СРАВНИТЕЛЬНОЕ ПРАВО

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The subject of proof and the burden of proof in civil proceedings in the Anglo Saxon and continental legal systems of foreign countries

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The article deals with the problems of the concept and legal nature of the subject of proof and the distribution of the burden of proof in civil proceedings in the countries of the Anglo-Saxon and continental legal systems. The authors point out the need for a fundamental revision of the Russian theory of evidence and making the necessary changes to procedural legislation, taking into account the positive experience of the legal regulation of the subject of proof in the procedural legislation of other states and the reception of certain positively tested norms of procedural legislation of foreign countries in terms of the regulation of the subject of proof and the distribution of the burden of proof in Russian procedural legislation. The authors note that the advantage of English and American law is the detailed consolidation of the mechanism of the disclosure of evidence and the sanctions for violation of its order, which amount to the inability to refer to evidence that has not been disclosed in accordance with the established procedure or disclosed with its violation. Currently, the rules for the disclosure of evidence are also fixed in the current civil procedural legislation. The sanctions for violation of the procedure for the disclosure of evidence have not been established. The paper notes that the legislative structure of the active role of the court in evidentiary activities according to the model of the French court could find consolidation in Russian civil proceedings. The authors conclude that the mechanism for determining the subject of proof is fixed in the procedural legislation of Russia, taking into account the type of substantive law applicable to disputed legal relations, detailing the general rule for the distribution of the burden of proof, fixing the mechanism of private rules for the distribution of the burden of proof.

Keywords: Russian procedural legislation, the law of evidence, the subject of proof, the burden of proof.

1. Introduction

Updating the laws of evidence is inevitable in the climate of improving Russian procedural legislation towards unification and optimization of judicial procedures, strengthening the function of the judiciary and reforming the judicial system. At the same time, the objectives of legal proceedings are to ensure that cases are heard and resolved in a proper and timely manner for the protection of violated or contested rights, freedoms and legitimate interests of the subjects of legal relations. Appropriate determination by the court of the subject of proof in a case is of great practical importance. The circumstances of the subject of proof set the boundaries of the evidentiary activity of the participants in a case. Determining the circumstances of the subject of proof is one of the three stages of the law enforcement process. While the circumstances of the subject of proof are determined on the basis of the applicable norm of substantive law, taking into account the claims and objections put forward by the participants in a case, a specific rule of law can be chosen only by establishing the factual circumstances of a case. The interrelationship and interdependence between establishing the factual circumstances of a case and the choice of a norm to be applied could be reflected by the legal category of "legal qualification". Legal qualification of a set of facts and relations between the parties is an indispensible prerequisite for the application of a legal norm, so far as the assessment of the legal outcomes based on the disposition or sanction of the norm will call for prior establishing the concordance of the facts of the case with its hypothesis. Inaccurate legal qualification of legal relationship entails incorrect assessment of legal consequences and results in misjudgment. The circumstances of the factual composition of a contested legal relationship (the subject of proof in a case) predetermine that the contested substantive legal relationship is qualified correctly. The circumstances of the subject of proof set the boundaries of the evidentiary activity of the parties in a case. The circumstances required and significant for due consideration and resolution of a dispute allow for tracing the connection between the burden of proof distributed by the court between the parties involved in a case, in accordance with general and specific guidelines for the distribution of the burden of proof. The circumstances of the subject of proof predetermine the requirements of relevance and sufficiency of evidence. The circumstances of the subject of proof may be established with varying degrees of certainty. Therefore, there is a relationship between the subject of proof and the standards of proof that can be traced. When a court fails to determine the circumstances of the subject of proof correctly and completely, it is the ground for overturning a judicial act; the specified ground refers to the violation of the obligation to substantiate the judicial act. The requirement of substantiation is imposed on a court decision, according to which the conclusions made by the court should be compatible with the circumstances of the subject of proof established by the court, and the account of these circumstances must, furthermore, be complete and detailed, the conclusions of the court must be confirmed by evidence comprehensively and fully examined during the legal proceeding. While judicial errors in determining the subject of proof can be both explicit and latent, they would always be deemed significant, as they result in overruling or reversing the judicial act. Violation by the court of the duty to determine the subject of proof in the case entails the violation of the principles of adversarial and equal rights of the parties in court proceedings, which gives rise to the violation of a more generic right — the right to a fair trial. Incorrect or incomplete determination of the circumstances of the subject

of proof affects the validity of the distribution of the burden of proof, interferes with presenting relevant, admissible and sufficient evidence in general or by one of the parties, and, at the same time, disrupts the component of the procedural element of the right to a fair trial, namely the right to equal procedural opportunities of the parties in a particular case. It is also worth noting that many categories of the law of evidence can be considered controversial, which can be fairly attributed to the category of "the subject of proof" in civil proceedings. However, in the doctrine, individual scholars have highlighted the need for a fundamental revision of the theory of evidence. In this context, the enquiry into the issue of the subject of proof in civil proceedings as it is presented in the current procedural doctrine, current procedural legislation and judicial practice is apparently relevant. Given the imperative of a fundamental revision of the theory of evidence, as well as the need to make changes in the procedural legislation, it is relevant to address the positive experience of the legal regulation of the subject of proof in the procedural legislation of other countries and to adopt some of the norms of the procedural legislation, especially those which were successfully tested by other countries in terms of the regulation of the subject of proof and the distribution of the burden of proof, into Russian procedural legislation. Defining a single concept of the study, it seems correct to analyze particular provisions on the subject of proof and the burden of proof in the countries of the Anglo-Saxon legal system (England, USA) and the countries rooted in the continental legal system (France, Germany, some of the countries of the Commonwealth of Independent States) in order to identify the specifics of legal regulation.

2. Basic research

2.1. The subject of proof and the burden of proof in civil proceedings in England and the USA

In English law the subject of proof is understood as a set of facts confirming or refuting claims and objections (Reshetnikova 1997, 98–104; Puchinsky 2008, 189–199). The subject of proof is determined on the basis of substantive law rules, only the facts disputed by the parties being included. There is an English law rule, similar to that operating in the Russian arbitrazh procedure, which states that if the parties disagree on factual circumstances this situation must be directly expressed by the parties in the pleadings, otherwise, omitting to do so is equated to accepting a disputed fact. In the sense of English law, the subject of proof is determined by the parties. The circumstances that are not subject to proof include the facts of common knowledge, pre-judicial facts, presumed facts, facts of personal court expertise (Puchinsky 2008, 199–213). Prejudices are established by case law. Judicial acts, both in civil and criminal cases, are of pre-judicial significance. The objective and subjective limits of a presumption coincide with those in force in the Russian doctrine of the law of evidence. The definition of presumption in English law resonates with that in the doctrine of the law of evidence in Russia (Reshetnikova 1997, 105–107). The role of a presumption is limited to establishing the party that is likely to lose the case unless they provide sufficient evidence. Presumptions are classified into refutable and irrefutable ones. Refutable presumptions are subdivided into persuasive and evidentiary ones. The function of persuasive presumptions is to prove another fact, while an evidentiary presumption is valid until proven otherwise. Irrefutable presumptions are estab-

lished by statutes and are divided into legal presumptions, permissive presumptions and presumptions made on the basis of everyday experience. The facts of common knowledge include those that are known either to a wide range of people or to the parties in the case only, or those known to the court only. In the latter instance, the party challenging such a fact is typically deprived of the opportunity to prove the opposite. The burden of proof consists of two elements in English law (Reshetnikova 1997, 107–112; Puchinsky 2008, 218–222): 1) each party has to prove the grounds of their claims and objections; 2) the burden of proof rests with the party that is likely to lose if the evidence is not presented. The burden of proof is highlighted in the English doctrine of the law of evidence, where its purpose is to provide evidence sufficient for the case to be considered.

The definition of the subject of proof in the doctrine of the American law of evidence resembles the definition of legally significant circumstances in the doctrine of the Russian law of evidence (Reshetnikova 1997, 98–104). The subject of proof is determined by the parties on the basis of a substantive law norm applicable to the disputed legal relations and upon the claims and objections of the parties in the pleadings. Among the grounds for the exemption from the burden of proof are the facts known to the court; the facts of common knowledge; admitted facts; pre-judicially established facts; presumed facts. There is a concept of a "non-reciprocal presumption" in the American law of evidence; according to its rule a party who did not participate in a previous dispute has the option to use a presumption against a person who lost in a previous dispute. The burden of proof rests with the parties in the American law of evidence (Reshetnikova 1997, 105–107). In this regard, the burden of proof has a complex structure (the burden of presenting evidence and the burden of allegation). The duty of proof is determined by the court. The burden of proof is addressed in the doctrine of the law of evidence of the United States and the procedural legislation of the states. The concept of *prima facie* evidence is used to denote the legal force and credibility of evidence. Sometimes a reference to the first type of evidence may be contained in the rules of law. The function of presumptions (Reshetnikova 1997, 105–107) in the law of evidence of the USA is limited to the redistribution of the burden of proof.

2.2. The subject of proof and the distribution of the burden of proof in the civil proceedings of France and Germany

The subject of proof in the civil procedural law of France[1] is a set of legal facts which, by virtue of a relevant rule of law, are associated with a certain legal effect; these are the facts to be proven in a specific case (Mirzoian 2008). The French Court has broad powers: 1) to prescribe the procedure for considering a case; 2) to determine the subject of proof; 3) to obtain evidence if so requested by the parties; 4) to determine applicable rules of law (Lazarev 2018). When a French court determines the legal qualification of a legal relationship, it is bound by the qualification given by the parties and can select the applicable norm (Medvedev 2004, 94) on its discretion only if a disagreement between the parties has arisen. When considering a case on the merits, French judges are completely independent in assessing evidence presented to them. Judicial discretion comes into play

[1] Article 9 of the Civil Procedure Code (CPC) of France as amended and supplemented as of 27.06.2023. Accessed December 5, 2023. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716.

when the court analyzes written evidence, checks the date and authenticity of a copy, decides whether to accept or reject commercial evidence, rules on inadmissibility of written evidence, assesses the significance of circumstantial evidence, considers expert opinion, decides on using a confirmation oath, etc. As for the French Court of Cassation, the scope of its powers in most cases is minimal (Givel 2013). To ensure the administration of justice in proceedings, in order for a specific fact to be provable it should meet two criteria: a) be controversial; b) be relevant. In substantiating their claims, the parties must state and prove the facts which support their claims (Medvedev 2004, 96–97). The subject of proof may include both positive and negative facts. The fact stated by the party in the justification of their right, unless challenged during the consideration of the case on the merits, should be considered as true and existing. At the same time, the relevance of a fact is understood as the ability to justify a claim or objection; contesting a fact can be expressed by denying it. Indisputable (accepted) facts, pre-judicially established facts and the facts of common knowledge are excluded from the subject of proof. Pre-judicially established facts are the facts established in a court decision. Such facts are deemed to be existing or non-existing in reality, since they are specified in a court decision that has entered into legal force. Prejudice is given only a relative legal force as it applies only to the parties in a dispute (Mirzoian 2008, 128). Regarding the burden of proof in French procedural law it should be noted that even if a French judge is given real powers to establish the circumstances of a case[2], the procedure remains accusatory: with the exception of legislative presumptions and those deriving from practice, the plaintiff is under an obligation to present evidence to support their claim[3], while the defendant is obliged to prove their own statements (Givel 2013). Therefore, in the sense of French law, evidence should be submitted by opposing parties or even be external by nature. As a general rule, evidence should never come from a person whose allegations are grounded thereon (no one can create evidence for themselves). It should also be noted that a French judge is not empowered to use information received privately. In addition, the adversarial principle underpinning the entire legal system should be respected (Givel 2013). In France, a court plays an active role in civil proceedings, it is empowered to initiate collecting evidence; in particular, a judge has the right to appoint an expert examination, summon the parties to give explanations, participate in the examination for direct perception of the facts, request a document withheld by a party or a third party, officially prescribe any legal measures of judicial inquiry. If evidence is withheld, the court may apply an increasing daily *l'astreinte* (Mirzoian 2008, 142–143). Presentation of evidence includes steps such as examining evidence presented by the other party, obtaining evidence presented by third parties. Each party must provide the other party with evidence they rely upon. If a party fails to fulfill this duty, the judge sets the deadlines and terms for evidentiary hearing, and, if the party does not comply with it, a fine is imposed (Mirzoian 2008, 143). As noted in legal literature, the French Civil Code[4] recognizes legal and factual presumptions as evidence (Mirzoian 2008, 133); therefore this approach is inconsistent with that in the Russian civil proceedings where presumptions are understood as private rules for the distribution of the burden of proof. Presumptions are understood as conclusions that are derived from the law in line with

[2] Article 10 of the CPC of France.

[3] Article 9 of the CPC of France.

[4] Accessed December 5, 2023. https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF.

known facts, or can be made by the court in relation to unknown facts. A statutory presumption is also considered as the grounds for the exemption from proof in French civil law. Presumptions fall into refutable and irrefutable, absolute and relative ones. While absolute presumptions are applicable to any persons, relative presumptions apply to certain categories of persons. As a general rule, when applying factual presumptions, the French court takes into account the following criteria: only presumptions which are serious, definite and concurring in their meaning when applied, and only in cases which admit evidence, shall be applicable. Factual presumptions are not applicable when the validity of a transaction is challenged on the grounds of forgery or fraud (Mirzoian 2008, 133–134). The purpose of proof in the doctrine of the French law of evidence is to obtain true knowledge about the subject of knowledge. The subject of proof is understood as the facts to be proven in a particular case, with which, by law, certain legal consequences are associated, and which the establishment of the judicial truth depends upon. The classification of the facts of the subject of proof is made up by positive and negative facts, disputed facts and relevant facts. Each party must prove the cause of their action and the grounds for objections. The ability to substantiate a claim or objection is regarded as the relevance of a fact. The denial of the fact is considered as the legal means of defense available to a party. The implication of these rules is the principles of neutrality of the court and the leading role of the parties in a trial, in case the principles of legality and integrity are observed. The principle of cooperation with the court and the other party in resolving a dispute is fixed by law. In all cases, the judge may assist in obtaining evidence from the parties and a third party under the influence of coercion, the burden of proof of third parties shall be enforced if there are no legal impediments. If evidence is withheld, the court may impose an increasing *l'astreinte*. Within the meaning of French procedural law, presentation of evidence encompasses actions including examining evidence presented by the other party and obtaining evidence submitted by third parties. In case the burden of proof is violated, the judge sets the deadlines and terms for evidentiary hearing, for non-compliance with which a fine is imposed. Thus, the subject of proof includes disputable and relevant facts with exclusion of indisputable (accepted) facts, pre-judicially established facts and the facts of common knowledge. The facts which were established in the judgment are called pre-judicially established facts. Prejudice is applicable only to the parties to the dispute.

The subject of proof under German procedural law may include facts; empirical evidence or situations arising from life experience; legal norms of foreign law (Davtyan 2000, 109–110). Only the facts that are asserted by the party and disputed by the opponent are subject to proof. Crucial facts, that is, the facts underpinning the judgment in a particular case, are subject to proof. The notion of facts in the German law of evidence refers to all stuff that belongs to the factual composition of the adopted legal norm and forms the basis of the judicial syllogism. These are events and states of the external world and the human soul, concrete and specified in time and space, which make objective law a prerequisite for a legal action. A distinction is made between internal and external facts (Davtyan 2000, 62). Internal facts are conscious intention (intent), the knowledge of certain circumstances. In the law of evidence, the difference between internal and external facts is that the former are not always available and, as a rule, can be established on the basis of the latter. The facts constituting the subject of proof are commonly classified into positive and negative, depending on the events or actions that have occurred or have been committed, or, otherwise, did not occur or were not committed. In addition, there are the facts

that are directly related to the factual composition of the applicable norm, and indirect facts that are of indirect relevance to the case. In German civil proceedings, the following are considered as the grounds for the exemption from proof: accepted facts; indisputable facts; the facts known to the court; legal presumptions; empirical evidence (Davtyan 2000, 63–64). The burden of proving the factual prerequisites of the legal norm indicated by a party as a defense rests with the party (Davtyan 2000, 111–113). The party has to prove every statement they refer to. This is the basic rule for the distribution of the burden of proof. Moreover, the notions of objective and subjective burden of proof are identified (Davtyan 2000, 65).

2.3. The subject of proof and the distribution of the burden of proof in civil proceedings in selected countries of the Commonwealth of Independent States

According to the civil procedural legislation of the Republic of Belarus, the subject of proof encompasses all the facts that are important for the resolution of a case. The "subject of proof" term is fixed by the legislature. The general rule for the distribution of the burden of proof is established by Art. 179 of the Civil Procedure Code of the Republic of Belarus[5], while the presumptions are referred to the rules for the redistribution of the burden of proof: the facts which, by law, are deemed established shall not be subject to proving. However, evidence may be presented to refute them. The facts of common knowledge, pre-judicially established facts (Art. 182 of the CPC RB) are considered as the grounds for the exemption from proof. At the same time, it is not of mandatory significance for the court that a party accepts the facts which support the other party's claims or objections. The court may consider an accepted fact as an established one if it has no doubt that the acceptance of this fact is consistent with the circumstances of the case. When considering an appeal and/or an appeal complaint, the court of appeal checks the validity of the decision made by the court of first instance on the factual circumstances of the case and the validity of substantive and procedural law application looking at the documentation in the case and other additionally submitted materials. The court of appeal may establish new facts within the limits of the claims stated in the court of first instance and examine new evidence that the party was not able to present to the court of first instance for the reasons recognized as valid by the court of appeal. If, when reviewing the decision of the court of first instance in the contested (protested) part, it is established that the court violated or applied the norms of substantive and/or procedural law incorrectly, the appellate court has the right to review such a decision in its entirety. In this case, the ruling of the court of appeal must contain the reasons for which the court came to the conclusion that such a review was necessary (Art. 418 of the CPC RB). The decision of the court of first instance may be overruled or reversed on appeal, if: 1) the court has not taken into account all the facts included in the subject of proof in the case; 2) the facts underlying the decision are not supported by sufficient and credible evidence; 3) the conclusions of the court laid down in the decision do not conform to the established facts (Art. 424 of the CPC RB).

[5] The Civil Procedure Code of the Republic of Belarus. Accessed December 5, 2023. https://pravo.by/document/?guid=3871&p0=hk9900238.

Under Part 2 of Art. 73 of the Civil Procedure Code of the Republic of Kazakhstan[6], the circumstances deemed significant for due resolution of a case are determined by the court on the basis of the claims and objections of the parties and other persons participating in the case, taking into account applicable norms of substantive and procedural law. A party has the right to refer only to evidence disclosed in the preparation for the trial or during the proceedings, in the cases established by Part 1 of this Article. Each party must prove the circumstances which it refers to as to the cause of action or the grounds for its objections, exercise the right to defense, assert and challenge facts, present evidence and objections to evidence within the time limits set by the judge that shall comply with due process and be aimed at facilitating the proceedings. The burden of proof in the cases specified in Chapter 29 of the CPC RK rests with the state authorities, the local government, public associations, organizations, officials and civil servants, whose acts, actions (omissions) are appealed (Art. 72 of the CPC RK). Pursuant to Art. 76 of the CPC RK, the grounds for the exemption from proof are the facts of common knowledge, pre-judicially established facts, and presumed facts. In addition, the circumstances are considered to be established without evidence, unless proven otherwise by due process of law: 1) the correctness of research methods generally accepted in modern science, technology, art and craft; 2) the person's knowledge of the law; 3) the person's knowledge of their official and professional duties; 4) the lack of training or education of the person who failed to submit a document in confirmation of their aptitude and to indicate the educational establishment or other institution where they received special training or education (Part 7 of Art. 76 of the CPC RK). In addition, the accepted circumstances are not subject to proof (Part 2 of Art. 79 of the CPC RK). When making a decision, the court evaluates evidence, determining which of the circumstances relevant to the case have been and have not been established, what legal relations of the parties are, which law should be applied in this case and whether the claim is valid. The court resolves the case within the limits of the plaintiff's claims. Having been recessed to make a decision, the court, in case it has found it necessary to clarify the circumstances relevant to the case, or to examine evidence, shall issue a ruling on the resumption of the merits phase which is recorded in the minutes of the court session. After the consideration of the case on the merits is completed, the court hears the arguments once again, and, if the case is covered by Art. 219 of the CPC RK, the opinion of a public prosecutor is also heard (Art. 225 of the CPC RK). In the reasoning part of the decision the circumstances of the case established by the court, the proofs laid down in the court's conclusions on the rights and obligations, the arguments on which the court rejects any evidence, the laws that the court has applied, are briefly indicated. If the claim is accepted both by the defendant and the court, the reasoning part may be limited to indicating only this fact (Part 5 of Art. 226 of the CPC RK). The grounds for overruling or reversing the decision on appeal are: 1) failure to determine and clarify the circumstances relevant to the case; 2) failure to prove relevant circumstances established by the court of first instance; 3) discrepancy between the conclusions set out in the decision of the court of first instance and the circumstances of the case (Part 1 of Art. 427 of the CPC RK). When considering the case in cassation, the court reviews the legality of judicial acts issued by the courts, based on the documentation within the arguments in motions, petitions, and protests available in the case. In the interests of legality, the court of cassation is

[6] Civil Procedure Code of the Republic of Kazakhstan. Accessed December 5, 2023. https://online.zakon.kz/document/?doc_id=34329053.

empowered to go beyond the limits of a motion, petition or protest and review the legality of the appealed or protested judicial act in full (Art. 449 of the CPC RK). There is no supervisory procedure in the CPC RK.

The concept of the subject of proof is not found in the Civil Procedure Code of Armenia[7]. By virtue of Art. 52 of the CPC of Armenia, the facts of common knowledge and pre-judicially established facts are exempt from proof. It is not of mandatory significance for the court that a party accepts the facts which support of the other party's claims or objections. The court may consider an accepted fact as an established one if it has no doubt that the acceptance of this fact is consistent with the circumstances of the case and the party was not under the influence of deceit, violence, threat, mistake, conspiracy between the representatives of the parties in order to conceal the truth (Part 2 Art. 64 of the CPC of Armenia). There is no stage of preparation; the circumstances on which the claim is based are indicated in the complaint. When making a decision, the court shall: 1) assess the proofs; 2) determine which of the circumstances relevant to the case have been or have not been established; 3) determine what laws and other legal acts are applicable in the case; 4) resolve the complaint in full or in part, or dismiss it (Part 1 of Art. 131 of the CPC of Armenia). The reasoning part of the decision must indicate the circumstances of the case revealed by the court, the evidence underpinning the court's conclusions, the arguments on which the court rejected some of the proofs, as well as the laws and other norms that the court was guided by when making the decision (Part 1 Art. 132 of the CPC of Armenia).

Under Art. 82 of the Civil Procedure Code of the Republic of Azerbaijan[8], the facts of common knowledge and pre-judicially established facts are exempt from proof. If a party retains evidence and fails to present it at the request of the court, the judge is empowered to recognize the circumstances that are relevant to the case as established on the basis of the data submitted by the parties. If a party accepts the facts which are the grounds for the other party's claims and objections, the latter is exempt from the burden of proof onwards. Acceptance of the fact by a party is recorded in the minutes of the court session and signed by the party accepting the fact. If acceptance of the fact is set out in a written statement, it shall be attached to the case file. If the court has doubts and suspects that confession was made in order to conceal the real circumstances of the case, or under the influence of deceit, violence, threat or mistake, it shall not accept the confession. In this case, the facts are subject to proof on a general basis (Art. 106.2–106.4 of the CPC of the Republic of Azerbaijan). The reasoning part of the decision must indicate the circumstances of the case established by the court, the proofs underpinning the court's conclusions, the arguments on which the court rejected some of the proofs or the laws and norms cited by the parties in the case, as well as the laws and other norms that the court was guided by when delivering the judgment. In the event that the claim is accepted by the defendant and the court, the reasoning part may be limited to indicating only this fact (Art. 220.4 of the CPC of the Republic of Azerbaijan). New evidence is accepted by the court of appeal if the persons involved explain the impossibility of presenting evidence in the court of first instance for reasons beyond their control (Art. 371 of the CPC of the Republic of Azerbaijan). The

[7] Civil Procedure Code of Armenia. Accessed December 5, 2023. http://www.parliament.am/legislation. php?sel=show&ID=1918&lang=rus.

[8] Civil Procedure Code of the Republic of Azerbaijan. Accessed December 5, 2023. https://online. zakon.kz/document/?doc_id=30420065.

grounds for overturning the decision on appeal are: the violation of the norms of substantive or procedural law or incorrect application thereof; failure to reveal all the factual circumstances essential for the conclusions of the court; failure to prove the relevant circumstances established by the court of first instance; the discrepancy between the conclusions set out in the decision of the court of first instance and the circumstances of the case. If the decision of the court of first instance is correct in essence, lawful and substantiated as far as the facts of the case are concerned, it cannot be overturned on formal grounds alone (Art. 385 of the CPC of the Republic of Azerbaijan). The norms of substantive law are considered violated or incorrectly applied if the court of first instance did not implement the law to be applied, or misinterpreted the law (Art. 386 of the CPC of the Republic of Azerbaijan). If other factual circumstances affecting the outcome of the case are established during the examination of any proof in the court of appeal, this situation is referred to as an incomplete clarification of all the factual circumstances essential for the outcome of the case (Art. 388 of the CPC of the Republic of Azerbaijan). The circumstances essential for the case and recognized by the court as established, are considered as unproven in the court of first instance if the facts of the case were not supported in the decision of the court of first instance by evidence specified in the law or were supported by inaccurate, contradictory, irrelevant evidence (Art. 389 of CPC of the Republic of Azerbaijan). The arguments laid out in the judgment are recognized as inconsistent with the circumstances of the case if the court came to a wrong conclusion about the relationship between the parties based on the established facts (Art. 390 of the CPC of the Republic of Azerbaijan).

Under Art. 58 of the Civil Procedure Code of the Republic of Tajikistan[9], each party must prove the circumstances which are the grounds for their claims and objections if the latter are challenged by the other party, unless otherwise is provided by law. The party which did not prove any of the circumstances shall bear adverse consequences of the failure to prove this circumstance. Each statement of either party about the circumstances of the case, if it is not challenged by the opposite party, is considered recognized and thus indisputable, which relieves the parties from the burden of proving this statement. The statement of the party is considered accepted even if it is challenged by the opposite party with no concrete arguments being put forward. To contest the statement of the other party without putting forward any arguments is possible only in those cases where the subject of the statement is a fact not related to the actions of the disputing party and is not the subject of their own perception. The circumstances significant for due resolution of a case are determined by the court on the basis of the claims and objections of the parties in the case, in accordance with the applicable norm of substantive law (Parts 1–4 of Art. 58 of the CPC of the Republic of Tajikistan). The grounds for exemption from the burden of proof are the facts of common knowledge, pre-judicially established facts (Art. 64 of the CPC of the Republic of Tajikistan). Explanations given by the disputing parties and third parties in connection with the circumstances known to them and those essential for due resolution of a case are subject to verification and assessment along with other evidence. If the party obliged to prove its statements or objections withholds evidence and fails to present it to the court, the judge is empowered to refer to the explanations of the other party in their conclusions. If the party accepts the circumstances which are the grounds for the other party's claims or objections the former is relieved from the burden of proving these

[9] Civil Procedure Code of the Republic of Tajikistan. Accessed December 5, 2023. https://online.zakon.kz/document/?doc_id=30410757.

circumstances onwards. Acceptance of the fact by the party is recorded in the minutes of the court session. If acceptance of the fact is set out in a written statement, it shall be attached to the case file. The party who failed to substantiate their allegations or objections in full using available means of proof has the right to file a motion requesting the court to interrogate the opposite party about the facts to be proven. If the other party evades testifying or does not submit evidence requested by the court, the court decides on the credibility of this evidence on its own discretion, taking into account all the circumstances of the case, the reasons for evasion (Art. 71 of the CPC of the Republic of Tajikistan). The circumstances which are the grounds for the cause of action and the proofs confirming these circumstances are indicated in the complaint (Part 2 of Art. 134 of the CPC of the Republic of Tajikistan). The reasoning part of the decision must indicate the circumstances of the case established by the court, the proofs underpinning the court's conclusions, the arguments on which the court has rejected some of the proofs; the laws that the court has been guided by when delivering the judgment (Part 2 of Art. 202 of the CPC of the Republic of Tajikistan). The CPC of the Republic of Tajikistan does not provide for proceedings on appeal as a stage of civil proceedings. The court of cassation verifies the legality and validity of the decisions made by the court of first instance, based on the arguments set forth in the cassation complaint and protest, and on the grounds of the objections to the complaint and the protest. The court accesses all proofs available in the case, as well as additionally submitted evidence, if it recognizes that the party could not present these proofs to the court of first instance, confirms the facts and legal relations indicated in the court decision which has been appealed and protested, or establishes new facts and legal relations. The court of cassation, in the interests of ensuring the supremacy of law, is empowered to review the decision of the court of first instance in full (Art. 336 of the CPC of the Republic of Tajikistan). The grounds for overturning or reversing the decision in cassation are: the incorrect definition of the circumstances relevant to the case; failure to prove the circumstances relevant to the case which were established by the court of first instance; discrepancy between the conclusions set out in the decision of the court of first instance and the circumstances of the case; the violation or misapplication of substantive or procedural law. The instances of significant violations of the norms of substantive or procedural law are recognized as the grounds for the reversal or modification of judicial acts as the matter of judicial review (Art. 376 of the CPC of the Republic of Tajikistan).

Article 72 of the Civil Procedure Code of the Republic of Uzbekistan[10] establishes a general rule for the distribution of the burden of proof. The court determines which circumstances are relevant to a case and which of the parties has to prove them, to bring the proofs related to these circumstances forward for a discussion even if it was not referred to by the parties. Evidence shall be submitted by the parties and other persons participating in the case. The court may ask them to provide further evidence. If it is difficult for the parties and other persons participating in the case to submit additional evidence, the court, at their request, assists them in collecting evidence. The facts of common knowledge, pre-judicially established facts, and those affirmed by a notary are considered as the grounds for exemption from proof (Art. 75 of the CPC of the Republic of Uzbekistan). The explanations of the parties, third parties and their representatives in connection with the circumstances known to them and essential for due resolution of a case, are subject to verification and evaluation

[10] Civil Procedure Code of the Republic of Uzbekistan. Accessed December 5, 2023. https://online.zakon.kz/Document/?doc_id=36307998 pos=6;-106.

along with other evidence collected in the case. If a party accepts the circumstances which are the grounds for the other party's claims or objections, the named party is relieved from the burden of proving these circumstances onwards. If the court doubts any of the facts, this fact is subject to proof on a general basis. Acceptance of the fact by the party is recorded in the minutes of the court session and signed by the accepting party. If acceptance of the fact is set out in a written statement, it shall be attached to the case file (Art. 81 of the CPC of the Republic of Uzbekistan). The grounds for overturning or reversing the judicial act on appeal are: 1) the incomplete clarification of the circumstances relevant to the case; 2) failure to prove relevant circumstances which the court considered as established; 3) the inconsistency of the conclusions of the court set out in the judgment with the circumstances of the case (Art. 3991 of the CPC of the Republic of Uzbekistan). When considering the case in cassation, the court reviews whether the court of first instance and the appellate court applied substantive law and complied with the rules of procedural law correctly based on the materials of the case. The court of cassation is not entitled to examine new evidence and establish new facts (Art. 416 of the CPC of the Republic of Uzbekistan).

Under Art. 118 of the Civil Procedure Code of the Republic of Moldova[11], each party must prove the circumstances which are the grounds for their claims and objections, unless otherwise is provided by law. A party that did not fulfill their duty to prove certain facts in full is entitled to filing a motion requesting to hear the opposing party' statements on these facts if the motion is not related to the circumstances that the court considers proven. The circumstances essential for due resolution of a case are finally determined by the court based on the claims and objections of the parties and other participants in the case, and the applicable norms of substantive and procedural law. In the event of non-compliance with the provisions of the law of evidence, or the loss of the original copy of the document, the party or other participant in the case who could and should have obtained reliable and accurate evidence before the trial shall face adverse consequences of the failure to prove statements about the factual circumstances of the case. If it is necessary, the court (judge) is empowered to ask the parties and other participants in the case to provide additional evidence and prove the facts constituting the subject of proof in order to verify their authenticity. Under Art. 123 of the CPC of the Republic of Moldova, the grounds for the exemption from proof are the facts of common knowledge, pre-judicially established facts, presumed facts, and those that are not challenged by the other party. The facts stated by one of the parties are not subject to proving to the extent that the other party does not deny them. If the party baring the burden of proof withholds evidence and does not present it to the court, the judge has the right to refer to the explanations of the opposing party in order to substantiate the conclusions underlying the decision. If the party accepts the facts which are the grounds for the other party's claims or objections either at the stage of the trial or executing the court order, this situation releases the latter from the need to prove these facts. Acceptance of the fact by the party is recorded in the minutes of the court session. If acceptance of the fact is set out in a written statement, it shall be attached to the case file (Parts 3 and 4 of Art. 131 of the CPC of the Republic of Moldova). Preparation for the trial is mandatory in every civil case and aims a) to determine the applicable law and legal relations between the parties; b) to establish the circumstances that are essential for due resolution of the case (Part 2 of Art. 183 of the CPC of the

[11] Civil Procedure Code of the Republic of Moldova. Accessed December 5, 2023. https://online.zakon.kz/document/?doc_id=30397949.

Republic of Moldova). The reasoning part of the decision indicates the circumstances of the case established by the court, the proofs underlying the conclusions of the court about these circumstances, the arguments on which the court rejects certain evidence, the laws the court was guided by (Part 5 of Art. 241 of the CPC of the Republic of Moldova).

The appellate instance verifies, within the limits of the submitted appeal application, withdrawals and objections, the legality and validity of the appealed decision with regard to the establishment of the factual circumstances and the implementation of the law by the court of first instance. The decision of the court of first instance is overruled or modified by the appellate instance if: 1) the circumstances essential for the resolution of the case were not determined and clarified in full; 2) the circumstances relevant to the resolution of the case and considered as established by the court of first instance were not proven by accurate and sufficient evidence; 3) the conclusions set out in the decision of the court of first instance contradict the circumstances of the case; 4) the norms of substantive or procedural law were violated or incorrectly applied.

3. Conclusions

A detailed regulation of the subject of proof in general together with the regulation of the burden of proof, specific rules for the distribution of the burden of proof and facts that are not subject to proof are viewed as a merit of English and American law. The subject of proof is determined by the parties, the burden of proof is determined by the court. Evidentiary presumptions are considered as grounds for the exemption from the burden of proof. Russian legislation, in its turn, does not define the concept of legal presumption in the current legislation, the legal nature of this category being debatable. There are two main points of view on the legal nature of presumption in the Russian theory of evidence. Some authors see presumptions as a means of redistributing the burden of proof, as a procedural benefit that modifies the general rule of distributing the burden of proof. Other researches, however, perceive evidentiary presumptions as the grounds for the exemption from the burden of proof. Therefore, it seems necessary to enshrine the mechanism of the presumption in the current Russian legislation. In addition, among the benefits of English and American law is the detailed regulation of the disclosure procedure and the sanctions for its violation, which are reduced to the inability to refer to the evidence that was not disclosed in accordance with the established procedure, or has been disclosed with its violation. Currently, the rules for the disclosure of evidence are also set out in the current Russian civil procedural legislation. However, sanctions for the violation of the disclosure procedure have not been established yet. In this situation, the norm on the disclosure of evidence in Russian civil proceedings becomes declarative.

Based on the analysis of the law of evidence in France and Germany, it may be noted that the legal regulation of proof and evidence in these countries is generally similar to those in the civil proceedings in Russia. However, the legal nature of evidentiary presumptions is different. In French law, presumptions are considered as evidence, whereas in German procedural law they are viewed as the grounds for the exemption from the burden of proof. Taking into account the analysis of the norms of the law of evidence of France and Germany, it seems fair to conclude that adopting the idea of legal presumptions as the grounds for the exemption from the burden of proof in the norms of the Russian law of evidence is a need, since such a proposition approaches their legal nature as closely as possible. The increased

efforts of the French court towards evidentiary activity and enshrining the principle of judicial guidance are regarded as a positive characteristic of the legal regulation of the institution of proof and evidence. The court has the right to collect evidence on its own initiative. In particular, a French judge has the power to both collect evidence and assist in requesting it. If evidence is withheld by a party, the court may apply an increasing daily *l'astreinte*. Russian procedural legislation does not provide for the court's active role in the evidentiary activities of the parties. The court has the right to collect evidence only in the cases specified in the law, and in the cases arising from public legal relations. The legislative construct of the court's active role in evidentiary activities following the model of the French court could also be enshrined in Russian civil proceedings.

The legal regulation of the subject of proof and the distribution of the burden of proof in the civil procedural legislation of the Russian Federation and the CIS countries are similar, however, some differences do exist. The incomplete and incorrect determination of the circumstances of the subject of proof in the Russian Federation, the CIS countries is the basis for the reversal of judicial acts on appeal. The exception is the civil procedural legislation of the Republic of Tajikistan, according to which the incorrect determination of the circumstances of the subject of proof is the basis for the reversal of a judicial act in cassation. The civil procedural legislation of the Russian Federation and that of the CIS countries resonate in understanding the subject of proof as the circumstances important for due consideration and resolution of the dispute. The burden of proof is also regulated in the civil procedural legislation of the Russian Federation and that of the CIS countries. At the same time, there are peculiarities under the legislation of the Republic of Moldova and the Republic of Tajikistan. By virtue of the civil procedural legislation of Moldova and the Republic of Tajikistan, a party that has failed to prove certain facts in full has the right to submit a petition to the court demanding to hear the opposing party on these facts. By virtue of the civil procedural legislation of Armenia, the grounds for the exemption from proof are the facts of common knowledge, pre-judicially established facts. The recognized circumstances are not binding on the court under the legislation of Armenia. The CPC RB, the CPC RK, in addition to the grounds for the exemption from proof mentioned above, include the presumed facts. The CPC of the Republic of Moldova expands the specified list by adding the facts not denied by the other party. Only the CPC of the Russian Federation and the CPC of the Republic of Uzbekistan establish identical grounds for the exemption from proof.

The advantage of the procedural legislation of the Republic of Belarus in terms of regulating the subject of proof and the burden of proof lays in the fact that the legal category of "the subject of proof" is fixed in the current procedural legislation. Legal presumptions as grounds for the exemption from proof are established by the civil procedural legislation of the Republics of Belarus and Kazakhstan. However, the procedural legislation of foreign countries and of the CIS countries, including the Russian Federation, does not establish a general device for determining the subject of proof taking into account the type of substantive law applicable to disputed legal relations. In order to define the subject of proof in civil proceedings correctly, the classification of legal norms into absolutely definite and relatively definite ones is essentially important. Relatively definite norms are those which entitle the court to resolve the case taking into account specific circumstances. There are situational norms, distinguished among relatively definite legal norms, which provide for direct and elaborate regulation by an act of a law enforcement agency, depending on the circumstances of a particular situation. The fact that these norms are rather numerous in

the domain of substantive law makes it difficult for the court to determine the subject of proof. As a general device for determining the subject of proof, it seems appropriate to establish a rule under which the court is obliged to determine the subject of proof based on the grounds for the claims and objections of the persons participating in a case and taking into account the content of the applicable rules of law. It seems necessary to enshrine the procedure for determining the subject of proof in the current law: "The court determines the facts of a law-making, law-changing, law-preventing, and law-terminating character that are essential for the consideration and resolution of a case". Law-making, law-changing, law-preventing and law-terminating facts belong, in character, to substantive law and are to be proven by parties in accordance with the evidentiary rule established by the norms of both procedural and substantive law, since the law of evidence is an intersectoral and complex institution of law. At the same time, the presence of facts which are to be determined separately in substantive law, as well as the occurrence of the sets of facts including a concretizing element, predetermine the development of a procedure for establishing the subject of proof taking into account the specific circumstances of a case.

Besides that, it should be noted that the procedural legislation does not specify the general procedure for the distribution of the burden of proof, nor does it contain a particular procedure (legal presumptions, procedural fictions and special rules for the distribution of the burden of proof in operation) for the division of the duties related to the burden of proof. Establishing the substantive facts sought by the court being a prerequisite to the resolution of a dispute, the parties in the case are obliged to prove the relevant facts precisely, therefore it seems appropriate to enshrine a detailed general regulation of the distribution of the burden of proof in the law together with the procedure by which specific rules for the distribution of the burden of proof come into play. Thus, some of legally significant circumstances in a case can be established with varying degrees of probability, which is in line with the principle of legal truth in civil proceedings.

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