LYDIAN

Evidence

The importance of providing (adequate) evidence in order to substantiate what a party is claiming must not be underestimated. Hence in the following note we explain the most important (general) principles regarding evidence under Belgian law [1].

1. BURDEN OF PROOF

Under Belgian law, the party that raises certain facts must – in accordance with the Latin adage *actori incumbit probatio* – provide evidence of these facts, if they are contested. The burden of proof can thus rest on both a plaintiff and a defendant. However, facts that are generally known or which rest on experience do not have to be proven.

A party that claims that it can sue another party must therefore raise and prove the judicial acts or facts which lie at the basis of their claim. A party that -on the contrary- claims that it has discharged its obligations must raise and prove the judicial acts or facts which lie at the basis of their discharge.

In case of doubt, the party that had to provide evidence will -in principle- lose the case – so this party not only bears the burden of proof, but also bears the evidence risk.

Notwithstanding the aforementioned, all parties are nevertheless always obliged to cooperate to provide evidence. This duty of cooperation is legally anchored.

In exceptional circumstances, if the burden of proof resting on a party would be manifestly unfair, the court can – at its own initiative – reverse the burden of proof. A reversal of the burden of proof is nevertheless only possible if all useful investigative measures have been exhausted and if the court has verified that all parties have complied with the obligation to cooperate to provide evidence, without it being possible for (adequate) evidence to be obtained in this way.

[1] Book 8 of the (new) Civil Code entered into force – subject to a limited number of exceptions – on the 1th November 2020. Unless expressly provided otherwise in the law, the legislation of Book 8 of the (new) Civil Code is supplementary law, the parties thus can -by agreement- deviate from this legislation.

2. THE EVIDENTIARY STANDARD

The evidentiary standard is the extent to which the court must be convinced of a certain judicial act or fact so that the court can and shall regard it as proven. The starting point is that evidence should be provided with a *reasonable degree of certainty*. The court must therefore be convinced with a reasonable degree of certainty of what a party claims. As soon as a reasonable degree of doubt exists, the court cannot regard the judicial act or fact as proven.

However, when – due to the nature of the judicial act or fact that needs to be proven – it is impossible or unreasonable to demand certain evidence, or when it needs to be proven that a judicial act or fact did not occur, it suffices that a party proves the probability of the existence or non-existence of the judicial act or fact and thus makes it plausible.

3. THE PROVISION OF EVIDENCE

In a dispute before the court, each party in principle chooses itself what evidence it shall or shall not present. Belgian law has as its starting point a «free» evidentiary system and -with regard to the provision of evidence- there is in principle no obligation of disclosure (*discovery*).

There are nevertheless two exceptions to the aforementioned principle, namely (i) the possibility for the court to oblige -within the framework of a judicial proceeding- a party to produce certain exhibits and (ii) the obligation for each party to cooperate to provide evidence (see above).

The manner in which evidence must be delivered depends on the concrete situation. Evidence against a private individual is regulated, whereas evidence between and against enterprises is free.

In the regulated evidentiary system, each judicial act with a value of 3.500 EUR or higher must be proven by means of a signed writing.

In the free evidentiary system, all means of evidence – including (but not limited to) a writing, a witness, a presumption, an admission and an oath – are in principle allowed, regardless of the value of the judicial act that a party wants to prove.

4. THE EVIDENTIARY VALUE

The evidentiary value means the degree to which evidence convinces the court that this evidence corresponds to the truth. It thus concerns the persuasiveness of evidence.

The evidentiary value which the court attaches to the evidence presented is in principle a matter of judicial discretion – except in case of evidence having a legal evidentiary value. Evidence with a legal evidentiary value is for example a notarial deed, a private deed, a legal presumption or a (judicial or extrajudicial) admission.

5. THE EVIDENTIARY FORCE

The court is obliged to acknowledge the evidentiary force of evidence. The evidentiary force is more specifically the force that evidence carries with it, regardless the associated evidentiary value. The court must therefore correctly interpret the content of the evidence, and may not disrespect that content. There is for example a failure to appreciate the evidentiary force of evidence if the court explains the wordings of a deed in a way that is not consistent with reality.

6. THE MEANS OF EVIDENCE

Belgian law provides different means of evidence: proof by (a signed) writing, proof through witnesses, proof by presumption, admission and oath.

Notwithstanding the aforementioned "free" evidentiary system in a commercial dispute, Belgian law gives special evidentiary force to the invoice and to the accounts.

- The invoice – any agreement concluded with an enterprise can be proven by means of an invoice, in so far as the invoice was accepted by the enterprise or was not contested by the enterprise within a reasonable period of time. An accepted / uncontested invoice is thus legally presumed to correctly reflect the agreement concluded between the parties.

  This legal presumption does not come into play when the addressee of an invoice is a private individual. In that case, the acceptance of an invoice by a private individual constitutes only a factual presumption. In addition, the lack of (timely) contest of an invoice by a private individual cannot be regarded as an acceptance of the invoice, unless the failure to contest the invoice cannot be construed otherwise than as an acceptance of the invoice.

  Notwithstanding the aforementioned, an enterprise or a private individual is always free to provide evidence to the contrary concerning the existence or the content of the agreement concluded between the parties.

- The accounts – when the accounts of two enterprises are consistent (with one another), these accounts bear a legal evidentiary value. When they are not consistent (with one another), these accounts bear (merely) a «free» evidentiary value, i.e. open to a judicial discretion of the court.

  The use of the accounts of another party as evidence can be regarded as an extrajudicial admission of that party.

  Finally, the court can -at its own initiative- oblige a party to produce (a part of) the accounts, within the framework of the obligation to cooperate to provide evidence that rests upon each party.

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