

Evidence

Issues with regard to proof are crucial in most disputes and proceedings. Below we highlight the principles of proof.

1 BURDEN OF PROOF

Each party must prove what it claims in court.

Under Belgian law, there is no disclosure phase or obligation (“discovery”). This implies that the parties themselves decide what evidence to use during court proceedings. In principle, a party can’t be obliged to provide proof.

One exception to this principle is the procedure for compulsory production of documents. A party can file a claim during the proceedings, in which it requests the court to order the counterparty to produce certain specific documents. In that case, the applicant must demonstrate that there are serious, precise and consistent presumptions that the counterparty holds evidence of a relevant fact. In such a case, the court may order that such a document be annexed to the case-file of the proceedings.

Another exception to the principle that each party chooses the evidence it provides, is the obligation of the parties to cooperate in the taking of evidence.

This obligation to cooperate in the taking of evidence can in principle not lead to a reversal of the burden of proof.

Only in exceptional circumstances, if the application of the abovementioned rules with regard to the burden of proof are manifestly unreasonable, the judge may decide to shift the burden of proof.

2 PRODUCTION OF DOCUMENTS

The production of new documents must always go hand in hand with the submission of written pleadings (except in the case of the aforementioned procedure for compulsory production of documents).

3 FREEDOM OF EVIDENCE IN COMMERCIAL MATTERS

The evidence can be (i) free and provided by any means of law or (ii) legal and provided in accordance with the legal provisions (in particular in the taking of evidence, the means of evidence and their evidential value).

Neither of the two regimes applies in an absolute manner and rules exist in all branches of law. In general, civil law is rather subject to a regulated legal system of evidence while commercial law is rather subject to a free system of proof.

In case of proceedings between two companies (commercial matters) or if evidence must be provided against a company, the principle of free evidence implies that proof can be provided by any means of law. An email or a WhatsApp-message can be provided as evidence and can even prove against documents.

The legal evidence system is applicable in civil disputes or in the case when a company must provide evidence against a private individual. The legal evidence system however also allows the freedom of evidence in certain situations (for example if the value of the dispute does not exceed EUR 3,500; in case of all unilateral acts; if proof is provided by the parties against third parties, except for the date;...).

The basic principle of the Belgian evidence system is that a written document is required in order to prove any legal act exceeding a certain sum.

4 DEGREE OF EVIDENCE

The question as to which type of evidence is decisive, is not regulated and depends in principle only on the judgment of the court. The court will, after all, decide when it deems a certain fact or claim to be proven. The only criterion is that the court must be “convinced” of what is claimed by a party.

The party which has the burden of proof must prove its claims with a reasonable degree of certainty. The expected degree of certainty is not 100%, but must exclude any reasonable doubt.

In addition, the person who bears the burden of proof of a negative fact may simply establish the plausibility of that fact. The same applies to positive facts of which, by the very nature of the fact, it is not possible or reasonable to require certain proof.

5 DIFFERENT TYPES OF EVIDENCE

The Civil Code provides for different kinds of evidence: written proof, testimony, presumptions, confessions and the oath.

In Belgium, testimony is rarely used as evidence in commercial disputes. The court has the possibility to summon and to hear witnesses, but in practice this is rarely or never done. In addition, a party can also request the court to summon and hear a witness. The court will make a sovereign decision as to whether or not it allows testimony evidence.

As stated above, the principle of freedom of proof applies between (or against) companies, but there are two kinds of proof to which the law attaches a particular evidential value, namely (a) an invoice and (b) the bookkeeping.

A. Proof by invoice: an invoice proves the agreement between the parties (and the terms of this agreement) insofar as this invoice has been accepted explicitly or tacitly by the other party.

Acceptance of the invoice requires first of all that the invoice has been sent to the addressee, which the sender must demonstrate.

Between companies, proof of acceptance of the invoice may be quite simple given the case-law in commercial matters, according to which an invoice that is not disputed within a reasonable time, is considered to be accepted.

However, a company may still try to convince the court that silence does not simply mean acceptance or proof the existence of verbal disputes.

The evidential value of the invoice applies to all possible contracts (and no longer only to sale/purchase contracts).

In practice, this rule also allows that seizures on goods belonging to a third party ("derdenbeslag") can be filed on the basis of an (accepted) invoice without a prior decision from the Seizure Court being required.

B. Proof by bookkeeping: the bookkeeping (incl. annual accounts) of a company can be accepted by the judge as proof between or against companies. A party may provide proof by reference to its own bookkeeping or the bookkeeping of the opposing party. In accordance with the rules on the contribution to the burden of proof, the judge may order a party to produce its bookkeeping.

The judge is bound by the principles of the bookkeeping, but is still required to estimate the evidential value, taking into account their regular nature.

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