

# **PROBLEMS INHERENT IN THE ABSTRACT NATURE OF GENERAL DISTRIBUTION RULE OF THE BURDEN OF PROOF IN CIVIL PROCEEDINGS**

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## **Abstract**

The burden of proof in civil proceedings is distributed between the parties following the general distribution rule of the burden of proof, meaning that each party has to prove the circumstances constituting the basis for its claim and objections. Such an abstract content of the distribution of the burden of proof, however, does not always reveal the answer to the question who carries the burden of proof. The impression can, therefore, be created that following the distribution rule for the burden of proof under discussion, each party has to prove the presence or absence of a fact. If we assumed, however, that substantiation of the same fact is a commitment of each opposing party, it would remain unclear who would have to bear the negative procedural legal consequences of failure to comply with or improper compliance with the burden of proof. Therefore, it is necessary to detail the general distribution rule of the burden of proof by identifying objective criteria to be invoked in deciding the issue of distribution of the burden of proof.

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**Keywords:** Civil proceedings, burden of proof, evidence

## **Introduction**

Involvement of the parties acting on an equal footing in adversarial procedure when each party to the case has equal possibilities during the proceedings expresses the substance of civil proceedings. Having assumed the function of administration of justice, the State must guarantee such an adversarial procedure which would ensure possibilities for both parties to prove their truth. Distribution of the burden of proof has to be based on objective criteria – even before taking the proceedings it should be clear for

the parties what they will have to substantiate and what evidence to produce so that their statements could be proved. Otherwise this can lead to a breach of the principle of equality and the requirements of legal clarity and certainty. Proper rules of the burden of proof make it easier for the party to decide whether it is worth taking the risk of initiating the proceedings and activates the procedural activity of the subjects obliged to produce evidence, which helps the court to acquire true knowledge about factual circumstances.

The object of this research is the distribution of burden of proof.

The article aims at exploring the content of the distribution rule of the burden of proof, identifying the problems related to the abstract nature of the rule under discussion and providing potential solutions to the issue discussed.

The data of the research were gathered using the documentary analysis method while the analysis of the data collected was based on the method of qualitative content analysis together with the systemic, teleological and comparative methods.

### **General distribution rule of the burden of proof in civil proceedings of the Roman law**

It is not disputed in the scholarship of law that the Roman law has played a unique role not only in the European but also the worldwide history of law. The Roman law with its perfect forms underpinned the richest legal culture which has become the asset of the entire humanity for a long time (Maksimaitis, M., 1998, P. 55). According to the American Roman law expert L. Burdick, the Roman law does not only constitute a subject-matter of the history of law, but also influences and shapes the law all around the world (Burdick, W, 2004, P. VII). The institute of proof was one of the core constituents of judicial proceedings in the Roman law, therefore, it was arranged with sufficient precision and its fundamental provisions have been taken over by most West European states, including Lithuania. Thus, in order to acquire knowledge of the substance of distribution of the burden of proof, it is necessary to undertake at least a brief analysis of the genesis of the institute under discussion.

Roman judicial proceedings took place with active involvement of the parties in the adversarial procedure since the oldest times. The first historical form of Roman civil proceedings was the *legis actiones* procedure, which existed more than five hundred years ago, i.e. prior to the 1<sup>st</sup> century BC (Sologubova, E., 1997, P. 41). It is stated in the work of the Roman lawyer Gaius "*Institutiones*" that the oldest form of civil proceedings was *legis actiones* (Nekrošius, I, Nekrošius, V., Vėlyvis, S., 1999, P. 36). Although this variety of proceedings was formalised, proceedings were adversarial, predominated by the parties. We come across the following rule in the Law of the Twelve Tables (around 451–450 BC): "Both of them being

present, let them speak so that each party may hear.” (Vėlyvis, S., Jonaitis, M., 2007, P. 7). This rule determined the position of the parties in the process of substantiation; the parties had to state the evidence corroborating their claims in the presence of each other (Zyl, D. H., 1938, P. 30). The parties had to be active in adversarial proceedings. In case of failure by at least one party to appear, the judge had to pronounce a judgment in favour of the present party (Vėlyvis, S., Jonaitis, M., 2007, P. 8).

It was during the early and classical period that in the sources of the Roman law as well as the post-classical Justinian codification period that the concept of the burden of proof (lot. *onus probandi*) and its distribution rules were formed and were later taken over by many posterior systems of law. The Digest of Justinian includes an excerpt from the works of the lawyer Marcian. He states that “he who appeals to a fact is bound to prove it” (Digesti Justiniana, P. 363.). The Digest also refers to the opinion of the lawyer Paul who formulated the distribution rule of the burden of proof with particular clarity: “Proving is a duty of the one who prosecutes, not the one who negates” (Lat. "*ei incumbit probatio qui dicit, non ei qui negat*“) (Digesti Justiniana, P. 361). Thus, it may be said that the burden of proof in Roman civil proceedings was borne by the plaintiff. The defendant was also bound to carry the burden of proof, but he had to prove only those facts which formed the basis of his objections. The procedure of distribution of the burden of proof between the parties in civil proceedings is detailed by Ulpian who points out that in the case of *exceptio* the defendant takes the plaintiff's position and has to substantiate his objection in the same way the plaintiff has to corroborate the claims asserted in the formula. For example, if the defendant's objection derives from the contract made with the plaintiff, it is necessary to prove that such a contract was really concluded (Jonaitis, M., 2005, P. 222). These principle provisions were later taken over by many legal systems and have formed the general distribution rule of the burden of proof. The general distribution rule of the burden of proof formulated in the Code of Civil Procedure of the Republic of Lithuania (hereinafter referred to as the CCP) has no principle difference from the one formed by Ulpian. Article 178 of the CCP provides that “the parties shall prove the circumstances invoked in their claims and objections <...>”.

In order to facilitate the distribution of burden of proof between the parties, there were attempts made in the Roman law to classify the facts to be proved into positive and negative. Positive facts had to be proved, while negative ones did not require any proof (Lat. *affirmanti incumbit probatio, non neganti; negativa non probantur*). However, as a result of an abstract and indefinite nature of the wording, such a distribution basis of the burden of proof would not facilitate the distribution of the burden of proof because it would be necessary in each specific case to refer again to the issue of the

definition of positive and negative facts, which would by itself aggravate the distribution of the burden of proof.

Exceptions to the general distribution rule of the burden of proof were also known in the Roman law. Such exceptions are legal presumptions (Lat. *praesumptiones iuris*). The parties were released from the burden of proof where the court, invoking certain facts, was able to make legal conclusions (Garido, M. Ch. G., 2005, P. 213-215). The term of presumptions later found its way in many legal systems. The Roman law made a distinction between presumptions of two types: irrebuttable (Lat. *praesumptiones iuris et de iure*) and rebuttable presumptions (Lat. *praesumptiones iuris tantum*) (Kosaitė-Čypienė, E., 2008, P. 105). There are also some presumptions in the Lithuanian law which derived from the Roman law. For example, where certain ensuing legal consequences depend on the fact which of natural persons died at an earlier date and where it is impossible to establish the moment of the act of death of them each, it shall be presumed that the said natural persons died at the same time (Article 2.2(4) of the Civil Code of the Republic of Lithuania (hereinafter referred to as the CC). An example of irrebuttable presumption is the presumption of incapacity of minors which remains relevant at the present time – it is acknowledged that minors who act without a guardian are unaware and incapable of anything (Digesti Justiniana, P. 369; Howaed, M. N.; Crane, P.; Hochberg, D. A. 1990, P. 83–95).

Rebuttable presumptions, which constitute a precondition of one or another fact, make the absolute majority of legal presumptions. This group also includes the presumption of lawfulness and validity of marriage (Article 3.37 of the CC), presumption of existence of the facts stated in documents certified in the notarial form (Article 26(2) of the Law on the Notarial Profession of the Republic of Lithuania), presumption of guilt of the advertising operator in breach of the law on advertising (Article 21(1) of the Law on Advertising of the Republic of Lithuania), presumption of good faith and many others. Whereas it is possible to prove the opposite, such presumptions are called *praesumptio iuris tantum* (Litewski, W. 1998, P. 209–210).

Thus, there was active adversarial procedure in place between the parties asserting their claims and objections to the claims made both in the early as well as in the classical period and the principal provisions formed during those times to regulate the distribution of the burden of proof have been transposed to the Lithuanian law of civil proceedings.

### **General distribution rule of the burden of proof**

One of the fundamental and most frequently used general principles of law is equality. This principle is laid down in Article 29 of the Constitution of the Republic of Lithuania and is of exceptional importance

because it underpins the unity of rights and obligations, which is possible only in case it is assumed that each individual is a subject of law and that the rights of all individuals should be treated with equal respect (Vaišvila, A. 2000, P. 148). Involvement of the parties acting on an equal footing in adversarial procedure when each of the parties to the case has equal possibilities during the proceedings expresses the substance of civil proceedings. Consequently, the state must guarantee such adversarial proceedings which would secure equal opportunities for both parties to prove their truth, i.e. what is not allowed to the plaintiff should not be available to the defendant and vice versa (*Corpus Iuris Civilis*. D. 50.17.41). If the court requested the party to prove what is not required by law or obligated one of the parties to prove what must be proved by the other party, the adversarial principle would be infringed. That is why it is important for the distribution of the burden of proof to be based on objective criteria and, even before taking the proceedings, it should be clear for the parties what they will have to substantiate and what evidence to produce so that their statements could be proved. Otherwise this can lead to a breach of the principle of equality and the requirements of legal clarity and certainty. Furthermore, proper rules of the burden of proof make it easier for the party to decide whether it is worth taking the risk of initiating the proceedings and activates the procedural activity of the subjects obliged to produce evidence, which helps the court to acquire true knowledge about factual circumstances. Undoubtedly, the distribution of the burden of proof takes an important part in evidentiary procedure (Klicka, T., 1995. P. 8.).

By submitting a claim, the plaintiff seeks to change the material legal relations in place between himself and the defendant, while the defendant is willing to keep such relations unchanged, therefore, the unfoundedness of the plaintiff's claims should not be proved by the defendant but, on the contrary, the plaintiff has to prove the circumstances forming the basis of his claim. It is rightly noted in the doctrine of law that civil proceedings rely on the "presumption of the defendant's innocence" (Baulin, O, V., 2004. P. 140).

The defendant becomes subject to the burden of proof only through the operation of the distribution rule of the burden of proof envisaged for substantive law or for the cases when the facts eliminating the plaintiff's right have to be proved. Submission of evidence and negation of the circumstances invoked by the plaintiff is a right of the defendant. The defendant exercises the right to produce evidence by stating the circumstances and submitting the evidence countering the circumstances invoked in the plaintiff's statement of claim.

The general distribution rule of the burden of proof does not change even in those cases when both parties invoke the same circumstance and one of the parties provides proof of the existence of the circumstances at issue

and the other – of their absence. Where the defendant disputes the circumstances stated by the plaintiff, it does not mean that the burden of proof is moved over to the defendant – he only makes use of the right granted to him by the procedural law. The defendant simply may not negate the claim without stating any reasons of his disagreement, however, this does not mean that the claim will be satisfied and will lead to negative consequences for the defendant. It has been noted time and again in the case-law of Lithuanian courts that an objection to the statement of claim and substantiation of the circumstances underpinning the objection is secondary, if the plaintiff invokes the circumstances he has to prove, but they are not presumed. The defendant has the right to rebut the claim and prove the circumstances favourable to him, due to which the claim may be dismissed. However, the claim may be satisfied if the plaintiff proves the circumstances constituting the basis of the claim and not because of the defendant's failure to substantiate his objections (ruling in the case No. 3K-3-549/2001). Thus, following the general distribution rule, the burden to prove the basis of claim falls on the defendant. In case the plaintiff fails to provide evidence to corroborate the plea, the claim should not be satisfied (Lat. *reus in excipiendo fit actor*). While making use of the right to present evidence and seeking to avoid an unfavourable decision the defendant will also be subjected to the burden of proof, however, the claim may be satisfied only if the plaintiff proves the circumstances at issue in his plea.

It should be admitted, however, that the simplicity of the general distribution rule of the burden of proof is merely apparent. It could be presumed following the general distribution rule of the burden of proof that the distribution of burden of proof depends on the subjective criterion, i.e. that its application depends only on the willingness of the parties. It has been mentioned, however, that the burden of proof should be shared on the basis of objective rather than subjective grounds. Taking the purpose of proceedings into account, it is considered to be the type of a legal fact and the type of a claim that may serve as objective criteria for distributing the burden of proof.

### **Criteria for distributing the burden of proof: type of a legal fact and type of a claim**

The theory of law distinguishes right-generating and right-eliminating legal facts (Vaišvila, A. 2004. P. 406), which can constitute the basis of claims and objections of the parties (subject-matter of proof). Legal facts that generate (corroborate) the right and eliminate the right are relevant when dealing with the issue of distribution of the burden of proof. It is obvious that the plaintiff who accesses the court has to prove the legal facts which give rise to (prove) his right (e.g., the fact of entry into a loan contract, etc.) and not the legal facts which eliminate his right, unless such facts form the basis

of the claim. The defendant has the burden to prove the non-existence of legal facts demonstrating the plaintiff's right, i.e. to prove the legal facts eliminating the plaintiff's right (e.g. the fact that the debt has been repaid). It follows from the above that it may be concluded that the party does not have to prove the circumstances which would counter the circumstances it has invoked. Even such an interpretation, however, is not universal, if we try analysing the problem at issue in isolation from a specific type of a claim.

In order to answer the question of concern about the criterion for distributing the burden of proof, it is important to discuss the types of claim singled out according to the procedural purpose. The doctrine of law (Schilken, E. 2002, P. 94) usually classifies claims by their procedural purpose into claims (positive and negative) regarding recognition (e.g., positive claim for recognition of ownership rights to a residential house, on the establishment of paternity, etc.; negative claim regarding invalidation of transactions, challenge of paternity, etc.), regarding award (for damages, debt) and modification of legal relations (claim seeking to create (for the establishment of easement, etc.), terminate (claim for eviction out of premises, etc.) or change the legal relations between the plaintiff and defendant).

Once a claim for recognition is filed, the distribution of the burden of proof will depend on the type of the claim. If the plaintiff seeks that the court approves, recognises the existence of a specific right or substantive legal relationship (positive claim), he has to bear the burden to prove the legal facts that give rise to his claim – not those that eliminate it. For example, once a negatory claim is submitted, the plaintiff has to refer to the circumstances substantiating his claim, i.e. the plaintiff has to prove his right to have a certain thing in his possession (ownership right, if he is the owner of the thing, or the lawfulness of management, if he is a lawful manager of the thing) and also demonstrate that the defendant precludes by his actions the plaintiff from managing the thing. Proof of the unlawfulness of the defendant's actions is not the plaintiff's obligation. In this case, the presumption of unlawfulness of the defendant's actions is in operation and it means that the defendant has to prove that his actions are not contrary to law, i.e. the lawfulness of his actions (ruling in the case No. 3K-3-72/1999).

In case the plaintiff seeks that the court recognises the non-existence of a substantive legal relation (negative claim), the plaintiff has to carry the burden of proving the existence of legal facts eliminating the defendant's right, while the defendant has to prove the existence of facts creating his right. For example, if a claim is asserted for invalidation of a patent, the plaintiff adduces evidence corroborating the non-patentability of the invention and the patent holder of the disputed invention proves those circumstances, which, in his opinion, prove that the invention satisfies the

requirement for patentability, i.e. the patent holder of the invention at issue in this case is not released from the obligation to provide proof, transferring all the burden of proof (Lat. *onus probandi*) on the person concerned (ruling in the case No. 3K-3-1031/2003). Where a claim to invalidate a transaction is filed, if the person is the manager of the property, it is considered that its management derives from good faith until the opposite has been proved (Article 4.26(2) of the CC). The person intending to terminate the management or having other claims to the manager of the property, where it is the subject-matter of the case at issue, has to prove that the property is managed in bad faith. It follows that the person who is a manager of the property is presumed to act in good faith. Its bad faith has to be proved by the person who makes such an allegation (Article 178 of the CCP). Good faith may be rebutted as it is a rebuttable presumption. Article 4.26(2) of the CC provides the fact that possession shall be deemed in good faith until the opposite is proven. Some exceptions to this rule are also possible when the defendant holds the burden of proving the non-existence of legal acts eliminating his right. For example, where a claim is asserted on the basis of *actio Pauliana*, the debtor's bad faith is presumed (Article 6.67 of the CC), therefore, the defendant has to prove that he acted in good faith when concluding the transaction. It should be noted, however, that such a distribution of the burden of proof is pre-determined by the special distribution rule of the burden of proof – the presumption of the debtor's bad faith established in substantive law. Where substantive law sets out certain specific distribution rules of the burden of proof, they are used instead of the general distribution rule of the burden of proof. In other cases the application of the general distribution rules of the burden of proof under discussion may be held to be universal.

When a claim for award (e.g. of debt) is filed where the plaintiff requests the court to obligate to perform certain actions, the legal facts generating the right are substantiated by the plaintiff, while the defendant has to prove the facts eliminating such a right. For example, if the debtor has the debt document or note in his possession, it constitutes the grounds to presume that the obligation has been fulfilled (Article 6.65 of the CC), therefore, the creditor, willing to rebut this presumption has to prove the existence of the opposite. Following the rule applicable to the fulfilment of obligations formulated by substantive law, it has been stated in the case-law on numerous occasions that the general distribution rule of the burden of proof in disputes arising out of loan contracts requires the creditor to prove that he has granted the loan while the debtor has to prove the repayment of the loan. The loan contract conforming to statutory requirements in possession by the creditor is a sufficient basis to presume that the contract has been concluded and that the borrower has received the money or things;



the law at the same time allows the borrower to rebut this presumption and prove that the loan contract has not been concluded (rulings in the cases No. 3K-3-187/2008 and No. 3K-3-450/2008). In claims for award, the distribution rule of the burden of proof, in principle, matches the distribution of the burden of proof in cases where a positive claim for recognition is filed.

Where claims for modification of legal relations are asserted in order to modify the substantive legal relations in place, the distribution of the burden of proof matches the above-mentioned rules. In case the plaintiff seeks to modify the existing legal relations, he has to prove the facts confirming his right while the defendant has to prove the facts against the plaintiff's right. For example, the spouse is held to be the father of the child born in wedlock, however, he may challenge his parenthood at court by providing the supporting legal facts to this effect. In case of a dispute on invalidity of a simulated transaction, the issue to be proved is the true willingness of the parties – the burden of proof falls on the contractual party which claims that the transaction is simulated (ruling in the case No. 3K-3-977/2003). In such a case, the plaintiff has to prove the legal facts eliminating the defendant's right while the defendant has to prove the facts supporting his right.

Taking the purpose of proceedings into account, it follows from the above that the type of a legal fact and the type of a claim may serve as objective criteria for distributing the burden of proof.

#### **Other interpretation theories of the distribution of the burden of proof**

In addition to the concept of distribution of the burden of proof discussed above, there are also other theories for interpreting the distribution of the burden of proof both in the doctrine of law and in the case-law.

The Lithuanian case-law dealing with the issue of distribution of the burden of proof underlines the criterion of ease of submission of evidence, i.e. evidence is provided by the party for which it is easier and more convenient to do that because it has the relevant evidence available or can obtain it with less effort than the other party. The court of cassation has noted in relation to the application of this principle in civil proceedings that the burden of proof is distributed between the parties in accordance with the rules of proof formed by the law, the doctrine of law and the case-law. One of the above mentioned rules specifies that one or another fact should be proved by the party for which it is easier because it has the relevant evidence available or can obtain it easier than the other party. In this way, where the burden of proving if it was possible for the employer to offer another job for the employee dismissed from office is moved over to the employee, it means a breach of the principle of procedural equality of the parties (rulings in the cases No. 2-1349/2009, No. 3K-3-593/2003 and No. 3K-3-390/2002).

On the one hand, the application of such criteria is subjective and does not eliminate indefiniteness in legal relations; it can also lead to a breach of the principles of impartiality of judges, equality of the parties and distort the very substance of adversarial proceedings. On the other hand, the application of the criteria under discussion may be justified in case they are used as a basis for establishing special distribution rules of the burden of proof in law rather than in the case-law and only in those categories of cases which are related to the protection of public interests (family, legal relations of employment, protection of human rights, bankruptcy, unfair competition, etc.).

The distribution rule of the burden of proof in the laws of German and Austrian civil proceedings implies the obligation of the party which submits a claim to provide evidence on the facts claimed and the other party carries the burden of proving the non-existence or insufficiency of the facts related to the claim (Rüßmann, H., 1995, P. 798; Klicka, T., 1995, P. 9; Rosenberg, L.; Schwab, H. K.; Gottwald, P., 1993, P. 671), i.e. the burden of proof falls on the party to whom the legal consequence deriving from the case facts is favourable (Rosenberg, L., 1965, P. 98, Klicka, T., 1995, P. 8). As this fundamental principle forms the basis of legal norms, it is described as a “normative theory” (Klicka, T., 1995, P. 9), i.e. the legal facts of substantive nature, which are subject to the ordinary procedure of proof and which form the statutory norm hypothesis. According to some specialists of Austrian civil proceedings, the legislator links legal consequences in legislative norms with the fact that case facts form the statutory factual elements (statutory norm hypothesis) (Klicka, T., 1995, P. 2). Thus, following the rule under discussion, the plaintiff has to prove the validity of his claims (factual basis) and the defendant has to substantiate the basis of his objection to the claim (*Lat. reus in excipiendo fit actor*). If the plaintiff fails to prove his plea, the claim will not be satisfied (*Lat. actore non probante reus absolvitur*). If the defendant fails to prove the substance of his objections, the court's decision against him may be rendered. Such an abstract nature of the general distribution rule of the burden of proof, however, does not answer the question who should bear negative consequences in case the court is unable to ascertain whether the relevant facts exist or not (in the *Non-liquet-Lage* situation), i.e. the question as to the party against which an unfavourable decision should be rendered also remains opened by the rule under discussion. Who should sustain negative procedural consequences is the question likely to be answered with reference to the above-discussed distribution criteria of the burden of proof – the type of a legal fact and the type of a claim.

In the states of common law, the burden of proof is on the party which seeks to change (terminate) the substantive legal relations existing

between the parties. Negative consequences are also entailed by the party which fails to prove the validity of the claim asserted by it (Denning, A., 1945, P. 370-390). Moreover, there is the theory widespread in common law countries that the distribution of the burden of proof between the parties is the matter of the court rather than the legislator. The court, following the principle of equality of the parties, has to ascertain in each individual case which party has to prove which facts. When determining the distribution of the burden of proof for the parties, the court should not only take the principle of equality of the parties into consideration but also for which of the parties it is easier to prove the relevant facts and obtain respective evidence. The burden of proof is carried by the party for which it is easier to do that (Cross, S. R.; Tapper, C., 1990, P. 110 – 158). The judge has to ascertain which of the parties has this obligation. For each statement at issue, it shall identify, firstly, which party will lose if no sufficient admissible evidence is provided in order to hold that the statement is correct; secondly, which party will lose if no evidence is submitted and the jury is unable to decide whether the statement is true (Reshetnikova I. V., 1997, P.106–107.). According to some authors, while distributing the burden of proof, attention should be paid to the following criteria: firstly, the proof of specific facts is an obligation of the party for which it is easier; secondly, the principle of justice and equality; thirdly, judicial assessment of probabilities (McCormic; Tilford, Ch., 1992, P. 430–432).

### **Application of the general distribution rule of the burden of proof substantiating legal facts of procedural nature**

The issue of distribution of the burden of proof is important not only when ascertaining legal facts of substantive legal nature, but also when deciding different procedural issues (regarding the suspension, termination of proceedings, the ordering of expert examination, the application of interim measures, the challenge of judges, etc.). The general distribution rule of the burden of proof, however, should not be held to be identical with substantiation of legal facts of substantive nature in procedural issues (Klicka, T., 1995, P. 11) as there is a major difference in the objective of proof. When proving the circumstances of substantive nature, the parties seek to prove the validity of their claims or objectives and in this way to resolve the case on the merits. Substantiation of the legal facts of procedural nature, however, does not seek, in principle, to prove the plea but to settle certain intermediate questions which would help to hear the case fairly and this predetermines a different role of the parties in the procedure of adducing evidence. It does not mean, however, that the distribution rule of the burden of proof discussed at the beginning should not be applied when dealing with the issues of procedural nature. The only difference is that there is no need to look for an objective basis for the distribution of the burden of proving the

circumstances of procedural nature; it is sufficient to have an abstract wording of the rule of distribution of the burden of proof so that the issue of distribution of the burden of proof could be possible to be dealt with. The burden of proof of the circumstances of procedural nature falls on the party for whom the legal consequence deriving from the case facts is favourable, i.e. the party, which is interested in having the procedural issue resolved positively in its regard, will bear the burden of proving the subject-matter of the claim. In case of failure to comply with or in case of improper compliance with the procedural burden of proof, an unfavourable decision against such a party may be rendered.

Thus, when proving the legal facts of both procedural and substantive nature, the distribution of the burden of proof between the parties is possible following the general distribution rule of the burden of proof. The difference is only that, differently from proof of facts of substantive nature, when the abstract nature of the general distribution rule of the burden of proof comes up as a problem, an abstract wording of distribution of the burden of proof is sufficient while proving the circumstances of procedural nature – each party has to substantiate the validity of its claims and objectives in order to have the issue of distribution of the burden of proof solved correctly.

### **Summary**

The classical content of the general distribution rule of the burden of proof, which has been taken over from the Roman law, has, in principle, remained unchanged at the present time. Due to the abstract wording of the general distribution rule of the burden of proof, however, it is not always possible to determine which of the parties should be subject to negative legal consequences as a result of improper compliance with the burden of proof, especially in the situations of *Non-liquet-Lage*. One of the potential solutions to this problem is to identify objective criteria to be invoked in deciding the issue of distribution of the burden of proof. It is the type of a legal fact and the type of a claim that, taking into account the purpose of proceedings, may be considered to be objective criteria for distributing the burden of proof. The application of such criteria is relevant only in case the party has to bear the burden of proving legal facts of substantive nature; proof of facts of procedural nature only requires an abstract wording of the distribution of the burden of proof so that the issue of distribution of the burden of proof could be decided correctly.

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