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The present publication includes reports presented during the Conference devoted to the 85th Anniversary of the Faculty of Law of the Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the Faculty of Law of the Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others who are interested in different legal issues relating to the legal system of Armenia.

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**APPORTION OF BURDEN OF PROOF IN WORKS AND/OR
SERVICES CONTRACTS: ARMENIAN PERSPECTIVE:
THEORY AND PRACTICE**

**Sergey Meghryan¹,
Hayk Hovhannisyan²**

Apportion of burden of proof is a milestone in almost every court dispute or arbitration. This issue is of particular importance when a material law in an international arbitration differs from the seat of arbitration as arbitrator(s) shall figure out if there are specific burden of proof apportion regulations provided by the material law (including the relevant precedents) governing the dispute despite the commonly accepted concept that apportion of burden of proof is generally procedural matter, and the procedural rules of the seat of arbitration shall be applied.

In this article, authors share their thoughts on Armenian perspective of apportion of burden of proof rules through analyzing specific rules provided by the Armenian Civil Code for the performance of obligations, work/services contracts and relevant precedents created by the Armenian Cassation Court in its chronology – demonstrating the development of the Law.

The Article has been developed on an international arbitration case study, where the authors have acted as an expert and party representative accordingly. The contractor in a services contract has been claiming unpaid amount for performed services, whereby the

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customer has submitted a counter-claim demanding the return of what has been paid because as it was alleged in counter-claim the services were not performed duly and on time.

2. Abstract

The Respondent in international arbitration alleges that Armenian law contains a general presumption of non-performance of obligations undertaken under a contract and that the performing debtor/claimant shall prove that the obligations have been properly fulfilled.

In particular, the Respondent argues that the contractor, and service provider, under a work contract, and/or service contract, shall prove that the results of the work, and/or service, have the agreed quality and have been delivered on time.

The question to be answered is:

Does the contractor, and/or service provider, acting as claimant in an action against the customer concerning outstanding payments for the work, and/or service performed, bear the burden of proof under the substantive laws of Armenia in relation to the alleged non-compliance of the results of the work, and/or service, in relation to the applicable quality standards, and/or the timeliness of the work and/or service provided?

3. The customer shall invoke and prove the fact of any improper fulfillment of the obligations by the contractor

Article 408 of the RA Civil Code distinguishes two forms of breach of an obligation:

1. Failure to fulfill an obligation,
2. Improper fulfillment (untimely fulfillment, defects of goods, works and services, or violations of other conditions determined by the content of the obligation)

Accordingly, the contractor's/performer's obligations may be breached by two forms of situations:

1. Failure to fulfill the obligation; that contractor/performer is not at all undertaking any actions (services, work) that are subject of the contract;

2. Improper fulfillment of the obligation; when the whole action, one or a few components of it are carried out in breach of a deadline, including defects of goods, works and services, or violates other conditions determined by the contract.

The Republic of Armenia's (RA) Civil Code does not contain any specific rules on the distribution of the burden of proof in case of the contractor's/performer's failure to fulfill the obligation and/or the contractor's improper fulfillment of the obligation. Instead, the burden of proof is distributed under the procedural law rules.

Under the general procedural rules of distribution of burden of proof, the contractor and/or performer (in a contract for services) acting as a claimant in an action concerning payment of the unpaid amount for the works done and/or services provided in order to substantiate his or her claim has the obligation to prove the facts, that generate rights, invoked by him/her regarding, particularly, the following:

- The work stipulated by the contract is performed, and the result of the work (its components) is submitted to the customer; and/or

- The service stipulated in the contract is provided (certain activity or actions to be performed under the contract are performed).

In other words, the contractor and/or the performer acting as a claimant and claiming the unpaid amount for works done and/or services provided shall prove the fact of the performance of the work and/or service stated in the contract.

As regards the improper fulfillment of obligation by the contractor/performer (breach of a deadline, defects of goods, works and services, or violations of other conditions determined by the contract), the following shall be mentioned.

When examining a claim for payment of an amount payable under the contract, the burden of proof regarding the absence of the facts that terminate rights under substantive legislation, shall not be put on the contractor/performer. As mentioned above, it may be concluded from the nature of adversarial procedure that facts excluding claimant's claim shall be invoked by the respondent/the person rejecting the claim, thus having an obligation to prove such facts, and bearing the risk of possible unfavorable consequences if not proved.

According to the general rule of distribution of burden of proof, the respondent shall prove the facts of the supposed breach of the work/services quality requirements, as well as facts with respect to a breach of the deadline, since it is the respondent that must invoke facts in support of a rejection of the claim in order to exclude the chance of full or partial satisfaction of the claim.

Additionally, it may be concluded from the legal regulation of the work performance/service provision legal relationships that the customer has an obligation to detect and invoke defects in the goods/services, and that the performer of such work/services does not have to prove that the work result corresponds to the requirements stated in the contract. On the contrary, the customer is obliged to examine the work (its results), in order to reveal any deviations from the contract that deteriorates the result of the work, or other defects, and give notice concerning such deviation within the prescribed term.

In case of not giving notice of the defects within the prescribed term, apparently, he/she will be deprived of the right to invoke them (Art. 718, Civil Code).

Accordingly, the customer must invoke and prove conditions excluding the obligation to pay for the work performed and services delivered (improper fulfillment, breach of the deadline, as a result of which the creditor has lost its interest in performance, etc.). Should the fact of improper fulfillment be of legal significance for the

customer/creditor; it must also terminate (exclude) the obligation to pay for the work performed/services delivered.

The situation differs from when the contractor/performer invokes improper fulfillment of the obligations by the customer, which has caused the improper fulfillment of the debtor's obligations; For instance, the when customer's/creditor's obligation was not performed in a timely manner due to the customer's/creditor's delay; or a claim with respect to deviations was presented in breach of established time limits. In those cases, the contractor/performer shall bear the burden of proof regarding facts invoked against the customer's objection.

Some earlier decisions¹ of the Cassation Court may be misleadingly interpreted while deciding on the distribution of the burden of proof. However, mentioned decisions have no bearing on the above mentioned issues for the following reasons. In the mentioned decisions the Court confirmed that the contractor bears the burden of proof in relation to the fact that *the services were provided and submitted*. Improper quality of the works performed/services delivered was not the subject of the Court examination in those cases and was not invoked as a basis for the objections, appeal or cassation complaints. In those cases, only the statement that the debtor had not performed some part of the activities prescribed in the contract, was invoked as a basis of the objections and complaints. Thus, the Court of Cassation lawfully concluded that it is the claimant's obligation to prove proper performance of work.

It is worth mentioning that the general approach of the Cassation Court has been subsequently clarified in its 2011 decision², where the Court referred to the burden of proof of the fact of improper fulfillment of a supply obligation. Particularly, the Cassation Court

¹ Cases No 3-299(TD) dated 01 June 2006, RLA-5 and No/0681/02/08 dated 13 February 2009.

² Cassation Court's decision on Case No /1452/02/09 dated 04 March 2011.

recorded that the Purchaser shall bear the obligation to prove facts relating to improper quality of the delivered goods, as the party that is obliged by law to examine the quality of the goods and immediately inform in writing about the revealed defects.

Thus, in line with the Cassation Court's findings in its 2011 decision, under the general rule of the clause 1 of the Article 48 of the RA Civil Procedure Code shall be applied, if the purchaser/customer relies on the fact of improper fulfillment of the obligation by the seller/contractor/service provider as a basis for the objection (poor quality, breach of deadline, essential or not essential defects) the purchaser/customer must prove the existence of that fact and bear the risk of possible unfavorable consequences.

Summarizing the aforementioned, the following conclusion shall be outlined:

1. The RA Civil Code does not contain any specific rules on the distribution of the burden of proof in case of the contractor's/performer's failure to fulfill the obligation and/or the contractor's improper fulfillment of the obligation. Instead, the burden of proof is distributed under the procedural law rules.

2. The contractor/service provider acting as a claimant with a claim for an unpaid amount for the works done and/or services provided shall prove that:

a. The work stipulated by the contract is performed, and the result is presented for receipt; and/or

b. The services stipulated in the contract are provided (certain actions were done in accordance with the contract).

3. The contractor/service provider acting as a claimant with a claim for an unpaid amount for the works performed and/or services provided does not have the burden of proof on the fact of proper performance/provision of the works/services (including: in agreed term, quality, without any defects).

4. The customer acting as a respondent regarding a the claim

for an unpaid amount for the works done and/or services provided, shall bear the obligation to invoke and prove the fact of improper fulfillment of obligations, and accordingly shall bear the risk of all possible unfavorable consequences if such facts remain disputable.

We would further like to discuss some issues regarding apportionment of the burden of proof rules in the context of work/services contracts to bring in some certainty on the issues discussed.

4. General remarks with regard to rules on burden of proof

It is indisputable that the apportion the burden of proof shall be based on the law of the seat of arbitration, and, on substantive law, if the relevant legislation, and Court of Cassation's interpretations of such legislation, provides for specific rules on burden of proof. While deciding on such an important matter as apportion of the burden of proof, arbitrators/judges may note that the general rule on apportionment of burden of proof prescribed by Article 48 of Civil Procedure Code of RA, is not purely procedural.

Article 48 exists within a substantive context, and fully corresponds to the regulation envisaged by Article 11(1) of the Civil Code, according to which: "*Citizens and legal persons at their discretion exercise the civil law rights belonging to them, including the right to their protection*". As it follows directly from this rule, a person whose rights have been allegedly violated shall decide at his/her discretion whether to apply to a competent body with the purpose of settling the dispute arisen from law or contract or to defend himself/herself against a filed claim. This also entails a decision to add such facts to the case as the person deems necessary, which is done as an emanation of the obligation to invoke such facts that his/her standpoints are based on.

Based on our lengthy experience gained through research and practical application of substantive and procedural regulations on issues regarding the apportionment of the burden of proof, we can

emphasize that the general principle “the party invoking a fact shall prove its existence” is the benchmark for legal regulation of almost all private-legal relations.

5. Specific substantive rules on burden of proof

It is a separate matter that the Armenian legislator in a few cases within the scope of Civil Code has introduced some special rules on the apportionment of the burden of proof, so that, the body entrusted with making the apportionment shall not apply the general rule described above.

Thus, the basic formula is the following: If a special rule is not provided by a certain norm of substantive law, then the party invoking a fact shall bear the burden to prove it. As a result, in all cases where a special rule on apportionment of the burden of proof has been deemed necessary to be introduced at a legislative level, such a rule has been *explicitly noted* in the relevant articles of the Civil Code.

The civil law of RA provides for two special rules that touch upon the questions discussed in this Article:

1) Presumption of the fault of a debtor regarding failure to fulfill and/or improper fulfillment of an obligation (Article 417(1) and (2) of the Civil Code);

2) Presumption of the fault of a person that has caused damage (Article 1058(2) of Civil Code).

We can add, with certainty, that the civil law of RA does not provide any other special rule with regard to the discussed issues.

Article 417(1) and (2) regulate the *special* rule on apportionment of the burden of proof, which is applicable only towards one fact, namely the *fault* of a person that fails to fulfill an obligation (thereby causing damage). The fact that regards the actual *breach* of the obligation (failure to fulfill, improper fulfillment) – characterizing the *objective side* of the debtor’s actions – is the first requirement for

liability, which differs from the requirement of fault – which is the *subjective* side of the same actions. The two requirements are individual conditions for liability, and separate facts to be proven.

A consequence of this principle is that the fact regarding improper fulfillment of an alleged obligation must be proven by the creditor (customer). Only if the creditor succeeds to establish the existence of improper fulfillment, does the issue of fault come into play.

Summary of conclusions

a) Although the Civil Code does not provide for a general rule regarding apportionment of the burden of proof, the general principle that “a person invoking a fact shall prove its existence” is a benchmark. The apportionment of burden of proof regarding the existence or absence of a factual allegation is essential for the resolution of a dispute and applies, as a general rule, to facts regarding failure to fulfil an obligation, improper fulfilment of an obligation, cause of damage, delay of performance, or loss of debtor’s interest in contract caused by delay in performance.

b) The general rule shall not be applied if the Civil Code provides for a particular rule regarding the presumption of the existence of a fact; such as a fault in Article 417 of the Civil Code.

c) Article 417 of the Civil Code, defining the presumption of fault, cannot be considered as a general rule and it is not applicable to any other fact that the existence or absence of fault. All other facts are subject to the general rule. On a fundamental note, we also would like to stress that the issue of existence or absence of fault may only be logically discussed or defined, after receiving a positive response to the question of any breach of the obligation. If there is no breach, an exercise of trying to establish fault becomes meaningless.

6. The customer’s obligation to examine the work

In order to explore customer's obligation to examine the work, it is useful to discuss the nature of the customer's *right* to examine the work results, the recording of any defects detected therein, and the duty to inform the contractor about them under Article 718 of the Civil Code and whether this right shall be considered exclusively as a preventive right that the customer has.

Article 718 of the Civil Code directly defines the aforementioned as customer's "obligation", and the unfavourable consequences of not performing this obligation follow from the further narrative; such as prohibition of invoking defects. It thus follows from the plain text of Article 718 that it is not anything else than an obligation, and that the reading suggested above is misconceived.

Regarding defects detected after the customer's examination, a claim by the customer to have the defects remedied by the contractor can only succeed if the defects were *hidden* or could not have been discovered by a usual method of acceptance (see Article 718 (3) and (4) of the Civil Code). It is noteworthy that in accordance with the general sense and logics of the article, if the customer chooses to present a claim regarding the remedy of hidden defects, the customer must demonstrate (invoke) the defect, and, naturally, the customer shall also bear the burden of proof with respect to the existence of the defect.

In this context, any attempt to interpret the mentioned article as transferring the burden of proof from contractor to the customer shall be misconceived. Such an interpretation of the law is wrong because it gives the customer an inexhaustible opportunity to escape from accepting the result of the work by constantly invoking various defects in putting the burden of proof for their absence on the contractor. We think that such a conclusion lacks any legal support. The article in question does not provide for any transfer of the burden of proof. On the contrary, it puts an obligation on the customer to

establish the existence of defects as a basis for any claim, both in cases where the defect is detectable by a usual method of acceptance (so-called obvious defects), and in cases where the defect is hidden, but discovered at a later stage, whereby the customer must notify the contractor within a reasonable period after discovery.

7. The contractor's liability

To further explore contractor's liability and the issue of proofs apportionment, Article 721 of Civil Code shall be analyzed in conjunction with Article 718. Article 721 provides:

"1. In cases when the work done by the contractor with deviations from the work contract that worsen the result of the work or with other defects that make it unsuitable for the use provided in the contract or, in the absence in the contract of a respective term, unsuitable for ordinary use, the customer shall have the right, unless otherwise established by a statute or the contract, at its choice to demand from the contractor:

1) uncompensated elimination of the defects without cost within a reasonable period;

2) proportional reduction of the price established for the work;

3) compensation for its expenses for the elimination of the defects when the right of the customer to eliminate them is provided in the work contract (Article 413).

2 ...

3. If the deviations made in the course of the work from the terms of the work contract or other defects of the result of the work have not been eliminated in a reasonable period established by the customer or are substantial and cannot be eliminated, the customer shall have the right to refuse to perform the contract and to demand compensation for the losses caused."

In analyzing Article 721, in light of Article 718, it may be concluded that a customer must prove the existence of a defect upon acceptance, or within a reasonable period after its discovery, if the

defect was hidden.

If we add – for the sake of argument – the abstract suggestion brought supra on the apportionment of the burden of proof onto these articles, then we would also have to accept the unacceptable idea that, for example, the contractor should prove the absence of a breach of contract, which has deteriorated its result, or the absence of any other defect which has made it inappropriate for the use stipulated in the contract or inappropriate for general use, and also that any existing defects are not insignificant or impossible to remedy.

Undoubtedly, such an approach would be unacceptable because it would put an unfair and disproportional burden on the contractor, which would dislodge the contractual balance in such a way that the contractor would be placed in a significantly less favorable position than the customer would. This is not consistent with the Armenian civil law.

Summary of conclusions

a) We remain convinced that it follows from the logic of Article 718 that the customer bears the burden of detecting and invoking any defects in work performed or services supplied. The contractor is not obligated to prove that the work/service meets the requirements set out in the contract. On the contrary, the customer is obliged to examine the work of the contract and immediately inform (upon or after acceptance) the contractor of any detected deviations in comparison with contractor's undertakings in the contract, or within a reasonable period after the discovery of hidden defects;

b) Article 718 does not provide for any special rule on the apportionment of the burden of proof. Thus, in case of detecting defects in the work, the customer shall prove their existence, and, as a consequence thereof, bear the risk of any unfavorable outcome if the defects cannot be proven;

c) There is a direct link between the obligation of examining the work results, informing of any detected defects, and the burden of proof regarding the existence of any defects. This means, in other words, that the person who bears the obligation to record and invoke the defects, shall also prove their existence, and the same person shall bear the unfavorable consequences if the defects cannot be proven.

8. The presumption of fault

Let's now examine the question of whether the contractor shall prove compliance of the works performed or services supplied with the contract in the context of the burden of proof apportion rules.

While thinking over this question a temptation may arise to allege that under Article 417 of the Civil Code, a person is generally liable until proven otherwise. However, such an approach is unacceptable. As discussed supra, the above-mentioned special rule is not applicable to the fact of a contractual breach. Contractual breach and the fault of a person that is considered to have breached an obligation shall be separated into two independent facts.

Secondly, it is important to determine correct facts to be proven. According to the position as expressed repeatedly by the Court of Cassation of the RA, in order to correctly apportion the burden of proof, the court must firstly determine the facts essential for the assessment of the case, by examining the factual allegations made by the parties.¹

In a typical dispute between works/services contract parties, the factual allegation of non-compliance with the relevant standard of performance as set out in the contract, seems to be essential, since non-compliance with the relevant standard has been brought forward as a basis for the customer not to accept the result of the work, and to reject the claim.

¹ Court of Cassation decision on civil case NoEAND/0479/02/08 dated 13.02.2009, decision on civil No EAQD/1096/02/13 dated 22.04.2016.

To answer the question regarding which party that shall bear the burden of proof regarding the discrepancy between the performed work and the provisions of the contract, we shall refer to the most recent official approach of the Cassation Court regarding the general rule on the burden of proof apportionment.

The Court of Cassation, with its decision in the civil case N EAQD/1096/02/13 dated 22.04.2016, reaffirmed its previously expressed position on some questions regarding the implementation of the general rule. Furthermore, by exercising its functions to ensure uniform application of the law and promotion of its development, the Court of Cassation has also formulated some basic principles that apply to all cases regarding apportionment of the burden of proof.

In the referenced case, the Court of Cassation stated, among other things, that (*literally*):

➤ *The subjective obligation to prove a fact involves the following two elements:*

1) *The obligation to invoke certain factual allegations as a basis upon which a claim or objection is made (burden of invoking facts), is deemed to be a necessity in order to substantiate claims and objections with facts, in other words, to bring forward certain factual allegations as grounds for claims and objections and submit them to the court.*

2) *The obligation to present evidence (burden of proof), which is the necessity of submitting to the court and other parties to the case, the evidence proving the factual allegations invoked as a basis upon which the claims and objections are made.*

...

➤ *The following formula forms the basis of the general rule of apportionment of the burden of proof:*

- 1) *Each party of the case shall prove what he/she relies on;*
- 2) *If a party denies a fact (by way of simple denial), the fact is not considered to have been proved by the other party.*

➤ *In order to understand the mentioned formula as the general basis for apportionment of the burden of proof, and to apply the formula to each civil case, it is necessary to pay attention to the nature and legal significance of the facts invoked by a party. Having said this, a party is not obligated to prove all facts invoked by him/her, only facts that trigger the arising, altering or termination of rights, and facts intended to directly support that fact.*

From our perspective, taking into account case law study, practice and other scientific data¹, the aforementioned means that:

a) The party (customer) that objects to a claim or forwards one, by invoking improper performance of an obligation, shall prove that fact and any fact intended to directly support that fact;

b) The party (contractor) denying the improper performance of an obligation (“saying I have properly fulfilled”) shall not have to prove this fact;

c) When examining customer’s claim regarding repayment of payments made under the contract, there can be no burden of proof placed on contractor regarding the absence of facts having right-terminating significance under substantive law.

If the customer has filed objections against the claims submitted by contractor means that the customer must invoke facts regarding failure to fulfill/improper fulfillment that support the rejection of contractor’s claims, bearing also the obligation to prove such facts

¹ See Evidence in Civil Procedure, Meghryan S.G., Yerevan, 2012, pages 100-103.

and the risk of possible unfavorable consequences if not proven¹.

The approach/principle described above has been further included in the new Civil Procedure Code² (the Draft), that has already passed the first reading and is currently on the agenda of the National Assembly of the RA.

Article 63 titled “The Obligation of Proof” of the Draft directly envisages that:

1. *“Each person participating in the case shall prove the facts having significance for case resolution and that his/her claims or objections are based on unless otherwise is prescribed by this code or other laws.*

2. *The obligation to prove a denial shall not be put on the person denying the fact that a person participating in the case bases his/her claims or objections upon, except in cases provided in part 4 of Article 77 of this Code.*

3. *The debtor shall bear the obligation to prove the fact that the activity forming the content of the obligation has been fulfilled.*

The fact of the improper fulfillment of the obligation shall be proved by the party to the case who invokes that fact.”

Summary of conclusions

a) A contractor, acting as claimant, with a claim for payment of amounts not paid for the works performed, shall prove that he/she has fulfilled its contractual undertaking to perform the services provided in the contract;

b) In examining a claim for payment of performed work, the burden of proof regarding a fact of non-compliance with the

¹ This logic has been applied by the Cassation Court in the civil case NoEED/1452/02/09 dated 04.03.2011 regarding the dispute on supply of goods.

² http://www.parliament.am/drafts.php?sel=onagenda&show_committee=111191

contractual provisions shall be put on the Respondent invoking it;

c) In examining a claim for payment of performed work, a claimant denying the fact of non-compliance shall not bear the burden of proof of the denial;

d) A customer must invoke all facts aiming at excluding an obligation to pay the determined amount to the contractor for work performed/services supplied; such as facts regarding improper fulfilment; delay of performance that causes loss of debtor's interest in contract, etc., since such facts are of legal significance to the customer by fully or partially terminating the obligation to pay for the works performed/services supplied. The customer also bears the burden of proof for such facts.

9. Some remarks on earlier case law developed by the Armenian Cassation Court

For the general subject of this Article we would like to make some general remarks with reference to the cases No 3-299, ESHD/0681/02/08, EED/1452/02/09 and EAQD/1096/02/13 mentioned supra:

a) Arbitrators and judges, when applying Armenian material law to a specific dispute shall note that specifics per case may differ (i.e. none of the mentioned precedents may be identical to a specific dispute with regard to material facts). Thus, the answers to the questions arbitrators and/or judges may have when deciding on the burden of proof question in some cases may necessitate a generalization and interpretation of the Court of Cassation expressed positions by revealing general meaning and spirit thereof.

We think that the positions expressed in the cases No EED/1452/02/09 and EAQD/1096/02/13 are examples of the development of the law, especially, the development of the issue regarding apportionment of burden of proof.

b) We have analyzed the cases No 3-299 (2007) and ESHD/0681/02/08 (2009) (including decisions of first instance court and the court of appeal) and came to the conclusion that in these cases, material facts concerning the improper quality of the work performed/services supplied were not subject to assessment by the courts.

In these cases, the respondents had based their objections and appeals on the debtor's partial non-performance of activities prescribed by the contract. The Court of Cassation concluded that the burden of proof for the fact of the activities having been performed should be put on the claimant (the contractor). We do not dispute this conclusion: indeed, the contractor shall prove that he/she has performed those activities for which compensation is required.

About the expression "due quality and volume" used in decision No 3-299 (2007), we think that, firstly, there is an error in writing, since the phrase should not have included the word "quality". The issue of the case was not compliance or non-compliance with regard to the goods. Secondly, the discussed decision is the first in a chronology of several decisions, whereby we note that the position expressed in later decisions certainly establish that the Court of Cassation's approach regarding the issue of burden of proof for improper fulfillment has been satisfactorily clarified.