

International report - The burden of proof in patent lawsuits

The burden of proof set out in Article 373 of the Civil Procedure Code (13105/2015) requires that the plaintiff produce evidence on a contested issue as follows:

Article 373 – The burden of proof is assigned to:

I – the plaintiff, as to the fact constituting his or her right.

However, the Civil Procedure Code also establishes that the burden of proof may be reversed if it is impossible or excessively difficult for the plaintiff to perform the duty or when evidence can be easily obtained by the other party.

In this way, the judge may assign the burden of proof differently by a reasoned decision, in which case the party must be given the opportunity to carry out the assigned charge.

There is a particular need for this process in patent-related actions (eg, patent infringement). This issue is regulated by Article 42(2) of the Industrial Property Law (9279/96), which reads as follows:

Article 42 – A patent confers on its proprietor the right to prevent third parties from manufacturing, using, offering for sale, selling or importing for such purposes without his consent:

I – a product that is the subject of a patent;

II – a process, or product directly obtained by a patented process;

Paragraph 1 – the patentee is further guaranteed the right to prevent third parties from contributing to the practice by other parties of the acts referred to in this article.

Paragraph 2 – the rights in a process patent will be violated, insofar as item II is concerned, when the holder or owner of a product fails to prove, through specific judicial ruling, that it was obtained by a manufacturing process different from that protected by the patent.

The burden of proof is transferred to the holder or the product owner because in some cases it is impossible for the patent owner to prove that the infringing product was manufactured using its patented process. For this reason the defendant, not the plaintiff, must produce evidence on the contested issue.