony. The judge may reject inappropriate questions. Witness testimonies must be records of their essential content or, if necessary, they must be recorded verbatim. Video and audio recorders and the data stored on them are generally deemed to be objects of inspection. Evidence through inspection is the result of the direct sensory perception of characteristics or conditions of things by the court. However, on the principle that evidence should be taken directly, such evidence is only admissible where direct evidence (e.g. a witness) is not available. The examination of witnesses using video technology is possible in principle and should be used in lieu of examination when executing requests for mutual legal assistance for reasons of economy of process. All courts have been equipped with video-conferencing facilities since 2011.

If the subject matter of the civil proceedings is related to criminal proceedings, the examination of parties who are the victims in these criminal proceedings within the meaning of Section 65, point (1)(a), of the Code of Criminal Procedure (*Strafprozessordnung*) shall, at their request, limit the participation of the parties to the proceedings and their representatives in the examination in such a way as to allow them to follow the examination using technical equipment for the transmission of speech and images and to exercise their right to ask questions without being present at the interview. If the victim is an underage minor, a suitable expert must carry out the questioning related to the criminal proceedings (Section 289a(1) of the Code of Criminal Procedure). The court may, upon request, examine a person in the manner described in paragraph 1 if, in the light of the evidence in question or personal involvement, the person to be heard cannot be reasonably expected to make a statement in the presence of the parties to the proceedings and their representatives (Section 289a(2) of the Code of Civil Procedure). The court may, upon request or *ex officio*, have the examination conducted in the manner described in Section 289a(1) of the Code of Civil Procedure, and, if necessary, by a suitable expert even if the well-being of the minor would not be jeopardised by the examination itself, but conducting the examination in the presence of the parties or their representatives would affect their well-being, taking into account their mental maturity, the subject of the examination and their relationship to the litigants (Section 289b(2) of the Code of Civil Procedure). Sections 289a and 289b of the Code of Civil Procedure also apply in non-contentious proceedings (Section 35 of the Non-contentious Proceedings Act).

## 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 a party infringes a contractual obligation, a provision of private law or the accepted principles of morality in order to obtain evidence, the court may admit and assess the evidence, but the party concerned will nevertheless be liable to pay compensation. If, in order to obtain evidence, the party infringes a provision of criminal law protecting the core basic rights and freedoms laid down by the Constitution (e.g. physical injury, kidnapping, or coercion of a witness to give testimony), the evidence so obtained is inadmissible and must not be accepted by the court. If there is doubt as to whether a criminal act has been committed, the court may suspend civil proceedings until a final judgment has been given in the criminal proceedings. If the criminal act committed to obtain evidence does not infringe the core basic rights and freedoms laid down by the Constitution, the party in question is deemed criminally liable, but the evidence is not inadmissible. Only evidence obtained illegally which has adversely affected the court's duty to establish the truth and thus undermines the guarantee that the court will deliver a true and accurate judgment is inadmissible.

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

The examination of the parties also constitutes evidence. Like witnesses, the parties also have a duty to attend, give testimony and take an oath. However, parties cannot be forced to appear or testify in court. Any unjustified failure by a party to attend the proceedings or to testify in court must be judged by the court with due regard for all the circumstances. Only in paternity or divorce proceedings is it possible to use force to ensure that the parties appear before the court. Failure by a party to tell the truth (unlike with witnesses) is not a criminal offence unless a false statement is given under oath. The examination of the parties may be ordered by judges on their own motion.

## 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.

Under Austrian national law, no authorities other than courts are currently competent to take evidence across borders under Article 2(1) of the Regulation.

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# Taking of evidence - Poland

## 1 The burden of proof

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

Matters relating to evidence and the taking of evidence are governed primarily by Article 6 of the Civil Code of 23 April 1964 ('the Civil Code') and Articles 227-315 of the Code of Civil Procedure of 17 November 1964 ('the Code of Civil Procedure').

In accordance with Article 6 of the Civil Code, the burden of proving a fact lies with the person who asserts legal consequences arising from this fact. The burden of proving certain facts will therefore lie with the claimant, and that of proving certain other facts with the defendant.

**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 accordance with Article 228 of the Code of Civil Procedure, there is no need for proof of well-known facts. There is no need to prove facts of which information is generally available and facts known to the court of its own motion, but the court must draw the attention of the parties to them. Nor is there any need for proof of facts acknowledged by the opposing party in the course of the proceedings if there is no doubt as to the acknowledgment (Article 229 of the Code of Civil Procedure). If a party does not express a view on the opposing party's assertions of the facts, the court may, having regard to the outcome of the hearing as a whole, consider those facts to be acknowledged (Article 230 of the Code of Civil Procedure). In accordance with Article 231 of the Code of Civil Procedure, the court may deem facts relevant for the resolution of the case to be established if that conclusion can be drawn from other established facts (factual presumption).

Presumptions established by law (legal presumptions) are binding on the court; however, they may be rebutted whenever the law does not exclude it (Article 234 of the Code of Civil Procedure).

As the law currently stands, there are no irrebuttable legal presumptions in Poland, i.e. those that may not be rebutted. However, certain legal presumptions can only be rebutted in separate proceedings – for example, the presumption that a person died on the date set in the decision declaring the death, the presumption that the child is from the mother's husband or the presumption that the person who has been declared to have acquired the succession is in fact the heir. The finding of a final criminal judgment concerning the commission of a criminal offence can also be called into question only in proceedings challenging that judgment.

Other legal presumptions may be rebutted by evidence to the contrary in the same proceedings. For example, the presumption of good faith, the presumption that the child was born alive, the presumption that an act threatening personal well-being is unlawful, the presumption that the joint owners' shares in the common property are equal, the presumption that the debtor acted with the knowledge that the creditors were harmed, the presumption that the contributions of the members of the civil-law partnership are of equal value, and the presumption that what is certified in an authentic instrument is true.

In accordance with Article 233(2) of the Code of Civil Procedure, the court shall, on the basis of its own conviction and on the basis of a comprehensive consideration of the evidence collected, assess the significance of the party's refusal to produce evidence or of the impediments to its performance contrary to the court's decision. Thus, in practice, the court may consider that the burden of proof to the contrary is passed on to a party whose conduct makes it difficult to prove a particular fact, that is to say, that the fact did not occur.

**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?**

Civil proceedings apply the principle of the free assessment of evidence (Article 233 of the Code of Civil Procedure), according to which the court assesses the reliability and strength of evidence to its satisfaction, based on a comprehensive examination of the gathered evidence. In order to base its decision on the existence of a given fact, the court must be satisfied that that fact actually occurred.

Exceptionally, in civil proceedings, the belief that a fact is likely to have occurred may be sufficient. This is the case in situations where the law requires only a prima facie case and not proof of the fact (Article 243 of the Code of Civil Procedure). A prima facie case is provided for in civil proceedings as being sufficient to rule, for example, on the grant of a security, on the intervention of the third party in the proceedings, or on the suspension of the immediate enforceability of a default judgment.

## 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 court may accept evidence not indicated by a party (Article 232 of the Code of Civil Procedure), but in contentious proceedings this is exceptional and is at the court's discretion. This is not the case in certain situations in non-contentious proceedings where the law provides for the possibility of initiating proceedings of the court's own motion (e.g. in matters of parental responsibility or guardianship) or where the law requires the court to determine of its own motion certain facts (for example, in proceedings for a declaration of inheritance, the court examines of its own motion who is the heir). In such a case, the court is obliged in practice to accept evidence of its own motion in the absence of sufficient evidence provided by the parties to the proceedings.

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

The court is not bound by the application for evidence. Evidence provided by a party may be admitted or omitted. Both the omission of evidence and its acceptance requires an order to be issued (Article 2352(2) of the Code of Civil Procedure, Article 236(1) of the Code of Civil Procedure). An exception is made for the documents in the case file or their attachments. Such a document is evidence without a separate decision – the court must issue a decision only if it wishes to omit it (Article 2432 CCP). When issuing a decision on the admission of evidence, the court shall indicate the evidence and the facts to be proved and, where necessary and possible, the date and place of the taking of evidence.

The court is not bound by its decision to admit or omit evidence and may, where appropriate, cancel or amend it (Article 240(1) of the Code of Civil Procedure).

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

In accordance with Article 2352 of the Code of Civil Procedure, the court may, in particular, omit evidence:

the implementation of which is excluded by a provision of the Code;

that aims to prove a fact that is uncontested, irrelevant to the outcome of the case or proven as claimed by the applicant;

unsuitable to demonstrate the fact in question;

impossible to provide;

seeking only an extension of the procedure;

and where the application does not state the evidence in such a way as to permit it to be provided or does not specify the facts to be proved, and the party has failed to remedy that omission despite the request.

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

The means of evidence may include, in particular:

documents containing text and enabling their issuers to be identified (Articles 2431-257 of the Code of Civil Procedure);

testimony of witnesses (Articles 259-277 of the Code of Civil Procedure);

expert opinion (Articles 278-291 of the Code of Civil Procedure);

visual inspection (Articles 292-298 of the Code of Civil Procedure);

hearing of parties (Articles 299-304 of the Code of Civil Procedure)

group blood testing (Articles 305-307 of the Code of Civil Procedure);

documents containing an image or sound recording (Article 308 of the Code of Civil Procedure).

This list is not exhaustive – Polish civil procedure allows for the use of means of evidence other than those expressly referred to in the Act (Article 309 of the Code of Civil Procedure).

**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 shall, as a rule, give evidence orally at the hearing. A witness who cannot appear when summoned because of illness, disability or other insurmountable obstacle shall be heard at his or her place of residence (Article 263 of the Code of Civil Procedure). The court may decide that the witness should give his or her testimony in writing (Article 2711 of the Code of Civil Procedure). In such a case, the witness is obliged to submit the text of the testimony to the court within the time limit set by the court. Deaf and mute witnesses give evidence in writing or with the assistance of an expert (Article 271 (2) of the Code of Civil Procedure). For unjustifiable non-appearance, the court will order the witness to be fined and issue a new summons and, in the event of repeated non-appearance, will impose an additional fine and may order that the witness be forced to appear in court (Article 274(1) of the Code of Civil Procedure).

Pursuant to Article 266 of the Code of Civil Procedure, before hearing the witness is informed of their right to refuse to testify and of the criminal liability for giving false testimony (Article 266 of the Code of Civil Procedure). A witness who is to testify takes the following oath: “Understanding the importance of my words and my legal obligations, I solemnly swear to tell the truth, and not to dissimulate anything of which I have knowledge.” A witness testifying in writing takes the oath by signing this text.

When giving an oral testimony, the witness begins by answering the court’s questions, what is known to them and from what source with regard to the case, after which the parties may put questions to them (Article 271(1) of the Code of Civil Procedure).

Witnesses whose testimony contradicts one another may be confronted (Article 272 of the Code of Civil Procedure).

It is for the court to decide whether the expert’s report will be made orally or in writing (Article 278(3) of the Code of Civil Procedure). Every opinion must include a statement of reasons (Article 285 of the Code of Civil Procedure). After the submission of the opinion, the court may request an oral or written supplement to the opinion or an explanation thereof, as well as an additional opinion of the same or other experts (Article 286 of the Code of Civil Procedure). Where evidence is taken through a designated judge or a requested court, the court may leave it to the designated judge or the requested court to choose an expert (Article 278(2) of the Code of Civil Procedure).

Until the expert’s activity has been completed, a party may request that the expert be excluded on the same grounds on which a judge’s exclusion may be requested (Article 281(1) of the Code of Civil Procedure).

An expert may refuse to give an opinion on the same grounds as those on which witnesses may refuse to testify (Articles 280 and 261 of the Code of Civil Procedure). An expert who is not registered in the register of court experts shall take an oath.

The court may order that the case file or the subject-matter of the inspection be presented to the expert to the extent necessary and order that they be present or participate in the taking of evidence (Article 204 of the Code of Civil Procedure).

In the event of unjustified non-appearance, unjustified refusal to give an oath or opinion, or undue delay in submitting an opinion, the court may order the expert to be fined, but may not order that the expert be forced to appear in court (Articles 287 and 289 of the Code of Civil Procedure).

The court may accept evidence from an opinion drawn up on behalf of a public authority in another procedure provided for by law. (Article 2781 of the Code of Civil Procedure).

Anyone ordered to do so by the court must submit, at the specified place and time, any document held by them and proving a relevant fact of the case, unless the document contains confidential information (Article 248(1) of the Code of Civil Procedure). Only persons who, regarding the facts discussed in the document, would be entitled to refuse to give evidence as a witness or who hold the document on behalf of a third party who would be entitled to object to submitting the document for the same reasons can be dispensed of the above obligation. However, even then a refusal to submit the document is unacceptable if its holder or the third party are required to do so in reference to at least one of the parties or if the document is issued in the interest of the party that requests the taking of evidence. Moreover, a party cannot refuse to submit a document if the damage to which that party would expose itself by submitting the document consists in losing the case (Article 248(2) of the Code of Civil Procedure).

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

There are no grounds for accepting a formal hierarchy of methods of proof from the viewpoint of their reliability and strength. As a rule the court assesses the evidence at its discretion. However, documents must, to the extent provided for by law, constitute sufficient proof of certain facts. Official documents drawn up in the prescribed form by the public authorities appointed to that effect and other State bodies within the scope of their activities, as well as other entities within the scope of the public administration tasks entrusted to them by law, constitute evidence of what has been officially certified therein (Article 244 of the Code of Civil Procedure). A party who denies the veracity of an authentic instrument or claims that the statements made therein by the authority from which it originates are incorrect must provide proof of this (Article 252 of the Code of Civil Procedure). A private document drawn up in written or electronic form proves that the person who signed it has made the declaration contained in the document (Article 245 of the Code of Civil Procedure). If a party denies the veracity of a private document or claims that the declaration of the person who signed it does not emanate from that person, they must provide proof of this. However, if the dispute concerns a private document originating from a person other than the opposing party, the veracity of the document must be proven by the party wishing to use it (Article 253 of the Code of Civil Procedure).

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

No, but where the law requires the use of a particular form for the conclusion of a particular contract, the possibility of proving the conclusion of that contract by means of evidence other than the contract document is considerably restricted. A person who has not acted properly shall be penalised by a procedural disadvantage in the form of a limitation on the possibility of introducing evidence. If a law or contract requires that a legal act be in writing, evidence from witnesses or from the questioning of the parties in a case between the parties to that act is admissible if it concerns the fact that the document covering the act has been lost, destroyed or taken away by a third party and, if the written form was reserved for evidentiary purposes only, also in the cases specified in the Civil Code (that is to say, in the case of disputes other than between traders, if both parties so agree, if the consumer so requests in a dispute with the seller or supplier or if the fact that the legal act was concluded is shown to be plausible by means of a document; Article 246 of the Code of Civil Procedure, Article 74(2) and (4) of the Civil Code). Similarly, evidence from witnesses or from the hearing of the parties against or over the content of a document containing a legal act may be accepted between the parties to that act only if it does not lead to circumvention of the reserved form, failing which it will be null and void, and where, in the light of the particular circumstances of the case, the court considers it necessary (Article 247 of the Code of Civil Procedure).

**2.8 Are witnesses obliged by law to testify?**

Yes.

**2.9 In which cases can they refuse to give evidence?**

Spouses of the parties, ascendants, descendants, siblings and relatives to the same line or degree, as well as persons who are in an adoptive relationship, may refuse to testify. The right to refuse to testify also continues after the termination of marriage or of the adoptive relationship. However, refusal to testify is not permitted in matters of civil status (e.g. determination or denial of the parentage of a child, annulment of marriage, adoption and dissolution of adoption, declaration of death), except for divorce cases (Article 261(1) of the Code of Civil Procedure).
The witness may also refuse to answer the question referred if the witness's testimony could expose them or their relatives referred to above to criminal liability, shame or severe and direct material damage, or if the testimony could constitute a violation of essential professional secrecy. In addition, members of the clergy may refuse to testify on facts made known to them in confession (Article 261(2) of the Code of Civil Procedure).

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

In the event of an unjustified refusal to give evidence or take an oath the court, after examining all the present parties regarding the validity of the refusal, imposes a fine on the witness. Regardless of the above fine, the court may have the witness detained for up to a week. The court releases the witness from detention if they testify or take an oath or if the case was resolved by a court where that witness's evidence was admitted (Article 276 of the Code of Civil Procedure).

**2.11 Are there persons from whom evidence cannot be obtained?**

Yes. Persons who are unable to observe or communicate their observations may not be witnesses (Article 259(1) of the Code of Civil Procedure). The cessation of the causes of that inability may lead to the lifting of the prohibition to testify. The mere fact of psychiatric treatment or incapacity does not automatically prohibit questioning. Nor is there an age limit above which a child is deemed able to perceive and to communicate what they perceive. Whether a child can be examined depends therefore on their individual capabilities and degree of development. In marital cases, the law provides for limitations as regards examining as witnesses minors below the age of 13 and the parties' relatives in the descending line below the age of 17 (Article 430 of the Code of Civil Procedure).
In addition, there is a general rule that nobody may be examined in the same case once as a witness and once as a party. The party's legal representative may therefore be heard in the context of the hearing of the parties and not as a witness (Article 259(3) of the Code of Civil Procedure). The representative of a party may be heard as a witness, except that they should, in such a case, appoint a substitute for the hearing and, as soon as the testimony has been given, terminate the power of attorney. Joint participants may not be witnesses (Article 259(4) of the Code of Civil Procedure).
Military personnel and civil servants who have not been released from the duty to keep secret information identified as 'classified' or 'confidential', if their testimony would involve the infringement of that secrecy, may not give evidence (Article 259(2) of the Code of Civil Procedure).
A mediator cannot be a witness as regards facts that they became aware of in the course of mediation, unless the parties release them from the obligation to keep the secrecy of mediation (Article 2591 of the Code of Civil Procedure).

**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?**

A witness is heard by the court. The presiding judge shall first check the identity of the witness, inform the witness of the criminal liability for giving false testimony and take an oath from the witness. The witness begins to testify by answering questions from the presiding judge regarding what is known to them in the case and from what source, and then questions may be asked by the other judges and parties (Article 271(1) of the Code of Civil Procedure). The presiding judge gives the floor, entitles them to ask questions and may take the floor if they abuse it, and cancels the question if they consider it inappropriate or superfluous (Article 155 of the Code of Civil Procedure). The witness may not leave the room before obtaining permission to do so from the presiding judge (Article 273(1) of the Code of Civil Procedure).
The examination of a witness using technical devices enabling this action to be carried out remotely depends on the court's decision, which assesses whether or not the nature of the evidence precludes it (e.g. because of the personal characteristics of the witness; Article 235(2) of the Code of Civil Procedure). In such a case, the witness should be kept in the premises of another court, or in prison or in custody when deprived of liberty, so that the hearing can be transmitted between the courtroom of the court conducting the proceedings and the place where the witness is present. At the place where the person deprived of liberty is present, a representative of the administration of the prison or detention facility, an agent, if any, and an interpreter, if appointed, shall be involved in the proceedings (Article 151(2) of the Code of Civil Procedure).
Note: exceptional rules for the holding of remote meetings and therefore also for the hearing of witnesses by videoconferencing are currently in place in the context of the COVID-19 epidemic. During the period of the state of epidemic threat or the state of epidemic declared due to COVID-19 and within one year of lifting the last of the two, a hearing or public hearing shall be held using technical devices enabling them to be held remotely with simultaneous direct transmission of images and sound (remote meeting); in such a situation, the persons attending the hearing, including the members of the panel, do not need to be present in the court building. A remote hearing may be waived only if it is necessary to hear the case in person or at a public hearing and the holding of the case in the court building does not unduly endanger the health of those attending it. At the request of a party or a requested person (including a witness) presented at least 5 days before the scheduled date of the remote meeting, the court will ensure that the requested party or person has the possibility to attend a remote meeting in the court building if the requested party or person indicates in the request that they do not have the technical facilities to attend the meeting remotely outside the court building. (Article 15zzs1 of the Act of 2 March 2020 on special arrangements for the prevention, combating and control of COVID-19, other communicable diseases and related emergency situations (Journal of Laws 2020, item 374, as amended). As the epidemiological emergency on Polish territory has been extended until 31 March 2023 and further extension is not precluded, it is not possible to set an end date for the application of this exceptional regulation.

## 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?**

Polish law does not provide for a general prohibition against the use of unlawfully obtained evidence in civil proceedings. The case-law of the courts and the views of the legal literature are not consistent. The prevailing view is that the court should assess on a case-by-case basis which legal interest should be better protected: the right violated by obtaining evidence or the right to judicial redress. Consequently, while evidence obtained as a result of a criminal offence should, in principle, be disregarded as inadmissible, that does not necessarily apply to evidence obtained through minor infringements of the law (e.g. infringement of personal interest in the form of the right to privacy), especially where there is an important public interest in the acceptance of evidence. As a general rule, evidence in the form of a recording of an interview in which the party requesting the taking of evidence took part is admissible, even if the recording was made without the knowledge and consent of the interlocutor.
In any event, if evidence has been obtained by means of an offence (as established by a final conviction), it may then be taken into account by the court as a basis for reopening the proceedings (Article 403(1)(2) of the Code of Civil Procedure).

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

The oral and written submissions of the parties do not constitute evidence. However, if, after exhaustion of evidence or in the absence of such evidence, certain facts relevant to the resolution of the case remain unexplained, the court may hear the parties in order to clarify the facts (Article 299 CCP) and this hearing is considered as evidence.

**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.**

In Poland, only the courts are competent to take evidence for judicial proceedings in civil or commercial matters.

Last update: 22/05/2023



## Taking of evidence - Portugal

### 1 The burden of proof

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

The general rules on burden of proof are laid down in Articles 342 to 348 of the Portuguese Civil Code.

**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 rules which exempt certain facts from the burden of proof.

In the following cases:

Article 412 of the Portuguese Code of Civil Procedure – Facts not requiring a claim or proof

Article 350 of the Portuguese Civil Code – Legal presumptions

Legal presumptions may, however, be rebutted by means of counter-evidence, except in cases where the law does not allow this (Article 350(2) of the Portuguese Civil Code).

**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 judge assesses evidence freely, on the basis of their judicious belief regarding each fact. The free assessment of evidence by the court does not cover facts for which the law requires special formalities to prove them, or those that can be proven only by documents or that are fully proven, either by documents, by agreement or confession of the parties (Article 607(5) of the Portuguese Code of Civil Procedure).

The court must consider all evidence produced, whether or not originating from the party that should have produced it, without prejudice to the provisions declaring the statement of a fact to be irrelevant if it is not made by a certain interested party (Article 413 of the Portuguese Code of Civil Procedure).

The value of each means of proof varies according to its nature (Articles 369 to 396 of the Portuguese Civil Code).

### 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 taking of evidence does not always require the application by a party.

Portuguese law sets out the ‘inquisitorial principle’, i.e. it is the judge’s duty to carry out or order, even of their own motion, all actions necessary to determine the truth and fair settlement of the dispute with regard to the facts that they are lawfully entitled to examine (Article 411 of the Portuguese Code of Civil Procedure).

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

At the pre-trial hearing or by order, as applicable, the court determines which means of proof are admissible and can be adduced (Articles 591 and 593 of the Portuguese Code of Civil Procedure).

As a general rule, evidence is taken at the final hearing (Article 604(3) of the Portuguese Code of Civil Procedure). By way of exception, however, the court may allow evidence to be given at an earlier stage (Article 419 of the Portuguese Code of Civil Procedure).

If, after the trial is over, the judge believes that they do not have sufficient information, they may reopen the trial to hear the people they wish to and order any other necessary action (Article 607(1) of the Portuguese Code of Civil Procedure).

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

In general, in compliance with the procedural duty laid down in Article 6 of the Portuguese Code of Civil Procedure, it is for the judge to reject evidence which is irrelevant or merely dilatory.

Below are some of the examples that can give rise to rejection, in whole or in part, of an application to obtain evidence:

Limit on the number of witnesses (Article 511 of the Portuguese Code of Civil Procedure)

Impediments (Article 496 of the Portuguese Code of Civil Procedure)

Oath and preliminary questioning (Article 513 of the Portuguese Code of Civil Procedure)

Facts on which a party may base their testimony (Article 454 of the Portuguese Code of Civil Procedure).

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

The following means of proof exist:

Presumptions (Article 349 of the Portuguese Civil Code)

Confessions (Article 352 of the Portuguese Civil Code)

Statements by a party (Article 466 of the Portuguese Code of Civil Procedure)

Documentary evidence (Article 362 of the Portuguese Civil Code)

Expert evidence (Article 388 of the Portuguese Civil Code)

Confessions (Article 390 of the Portuguese Civil Code)

Witness evidence (Article 392 of the Portuguese Civil Code)

Presentation of movable or immovable property (Article 416(1) of the Portuguese Code of Civil Procedure).

**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?**

There are various means of obtaining witness evidence under Articles 452, 456, 457, 466, 500, 501, 502, 503, 506, 518 and 520 of the Portuguese Code of Civil Procedure:

Appearance of parties and witnesses in person or via technological means, pursuant to Article 502 of the Portuguese Code of Civil Procedure

Examination by letter rogatory (Article 500(b) of the Portuguese Code of Civil Procedure)

Examination at place of residence or headquarters of the services (Article 503 of the Portuguese Code of Civil Procedure)

Written hearing (Article 517 of the Portuguese Code of Civil Procedure)

Written submission of evidence (Article 518 of the Portuguese Code of Civil Procedure)
Direct communication between the court and the person giving evidence (Article 520 of the Portuguese Code of Civil Procedure)
On-the-spot examination (Article 501 of the Portuguese Code of Civil Procedure)
The means of taking expert evidence in accordance with Articles 486, 490 and 492 of the Portuguese Code of Civil Procedure differ from the abovementioned means of taking witness evidence as follows:
The experts attend the final hearing when either party so requests or when ordered to do so by the judge. Experts from establishments, laboratories or official services are heard by video conference at their workplace (Article 486 of the Portuguese Code of Civil Procedure).
The court may conduct an inspection of objects or persons, carry out on-the-spot visits or order a reconstruction of the facts; the judge may be accompanied by a specialist if they consider it appropriate (Articles 490 and 492 of the Portuguese Code of Civil Procedure).
The rules governing the submission of written evidence, reports or expert opinions are laid down in Article 416 of the Portuguese Code of Civil Procedure).

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

Yes, probative value varies depending on the nature of each means of proof (see answer to question 1.3).

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

Yes, specifically in the following cases:
Legal requirement for a written document (Article 364 of the Portuguese Civil Code)
Failure to comply with legal form (Article 220 of the Portuguese Civil Code)

**2.8 Are witnesses obliged by law to testify?**

All persons, whether or not they are parties to the case, have a duty to assist in discovering the truth of the matter, in accordance with Article 417 of the Portuguese Code of Civil Procedure.

**2.9 In which cases can they refuse to give evidence?**

The cases in which a witness may legitimately refuse to give evidence are set out in Article 497 of the Portuguese Code of Civil Procedure.

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

All persons, whether or not they are parties to the case, have a duty to assist in discovering the truth of the matter, in accordance with Article 417 of the Portuguese Code of Civil Procedure.
Anybody refusing to cooperate is fined, without prejudice to possible coercive means (Article 417(2) of the Portuguese Code of Civil Procedure).
If a witness unjustifiably fails to appear, the court may impose a fine or order the witness to appear under custody (Article 508(4) of the Portuguese Code of Civil Procedure).

**2.11 Are there persons from whom evidence cannot be obtained?**

Yes, evidence cannot be obtained in the following cases:
People who are not mentally fit to testify on the facts to be proven may not serve as witnesses, pursuant to Article 495 of the Portuguese Code of Civil Procedure).
People who may give testimony as parties in the case are forbidden to testify as witnesses (Article 496 of the Portuguese Code of Civil Procedure).

**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 role of the judge and the parties in the hearing of a witness is governed by the rules on testifying by witnesses laid down in Article 516 of the Portuguese Code of Civil Procedure.
Witnesses testify at the final hearing in person or by videoconferencing (Article 500 of the Portuguese Code of Civil Procedure). The examination of witnesses by technological means, such as teleconferencing, is governed by Article 502 of the Portuguese Code of Civil Procedure.

## 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?**

Yes. An example of this is evidence obtained in disregard of private and family life and human dignity, as required by Article 490 of the Portuguese Code of Civil Procedure).

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

Yes. A confession whereby the party recognises a fact that is detrimental to him or her and benefits the counter party is obtained through the testimony of the party (Article 352 of the Portuguese Civil Code and Article 452 of the Portuguese Code of Civil Procedure).
The court freely considers the statements of the parties, except where they involve a confession (Article 466(3) of the Portuguese Code of Civil Procedure ).

## 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.

Portugal has not specified any other authorities, the taking of evidence for the purposes of judicial proceedings being the responsibility of the Portuguese courts.

**Applicable legislation**

Portuguese Civil Code
Portuguese Code of Civil Procedure

**Note:**

The EJN-Civil Contact Point, the courts or other entities and authorities are not bound by the information contained in this factsheet, which may be subject to changes in interpretation by the case law. Although the factsheets are updated on a regular basis, it is still necessary to read the legislation in force.
Last update: 27/11/2023

# Taking of evidence - Romania

## 1 The burden of proof

The main legal basis is provided by:

Articles 249 to 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 in the case of presumptions the burden of proof switches 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 Official Gazette of Romania (*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 upon 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 (*prezumție 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 for the resolution of the proceedings. After the court has allowed evidence for particular facts, the question as to 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 to 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 the argument on the merits begins; evidence and counterevidence are taken at the same time insofar as this is possible.

Evidence is taken in a public hearing before 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 (pertinență) and cogency (concludență).* 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 also be plausible and relevant for the resolution of the proceedings.

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 or goes beyond 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 proceedings; 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), an expert's report, 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 time limit for their work. The expert's conclusions are recorded in an expert report. A fresh report by another expert may be sought, where justified, 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 proceedings in the form of a 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 opposing party's possession if the document is common to the parties to the proceedings, if the opposing party itself has made reference to the document during the proceedings or 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 at the place where it is located. If a document is held by a third party, that party may be summoned as a witness and required to bring the document.

The evidence is taken in closed session by the court having 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 so permits 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 the law. But statements made by the parties and recorded in an authentic document constitute proof only until it is proven otherwise.

Where there are presumptions left to the discretion of the judge, the judge 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?**

See 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. See 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 as initial evidence in favour of the party who proposed the questioning 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 declared as not having legal capacity (*sub interdicție 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, judicial enforcement officers, 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 in the exercise of their duties;

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 located.

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 in accordance with the 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 as to the author of the forgery or an accomplice, the court may suspend proceedings and at once forward the allegedly false document to the competent prosecutor's office together with a report drawn up in support of a request 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.

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 competent 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 constitutes evidence. An admission made in court constitutes full evidence against the person who made it and cannot be taken into account in separate parts unless they relate to separate facts that have no connection with each other. Out-of-court admissions can be freely assessed by the court. They are subject to the admissibility and evidence-taking requirements governing other evidence under ordinary law.

The court may agree to have either party summoned to be questioned regarding personal facts if they are deemed relevant for the resolution of the case.

**Relevant links**

https://www.just.ro

Last update: 10/09/2020



## Taking of evidence - Slovenia

### 1 The burden of proof

The rules regarding the taking and presentation of evidence and the methods of taking evidence in civil proceedings are regulated by the Civil Procedure Act (Zakon o pravdnem postopku, ZPP).

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

The general rule is that the parties must state all the facts underlying their claims and objections, and present evidence proving those facts (Articles 7 and 212 of the ZPP).

Claimants must prove the facts which are at the origin of their claims, while defendants must prove the facts underlying their objections. Substantive law tells us which of the parties is required to assert and prove a given fact. The consequences of a fact not being proven fall on the party which, according to the norms of substantive law, must assert and also prove that fact (Articles 7 and 215 of the ZPP).

**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?**

The evidence-taking procedure covers the facts on which the claims and objections are based, scientific and professional rules, and rules based on experience. The legal norms are not proved, since the rule applied to them is that the court must be acquainted with them ex officio (iura novit curia).

No proof is required for facts that are acknowledged by a party during proceedings before the court. A court may order acknowledged facts to be proved if it believes that a party has acknowledged them in order to assert a claim which it may not assert (Article 3(3) of the ZPP).

Facts which a party does not deny or denies without stating the reasons for denying them, shall be deemed to be acknowledged, unless the purpose of denial of these facts stems from other statements of the party. A party may also prevent the effect of this presumption of acknowledgement by stating that they do not recognise the facts; however, this only applies to facts that do not relate to the conduct of this party or their perception.

No proof is required for facts that are acknowledged and generally known (Article 214(1, 6) of the ZPP).

The court considers a fact acknowledged without checking its veracity (Article 214(1) of the ZPP), unless it considers that the party has acknowledged it with the intention of asserting a claim which it is not permitted to assert (Article 3(3) of the ZPP).

Facts that the law presumes do not require proof; however, it can be argued that these facts do not exist, unless the law determines otherwise (Article 214(5) of the ZPP).

**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?**

To take a decision on the merits of a claimant's claim, a high degree of truth (material proof) is required, i.e. the court must be convinced of the facts that are relevant in law.

On some occasions a demonstration of probability is sufficient to issue a decision, in particular for the issuing of certain interim procedural decisions which do not bring the proceedings to an end and by which the court settles interim procedural questions. For the judge to apply a specific procedural rule, the legally relevant facts must be shown to be probable. However, it is not necessary for the judge to be convinced of their existence. The ZPP does not define facts that can be shown to be probable in order that a certain norm be taken into account.

### 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?**

In accordance with the adversarial principle in place, it is mainly the parties that apply for evidence to be taken.

The court may also take evidence ex officio (Article 7(2) of the ZPP) if it considers that the parties intend to make inadmissible use of their claims (Article 3(3) of the ZPP).

The court takes evidence ex officio in parental disputes, where it is not bound by the claim and even though a claim has not been raised; it may also take evidence even though neither of the parties have stated evidence and if this is required in order to protect children's interests (Article 408 of the ZPP).

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

The court decides which evidence should be taken for the purpose of establishing the decisive facts (Article 213(2) and Article 287 of the ZPP). It adopts a decision on the evidence by which it accepts or rejects the parties' applications, and may also order the taking of certain evidence ex officio.

If a party's application concerning evidence is approved by court decision, this is then implemented and evidence actually taken. The court is not bound by its decision on evidence. It may change it in the course of the proceedings and take evidence regarding which it rejected a previous application, and may also take new evidence (Article 287(4) of the ZPP).

Evidence is generally taken at the main hearing before a judge, who issues the final decision (Article 217(1) of the ZPP). If there are valid reasons, evidence may be taken before a specified judge upon request (Article 217(1) of the ZPP). In exceptional cases, it is also possible to take evidence after the main hearing is completed, when the judges' panel decides that the completed main hearing is to be reopened. This occurs, if required, in order to supplement proceedings or to clarify specific important issues (Article 292 of the ZPP).

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

The ZPP specifically provides that the taking of evidence may be rejected only where the evidence is irrelevant to the decision (Article 287 of the ZPP); i.e. the evidence does not serve to establish the legally relevant facts. However, the ZPP contains no specific provisions regarding the possibility of rejecting inadmissible evidence, or evidence which cannot be obtained cost-effectively or which cannot feasibly be obtained.

A party must, no later than by the first main hearing, state all facts necessary to support their motions, adduce the evidence required to establish the truth of their statements, and state their position with regard to the statements and the evidence adduced by the opposing party. This means that the court does not take into account evidence which a party is too late in proposing. This means that the court does not take into account evidence which a party is too late in proposing. The party is generally precluded by such a motion (Article 286 of the ZPP). The only exceptions involve cases where a party can prove that they were prevented from presenting evidence at the first hearing by reasons beyond their control or if the admission of the evidence would not, in the court's opinion, delay the dispute (Article 286(3) of the ZPP).

Regarding inadmissible evidence and evidence that cannot feasibly be obtained, it is important to comply with Article 3(3) of the ZPP, which states that the court will not recognise the motions of parties which are contrary to binding regulations or contrary to moral rules.

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

The ZPP recognises the following means of proof: inspections, documents, the hearing of witnesses, the hearing of expert witnesses and the hearing of parties.

**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:** Anyone summoned to be a witness must attend and, unless otherwise provided by law, must testify (Article 229(1) of the ZPP). Witnesses are heard at the proposal of a party, which must state about what the witness is to testify and give their personal details (Article 236 of the ZPP). Witnesses are called to a hearing by a special summons; this summons must advise them of their obligation to testify, the consequences of an unjustified failure to attend, and their right to a reimbursement of their costs (Article 237 of the ZPP).

Witnesses are heard at the main hearing. Witnesses who, because of age, illness or serious physical disability, cannot comply with the summons may be heard at their place of residence (Article 237(2) of the ZPP). Each witness is heard individually and not in the presence of other witnesses who are to testify later (Article 238(1) of the ZPP). The court advises witnesses of their obligation to speak the truth and not to omit anything; it also warns them of the consequences of giving false testimony. The witness first states what he or she knows about the case; the judge presiding over the chamber or the members of the chamber and the parties and their representatives and proxies then put questions in order to test the witness’s statements or to supplement or clarify them. If witnesses give statements that are inconsistent, they may be confronted with the fact (Article 239(3) of the ZPP). The ZPP no longer recognises the witness oath.

The ZPP makes no distinction between the procedure for hearing ordinary and ‘expert’ witnesses, and lays down no special procedural provisions in that regard. There is no difference between the procedures for hearing witnesses and expert witnesses.

**Documents:** Although the ZPP does not rank the different means of proof, documents are deemed to be the most reliable. These can be divided into public and private documents. Public documents are those issued in a prescribed form by a state body acting within its sphere of competence or documents issued in such a form by a self-governing local community, a company or other organisation or an individual in exercising a public authority entrusted to them by law (Article 224(1) of the ZPP). Private documents are all documents that are not public. In a private document, a signature may be authenticated by an authorised state body or a legal or natural person exercising a public authority (e.g. a notary public). Such authenticated clauses in private documents are of public significance, and that part of the document may also be regarded as a public document. The evidential value of public documents is defined separately in the ZPP. A public document proves the veracity of the facts confirmed or specified therein (Article 224(1) of the ZPP). While the ZPP proceeds from the assumption that the contents of a public document are true, it is admissible to argue that facts have been inaccurately recorded in a public document or that a public document has been drawn up incorrectly (Article 224(4) of the ZPP). That is the only rule of evidence in Slovenian civil procedure.

Foreign public documents authenticated under the relevant regulations have the same evidential value as Slovenian documents, provided that reciprocity arrangements are applied, unless an international agreement determines otherwise (Article 225 of the ZPP).

The ZPP also lays down rules on the delivery of documents (the duty to provide documents), which depend on whether the document is with the party referring to it, with the opposing party, with a state body or organisation exercising a public authority, or with a third person (natural or legal person).

**Expert witnesses:** The court takes evidence from an expert witness when technical knowledge is required to establish or clarify a given fact and such knowledge is not available to the court (Article 243 of the ZPP). The civil court appoints an expert witness by special decision, and may give the parties an opportunity to present their views on the matter prior to the appointment. An expert witness may also be appointed by the judge presiding over the chamber or by a specially requested judge, if they are authorised to take such evidence (Article 244 ZPP). Expert witnesses are generally appointed from a special list of court-appointed witnesses; the task may also be entrusted to a specialised institution. Only natural persons may act as expert witnesses. Expert witnesses are bound to accept their duties and give their findings and opinion (Article 246(1) of the ZPP). The court may impose a fine on an expert witness who has been summoned in the proper manner and fails to attend without justifying their absence; an expert witness who declines to carry out their tasks without giving a justified reason; an expert witness who fails to notify the court immediately of the reasons preventing them to perform the expert work (in a timely manner); and an expert witness who, without giving a justified reason, fails to perform their expert work within the time limit determined by the court (Article 248(1) of the ZPP). Expert witnesses may be released from their duty by the court, at their request, only for the reasons which they may invoke to refuse to testify or answer an individual question. The court may also release expert witnesses from their duty, at their request, for other justified reasons (e.g. excessive workload). An exemption for that reason may also be requested by an authorised employee of the body or organisation in which the expert witness works (Article 246(2) and (3) of the ZPP). An expert witness may also be disqualified in the same way as a judge; the only exception to this is where someone who has already previously been heard as a witness may serve as an expert witness (Article 247(1) of the ZPP).

The work of an expert witness comprises findings and an opinion. The court also decides whether an expert witness is to give their findings and opinions only orally at the hearing or whether they must also submit them in writing before the hearing. The court also sets the deadline by which an expert witness is obliged to give their findings and opinion. If more than one expert witness is appointed, they may give their findings and opinions jointly, if they agree on them. If they do not agree, each expert witness gives their findings separately (Article 254 of the ZPP). If fundamental differences emerge between the information provided by expert witnesses or if the findings of one or more expert witness are unclear, incomplete or self-contradictory, or contradict the circumstances that have been investigated, and such anomalies are not rectified by a fresh hearing of the expert witnesses, evidence is taken again from the same or other expert witnesses (Article 254(2) of the ZPP). However, if there are contradictions in the opinion of one or more expert witnesses or their opinion contains anomalies or if reasonable doubt arises regarding the correctness of the opinion provided, the opinions of other expert witnesses are requested (Article 254(3) of the ZPP). Expert witnesses have the right to a reimbursement of their costs and the right to remuneration for their work (Article 249(1) of the ZPP).

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

The principle applied in the evaluation of evidence is that of the free assessment of evidence. The court, acting according to its own convictions, decides which facts are deemed to have been proved, based on a thorough and careful appraisal of each item of evidence separately and of all the evidence

together, and on the success of the proceedings as a whole (Article 8 of the ZPP). Slovenian civil procedure does not therefore recognise 'rules of evidence', whereby the legislator lays down in advance in abstract fashion the value of specific types of evidence. The only exception to this is the rule on the evaluation of public documents (see point 2.5).
In practice, however, the rule applied is that documentary evidence, for example, is more reliable (but not stronger) than other methods of proof, such as the testimony of witnesses or parties.

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

The ZPP contains no provisions on whether certain items or means of proof are obligatory in order to establish the existence of certain facts.

**2.8 Are witnesses obliged by law to testify?**

Yes. Anyone summoned to be a witness must attend and, save where otherwise provided by law, must testify (Article 229(1) of the ZPP).

**2.9 In which cases can they refuse to give evidence?**

A person may not be heard as a witness if their testimony would violate the obligation to preserve an official or military secret unless the competent authority releases them from that obligation (Article 230 of the ZPP).
The judge presiding over the chamber may exceptionally allow the hearing of a witness revealing an official or military secret, if conditions are met to disclose secret information in judicial proceedings (depending on the significance of the information and document content for the proceedings; the nature and sensitivity of the classified information; the significance and gravity of the material rights in question; and whether the disclosure of the classified information would compromise the functioning of a body or national security).
Witnesses may refuse to testify (Article 231 of the ZPP):
on matters which a party has confided in them as their authorised representative;
on matters which the party or another person has confessed to them as a religious confessor;
on facts which they have discovered as a lawyer or doctor or when practicing any other profession or activity where they are bound by an obligation to keep secret any facts they discover in practicing that profession or activity.
Witnesses may refuse to answer individual questions if they have good reason, particularly if, by answering, they would bring serious shame, considerable financial damage or criminal prosecution on themselves or lineal blood relatives up to any degree, or on collateral blood relatives up to the third degree, or if they would bring serious shame, considerable financial damage or criminal prosecution on their spouse or a relative by marriage up to and including the second degree (even where the marriage has already been terminated), or to their guardian or charge, or to their adopted parent or adopted child (Article 233 (1) of the ZPP).
However, the risk of causing financial damage may not be used by a witness as a reason for refusing to testify on legal transactions at which they were present as a summoned witness, on actions which they performed, in relation to a dispute, as a legal predecessor or representative of any of the parties, on facts relating to property relations linked to family ties or marriage, on facts relating to birth, marriage or death, or wherever, pursuant to special regulations, they are obliged to submit an application or give a statement (Article 234 of the ZPP). A witness may also not refuse to testify on the grounds of protection of a business secret, if the disclosure of certain facts is necessary in order to benefit the public or another person, provided that such benefit outweighs the damage caused by disclosure of the secret (Article 232 of the ZPP).

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

Yes. If a witness who has been summoned in the proper manner fails to attend and their absence is unjustified, or if they leave the place where they were to have been heard without permission, the court may order them to be brought by force, at their expense, and may also impose a fine of up to EUR 1 300). The court may also impose such a fine on a witness who attends but who then, after having been warned of the consequences, declines to testify or to answer specific questions for reasons that the court deems to be unjustified. In the latter case the court may, if the witness is still unwilling to testify, imprison the witness until such time as they are willing to testify, or until they no longer need to be heard, but for no longer than one month (Article 241(1, 2) of the ZPP).

**2.11 Are there persons from whom evidence cannot be obtained?**

A witness may be any person who is capable of giving information on the facts to be proved (Article 229(2) of the ZPP). Eligibility to be a witness does not depend on legal capacity. A child or a person who has been declared partly or wholly legally incapable can be a witness if they are capable of giving information on the legally relevant facts. The question of whether or not a witness is capable of testifying is assessed by the court on a caseby-case basis.
A party or a party's legal representative may not act as a witness; however, an ordinary representative (pooblaščenec) or an intervenor (stranski intervenient) may act as a witness.

**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?**

With regard to the hearing of witnesses, see the reply above.
Videoconferencing is regulated by Article 114a of the ZPP, which states that a court may, with the consent of the parties, permit the parties and their representatives to be at another location during the hearing and conduct procedural acts at that location if sound and video transmission is provided from the location at which the hearing is being conducted to the location or locations at which the parties and/or representatives are present. The same conditions apply to the taking of evidence by way of inspections, documents, hearing parties, witnesses and expert witnesses.

## 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?**

Generally speaking, evidence obtained illegally (e.g. through unlawful phone tapping) may not be used in civil proceedings. However, case law does exceptionally allow the use of such evidence if there are substantiated reasons for doing so or if the taking of evidence would have special importance for the implementation of a constitutionally protected right. In this case, in addition to the fact that some evidence might have been obtained illegally, the decisive role is played by the fact of whether the evidence provided in civil proceedings would lead to re-violation of human rights.
Regarding inadmissible evidence and evidence that cannot feasibly be obtained, Article 3(3) of the ZPP states that the court will not recognise the motions of parties which are contrary to binding regulations or contrary to moral rules.

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

If the statement forms part of an action or an application of some kind, it will not count as evidence, but will have the status of an actual assertion by the party, for which the party must also present appropriate evidence. If the statement is contained in a document submitted as evidence of a party's assertions, that statement will have the status of a document.
A statement given by a party during their hearing also counts as evidence, as the ZPP also recognises the hearing of parties as evidence (Article 257 of the ZPP).

**Related links**

http://www.pisrs.si/Pis.web/

https://www.uradni-list.si/
http://www.dz-rs.si/wps/portal/Home/deloDZ/zakonodaja/preciscenaBesedilaZakonov
http://www.sodisce.si/
Last update: 03/07/2019


# Taking of evidence - Slovakia

## 1 The burden of proof

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

The rule by which the court takes evidence during hearings is based on Article 48 (2) of the Constitution.

Where appropriate, a different court can be requested to take evidence or evidence can be taken outside the hearing. The court usually notifies the parties to the proceedings of evidence taking outside a hearing five days in advance. The parties to the proceedings have the right to attend such taking of evidence.

The parties are required to indicate the evidence to prove their claims. The court decides which of the indicated pieces of evidence it will take.

The court may, exceptionally, take evidence other than evidence proposed by the parties if necessary for deciding in the case.

The court can decide that evidence taken be supplemented or repeated before it.

**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?**

An exception to taking evidence during a hearing is where the conditions for delivering a decision without an oral hearing are met. This does not mean that evidence is not taken in such cases, but rather that evidence is taken outside rather than during the hearing. Evidence taking is qualitatively similar to demonstrating a claim.

Such exceptions include the following:

hearing a case on the merits where a simple legal assessment of the matter is involved;

the facts claimed by the parties are uncontested and the value of the dispute, without incidentals, does not exceed EUR 2 000;

on the basis of the parties' consent; if a payment order, default judgment or judgement for acknowledgement is issued, and where a claim is waived.

Furthermore, hearings do not have to be ordered in proceedings on a review *in abstracto* in consumer cases, when a default judgment in favour of a consumer is being delivered, in anti-discrimination disputes provided the claimant consents, in individual labour disputes, and in the case of motions for ordering an urgent measure.

**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?**

When evaluating evidence the court is not, in principle, restricted by legislation as to how it should evaluate a particular piece of evidence in terms of veracity. Thus, the principle of discretionary evaluation of evidence is applied. Only rarely does the law impose certain restrictions on the court in evidence evaluation; for example, the court must accept as proven any fact for which the law contains a rebuttable presumption, unless proven otherwise in the proceedings – Section 133 of the Civil Code.

The court is bound by decisions of the Court of Justice of the European Union. It is also bound by the Constitutional Court's decision on whether or not a certain piece of legislation is in conflict with the Constitution, a law, or an international treaty that is binding on the Slovak Republic. The court is also bound by the decisions of the Constitutional Court and the European Court for Human Rights concerning fundamental human rights and freedoms. Furthermore, the court is bound by decisions by competent bodies that a criminal offence or a minor offence or other administrative offence punishable under specific regulations has been committed; however, the court is not bound by on-the-spot fine decisions.

Apart from that, a court can examine issues within another authority's decision-making competence. If, however, the competent authority has delivered a decision on such an issue, the court takes this decision into account and incorporates it into the grounds for its judgment (respect for prior decisions).

## 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 parties to the proceedings are required to indicate the evidence to prove their claims. The court decides which of the indicated pieces of evidence it will take. The court can also take evidence on its own initiative in the case of evidence based on public registers and lists if such registers and lists indicate that the facts claimed by the parties are at variance with reality; the court does not take any other evidence on its own initiative.

On its own initiative, the court can take evidence to establish whether the procedural conditions have been satisfied or whether the proposed decision will be enforceable, and also to familiarise itself with relevant foreign law.

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

The court takes evidence during hearings, unless the conditions for delivering a decision without holding an oral hearing have been satisfied.

The parties have the right to submit their observations on motions for evidence and on any evidence taken.

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

The court evaluates evidence at its own discretion, taking each piece of evidence individually and all pieces of evidence in relation to each other, while carefully considering any matters brought to light in the proceedings. The reliability of each piece of evidence taken can be contested unless the law provides otherwise.

A certain limit on the discretionary evaluation of evidence applies to the appellate court and the court dealing with appeals on points of law, where the appellate court is not bound by the facts of the case as established by the court of first instance. It may thus reach a different conclusion as to the facts. However, it cannot depart from the evaluation of the specific evidence taken by the court of first instance. It can only evaluate evidence taken by the court of first instance differently if it repeats that evidence. However, unlike the court of first instance, it can evaluate differently evidence taken by a lower court through a requested court.

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

Anything that can contribute to the proper clarification of the matter and that has been obtained in a lawful manner from the means of proof can serve as evidence. Means of proof include examination of the parties and of witnesses, documents, expert reports, expert witnesses, and inspections. If the manner of taking evidence is not prescribed it is specified by the court.

**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?**

A witness is a person distinct from the court and from the parties to the proceedings who testifies about facts they have perceived through their senses. Only natural persons can be witnesses.

In matters falling within the competence of civil courts expert opinions on the facts that serve as the factual basis for decisions on the merits of the case are often required. Where deciding on the merits of a case depends on an assessment of facts for which expert knowledge is required, the court appoints an expert witness. In such a case the court must appoint an expert witness even if the judge has expert knowledge that would enable him or her to assess the subject matter of the proceedings in an expert manner. This knowledge cannot take the place of the objective establishment of the facts by a party outside the body deciding on them.
The court's basic task is to formulate the questions for the expert witness correctly. The court is required to ask the expert witness questions as to the facts only, avoiding questions relating to the legal assessment of the subject matter of the expert opinion.
The court can have the expert opinion reviewed by another expert witness, or by a scientific or other institution. The subject matter of such a second opinion is a review of the opinion submitted earlier. This is sometimes referred to as the review opinion. The court examines expert opinions as any other evidence.

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

The court evaluates individual pieces of evidence in terms of their reliability and veracity. The court is not restricted by any legislation as to how it should evaluate any particular piece of evidence – this is the principle of discretionary evaluation of evidence. Nevertheless, the court's evaluation considerations are not arbitrary; the court must take into account everything that has been brought to light in the proceedings. The court should respect these facts and must correctly determine how they relate to each other. At the same time, the court is not bound by any order of priority in terms of the significance and probative force of individual pieces of evidence.

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

In matters where proceedings may begin without a motion and also in proceedings on permission to marry, on the determination and denial of parenthood, on adoptability and on adoption, and in commercial register matters, the court is required to take additional evidence needed for establishing the facts even if the parties have not proposed such evidence.

**2.8 Are witnesses obliged by law to testify?**

Any natural person who is summonsed is obliged to appear in court and testify as a witness –Section 196 (2) of the Rules of Contentious Civil Procedure. They must tell the truth and conceal nothing. The court must advise the witness of the criminal-law consequences of giving false testimony and of their right to refuse to give evidence.

**2.9 In which cases can they refuse to give evidence?**

Witnesses may refuse to give evidence only where it might incriminate themselves or persons close to them. The court decides on whether the refusal to testify is legitimate. Witnesses may also refuse to give evidence if their testimony would break the seal of the confessional or the confidentiality of information imparted to them as persons entrusted with pastoral care, orally or in writing, on condition of confidentiality.

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

The court decides on the legitimacy of the refusal to testify. Appeals against the court's decision are not admissible. If, despite the court's decision, the witness refuses to give evidence the court may levy a procedural fine on him or her.

**2.11 Are there persons from whom evidence cannot be obtained?**

Courts must always hear the statutory representative of an organisation that is a party to civil proceedings as a party to such proceedings rather than as a witness (Section 185 of the Code of Contentious Civil Procedure)

**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?**

Before examining witnesses the court must establish their identity and their relationships to the parties. Furthermore, witnesses must be informed of the significance of testimony, their rights and obligations, the criminal consequences of giving false testimony, and of their entitlement to witness fees.
The court invites the witnesses to describe, in a coherent manner, everything that they know about the subject matter of the examination. The court then asks the witnesses questions that are necessary for supplementing and clarifying their testimony.
Witnesses may not be asked tendentious or leading questions. If the parties to the proceedings or expert witnesses are asked any such questions or any questions relating to the legal assessment of the case the presiding judge deems the questions inadmissible. The presiding judge decides on the inadmissibility of the questions in an order that is not served and against which no appeal may be lodged. The order only forms part of the transcript of the hearing.
Subject to the consent of the parties to the proceedings the court can organise an oral hearing via videoconferencing or other communication technology facilities.

## 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?**

It should be reiterated that the court is not restricted by legislation as to how it should evaluate any particular piece of evidence – this is the principle of discretionary evaluation of evidence under Section 191 of the Code of Contentious Civil Procedure.

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

The court assesses acts by the parties and their counsels and other persons involved in the proceedings strictly in terms of their content rather than on the basis of how these persons have denoted them. Acts by the parties are governed by the principle of informality. In principle the parties have discretion in making procedural acts: whether submitted in writing or as an oral statement entered on the record, their testimony has the same legal effects, but it must be stated in explicit terms or in a manner preventing any doubts as to their true intent.

Last update: 22/04/2022



# Taking of evidence - Finland

## 1 The burden of proof

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

The claimant must prove the facts that are necessary to establish the claim, while the defendant bears the burden of proving defences to the claim. A party who fails to present evidence runs the risk that the facts that his or her claims are found not proven.

**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?**

Admitted facts do not need to be proven. In addition, generally acknowledged facts, or facts that are *ex officio* known to the court, need not be proven. Counter-evidence may naturally be presented.

**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?**

In this respect the law merely contains a provision whereby the court must, after having carefully considered all the facts which have arisen, decide what is to be regarded as the truth in the case. Finland applies the principle of “free evaluation of evidence”, and so it is a matter of presenting adequate evidence to the court.

## 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?**

In practice the interested parties must themselves obtain the evidence on which they wish to rely. The law also permits the court to decide to obtain items of evidence on its own initiative. However, the court cannot order a new witness to be examined or a document to be presented on its own initiative and against the will of both the interested parties if the case in question is one which is amenable to out-of-court settlement.

In certain cases, such as paternity cases, it is also the duty of the court to ensure that all necessary evidence is obtained.

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

The taking of evidence takes place at the main hearing.

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

The court can deny such an application if, for example, the evidence is irrelevant or the case has already been proven in this respect. An application to obtain evidence can also be rejected if it is made at too late a stage.

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

Different means of proof include the hearing of the interested parties, witnesses and experts, the presentation of written evidence and expert statements, and examination.

**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?**

There is no difference between the evaluation of oral witness or expert testimony and that of a written expert statement. However, courts do not accept written statements from witnesses.

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

No. The court has free discretion when evaluating evidence.

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

No.

**2.8 Are witnesses obliged by law to testify?**

As a rule, a witness cannot refuse to give evidence.

**2.9 In which cases can they refuse to give evidence?**

The spouse, fiancé(e) and direct ascending or descending relatives of an interested party as well as an interested party’s siblings and their spouses or the adoptive parents or adoptive children of an interested party have the right to refuse to give evidence. In addition, the law includes various other situations where a witness has the right or the obligation to refuse to give evidence.

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

A witness who without lawful cause refuses to give evidence can be obliged under the threat of a fine to fulfil his or her obligation. If the witness still refuses to give evidence, the court can order him or her to be detained until he or she consents to giving evidence.

**2.11 Are there persons from whom evidence cannot be obtained?**

It is up to the discretion of the court whether (for example) a person under 15 years of age or a mentally disturbed person can be heard as a witness. Certain groups of persons, such as doctors and lawyers, cannot give evidence in matters relating to their position of trust.

**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?**

As a general rule, the party who calls a witness examines that witness first. The other party then has a right to cross-examine the witness. Following cross-examination, the court and the interested parties can put further questions to the witness.

A witness can be heard using videoconferencing or other suitable telecommunications technology that provides an audiovisual link between those taking part in the session, if the court considers this to be appropriate. This procedure can be used, for example, if a witness has been prevented from attending court in person or if his or her attendance would result in unreasonable costs, or if the witness is under 15 years of age. In certain situations a witness can also be examined over the telephone.

## 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 law does not contain specific instructions for such circumstances. The court must, using its discretion, decide what significance such evidence will have.

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

Yes. Interested parties can be heard freely for the purpose of presenting evidence, and in a civil case they can be heard under oath regarding facts that are of special significance to resolving the case. A statement given by an interested party in evidence will be evaluated on the same criteria as a statement given by a witness.

**Links**

Taking of evidence (Ministry of Justice, Finland)

Brochure: Testifying in court (Ministry of Justice, Finland)

Last update: 10/05/2023



# Taking of evidence - Sweden

## 1 The burden of proof

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

Swedish law is based on the principles of the mode of proof and admissibility of evidence Following a detailed assessment of everything that has emerged during the case, the court must decide what has been proved. It is the court that decides what value is to be attached to the evidence.
Certain rules on the admissibility of evidence have been established in case-law, including in relation to where the burden of proof lies. A highly simplified main rule, to which there are many exceptions, is that anyone who asserts something must also prove it. If one party has found it easier to secure proof of a certain fact, the burden of proof is often placed on him or her. If a party has found it difficult to produce evidence of a certain circumstance, this may also be of significance for establishing where the burden of proof lies. If, for example, someone demands payment for a debt, he or she must prove that he or she has a claim against the opposite party. If the opposite party pleads that payment has already been made, then it is he or she who has the burden of proving that this is the case. In cases of liability for damages, it is normally the party who claims that he or she has suffered damages who has the burden of proof. It may also happen that the burden of proof for a certain fact may be inverted.
If the evidence produced is insufficiently solid, the court cannot use the circumstance in question as the basis for its examination. If it is a case of estimating the value of damage that has occurred, there is an exception that means that the court may, if it is not possible or very difficult to produce evidence as to the amount of damage, estimate the value of the damage at a reasonable amount.

**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?**

Please see the response to question 1.1.

**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 requirements that are laid down for the weight of evidence depend on what type of case is concerned. In civil cases the normal requirement is that the fact in question is to be confirmed. In certain civil cases a lower evidence requirement may apply. An example that could be mentioned is that of cases of consumer insurance policies, where it is considered sufficient that it appears more probable than not that the event insured against has occurred.

## 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 parties themselves are responsible for the evidence. In indispositive cases, i.e. cases relating to matters concerning which the parties cannot reach conciliation, there is an opportunity for the court to introduce evidence to the case without this being requested by either party. In cases relating to custody or visiting rights, therefore, the court may decide that the investigation must be supplemented by additional evidence. In civil cases where the parties can reach conciliation, which are known as dispositive cases, the court may not introduce new evidence to the case of its own volition.

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

The evidence is heard at the main hearing.

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

The court can reject the evidence if what the party wishes to prove is of no significance to the case. This also applies if evidence is not required or if the evidence would obviously have no effect. In addition, there are rules that mean that written testimony may be relied upon only in special exceptional circumstances.

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

In Sweden there are, in principle, five different basic forms of evidence (means of evidence). These are:
written evidence
examination of witnesses
examination of a party
examination of an expert
inspection.

**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?**

A witness is, as a general rule, to be heard orally and in the presence of the court. Written witness testimonies must not be referred to. With the approval of the court, however, the witness may use notes to refresh his or her memory. The party who called the witness starts the examination (this is called direct examination), unless the court determines otherwise. The opposite party then has the opportunity to interrogate the witness (cross-examination). After the cross-examination, the person who called the witness and the court may ask supplementary questions.
In the case of evidence from an expert the principal rule is instead that the expert is to give a written statement. If it is requested by one of the parties, and it is does not obviously lack significance, the expert is also to be heard orally during the proceedings. An oral hearing is also to take place if it is essential that he or she is heard directly in the presence of the court.
If the case is to be determined after a main hearing – e.g. in order for the witness to be heard – written evidence and expert statements must in principle be read aloud at the hearing in order for the court to be able to take account of the material in its judgment. The court may, however, decide that written evidence is considered to have been heard at the main hearing without this needing to be read aloud at the hearing.

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

Under Swedish law, the principle of the admissibility of evidence applies. Among other things, this means that there are no set principles laid down in law with regard to the weight that different evidence carries. Instead, the court carries out an independent assessment of everything that has emerged and decides what may be considered as evidence in the case.

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

The principle of admissibility of evidence means that there are no rules that specify that certain circumstances require certain types of evidence in order to be confirmed. Instead the court carries out an overall assessment of the circumstances of the case in its examination of what has been proved.

**2.8 Are witnesses obliged by law to testify?**

Under Swedish law, a general duty to testify applies. This means that, as a main rule, a person called as a witness is bound to testify.

**2.9 In which cases can they refuse to give evidence?**

A person is not obliged to testify in a case in which a close relative is a party. A witness may refuse to comment on a certain fact if a statement would mean that the witness was thereby forced to reveal that he or she had committed a criminal or dishonourable act. He or she may also, in certain circumstances, refuse to disclose trade secrets. There are certain restrictions on the duty to testify in the case of some categories of professional, such as healthcare staff.

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

A person who is to be heard as a witness is summoned to the proceedings under penalty of a fine. If the witness does not appear, the fine is imposed if he or she does not have a valid excuse for his or her non-appearance, e.g. illness. If the witness does not appear, the court can also decide that the witness is to be fetched to court by the police. Ultimately the court has the option of taking into custody a person who refuses to testify without a valid reason for refusing to reply to questions.

**2.11 Are there persons from whom evidence cannot be obtained?**

If the person called as a witness is under 15 years of age, or suffers from a mental disorder, the court will examine whether he or she may be heard as a witness, taking the circumstances into account. Please also see Section 2.9.

**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 examination of witnesses is normally begun by the person who called the witness (direct examination). Thereafter, the opposite party has the opportunity to ask questions (cross-examination). After the cross-examination, the person who called the witness and the court may ask supplementary questions. The court is to reject questions that obviously have nothing to do with the case or which are confusing or inappropriate in some other fashion.

Parties, witnesses and others who are to participate in a court hearing must be able to participate remotely via video link if this is not inappropriate. The main rule does, however, remain that those who are to participate must attend court in person.

A witness may be examined by telephone if this is suitable taking into account the costs that would be involved if the witness were to appear at court instead and the importance of the witness being heard in person at the hearing.

## 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 principle of admissibility of evidence means that there are only certain rare exceptions where it is forbidden to use certain types of evidence. That evidence has been acquired in a manner that is not permitted does not therefore, in principle, prevent the proof being relied upon during the trial. It may, however, be of significance if the evidence is given limited evidential value in the weighing of evidence.

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

A party cannot testify, but is instead examined under oath, where the party bears criminal liability for the correctness of the information that he or she provides.

## 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 hearing of evidence is carried out only by district courts.

Last update: 20/02/2023



# Taking of evidence - England and Wales

## 1 The burden of proof

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

The general rule about discharging the burden of proof is that in civil cases, the party asserting the fact has to do so; so that the judge (or jury) is satisfied that on the balance of probabilities the fact being asserted is correct. The burden applies to both parties save where it is so obvious that the claimant has not discharged the burden; here the judge is entitled to proceed without troubling the other side.

In practical terms this means that the court is satisfied on the balance of probabilities that the event occurred. This standard is modified by the fact that the rarer the occurrence, the higher the burden of proof as explained by Lord Hoffman in *Secretary of State for the Home Department vs Rehman**[1]*.

[1] [2001] UKHL 47.

**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?**

It is not necessary to prove facts which are admitted, or obvious or irrelevant to the case.

The law makes various presumptions which may be rebutted by evidence to the contrary. These include presumptions as to the legitimacy of children, validity of marriages, sanity of individuals, and death of people who have disappeared. Innocence of crime is presumed, but a criminal conviction is admissible in civil proceedings as evidence that a party committed an offence (and means that the party bears the burden of proving innocence).

There is a presumption of negligence where a claimant proves that he or she has suffered harm from a source which was under the defendant's exclusive control, and that the accident was of a kind which normally arises through negligence[1]. A similar presumption arises where a person has been entrusted with goods and they have been lost or destroyed. In both instances, the presumption can be rebutted by the defendant.

One area where the burden is reversed is in the field of employment discrimination law. Once a *primae facie* case of discrimination is made out, the burden shift to the other side to show that there was no discrimination. This phenomena arose out of European discrimination legislation and is now in the Equality Act 2010.

Finally there are several civil matters, generally around Health and Safety legislation, where it is a case of strict liability. That is, if the accident happened, it is by virtue of the employer's strict duty of care that the employer is liable.

[1] [2001] UKHL 47.

[2] The doctrine of *res ipsa Loquitor* or the thing speaks for itself.

**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 standard of proof in civil cases is the "balance of probabilities". In other words, the court will find that a fact is established if satisfied that the fact is more likely to have occurred than not. As noted above the standard operates flexibly: more convincing evidence is required to establish serious allegations, such as fraud on the balance of probabilities- as such allegations are generally regarded to be likely to be true.

This test is modified in two circumstances. In cases where in the absence of a compelling cause there are none the less competing causes the judge is entitled to find that the cause was not proven[1]. Additionally in applications for summary judgment[2] the bar is quite low, the court will make a decision without the benefit of full disclosure or cross examination.

[1] This phenomena was explored in *Rhesa Shipping* [1985] 1WLR.

[2] Often used in the TCC to enforce an arbitration award to pay a sum of money.

## 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[1] is obtained in civil proceedings through the disclosure of relevant documents by the parties, and the testimony of witnesses and experts, the evidence must be before the court

Different rules apply in each case.

**Disclosure**

Parties to civil proceedings are required to disclose[2] the existence of documents in their control or possession, to the extent that the court orders them to do so, and to allow the other parties to inspect those documents. The court will normally order "standard disclosure," which requires the parties to make a reasonable search for documents which either support or adversely affect the case of any party, without the parties needing to apply to the court. For any other types of disclosure a party must apply for permission from the court. The court may also make orders for the preservation of evidence and property.

**Witnesses of fact**

Parties do not require the permission of the court to adduce witness evidence in support of their cases. However, a party who wishes to rely on the evidence of a witness must serve a witness statement signed by the witness setting out the witness's evidence, and must call the witness to give oral evidence at trial. If the party does not provide a witness statement or summary for a witness before trial, the party may not call that witness without the court's permission. Furthermore, the court has wide powers to control the evidence which is allowed, such as excluding evidence which would otherwise be admissible and limiting the cross-examination of witnesses.

A party may also apply for a court order that a witness's evidence shall be given in a sworn deposition taken by a court-appointed examiner[3] prior to the hearing of the action.

The judge's role is essentially to assess the evidence adduced by the parties, and does not include an independent fact-finding function.

**Expert witnesses**

A party may not rely on expert evidence[4] unless the court gives permission. The court can control the issues upon which expert evidence is to be given, the form in which the evidence is given, and the fees payable to the expert.

Where more than one party wishes to submit expert evidence on an issue, the court may direct that the evidence shall be given by a single expert instructed jointly by the parties, rather than by a separate expert instructed by each party. The court may make such a direction on its own initiative, without the agreement of the parties.

The court will not require the parties to adduce expert evidence on its own initiative. However, the court may itself appoint an expert as an "assessor" to assist the court in relation to an issue. The court may direct the assessor to prepare a report (copies of which must be provided to the parties) and to attend the trial to advise the court.

Part 35 of the CPR allows for expert evidence to be given concurrently by experts in like disciplines. Generally in these circumstances the parties will cross examine and then the judge will summarise the position to which the experts are invited to agree.

[1] See CPR Part 32
[2] See Part 31 CPR
[3] Part 34.8 CPR
[4] See part 35 CPR

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

**Disclosure**

Following an order for disclosure, each party must serve on the other parties a list of the relevant documents which are, or have been, in its possession or control. The other parties are then entitled to inspect and have copies of the documents. Charges may be made for photocopying.

**Witnesses of fact**

The court will order the parties to serve signed witness statements from each witness on whose evidence they intend to rely before the trial. The statement may be drafted by the witness, but will often be prepared by the lawyer for the party on whose behalf the witness is giving evidence. The statement should set out the witness's evidence in full, in the witness's own words if practicable.

If a party has been ordered to serve a witness statement from a witness but is unable to obtain one, the party may seek the court's permission to provide a witness summary, setting out the evidence which the witness is expected to give or the matters on which the party intends to question the witness.

If the court orders that a witness's evidence should be taken in a deposition, the witness will give evidence orally before a court-appointed examiner. The examination will be conducted as if it were a trial, with a full opportunity for cross-examination of the witness, and a transcript of the evidence will be produced.

**Expert witnesses**

If the court gives permission for expert evidence, the parties prepare instructions to the expert(s). Where there is a joint expert, the parties may instruct the expert separately if instructions cannot be agreed. The expert, whose overriding duty is to the court and not to the instructing party or parties, will prepare a written report. A party may then put written questions to an expert who was instructed jointly or by another party. Where there are separate experts, the court may also direct that there should be discussions between the experts to identify areas of agreement and disagreement. Expert witnesses are entitled to be paid for their services, normally by the party or parties instructing them.

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

Whenever parties apply for orders to enable them to obtain or adduce evidence, the court will need to be satisfied that the evidence in question is likely to be relevant and admissible. In considering how to exercise its powers, the court must also seek to deal with cases justly, which includes saving expense and dealing with cases in ways which are fair, expeditious and proportionate to the importance, complexity and value of the claim. These considerations may lead the court to reject applications or to make orders of its own initiative (e.g. requiring a single joint expert rather than separate experts appointed by each party).

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

Facts may be proved by evidence, by presumptions and inferences which arise from evidence, and by the court taking judicial notice of facts (see above). The types of evidence which may be relied upon in civil proceedings are witness testimony, documents and real evidence. Documents can include paper documents, computer records, photographs, and video and sound recordings. Real evidence consists of other material objects relevant to the issues in dispute which are produced to the court, such as the products which form the subject-matter of an intellectual property dispute. It may also include a judge visiting the scene of an accident or some other relevant location to go on a view.

**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?**

In principle, witnesses of fact give their evidence orally at trial. However, as stated above, each party is required to serve a witness statement for each witness upon whose evidence the party intends to rely. At trial, the witness will be asked to confirm the truth and accuracy of his or her statement, which will then stand as the witness' evidence for the party who called him or her. Where only a witness summary has been served, the witness will have to give more detailed oral evidence.

Expert witnesses give their evidence in written reports unless the court orders otherwise. An expert report must set out its conclusions, the facts and assumptions upon which it is based, and the substance of the expert's instructions. The court will decide whether it is also necessary for an expert to attend trial to give oral evidence. A court-appointed assessor will not be required to give oral evidence.

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

The court has a wide discretion as to the weight or credibility which should be attached to any piece of evidence. There is no rule against adducing a statement made outside court as evidence of the facts contained in that statement ("hearsay" evidence)[1], so a party may rely on a letter as evidence of its contents, or on a witness's report of a statement made by another person. However, hearsay evidence will often carry less weight than direct testimony, particularly if the maker of the statement could have been called to give evidence.

Certain documents and records are accepted as authentic. For example, the records of businesses and public authorities are accepted as authentic if certified as such by an officer of the business or public authority. And various types of official documents (such as legislation, by-laws, orders, treaties and court records) may be proved by printed or certified copies without any further proof.

[1]See Part 33 CPR and the accompanying Practice Direction to it.

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

Certain transactions (e.g. wills and sales of land) must be effected in writing, and documentary evidence will therefore be required to prove them.

**2.8 Are witnesses obliged by law to testify?**

In general, witnesses who are competent to give evidence may be compelled to do so. A party who wishes to secure the attendance of a witness at trial prepares a witness summons requiring the witness to attend court to give evidence. Once issued by the court and properly served, the summons binds the witness until the end of the hearing.

If the court orders that a witness's evidence should be taken in a deposition but the witness fails to attend or refuses to answer lawful questions, the party requiring the deposition may apply for a further order that the witness attend or answer questions.

**2.9 In which cases can they refuse to give evidence?**

The general rule that competent witnesses may be compelled to testify does not apply to the Queen, foreign sovereigns and their households, foreign diplomatic agents and consular officials, representatives of certain international organisations, and judges and jurors (in relation to their activities in those capacities). Spouses and relatives of the parties may be compelled to give evidence in civil proceedings.

Witnesses who may generally be required to give evidence are nevertheless entitled to withhold certain documents from inspection and refuse to answer certain questions on the grounds of privilege. The main types of privilege are legal professional privilege (which applies to communications made for the purpose of giving or seeking legal advice, or for the purpose of obtaining evidence for litigation), "without prejudice" privilege (which applies to communications between the parties which are made in a genuine attempt to compromise the dispute, such as offers to settle a claim), and the privilege against self-incrimination (which means that a witness may not be required to give evidence if there is a real danger that it would expose the witness or witness' spouse to a criminal charge or penalty in the UK). Privilege may be waived.

Evidence may also be withheld on the ground of public interest immunity if its production would be contrary to the public interest. The evidence which may be covered by the immunity includes evidence relating to national security, diplomatic relations, the workings of central government, the welfare of children, the investigation of crime and protection of informants. In addition, journalists are not required to disclose their sources unless disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Bank officers cannot be compelled to produce bank books or to give evidence of their contents unless there are special grounds for the court to order them to do so, but the court may order that a person shall be allowed to inspect or copy bank account entries.

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

A witness who, having been served with a witness summons, fails to attend court or refuses to testify may be committed for contempt of court and imprisoned (in the High Court) or required to pay a fine (in the County Court).

**2.11 Are there persons from whom evidence cannot be obtained?**

All adults are competent to give evidence in civil proceedings unless they are incapable of understanding the nature of the oath which witnesses must swear or incapable of giving rational testimony, for example due to mental illness. Where a child witness does not understand the nature of the oath, his or her evidence may still be admitted, but only if the court is satisfied that the child understands the duty to speak the truth and has "sufficient understanding to justify his evidence being heard".

**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?**

**Role of the judge and the parties**

Traditionally, witnesses have given "evidence-in-chief" at trial in response to non-leading questions put by counsel for the party who called them. However, a witness statement will now stand as the witness's evidence-in-chief unless the court directs otherwise. The witness may then be cross-examined by counsel for the opposing party, who may put leading questions to the witness. Expert witnesses who give oral evidence at trial may also be cross-examined, but a court-appointed assessor cannot be cross-examined by the parties. The judge may put questions to witnesses, usually to obtain clarification of their answers to questions from counsel.

**Video link evidence**

Evidence may only be provided by video link if the court gives permission. When considering whether to make an order allowing evidence to be given in this way, the court will take into account the convenience of using video conferencing (particularly if a witness is unwell or abroad), the costs or savings associated with using a video link, and the implications for the fairness of the proceedings (including the more limited degree to which the court can control and assess the witness).

## 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 communications sent through the post or a telecommunications system (which includes telephone calls, faxes and e-mails) are illegally intercepted, evidence of the contents of those communications may not be given in legal proceedings. Otherwise, evidence is generally admissible even if it was obtained improperly. However, the court has the power to exclude evidence which would otherwise be admissible. In deciding how to proceed, it will balance the importance of the evidence against the gravity of the improper conduct. If the circumstances do not justify excluding the evidence, the court may penalise the party which has acted improperly in other ways, such as by ordering it to pay costs.

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

Statements of case (i.e. the formal documents setting out each party's case) can be used as evidence at interim hearings, but will not stand as evidence at trial.

Witness statements given by the parties to the proceedings are admissible in evidence to the same extent as statements given by non-parties.

**Related links:**

Ministry of Justice

Civil Procedure Rules

Last update: 17/12/2018



# Taking of evidence - Northern Ireland

## 1 The burden of proof

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

In general, the evidential burden of proof falls on the party seeking to rely upon any particular fact. The applicant (in Northern Ireland called 'the plaintiff') must prove the facts which give rise to the claim and the defendant must prove those facts which he wishes to rely upon in defending the 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?**

Facts may be exempted from the burden of proof by the law or by a pre-existing contract between the parties. Additionally, the court may consider certain facts proved by 'taking judicial notice', for example, matters of general knowledge. Some presumptions are taken as conclusively presumed, for example, if a statute provides this to be so and others may be rebutted, for example, the presumption that a person is sane.

**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 convinced of a fact on the 'balance of probabilities' i.e. that it is at least 51% likely to be true as against 49% likely not to be true. Once a fact is proved on the balance of probabilities, it is taken to be established.

## 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?**

It is the general rule that a judge may not require the attendance of a witness, except in limited circumstances, but he can call a witness and recall a witness already called. By virtue of the rules which govern court procedure in Northern Ireland, the court has discretion to order any person to attend proceedings and produce a document.

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

If a party, usually through his lawyers, is permitted to call a particular witness to give evidence, his own lawyer will question the witness (this is called 'evidence-in-chief') and then the other party's lawyer will cross-examine the witness. The Judge may ask questions of the witness and he will invite the lawyers, to follow up, if they wish, on anything that arises from what he has asked.

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

In certain cases, for example, where a witness is to attend a hearing in private, the court's permission must be sought before the witness can be officially summoned to attend. Otherwise, the court has no control over which witnesses are called to give evidence although it may impose costs penalties on parties which call unnecessary witnesses.

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

The main method of proof is by oral testimony. Written testimony, such as reports from an expert, and documentary evidence, such as maps, may also be used.

**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?**

The principle means is proof is by oral evidence of the parties and their witnesses. The evidence of expert witnesses, for example, doctors and engineers, may be taken from a written report by agreement. The witness may then be questioned on particular points. Court rules in Northern Ireland restrict the number of expert witnesses who may give oral evidence to two medical experts and one other expert unless leave is granted by the Court to call more. Maps and documents may also be used as evidence and their authenticity must be proved to the court's satisfaction. Additionally, the court may wish to go to a scene or look at an actual item if it feels that doing so has some probative value.

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

It is always a matter for the court to decide what weight to attach to any particular piece of evidence.

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

There is a presumption that facts will be proved orally and in open court.

**2.8 Are witnesses obliged by law to testify?**

A competent witness who has been summoned to give evidence is obliged to appear at the hearing and failure to do so is contempt of court.

**2.9 In which cases can they refuse to give evidence?**

A party may claim 'privilege' from having to give evidence on the grounds of the existence of a legal professional relationship; self- incrimination of him or his spouse; public interest and administration of justice. There are other forms of privilege which are guaranteed by statute e.g. diplomatic privilege. Also, there is discretionary privilege, for example, in relation to information given in confidence.

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

Yes. A witness would be guilty of contempt of court if he failed to appear having been duly served with a witness summons or 'subpoena'. The Judge could then impose a fine or period of imprisonment and require the witness to purge the contempt by attending and giving evidence.

**2.11 Are there persons from whom evidence cannot be obtained?**

Capacity is the general criterion for giving evidence. A person is considered to be capable of given evidence unless he is incapable of understanding the duty imposed by the oath due to infancy or, for example, insanity; he is the judge in the case or he is able to claim privilege.

**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 role of the parties, usually represented by lawyers (although there is provision to represent oneself) is to present evidence to the court to prove their case on the balance of the probabilities. The Judge acts as umpire to ensure the questioning of witnesses is fair, lawful and relevant to the points at issue in the case. The Judge can question the witnesses himself but will allow the parties' lawyers to pursue anything that arises from the witness in response to his questions.

Some limited use is now made, for example in the High Court in Belfast, to facilitate expert evidence via video link or Skype where the expert cannot readily come from another jurisdiction.

### 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 does not have a general discretion to exclude evidence that has been obtained unfairly. Evidence may only be excluded where there is statutory authority to do so or where it is struck from the record because it is scandalous or an abuse of process.

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

Yes, parties to a case may give evidence on their own behalf.

**Related links**

Northern Ireland Courts and Tribunals Service

Last update: 03/02/2020



## Taking of evidence - Scotland

### 1 The burden of proof

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

The standard of proof in civil cases in Scotland is on the balance of probabilities with the burden of proof being upon the party who seeks to have a particular issue decided in their favour. In order to do so, that party has to adduce sufficient evidence to support their argument. If evidence is led on a specific issue which leaves the matter in question finely balanced then the party relying on it as part of their case may well lose on that issue.

**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?**

There are certain circumstances in which the onus of proof on a particular issue is on a party but that party is not required to lead all or any direct evidence to support it. There are 4 main situations when this arises:

(i) when a presumption operates in favour of a party

(ii) when the matter is judicially noted i.e. the points in issue are matters which can be immediately ascertained from sources of indisputable accuracy

(iii) when a matter between the parties is said to be res judicata i.e. preventing a matter which has already been adjudicated being adjudicated on subsequent occasions

(iv) when the point is formally admitted by the other party at the outset

There are 3 general categories of presumptions.

These are:

(1) irrebuttable presumptions of law – these are fixed principles of law that cannot be “rebutted” or argued away by means of evidence to the contrary.

(2) rebuttable presumptions of law - these may be countered by evidence which shows that in the particular case it is unsafe to arrive at a particular conclusion purely on the basis of a particular fact. However, unless some rebutting evidence is produced, that conclusion is likely to be drawn.

(3) rebuttable presumptions of fact – these arise from the facts of particular cases derived from common human experience. In regard to a rebuttable presumption of fact, Fact A usually means Fact B but because this is not invariably the case the court will hear rebutting evidence.

**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?**

There are no legal rules governing the “weight” that is given to a particular item of evidence and this is a matter for the judge and jury. The court must be satisfied by the party on which the onus of proof on a particular issue lies, that their version of the facts is more probable than that of their opponents.

### 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?**

A judge cannot make investigations on his or her own behalf in a case, or call witnesses or interview them in private. Whenever the case calls for proof, the judge will hear parties on the evidence which they have decided to lead before him or her, and then make a decision in the case.

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

In general, once parties have finalised their written pleadings then they can apply to the court to fix a proof. At the proof, parties will present to the judge the evidence which they wish to lead to prove their case.

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

In instances where the court rules that a particular piece of evidence is inadmissible.

For evidence to be admissible it must satisfy two requirements. It must be relevant and it must conform to the peremptory rules of evidence.

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

There are 3 types of hearing at which evidence in the merits of a case could be led. These are proofs, proofs before answer and jury trials. A proof before answer is a proof in a case in which the court considers it necessary to hear the evidence of both parties before deciding any legal questions which may have to be resolved in order to make a final decision in the case. Almost all hearings of evidence are by way of proof or proof before answer and only very rarely do cases go to jury trial. Jury trials are only available in the Court of Session in particular types of action, and in the specialist Sheriff Personal Injury Court.

**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?**

Evidence is normally obtained in 3 ways: by oral, real and documentary evidence of a witness.

Oral evidence includes hearsay evidence which is when a witness simply relates what someone saw or heard. As far as possible, the practice is to have witnesses present in court to give their evidence so that they can be examined and cross-examined.

Real evidence is something tangible and physical and must be lodged as a “production”. Usually, at least one witness must speak to the piece of evidence for it to be admissible.

Documentary evidence may be written, printed, or recorded in some other reliable way such as on tape, video, CD or electronically, and it should also be lodged as a production. Expert witnesses will normally be required to attend court to give their evidence e.g to give testimony in support of a report lodged as a production.

Written evidence such as affidavits are regularly admitted and accepted as evidence in civil proceedings. Expert witnesses will normally attend court to give their opinion as evidence in the proceedings. In many cases, an expert will be speaking in support of a report lodged as a production.

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

There is a general rule that the best evidence must be produced in the case. In Scotland, great value is placed on the oral evidence of a witness rather than other forms of evidence, as the witness is able to provide the court with a first hand account of what they have seen or heard.

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

A written document is required in certain circumstances. For instance for the constitution of a contract relating to land, in a trust where a person declares himself or herself to be sole trustee of either his or her own property or any property which he or she may acquire or in the making of any will, testamentary trust disposition and settlement or codicil.

Also in cases where documentary evidence is to be relied upon, then the original of the document must be produced unless the parties accept either a copy of the original or one that has been properly authenticated as a true copy by the person making the copy.

**2.8 Are witnesses obliged by law to testify?**

Generally speaking, any witness who is cited to give evidence is required to do so.

**2.9 In which cases can they refuse to give evidence?**

In cases where a witnesses has privilege against answering questions e.g. communications between a legal adviser and his or her client. There is also a general rule in Scots law that a person cannot be forced to incriminate themselves. A witness is entitled to refuse to answer a question if a true answer may lead to a crime or involves an admission of adultery as an untrue answer could lead to a charge of perjury.

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

If a person refuses to give evidence then he or she can be forced to testify under threat of a charge of contempt of court. It is also possible to lodge as evidence a previous statement the witness made if they now refuse to give evidence.

**2.11 Are there persons from whom evidence cannot be obtained?**

No. The Vulnerable Witnesses (Scotland) Act 2004 abolished the ‘competence test' for witnesses in criminal and civil proceedings so evidence is not inadmissible solely because a witness does not understand the duty to give truthful evidence or the difference between truth and lies. It will be for the judge or jury to decide if the testimony is reliable and credible in light of all the evidence led in the case.

**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 role of the judge is to ensure that a witness when giving their evidence is questioned fairly by parties. The judge must also act with impartiality. The judge can also ask questions in order for example to clarify a matter which remains obscure or to open up another line of inquiry which seems relevant. The role of the parties is that they will lead their respective witnesses in turn who will then each in turn be open to cross-examination by the other party or parties.

Under the Vulnerable Witnesses (Scotland) Act 2004 vulnerable witnesses (as defined in the Act) are entitled to apply for special measures (e.g. live TV link, screen, supporter) to help them give their evidence. In certain proceedings under the Children (Scotland) Act 1995 the evidence of a witness can also be taken by way of live TV link.

## 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 has a discretion whether to exclude evidence that has been obtained improperly subject to the overriding objective of the interests of justice.

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

If a party to a civil case gives evidence then the court will take this into account together with any other evidence it has heard when reaching a decision in the case.

Last update: 09/06/2020



# Taking of evidence - Gibraltar

## 1 The burden of proof

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

In general the burden of proving a fact which is in issue rests upon the party asserting that fact as part of its case. Thus the claimant bears the burden of proving the facts which are necessary to establish the claim, while the defendant will generally bear the burden of proving defences to the claim.

If doubts about a fact cannot be resolved, the party who bears the burden of proving that fact will not have discharged the burden of proof, and the court will find that the fact is not proved. However, the judge has a duty to resolve important factual issues and should only find that the burden has not been discharged in exceptional cases.

**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?**

It is not necessary to prove facts which are admitted. Judges may also rely on their general knowledge of life to take “judicial notice” of facts which are notorious or clearly established, and evidence of such facts is unnecessary.

The law makes various presumptions which may be rebutted by evidence to the contrary. These include presumptions as to the legitimacy of children, validity of marriages, sanity of individuals, and death of people who have disappeared. Innocence of crime is presumed, but a criminal conviction is admissible in civil proceedings as evidence that a party committed an offence (and means that the party bears the burden of proving innocence).

There is a presumption of negligence where a claimant proves that he or she has suffered harm from a source which was under the defendant’s exclusive control, and that the accident was of a kind which normally arises through negligence. A similar presumption arises where a person has been entrusted with goods and they have been lost or destroyed.

**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 standard of proof in civil cases is the “balance of probabilities”. In other words, the court will find that a fact is established if satisfied that the fact is more likely to have occurred than not. This standard operates flexibly: more convincing evidence is required to establish serious allegations such as fraud on the balance of probabilities, because such allegations are generally regarded as less likely to be true.

## 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 is obtained in civil proceedings through the disclosure of relevant documents by the parties, and the testimony of witnesses and experts. Different rules apply in each case.

**Disclosure**

Parties to civil proceedings are required to disclose the existence of documents in their control or possession, to the extent that the court orders them to do so, and to allow the other parties to inspect those documents. The court will normally order “standard disclosure,” which requires the parties to make a reasonable search for documents which either support or adversely affect the case of any party, without the parties needing to apply to the court. For any other types of disclosure a party must apply for permission from the court. The court may also make orders for the preservation of evidence and property.

**Witnesses of fact**

Parties do not require the permission of the court to adduce witness evidence in support of their cases. However, a party who wishes to rely on the evidence of a witness must serve a witness statement signed by the witness setting out the witness’s evidence, and must call the witness to give oral evidence at trial. If the party does not provide a witness statement or summary for a witness before trial, the party may not call that witness without the court’s permission. Furthermore, the court has wide powers to control the evidence which is allowed, such as excluding evidence which would otherwise be admissible and limiting the cross-examination of witnesses.

A party may also apply for a court order that a witness’s evidence shall be given in a sworn deposition taken by a court-appointed examiner prior to the hearing of the action.

The judge’s role is essentially to assess the evidence adduced by the parties, and does not include an independent fact-finding function.

**Expert witnesses**

A party may not rely on expert evidence unless the court gives permission. The court can control the issues upon which expert evidence is to be given, the form in which the evidence is given, and the fees payable to the expert.

Where more than one party wishes to submit expert evidence on an issue, the court may direct that the evidence shall be given by a single expert instructed jointly by the parties, rather than by a separate expert instructed by each party. The court may make such a direction on its own initiative, without the agreement of the parties.

The court will not require the parties to adduce expert evidence on its own initiative. However, the court may itself appoint an expert as an “assessor” to assist the court in relation to an issue. The court may direct the assessor to prepare a report (copies of which must be provided to the parties) and to attend the trial to advise the court.

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

**Disclosure**

Following an order for disclosure, each party must serve on the other parties a list of the relevant documents which are, or have been, in its possession or control. The other parties are then entitled to inspect and have copies of the documents. Charges may be made for photocopying.

**Witnesses of fact**

The court will order the parties to serve signed witness statements from each witness on whose evidence they intend to rely before the trial. The statement may be drafted by the witness, but will often be prepared by the lawyer for the party on whose behalf the witness is giving evidence. The statement should set out the witness’s evidence in full, in the witness’s own words if practicable.

If a party has been ordered to serve a witness statement from a witness but is unable to obtain one, the party may seek the court’s permission to provide a witness summary, setting out the evidence which the witness is expected to give or the matters on which the party intends to question the witness.

If the court orders that a witness’s evidence should be taken in a deposition, the witness will give evidence orally before a court-appointed examiner. The examination will be conducted as if it were a trial, with a full opportunity for cross-examination of the witness, and a transcript of the evidence will be produced.

**Expert witnesses**

If the court gives permission for expert evidence, the parties prepare instructions to the expert(s). Where there is a joint expert, the parties may instruct the expert separately if instructions cannot be agreed. The expert, whose overriding duty is to the court and not to the instructing party or parties, will prepare a written report. A party may then put written questions to an expert who was instructed jointly or by another party. Where there are separate experts, the court may also direct that there should be discussions between the experts to identify areas of agreement and disagreement. Expert witnesses are entitled to be paid for their services, normally by the party or parties instructing them.

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

Whenever parties apply for orders to enable them to obtain or adduce evidence, the court will need to be satisfied that the evidence in question is likely to be relevant and admissible. In considering how to exercise its powers, the court must also seek to deal with cases justly, which includes saving expense and dealing with cases in ways which are fair, expeditious and proportionate to the importance, complexity and value of the claim. These considerations may lead the court to reject applications or to make orders of its own initiative (e.g. requiring a single joint expert rather than separate experts appointed by each party).

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

Facts may be proved by evidence, by presumptions and inferences which arise from evidence, and by the court taking judicial notice of facts (see above). The types of evidence which may be relied upon in civil proceedings are witness testimony, documents and real evidence. Documents can include paper documents, computer records, photographs, and video and sound recordings. Real evidence consists of other material objects relevant to the issues in dispute which are produced to the court, such as the products which form the subject-matter of an intellectual property dispute. It may also include a judge visiting the scene of an accident.

**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?**

In principle, witnesses of fact give their evidence orally at trial. However, as stated above, each party is required to serve a witness statement for each witness upon whose evidence the party intends to rely. At trial, the witness will be asked to confirm the truth and accuracy of his or her statement, which will then stand as the witness’ evidence for the party who called him or her. Where only a witness summary has been served, the witness will have to give more detailed oral evidence.

Expert witnesses give their evidence in written reports unless the court orders otherwise. An expert report must set out its conclusions, the facts and assumptions upon which it is based, and the substance of the expert’s instructions. The court will decide whether it is also necessary for an expert to attend trial to give oral evidence. A court-appointed assessor will not be required to give oral evidence.

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

The court has a wide discretion as to the weight or credibility which should be attached to any piece of evidence. There is no rule against adducing a statement made outside court as evidence of the facts contained in that statement (“hearsay” evidence), so a party may rely on a letter as evidence of its contents, or on a witness’s report of a statement made by another person. However, hearsay evidence will often carry less weight than direct testimony, particularly if the maker of the statement could have been called to give evidence.

Certain documents and records are accepted as authentic. For example, the records of businesses and public authorities are accepted as authentic if certified as such by an officer of the business or public authority. And various types of official documents (such as legislation, by-laws, orders, treaties and court records) may be proved by printed or certified copies without any further proof.

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

Certain transactions (e.g. wills and sales of land) must be effected in writing, and documentary evidence will therefore be required to prove them.

**2.8 Are witnesses obliged by law to testify?**

In general, in civil proceedings, witnesses who are competent to give evidence may be compelled to do so. A party who wishes to secure the attendance of a witness at trial prepares a witness summons requiring the witness to attend court to give evidence. Once issued by the court and properly served, the summons binds the witness until the end of the hearing.

If the court orders that a witness's evidence should be taken in a deposition but the witness fails to attend or refuses to answer lawful questions, the party requiring the deposition may apply for a further order that the witness attend or answer questions.

**2.9 In which cases can they refuse to give evidence?**

The general rule that competent witnesses may be compelled to testify does not apply to the Queen, foreign sovereigns and their households, foreign diplomatic agents and consular officials, representatives of certain international organisations, and judges and jurors (in relation to their activities in those capacities). Spouses and relatives of the parties may be compelled to give evidence in civil proceedings.

Witnesses who may generally be required to give evidence are nevertheless entitled to withhold certain documents from inspection and refuse to answer certain questions on the grounds of privilege. The main types of privilege are legal professional privilege (which applies to communications made for the purpose of giving or seeking legal advice, or for the purpose of obtaining evidence for litigation), "without prejudice" privilege (which applies to communications between the parties which are made in a genuine attempt to compromise the dispute, such as offers to settle a claim), and the privilege against self-incrimination (which means that a witness may not be required to give evidence if there is a real danger that it would expose the witness or witness' spouse to a criminal charge or penalty in Gibraltar). Privilege may be waived.

Evidence may also be withheld on the ground of public interest immunity if its production would be contrary to the public interest. The evidence which may be covered by the immunity includes evidence relating to national security, diplomatic relations, the workings of central government, the welfare of children, the investigation of crime and protection of informants. In addition, journalists are not required to disclose their sources unless disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Bank officers cannot be compelled to produce bank books or to give evidence of their contents unless there are special grounds for the court to order them to do so, but the court may order that a person shall be allowed to inspect or copy bank account entries.

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

A witness who, having been served with a witness summons, fails to attend court or refuses to testify may be committed for contempt of court and imprisoned.

**2.11 Are there persons from whom evidence cannot be obtained?**

All adults are competent to give evidence in civil proceedings unless they are incapable of understanding the nature of the oath which witnesses must swear or incapable of giving rational testimony, for example due to mental illness. Where a child witness does not understand the nature of the oath, his or her evidence may still be admitted, but only if the court is satisfied that the child understands the duty to speak the truth and has "sufficient understanding to justify his evidence being heard".

**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?**

**Role of the judge and the parties**

Traditionally, witnesses have given "evidence-in-chief" at trial in response to non-leading questions put by counsel for the party who called them. However, a witness statement will now stand as the witness's evidence-in-chief unless the court directs otherwise. The witness may then be cross-examined by counsel for the opposing party, who may put leading questions to the witness. Expert witnesses who give oral evidence at trial may also be cross-examined, but a court-appointed assessor cannot be cross-examined by the parties. The judge may put questions to witnesses, usually to obtain clarification of their answers to questions from counsel.

**Video link evidence**

Evidence may only be provided by video link if the court gives permission. When considering whether to make an order allowing evidence to be given in this way, the court will take into account the convenience of using video conferencing (particularly if a witness is unwell or abroad), the costs or savings associated with using a video link, and the implications for the fairness of the proceedings (including the more limited degree to which the court can control and assess the witness).

## 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 communications sent through the post or a telecommunications system (which includes telephone calls, faxes and e-mails) are illegally intercepted, evidence of the contents of those communications may not be given in legal proceedings. Otherwise, evidence is generally admissible even if it was obtained improperly. However, the court has the power to exclude evidence which would otherwise be admissible. In deciding how to proceed, it will balance the importance of the evidence against the gravity of the improper conduct. If the circumstances do not justify excluding the evidence, the court may penalise the party which has acted improperly in other ways, such as by ordering it to pay costs.

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

Statements of case (i.e. the formal documents setting out each party's case) can be used as evidence at interim hearings, but will not stand as evidence at trial.

Witness statements given by the parties to the proceedings are admissible in evidence to the same extent as statements given by non-parties.

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