Theoretical and practical considerations on probation in labor disputes[1]

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Abstract

Having the actori incubit onus probandi apothegm as a starting point, we shall examine the particular aspects of probation in work-related conflicts, as stipulated in the 272-273 Article within the 53/2003 Law regarding The Labour Code and 212 Article within 62/2011 Law on Social Dialogue. The objective of this paper is to examine distinct features related to the functions of evidence, to the set of fundamental principles which underlie the judicial proceedings of probation in work-related conflicts, as well as the active role of the judge in order to assure a righteous and fair trial. All the elements referred to will be regarded from historical, hermeneutic, teleological and comparative points of view. The specific character of regulations underpinning the management procedures regarding probation in work-related conflicts, differing from the provisions under statutory law, highlights the legislator's choice towards establishing a simple and urgent procedure. It should be adjusted to the work terms and to the individual right to work, representing a genuine guarantee for bringing the law claims which derive from adequate or inadequate performance of individual or collective contracts, performed by the employer. Examples provided by judicial practice uncloak the difficulties encountered by both parties of the trial and court when it comes to enforcing the specific provisions for the application of the legislation, fact which is not always compatible with the legislature's aim, by means of regulation.

Keywords: *labor disputes, social dialogue, labor law, burden of proof.*

JEL Classification: K31, K41

1. Introductory remarks

From adagio *actori incubit onus probandi*, in the following we refer the particular aspects of evidence in labor disputes in terms of the provisions of the Law art.271-273 No. 53/2003 on the Labour Code and art.212 Law No.62 / 2011 on social dialogue.

This study examines from a historical perspective, hermeneutics, teleological and comparative aspects concerning the burden of proof, the principles underlying the legal procedure of proof in labor disputes, as well as the judge's active role in ensuring a fair trial.

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The doctrine[3] was considered evidence in a general sense is to establish the reality of a statement, to show that it corresponds to the truth. In law, evidence is means that a person can use to prove and establish his legal right, or facts from which derives its right[4].

The duty of proof is called burden of proof[5]. The burden of proof is a procedural issue apparently as simple as it is complex in reality given the need to balance the production of evidence. Derived from an old procedural principle *actori incubit onus probandi*, the burden of proof finds its regulation in article 249 Civil Procedure Code that "it who does support during the process must prove, in addition to cases specifically provided by law." As such, the plaintiff must prove that the facts of the opponent is contrary to law, and that must be changed in his favor[6]. The defendant in turn may prove the existence in favor of a law that destroys the right applicant, citing an exception[7], a defense[8], the burden of proof falls to the defendant because he is the one who makes an endorsement to the judge becoming such procedural plaintiff in the report linked, *in excipiendo reus fit actor*. That being so, we find that the initiative of evidence is for the parties, the judge has the possibility to order the parties to supplement the evidence offered if they are not sufficient to clarify the entire process or to question the parties need for any other evidence, they will order even if the parties are against[9]. Judge's intervention in the proceedings of evidence is limited, but it is one that will appreciate the value of the evidence adduced by the parties.

The burden of proof placed on an equal footing parties. Procedural aspect, the plaintiff bears the burden of proof in the beginning according to article 249 Civil Procedure Code it is obliged to prove the commission or occurrence of the event that created the legal relationship between him and the defendant[10]. The legal provision referred granted the defendant's right to remain passive until that is communicated proof of acts and facts on which the plaintiff bases its claims, since the defendant is on par with the applicant, because any support it (except, procedural incident) must be proven, complementing thus procedural picture of probation.

The doctrine[11] judiciously be appreciated that in modern law the burden of proof is shared between the plaintiff and the defendant, the plaintiff proves

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[3] Traian Ionaşcu, Eugen A.Barasch, Aurelian Ionaşcu, Salvador Brădeanu, Mihail Eliescu, Virgil Economu, Yolanda Eminescu, Maria Ioana Eremia, Eleonora Roman, Ion Rucăreanu, Victor Dan Zlătescu, *Tratat de drept civil*, Ed. Academiei RSR, Bucharest, 1967, p. 389.

[4] Constantin Hamangiu, Ion Rosetti-Bălănescu, Alexandru Băicoianu, *Tratat de drept civil,* vol.I, Ed.All, Bucharest, 1996, p.124.

[5] Traian Ionaşcu a.o., *op.cit.* p.395.

[6] Constantin Hamangiu a. o. *op.cit.*, p.126.

[7] Vladimir Hanga, *Drept privat roman*, Publishing scientific and encyclopedic, Bucharest, 1978, p. 144.

[8] Constantin Hamangiu and others, *op. cit.*, p.126.

[9] Art. 254, para. (5) of the Civil Procedure Code.

[10] Traian Ionaşcu and others, *op. cit.*, p.396.

[11] Ioan Leş, *Tratat de drept procesual civil*, *Vol.I, Principii şi instituţii generale.Judecata în faţa primei instanţe,* Ed.Universul Juridic, Bucharest, 2014, p. 742.

generator, and the defendant acts modifying or extinguishing of invalidity. Equal parts involves shifting the burden of proof from the plaintiff to the defendant and the defendant to the plaintiff as the two sides make new allegations in stands trial in their possession in proceedings, but the judge is the one who sets the value of the evidence according to the maxim Latin *da mihi factum dabo tibi jus*.

2. The burden of proof in labor disputes

2.1 Procedural issues

2.1.1 Under the provisions of the Labour Code 272 "The burden of proof lies with the employer in labor disputes, it is obliged to give evidence in his defense until the first day of the trial". The legal text mentioned a regime clearly derogatory from the common law rule by removing classical adage translated *actori incubit onus probandi*[12]. In previous regulatory[13] regime derogatory concerned only if they were challenged unilateral measures taken by the unit which was required as, until the first day of hearings, submit evidence on which to take such action, for all other cases of labor disputes incidents were common law provisions or rules contained in the Civil Procedure Code. Examining both regulations underlying the reversal of the burden of proof in labor disputes, notice the new orientation of the Legislature to ensure procedural aspect, employee or former employee, a security interest in capitalizing rights resulting from failure or improper performance of the individual or collective labor by the employer. The plan "equality of arms" in the trials could accredit the idea that the employee was created favored treatment, but the urgency in resolving labor disputes[14] has led the legislature to adopt a solution that supports this principle given that documents will be filed in the case file are in most situations the employer's possession. An additional argument supporting legal provision derives from the employer's interest to submit documents to reject the applicant's claims. This is the position of the Constitutional Court[15] examined the relevant exception of unconstitutionality of art. 58 and 104 of Law no. 304/2004 on judicial organization and of art. 38, 165, 284 and 287 (now 272) of Law no. 53/2003 - Labour Code notes that the provisions of art. 287 (now 272) of the Code "are rules of procedure, according to art. 126 par. (2) of the Constitution shall be regulated by law" and that "the employee and employer are two sides of the labor dispute, situated on opposing

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[12] Al.Athanasiu, in Al.Athanasiu, Magda Volonciu, Luminița Dima, Oana Cazan, *Codul muncii.Comentariu pe articole,* vol.II, articles 108-298, Ed.C.H.Beck, Bucharest, 2011, p.428.

[13] Article 75 of Law no.168 / 1999 on the settlement of labor disputes (now repealed).

[14] Article 271, paragraph 1 of the Labour Code.

[15] Decision no. 494 of 11 November 2004 on the exception of unconstitutionality of art. 58 and 104 of Law no. 304/2004 on judicial organization and of art. 38, 165, 284 and 287 (now 272) of Law no. 53/2003 - Labour Code, published in the Official Gazette, Part I, no. 59 of 18 January 2005; Decision no. 718 of 24 October 2006 regarding the exception of unconstitutionality of art. 79 para. (1), (3) and (7) and art. 287 of Law no. 53/2003 - Labour Code, published in the Official Gazette. Part I, no. 973 of 5 December 2006.

and conflicting interests, their situation different justifying, in some respects, and legal treatment differently. The employer is holding the documents and all other relevant evidence to elucidate the conflict and to establish rights and obligations of the parties legal relationship work, being necessary and its natural obligation to present such evidence. "

The Constitutional Court[16] held that "by establishing a specific legal treatment applicable to employers not discriminate reach the employee and the provisions criticized are rules that establish a specific procedure, derogatory, on the way of evidence for judging applications for labor disputes. This way the regulation is an option of the legislature, which took into account a procedure simple and immediate, appropriate exercise of employment and labor rights. The rules of procedure laid down therein applies fairly to both employers and employees, without being favored one or another category. "

However, the Constitutional Court held that "the employer and employee are two sides of the labor dispute, located on opposite sides and opposing interests, justifying their situation different in some respects, legal and differentiated treatment. The employer is holding the documents and all other relevant evidence to elucidate the conflict and to establish rights and obligations of the parties legal relationship work, it is necessary and natural obligation to present such evidence. "Motivation Constitutional Court is fully consistent with the spirit of labor law, the legislature regulating nature protection of the rights of employees"[17]. The rule contained in 272 of the Labour Code is therefore common law or general law in labor law and there is a special provision contrary[18].

2.1.2 Article 272 of the Labour Code makes the employer the obligation to submit evidence in his defense until the first day of the trial. Art. 134 C.proc.civ. 1865 defines the first day of the trial period as the parties, duly summoned, can draw conclusions. The current code, establishing the procedure for regularization of the application for summons, omit regulation institution procedural first day of the trial, stating that the applicant may amend the application and propose new evidence, under penalty of forfeiture, just before the first term that he is summoned[19], a term which does not coincide with the first day of the trial.

Regarding the deregulation of this institution procedural doctrine[20] showed that in the New Code of Civil Procedure legislature dropped the word very precisely defined by the Code of Civil Procedure 1865, the "first day of the trial," the author expressing reservations about whether higher the current regulations,

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16 Decision no. 48 of 20 January 2011 regarding the exception of unconstitutionality of art. 287 of Law no. 53/2003 - Labour Code published in M.O. no. 182 of 15 March 2011; Decision no. 82 of 5 February 2008, published in the Official Gazette, Part I, no. 161 of 3 March 2008 Decision. 1321 of 14 October 2010, published in the Official Gazette, Part I, no. 770 of 17 November 2010.

17 Al.Athanasiu, *op.cit.* p.428.

18 Maria Fodor, *Sarcina probei în litigiile de muncă*, "Revista Română de Dreptul Muncii" no. 3/2004, p. 36.

19 Article 204, para. 1 C.pr.civ.

20 Ioan Leş, *op. cit.*, p. 630-631.

and noted the inconsistency legislature which in some areas are first term, simply and in others, the first term on which the parties are legally summoned, as a result the applicant is entitled to alter request for summons mentioned in the first term, regardless of whether or not the goal was duly summoned. In another opinion[21] it was argued that the legislation stands, the first hearing of the first day of hearings over the functions of the previous legislation, resulting in preliminary theses aspect of the draft Code of Civil Procedure[22].

In light of the provisions of article 275 of the Labour Code, special procedural rules contained in the Labour Code is supplemented by the Code of Civil Procedure, the provision contained in the context 272 of the Labour Code on the first day of appearance is meaningless, since the Civil Procedure Code rules this institution was omitted from its regulations. Corroborating the provisions of article 271, para. (1) of the Labour Code that establish an emergency in its proceedings concerning labor disputes with the thesis project prior to the Civil Procedure Code[23] which highlights the need to rethink the principles underlying the contentious procedure, so as to increase the efficiency of and reduce costs during the civil process, ensuring all procedural safeguards, we share the view that the first hearing is the first day of hearings in the earlier legislation. Therefore, we consider that the phrase "first day of the trial" should be interpreted 204, paragraph 1 Civil Procedure Code as the first hearing will be at most 60 days from the date of the resolution by which summon the parties judge[24]. An additional argument in support of this view is provided by the Constitutional Court observed that, by providing a deadline within which the unit can submit evidence in defense art. 75 of Law no. 168/1999 (the derogation concerned only if the disputed unilateral measures were ordered by the unit) provides settlement of the case within a reasonable time[25].

The obligation is determined solely by the employer[26] and is determined by its stronger position against the employee, the objective situation resulting from ownership by the employer documents and data necessary to elucidate the case[27].

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21 Gabriel Boroi, Mirela Stancu, *Drept procesual civil,* Ed.Hamangiu, Bucharest, 2015, p. 381.

22 Approved by H.G.nr.1527 / 2007 Official Gazette, Part I, nr.889 of 27 December 2007.

23 D. Contentious procedure. D.1. Notification of the court.

24 According to article 201, alin.1,2,4 the Civil Procedure Code. if the defendant has not filed welcome the specified deadline (25 days after notice of the summons) or, where appropriate, the applicant has not communicated response to meet the specified deadline (10 days from the communication of defense) at deadline corresponding resolution by the judge sets first hearing, which will be no later than 60 days from the date of the resolution ordering summoning the parties.

25 Decision no. 461 of 1 June 2006 regarding the exception of unconstitutionality of art. 75 and art. 80 of Law no. 168/1999 regarding the settlement of labor disputes, published in the Official Gazette, Part I, no. 580 of 5 July 2006.

26 Diana-Persida Popa, Cristin-Nicolae Popa, *Considerații privind jurisdicția muncii în lumina noului cod al muncii,* ”Revista Română de Dreptul Muncii” no.1/2003, p. 100.

27 Decision no. 58 of 16 January 2007 the Constitutional Court regarding the exception of unconstitutionality of art. 266, art. 267 and Art. 268 of Law no. 53/2003 - Labour Code, published in the Official Gazette, Part I, no. 117 of 16 February 2007.

2.1.3 In the last sentence of article 249 of the Civil Procedure Code legislature establishes an exception to the traditional rule that "he who does support during the process must prove" stating that this rule does not apply "in cases specifically provided by law."

The regulation contained in 272 of the Labour Code is one of the exceptions mentioned above the legal requirement, reversing the burden of proof is a procedural operation derogating from common law. According to the maxim *exceptio est strictissimae interpretationis*, reversing the burden of proof only applies in situations where the conflicting parties work are the employer and employee.

Case October 17, 1989 of the Court of Justice of the EU in Case 109/88 *Faglige Voldgiftsret vs Denmark* is a relevant application in terms of reversing the burden of proof in labor disputes finding that the dispute between the parties to the main proceedings derives the mechanism that increases individual basic remuneration is applied in practice so that a female worker is unable to identify the same criteria of a difference between his salary and that of a male worker performing the same work. Workers are informed only of the amount of wages increased but may determine the effect that he had increased each of the criteria. The Court held that Directive 75/117 on equal remuneration between male workers and female must be interpreted as meaning that where an undertaking applies a system of pay characterized by a lack of transparency, the employer has the burden of wage prove that his practice is not discriminatory, since female worker establishes, in relation to a relatively large number of workers that their average remuneration is lower than that of male workers. The Court held that to prove that his practice does not pay systematically disadvantage female workers, the employer will have to indicate which criteria increase, thus being forced to make his system of pay transparent[28].

According to Article 55 of Civil Procedure Code party plaintiff and the defendant, and, under the law, third parties involved in the process. In the contentious procedure applicable in labor disputes "parties in the lawsuit"[29] are individuals and businesses that have a dispute concerning an individual right civilian before the Court or in a legal situation for the completion of which way the judgment is binding and who will be affected by the judgment following a ruling that was handed down times. The provision of 272 of the Labour Code does not apply to third parties[30] involved in the process, the foreign legal relationship[31]

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[28] The ECJ judgment on June 30, 1988 in the case Commission v France, Rep.1988, paragraph 27 condemning the recruitment system characterized by a lack of transparency as being contrary to the principle of equal access to employment on the grounds this prevents any form of control by the courts, Costel Gîlcă, *Jurisprudența Curții de Justiție Europene în materia dreptului muncii. Egalitate de tratament. Relații de muncă*, Ed."Wolters Kluwer", Bucharest, 2008, p. 225-233.

[29] Gabriel Boroi, Mirela Stancu, *op.cit.*, p. 78.

[30] Viorel Mihai Ciobanu, Gabriel Boroi, *Drept procesual civil*, Ed.ALL BECK, Bucharest, 2002, p. 41: Main deliberate action is not admissible in individual labor disputes as a third party can not be required to establish rights arising from an employment relationship in which subjects are persons appearing as parties in the original application.

before it, so if they claim for damages in an action for declaring the strike illegal formulated by the employer, the onus sample and not the employer, the applicant in the application[32].

2.1.4 Article 272 of the Labour Code provides that "The burden of proof lies with the employer in labor disputes, it is obliged to give evidence in his defense until the first day of the trial". The concept of "evidence" may be interpreted as referring to the documents evidencing the employer actually context in which it is required to submit by the first day of hearings only documents they hold. However, we believe that the concept must be interpreted in the sense of "evidence" that circumscribe the regulation of labor dispute resolution procedure and the content of the Code of labor regulation in art.250 Civil Procedure Code is enlightening in this respect, namely "Evidence of a legal act or fact can be done by documents, witnesses, presumptions, confession of one party made its own initiative or obtained by questioning the expertise through as evidence by research on-site or by any means provided by law". Documents[33] although drawn out process are the only evidence has probative value to the court as legal provision contained in Article 272 of the Labour Code is mandatory, other evidence such as expert opinion of the employer, the declaration of an employee time employer confession out of the process, are extra evidence to have probative value and they must comply with general rules laid down by the Civil Procedure Code of probation. As such, we believe that we can equate evidence and documents which constitute a category of evidence admitted by the legislature can be administered in the process.

2.1.5 The provision of 273 of the Labour Code recognize the prerogative of the court to the benefit of decades of proof admitted that unduly delay the administration. This legal provision imposes the following highlights:

-art.185, paragraph 1 of the Civil Procedure Code. It provides that where a procedural right to be exercised within a compliance therewith entail the forfeiture of the right exercise, unless the law provides otherwise.

- art. 273 of the Labour Code does not include a mandatory provision establishing an exception to the provisions of Article 185, Paragraph 1 of the Civil Procedure Code in conjunction with 204, paragraph 1 and 254 of the Civil Procedure Code regarding deadlines regulated by the legislative imperative Civil Procedure Code and art. 272 of the Labour Code, thus operating institution of forfeiture of admissible evidence. However it should be noted that 273 of the Labour Code establishes a derogation the procedural sanction of forfeiture, which

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[31]. Andrei Eusebiu Săvescu, *Probațiunea în conflictele de muncă*, ”Revista Română de Dreptul Muncii”, no. 3/2007, p. 58.

[32]. Maria Fodor, *op.cit.* p. 37.

[33] According to Art.265 of the Civil Procedure Code. "The document is any writing or other record that contains information about a legal act or fact, regardless of the material or how they support conservation and storage".

fall within the exception being the final sentence of Article 185, paragraph 1 Civil Procedure Code. "Unless otherwise provided by law" provision applies to situations other than those arising from mandatory rules. For these situations derogatory remark two coordinates of evidence, namely:

1) emergency regime. The urgency is similarly a procedure for resolving labor disputes arising from mandatory rules contained in article 271, paragraph 1 of the Labour Code and its justification is obviously determined by the specific labor relations. The legal provision fall within the stated requirements of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms enshrining the right person to trial within a reasonable case.

2) undue delay of proof. The purpose of this this legal provision[34] is to ensure prompt resolution of labor disputes. We must emphasize that the decay occurs only if the burden of proof is unduly delayed. The Constitutional Court held that it may be ordered forfeiture of the other evidence previously admitted the fact that the employer, in its defense, does not prove the legality and validity of the measure dismissal by presenting evidence in this respect before the first day of hearings, a position that does not we agree as oral testimony, expertise, local research evidence are not always depend on the will of the employer and their admission meant analysis usefulness, relevance and their conclusiveness. For example, show that the delay of proof testimonials (ex. driver) may be due to no fault of the employer if the conduct of business on longer transport, travel schedule is set long before the onset of a labor dispute, situation which we consider objective and the judge must assess how justified or unjustified the delay, case by case, based on the complexity of the dispute, the possibilities parties have procurement and production of evidence, as judiciously to review the doctrine[35].

However, deprived of the right to administer a test will still be able to defend themselves, discussing the legal and factual merits of the assertions and evidence adverse party[36].

Forfeiture of evidence admitted is possible both in the case of the employee because the legal text does not distinguish between the parties regarding this sanction procedural, thus ensuring equality of treatment between the two sides, and respect for the constitutional principle of equality of citizens before the law and public authorities, without privileges and discrimination[37] and the principle of

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[34] Decision no. 350 of 28 June 2005 regarding the exception of unconstitutionality of art. 77 para. (2) of Law no. 168/1999 regarding the settlement of labor disputes, as well as those of art. 64, art. 72 para. (2) and (3), art. 74 para. (1) c) and d) and art. 288, second sentence of the Labour Code (Law no. 53/2003), published in M.Of.nr. 779 of 26 August 2005.

[35] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, third edition, revised and enlarged, Ed.Universul Juridic, Bucharest, 2014, p.886; Al.Țiclea, coord., Mara Ioan, Ovidiu Ținca, Barbu Vlad, Verginel Lozneanu, Cosmin Cernat, Laura Georgescu, Mihai Vlad, Valeria Gheorghiu, Aurelia Peter, *Codul muncii, adnotat și comentat*, 2nd edition, Ed.Lumina Lex, Bucharest, 2006, p.1088.

[36] Art.263 of C.pr.civ.

[37] Art.16, para.1 of the Romanian Constitution.

civil procedural law enshrined in Article 8 civil Procedure Code that "In civil parties is guaranteed exercise of rights, equally and without discrimination".

2.2. Limits the principle of reversing the burden of proof

2.2.1 The doctrine[38] was considered that the particular burden of proof in labor disputes not apply to liability managers because they operate presumption of guilt by the mere lack of management[39], the presumption[40] is *iuris tantum*, may be rebutted by manager, by any means before the body jurisdiction. In such a circumstance pecuniary liability in the action promoted by the employer under 254, paragraph 1 of the Labour Code in conjunction with art.23-27 of Law no.22 / 1969[41] on hiring managers, collateral and accountability connection with asset management businesses, public authorities and institutions, plaintiff-employer shall incidents two procedural provisions, namely:

-art.249 Civil Procedure Code that "He who does support during the process must prove, in addition to cases specifically provided by law" provision applicable procedural position of the complainant,

-art.272 the Labour Code "burden of proof lies with the employer in labor disputes, it is obliged to give evidence in his defense until the first day of hearings" provision applies employer.

It is obvious that in such a situation, the employer will receive the complaint, evidence supporting her claims and the defendant - incumbent manager to prove that the plaintiff-employee claims are not substantiated in whole or in part, by taking samples[42]. In the procedure the administration of evidence by the defendant-witness testimony appreciate that the manager is distinguished in terms of probative value versus auditing carried out by experts and determined action triggering pecuniary liability. Although witness testimony can be given[43], the judge has the task of assessing the probative value of it. Assessment of the evidence by the judge is the mental operation which he will make to determine the strength and

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[38] Ion Traian Ștefănescu, *Tratat de drept al muncii*, Ed.Wolter Kluwer, București, 2007, p. 736.

[39] *Culegere de Decizii ale Tribunalului Suprem pe anul 1976*, Publishing scientific and encyclopedic, Bucharest, 1977, Supreme Court Decision guidance 1/16 February 1976, point 5; Sanda Ghimpu, *Dreptul muncii*, Publishing scientific and encyclopedic, Bucharest, 1985, p. 203; Sanda Ghimpu, Ion Traian Ștefănescu, Șerban Beligrădeanu, Gheorghe Mohanu, *Dreptul muncii, tratat*, vol,II, Publishing scientific and encyclopedic, Bucharest, 1979, p. 244.

[40] According to Article 327 of C.pr.civ. "Presumptions are the consequences which the law or the judge comes from a known fact to establish an unknown fact."

[41] Republished in the Official Gazette, Part I, no. 757 / 12.11.2012.

[42] The burden of proof is reversed and if pecuniary liability action based on Art.256 Labour Code. See in this respect the Constitutional Court Decision no.274 / 2011 regarding the exception of unconstitutionality of art. 272 par. (1) of Law no. 53/2003 - Labour Code, published in the Official Gazette, Part I, No. 355/23 May 2011.

[43] Article 309, paragraph 1 of the Civil Procedure Code. "Testimonial evidence is given in all cases where the law provides otherwise."

probative value of each sample individually, and of all the evidence together[44]. We believe that oral testimony proposed by manager-driver (aim for collective management in operating the driver carrying material from / to an internal structure or external society and in the action for patrimonial liability is the defendant) and admitted the court may rebut the presumption legal only if the evidence in their entirety (documents in management: minutes Acceptance, notes consumption etc, judicial expertise, questioning parties) unequivocally that the injury was not caused by it, but by those managing the materials during the interval between the moment of their reception from manager-driver and their teaching time by manager-driver, that negative facts being proved by proof positive opposites.

In the event that the defendant-manager fails rebut the presumption relative, the fact is not known and can not be proved by evidence to refer to himself that fact[45], the judge will grant the application for summons filed by plaintiff-employer.

2.2.2 In judicial practice to order the defendants argued that legal persons (third garnishment, employers), to issue a certificate showing the withholding over 1/5 of revenue that do not involve predecessor received within the provisions of the Labour Code 272 because the applicant it was incumbent to prove generator rights, namely the existence of employment legal relation between the predecessor plaintiff and the defendant and documents (judgments) under which its author had paid a certain sum of money by way of consults and which it was founded attachment that allegedly would have received. Submission of just one note, certificate of inheritance, the contents of which show that the applicant is the heir of the deceased considered it as having employee status to defendants third party withheld is not enough, as such, the action was dismissed by the court as unfounded[46]. So, probation is a set of samples that refers to acts and facts that give rise, modify and extinguish legal relations and the situation presented, the applicant was required to submit a document to prove the existence of the employment of its author such as contract individual work, job, decision suspension, modification, individual employment contract termination, resignation notice, management instruments, plug individual health and safety etc. The applicant is not a party to an employment relationship, one of the defendants, alleged employer predecessor it was not required to submit evidence in his defense, reversing the burden of proof operating only in cases where litigants are exclusively employer and employee.

2.2.3 In an action brought by an employee pecuniary liability under Art.253, paragraph 1 of the Labour Code, the rule that the burden of proof in labor

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44 Viorel Mihai Ciobanu, Gabriel Boroi, Traian Cornel Briciu, *Drept procesual civil. Curs selectiv. Teste grilă*, Ed.C.H.Beck, Bucharest, 2011, p .254.

45 Traian Ionaşcu, *op.cit.*, p. 429.

46 Bucharest Court of Appeal, Section VII of civil cases regarding labor disputes and social insurance, the decision nr.2323 / R of 9 April 2009, „Revista Română de Dreptul Muncii" No.5 / 2009 Ed.Wolters Kluwer, Bucharest, p. 95- 98.

disputes is overturned, it is not fully applicable. Thus, although the employer is required to submit by the first day of the trial evidence in his defense, they may be only partially useful, relevant and conclusive settlement of the dispute, which determines the plaintiff-employee request to produce evidence (new evidence) according to article 254, para 2 of the Civil Procedure Code to support its claims, so that, if the court will allow the Commission will make in regard to the applicant:

- To submit proof of payment for the right expertise necessary for the 254, paragraph 4, letter d and art.303, para 2 of the Civil Procedure Code,

-To pay the amount fixed by signing a declaration of local research, for research expenses[47],

-To pay the entitlements witness (travel expenses, accommodation, damages to cover revenue they would have obtained if they had practiced during His absence from work, occasioned by his call to obedience as witness, established with the state or profession exercised and actual time lost) as required by the appropriate 326 of Civil Procedure Code.

We appreciate that the above apply, the employer even has the legal obligation to submit documents in their possession can not be forced to bear costs that are generated by the evidence requested by the employee and assented judge of the labor dispute, the burden of proof moving -it dispute between the parties according to their procedural position. The expenses incurred by the plaintiff-employee emphasizes again, procedural equality of parties and applicability of evidence adage *actori incubit onus probandi*.

3. Conclusion

Romanian legislature has passed probation in the matter of proof and sustainable principles of Roman origin but paid special attention to international standards and jurisprudence, including those in U.E.

Employee protection has been a constant concern of the Romanian legislature established rules of jurisdiction in matters relating to the jurisdiction of the courts, procedural time and probation. The settlement of labor disputes, labor legislation burden of proof enshrined in a derogation of common law procedural rules, the latter completing probation judicial panel. This study highlights the legislator's option to establish a procedure simple and urgent aimed at the speedy trial of litigated employment, such as to ensure the parties' rights and procedural guarantees necessary to establish the truth.

[47] Gabriel Boroi, Mirela Stancu, *op.cit.*, p.479. Art. 262, para 1 Civil Procedure Code.

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