I – INTRODUCTION

Evidence plays a crucial role in dispute resolution of any kind. The outcome of most international arbitrations is determined by the facts of the case or at least by some combination of factual and legal issues. The claim, defense, and relief...
sought depend on the existence of certain facts.\textsuperscript{3} As a consequence, evidence is a critical aspect of international arbitration and the arbitral community has been devoting continuous efforts to develop evidentiary mechanisms in theory and practice. For example, the International Bar Association (“IBA”) Rules on the Taking of Evidence in International Arbitration seek to bridge traditional common and civil law procedures and practices on evidence and are arguably the most relevant soft law instrument for international arbitration.\textsuperscript{4}

Among the issues encompassed in the field of evidence, burden and standard of proof have not received enough attention in international arbitration practice. Commentators have observed that there is “little authority on the allocation of burdens of proof in arbitral contexts”.\textsuperscript{5} Yet research conducted during the International Council for Commercial Arbitration biennial conference in Miami, 2014, indicates that issues of burden of proof are frequently determinative of the outcome of arbitration.\textsuperscript{6} This is hardly surprising as burden and standard of proof are important aspects of the method by which legal systems resolve disputes over factual matters and have the potential of deciding the outcome of a dispute.\textsuperscript{7} When parties are not aware of the risks related to burden allocation or how much evidence an arbitral tribunal is expecting to receive on particular issues, significant problems may arise.\textsuperscript{8}

This paper reviews the basic concepts of burden and standard of proof in the context of litigation (Part II) and of international arbitration (Part III).\textsuperscript{9} It then seeks to analyze the applicable law and the different approaches to dealing with burden and standard of proof (Part IV). Finally, it attempts to provide some guidelines for a more comprehensive treatment of burden and standard of proof and proposes how arbitral rules can enhance predictability on the topic, without eliminating arbitrators’ flexibility on evidentiary matters (Part V).


\textsuperscript{9} This paper frequently makes reference to burden and standard of proof in common and civil law systems. One cannot forget, however, that while these “generalizations” – as any generalization – are convenient and have an important illustrative goal, they fail to be comprehensive and fully capture peculiarities of specific countries. See PAULSSON, Jan. Overview of methods of presenting evidence in different legal systems, Planning efficient arbitration proceedings: the law applicable in international arbitration. In: VAN DEN BERG Albert Jan (ed.). 7 ICCA Congress Series. Hague: Kluwer Law Int'l, 1996, p. 111 (noting that categorizations are “more conducive to lazy thinking and unhelpful approximations than to a reliable conceptual framework that would help fashion a transnational modus vivendi out of the inconsistent patterns of national practice”).

Before starting the analysis, two definitions are essential to avoid terminological problems. “Burden of proof”, in this paper, indicates the party who bears the risk of not having a certain claim considered as proved (i.e., who has to prove).\textsuperscript{10} “Standard of proof”, by contrast, addresses the level or degree of conviction that an “adjudicator must have to be satisfied that a burden has been met” (i.e., how much it has to be proven).\textsuperscript{11} Albeit analyzed together and naturally intertwined, burden and standard of proof ought to be properly distinguished.\textsuperscript{12}

II – BURDEN AND STANDARD OF PROOF GENERALLY IN NATIONAL COURTS LITIGATION

(a) Burden of proof

During the Roman law periods of legis actiones and formulary system, the adjudicator (\textit{iudex privatus}) had no legal obligation to decide cases if he or she was unable to reach a clear opinion as to the rights of the parties. In such circumstance, the \textit{iudex privatus} could declare non liquet and another adjudicator would be designated.\textsuperscript{13} In modern litigation, however, judges must decide the cases before them regardless of their doubts or complexity.\textsuperscript{14} There is a duty to adjudicate and judges must necessarily grant or deny a claim. Even when facing substantial doubts about factual or legal issues, judges are not released from such duty.\textsuperscript{15}

Burden of proof helps adjudicators to perform their duty notwithstanding such uncertainties.\textsuperscript{16} Since it is not desirable to have denial of justice situations, adjudicators may use the burden of proof as a “rule of judgment”.\textsuperscript{17} In this sense, burden of proof is a procedural mechanism to enable adjudicators to resolve disputes that could otherwise remain undecided.\textsuperscript{18} This is an efficiency function of burden of proof.\textsuperscript{19}

The goal of burden of proof is thus to help the adjudicator resolve the case where relevant issues are uncertain as well as to motivate the parties to present evidence in support of their own claims. In close cases, it serves the

\textsuperscript{12} The Rompetrol Group N.V. v. Romania. ICSID Case nº ARB/06/3, Award dated of May 6, 2013, ¶178 (stating that “the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party’s case as a whole”).
\textsuperscript{13} RABELLO, Alfredo. Non liquet: from modern law to Roman law. 10(1) Annual Survey of Intl & Comp. Law, 2004, p. 13 et seq.
\textsuperscript{14} Idem, at 1.
\textsuperscript{15} COMOGLIO, Luigi Paolo. Le prove civilì. Torino, 1998, p. 177 et. seq.
\textsuperscript{17} DINAMARCO, Cândido Rangel. Instituições de direito processual civil. v. 3. São Paulo: Malheiros, 2009, p. 81.
\textsuperscript{18} Idem, ibidem.
\textsuperscript{19} BRUNET, Edward. The triumph of efficiency and discretion over competing complex litigation policies, 10 Rev. Litig. (1990) 274.
function of assisting adjudicators to decide based on who bears the burden of proof.20 Additionally, by deciding a case on the grounds of burden of proof, the adjudicators “tell the losing litigant that he did not prevail because he failed to carry his evidentiary load”.21 In other words, it essentially determines who bears the risk of not having a claim considered as proved in proceedings.22

The Latin maxims *ei qui affirmat non ei qui negat incumbit probatio* (the burden of proof is carried by the person who affirms, not by the one who denies) and *affirmant incumbit probatio* (the person who affirms bears the burden of proof) reflect the commonly accepted view as to burden of proof.23 Regardless of the formal status of claimant or respondent in the proceedings, the party who affirms certain facts bears the burden of proving them.24 Burden of proof functions as a mechanism to create incentives for the parties to present evidence in support of their own claims.25 This is efficient because the interested party is usually in the best position to produce such evidence.

Burden of proof has also been intrinsically related to the concepts of fairness and due process. The moving party must have the opportunity to prove its allegations and, therefore, protect its right to be heard.26 If a judge restricts one’s right to present evidence and later concludes that the party has not borne the burden of proof, such party may have been denied the opportunity of reasonably presenting its case.27 By contrast, a party against whom an allegation is made must have the right to only be held accountable for facts duly proved.

When adjudicators conclude that the evidence produced is substantial, they must decide the case on the grounds of those elements despite burden of proof.28 The general rule is that factual positions argued (burden of allegation) but not proven (burden of proof) will be rejected by the adjudicators. Undisputed facts by omission or admission naturally do not require proof.29

In common law countries, burden of proof has been traditionally used to refer to two distinct concepts: (i) the burden of producing evidence; and (ii) the burden of persuasion.30 Whereas the former relates to the “burden to introduce some evidence that is minimally sufficient to support a jury finding on a given

---

issue”, the latter is related to the “requirement that a party introduce evidence that persuades the trier of fact on a given issue”. Following the terminology used in this paper, only the first concept is considered a burden of proof, while the second concept is related to standard of proof. The burden of producing evidence determines who is responsible for proffering evidence of the facts alleged. According to Fleming James Jr., a more appropriate definition of “burden of proof” would be “risk of non-production”, meaning that the party responsible for bringing evidence is said to “bear the risk of this consequence of non-production of evidence”.

Civil law countries generally codify their rules on burden of proof. For instance, Article 333 of the Brazilian Code of Civil Procedure sets forth that a claimant bears the burden to prove facts that give rise to its claim. Conversely, respondent has the burden to prove facts that may preclude, modify or extinguish claimant’s claim (affirmative defenses). Accordingly, the formula adopted by the Code of Civil Procedure recognizes that the burden of proof basically lies with the party who has the interest in establishing the fact alleged. There are other provisions on burden of proof for specific circumstances. For instance, Article 389 of the Code of Civil Procedure sets forth that a party who challenges the authenticity of a document bears the burden of proving its falsity. By contrast, if the challenge is directed to a signature, the burden is borne by the party who produced the document – in a clear inversion of the traditional rule on burden of proof. Exceptions to the rule of burden of proof, such as excuses in connection with legal presumptions, undisputed and notorious facts, are also found in the Code of Civil Procedure (Articles 334-335). There are several specific provisions referring to burden of proof in the Brazilian Civil Code as well. In general, however, all of them repeat the standard established in the Code of Civil Procedure and follow the general rule that the party alleging a fact bears the burden of proving it.

(b) Standard of proof

Standard of proof is a concept widely developed in common law systems. Its purpose is to “allocate the risk of error between the litigants and

32 Idem, ibidem.
34 DINAMARCO, Cândido Rangel. Op. cit., p. 71 et seq. Under the new Brazilian Code of Civil Procedure, which will become effective in March 2015, there will be identical provisions in Article 373.
35 Idem, ibidem.
36 Idem, ibidem.
37 Under U.S. law, the function of a standard of proof, as that concept is embodied in the Due Process Clause, is to “instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication”. In re Winship, 397 U. S. 358, (1970) (Harlan, J., concurring).
to indicate the relative importance attached to the ultimate decision”. There are three standards of proof according to the degree of evidence required to a certain case (i) “balance of probabilities”; (ii) “clear and convincing”; and (iii) “beyond a reasonable doubt”.

The standard of proof for most civil cases is a “balance of probabilities” or “preponderance of evidence”. Considering the type of issues generally discussed in civil cases, such standard means that a proposition appears more likely than not to be true. In the English case *Miller v. The Minister of Pensions*, the House of Lords elaborated the balance of probabilities concept, clarifying that if “the evidence is such that the tribunal can say ‘We think it is more probable than not,’ the burden is discharged, but if the probabilities are equal, then it is not”. Such standard means “society has a minimal concern with the outcome of such private suits” and accordingly the “burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion”.

A stricter civil standard is that of “clear and convincing evidence”, which requires a finding that a fact is significantly more likely to be true than not true. When society seeks to protect certain important rights, the law demands higher standards of probability in connection with the relevant facts supporting a claim. In *Bater v. Bater*, the House of Lords held that, “when considering a charge of fraud, [the court] will naturally require a higher degree of probability than that which it would require when asking if negligence is established”. Similarly, in *Addington v. Texas*, the Supreme Court of the U.S. highlighted that the interests involved in a case of fraud are “deemed to be more substantial than mere loss of money, and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof”. In the U.S., this degree of persuasion is generally used in such instances as fraud, disbarment, and validity of deed or will.

A third and significantly higher standard of proof is “beyond a reasonable doubt”, which applies in criminal trials. The prosecution must establish each element of guilt for the crime beyond a reasonable doubt. This standard
requires any doubt to affect a reasonable person’s belief that the fact is true. In other words, society finds it important to set a standard “designed to exclude as nearly as possible the likelihood of an erroneous judgment” against defendants in criminal cases.

When deciding a civil case without a jury, judges usually make no reference to standard of proof. But in criminal and civil cases submitted to a jury, judges commonly refer to burden of proof and also to standard of proof when summing up the legal issues to the jury. In common law countries, the standard of proof is said to be more objective and courts must adopt the standard of proof that “more fairly and efficiently captures the real truth of the case”.

By contrast, the standard of proof in civil law countries is a frequently undeveloped concept (or at least developed differently). Michele Taruffo submits that such is partially explained by the availability of a different method based on “logical probability” – as opposed to common law’s quantitative or “statistical probability”. Also, the probabilistic common law standard of proof was created to assist laypersons of the jury to decide cases. As there are no jury trials for civil matters in civil law systems, the idea of standards of proof arguably has not been necessary. Thus, parties in civil law countries basically look for judges to be satisfied with the evidence presented according to their “personal conscience” or “inner conviction”.

Inner conviction does not indicate the degree or quantum of evidence a judge needs to obtain to be favorable to a certain fact. Significant confusion has arisen by the misperception of the term “inner conviction” as synonymous with the standard of “beyond a reasonable doubt” as applied by U.S. courts. The principle of “inner conviction” and any similar principles do not “by themselves

51 BOND, Michael J. The standard of proof in international commercial arbitration, 77(3) Arbitration, 2011, p. 309 (“When discussing this [standard of proof] in Central Europe recently, the lawyers there looked entirely blank. There was no such distinction; the term ‘standard of proof’ had no resonance”).
52 See TARUFFO, Michele. Rethinking the standards of proof. 51 Am. J. Comp. L., 2003, p. 664. See also TARUFFO, Michele. La prueba de los hechos. Trotta, 2005, p. 193 et seq.
53 Even the concept of standard of proof is not universally accepted. See Allan Philip, Description in the award of the standard of proof sought and satisfied, 10(3) Arb. Int'l (1994) 360 (affirming a dissatisfaction with the expression, where civil cases are concerned because it “seems to imply that it is possible objectively and with general application to describe the degree of proof that is necessary in such a way that it may be applied to particular cases”).
entail the adoption of any specific standard of proof, let alone the standard of proof beyond a reasonable doubt”.57

The principle of “inner conviction” has a negative meaning. By establishing that the evidence shall be evaluated pursuant to one’s inner conviction, civil law countries tried to avoid pre-existing and defined “legal proofs” impacting the power of judges to freely dictate the weight of the evidence on the basis of their discretionary assessment.58 For many centuries, civil law countries were inspired by the principle of “legal proof” – as opposed to free evaluation – according to which the probative value of each item of evidence was determined a priori by general legal provisions, meaning that judges had virtually no discretion in making a decision about the facts in issue.59 In other words, the principle of inner conviction excludes the application of legal standards of proof but “do not prescribe by themselves any positive standard of proof”.60 Subsequently, the problem is to appreciate “how the ‘empty space’ created by the principles of free evaluation is ‘filled up’ by the practice of courts and by criteria suggested by legal theorists”.61

In Belgium and France, it is argued that the standard of proof is satisfied when one establishes a probability or likelihood that is sufficient to convince the judge of a certain disputed fact.62 While Bernard Hanotiau mentions holdings of the French Cour de Cassation purportedly demanding “certainty” over a determined fact, courts in these countries tend to consider that their role is not to find the truth – this would exceed human capability – but rather to determine which party has a position that is more likely than the other (“judges are probably in many cases far from the real truth of the case”).63

A similar approach is taken in Brazil. Article 131 of the Brazilian Code of Civil Procedure sets forth that judges shall freely evaluate the evidence, paying attention to the facts and circumstances on record and presenting reasons for their judgment.64 The standard of proof is not mentioned, but commentators observe that it should be balanced and cannot be neither so low as to create

61 Idem, at 666-667 (affirming that it is hard to “know much about the actual practice of courts because of the lack of empirical research in this domain, and thus we have to rely upon what legal theorists say, although sometimes it is not clear whether their statements are prescriptive (giving suggestions to the courts) or descriptive (picturing what courts really do), or both”).
63 Idem, ibidem.
64 In the original version: “O juiz apreciará livremente a prova, atendendo aos fatos e circunstâncias constantes dos autos, ainda que não alegados pelas partes; mas deverá indicar, na sentença, os motivos que lhe formaram o convencimento”. A similar provision will be in force with the new Brazilian Code of Civil Procedure after March, 2015 (Article 371). The Italian codice di procedura civile has an almost identical provision in Article 116: “il giudice deve valutare le prove secondo il suo prudente apprezzamento, salvo che la legge disponga altrimenti”. 
partiality in favor of the claimant nor so high as to hinder the protection of the claimant’s interests. 65 Ideally, such standard will be met, pursuant to the inner conviction of the judge, when one reasonably demonstrates the existence of the fact, with no requirement of an absolute certainty (judge reasonably convinced). 66 This does not mean that a judge may not try to find the truth. 67 However, considering human fallibility and concerns with the idea of truth, judges are only expected to find the most likely version of facts according to their intimate conviction. 68

In sum, albeit some commentators affirm that civil law countries adopt the “inner conviction standard”, such principle cannot be technically deemed as a standard of proof. Additionally, the idea of inner conviction does not prescribe any positive standard of proof, but rather reinforces the principle of free evaluation of the evidence. 69 There is no consensus among authorities over the concept of truth, being feasible to see it substituted by the concept of certainty as well as by different degrees such as possibility, likelihood, and probability. 70 In general, authorities state that judges must find the “prevailing version” according to their personal conscience and free evaluation of the evidence (no fixed standard of proof), but must be cautious in their task of evaluating the evidence. 71

In general, whereas civil law system’s concept of inner conviction conceives the fact-finding process as a more subjective and intuitive process, common law standards of proof attempt to set objective and rational standards of persuasion. 72

In reality, it is not easy to assess the exact degree of proof necessary to convince an adjudicator in each system. 73 The lack of comparative research in connection with standard of proof in different legal systems makes an assessment of the exact level of proof challenging. 74 It is unlikely, however, that any

---

66 Idem, ibidem.
68 HANOTIAU, Bernard. Op. cit., p. 345 (affirming that “one major difference between the civil law and the common law approach should be emphasized: judges in most civil law countries do not spend weeks or months of ‘trial’ to determine the exact reality of the facts. If the parties’ versions are contradictory, they will decide between those versions on the basis of the evidence they have in their possession, which is, most of the time, documentary evidence”).
70 CALAMANDREI, Piero. Verità e verosimiglianza nel processo civile, Rivista di Diritto Processuale. 1955, p. 170 (affirming that it is hard to establish in practice a difference among possibility, likelihood and probability, being usual to be informally addressed as synonymous).
74 An exception to the rule is the study conducted by Mark Schweizer with Swiss judges and clerks, where, in an empirical research, he found that there is no relevant difference between standards applied by civil and common law adjudicators. See SCHWEIZER, Mark. The civil standard of proof – what is it, actually? Max Planck Institut, 2013, p. 23 (affirming that “results suggest that there may be a “natural” or “intuitive” decision threshold that is largely unaffected by the normative standard of the respective legal system. They also lend empirical support to the
substantial difference in practice between the civil and common law standards exists.75 As described by Jeff Waincymer, how is “the balance of probabilities to be determined other than by the inner conviction of the adjudicator as to the probability of each view?”.76 Even commentators that submit the civil law standard would be higher, such as Von Mehren and Saloman, concede that the ultimate test is a “preponderance of evidence”.77

The Principles of Transnational Civil Procedure of the American Law Institute and the International Institute for the Unification of Private Law (“ALI-UNIDROIT Principles of Transnational Civil Procedure”), for instance, posit that facts are “considered proven when the court is reasonably convinced of their truth” (Article 21.2). The comments following the provision indicate that the “standard of ‘reasonably convinced’ is in substance that applied in most legal systems” and that the “preponderance of the evidence” standard, applied in the U.S. and some other countries, is “functionally” the same.78

Under both legal systems the ultimate goal of the parties is to convince the fact-finders, who have their own individual beliefs when evaluating the facts in dispute.79 Thus, notwithstanding some differences, the practical result is likely to be the same.80

III – BURDEN AND STANDARD OF PROOF IN INTERNATIONAL ARBITRATION

(a) Burden of proof

Like judges, arbitrators cannot refuse to decide because of uncertainties in the law or the evidence.81 In international arbitral proceedings, a party making an allegation of fact must demonstrate that fact with sufficient evidence.82
Yet arbitral rules rarely address the issue of burden of proof in international arbitration. An exception is found in some arbitral rules, such as the Article 27(1) of the 2010 UNCITRAL Arbitration Rules or the Article 24(1) of the Statute of the Iran-United States Claims Tribunal, which provide only an abstract and general rule on burden of proof (“each party shall have the burden of proving the facts relied on to support his claim or defense”).

Commentators observe that this is the general practice of virtually all international arbitral tribunals on burden of proof and is reflected in public awards in the field of international investment arbitration. In the International Centre for Settlement of Investment Disputes (“ICSID”) case Asian Agricultural Products Ltd. v. Sri Lanka, the arbitral tribunal considered that “there exists a general principle of law placing the burden of proof upon the claimant”. Even though using the term claimant, the tribunal further clarified that “with regard to ‘proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact’”. Likewise, the arbitral tribunal in Tokios Tokelés v. Ukraine held that “the burden of demonstrating the impact of the state action indisputably rests on the Claimant”.

In a decision delivered in Salini Costuttori S.p.A. and Italstrade S.p.A. v. Jordan, the arbitral tribunal corroborated that it “is a well-established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim”. Exemplifying the role of burden of proof as a rule of judgment, the arbitral tribunal in Plama Consortium Limited v. Bulgaria held it was “unable to form any firm view as to what really transpired” and consequently ruled against the claimant since it failed to carry out its burden of proof.

Since the concept of burden of proof is widely recognized in legal systems of different traditions, arbitrators may regard it as a general principle of law and apply it without reference to any national law. This has been expressly
recognized in the annulment proceeding of Azurix v. Argentina, where the ad hoc committee found “the general principle in ICSID proceedings, and in international adjudication generally, to be that ‘who asserts must prove’, and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts”. 91

Indeed, the maxim affirmant incumbit probation (the person who affirms bears the burden of proof) has been widely applied by international tribunals and the traditional allocation of burden seems to be in principle the same in litigation and international arbitration. 92

(b) Standard of Proof

Commentators submit “international arbitration conventions, national arbitration laws, compromis, arbitration rules and even the decisions of arbitral tribunals are almost uniformly silent on the subject of the standard of proof”. 93 International tribunals are also generally silent on the topic. 94 Arbitral awards are typically either silent or passively address the subject. 95

In fact, the nature of standard of proof is extremely disputed. 96 Even if the nature were not disputed, it would not be easy to establish generally acceptable rules on standard of proof. Arbitral institutions avoid taking positions in such controversies. 97

Due to these circumstances, modern national legislations and arbitral rules prefer to take a different approach. Article 19(2) of the 2006 UNCITRAL Model Law states the “power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence”. According to Article 25(1) of the 2012 ICC Rules, the arbitral tribunal shall “within as short a time as possible to establish the facts of the case by all appropriate means”. In order to do that and perform their duty, pursuant to Article 27(4) of 2010 UNCITRAL Arbitration Rules, arbitrators have the power to “determine the admissibility, relevance, materiality and weight of the evidence offered”. Likewise, Article 34(1) of the 2006 ICSID Arbitration

91 Azurix Corp. v. the Argentine Republic, ICSID Case no ARB/01/12, Decision on the Application for Annulment of the Argentine dated of September 1, 2009, ¶215. See also Middle East Cement Shipping and Handling Co. S.A. v. Egypt, ICSID Case no ARB/99/6, Award dated of April 12, 2002, ¶¶89-91.
92 The observation is qualified as “in principle” because, as will be demonstrated later, there are potential forms of non-traditional allocation of the burden of proof (see supra Part V(a)).
96 See below Part IV(b).
97 PARK, William. The value of rules and risks of discretion: arbitration’s protean nature, Arbitration of international business disputes. Oxford, 2012, p. 778 (“Arbitral institutions that aspire to market their services globally are understandably shy about taking sides in long-standing debates between different national legal systems, particularly on those controversies that divide continental and Anglo-American civil litigation”).
Rules also sets forth that the “Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value”.

By reinforcing arbitrators’ power to decide as to the weight of the evidence offered, national legislations and arbitral rules follow the principle of free evaluation of the evidence, which is “quite obvious in modern legal systems, and specially in common law ones, where – given also the presence of the jury as a matter of fact – the evidence has always been appreciated according to the free evaluation of the court”.98 As final receivers of the evidence, arbitrators are naturally the ones who must weigh the evidence presented by the parties.99

The principle of free evaluation of the evidence, however, as seen before, does not prescribe any positive standard of proof. Instead, it means only that these provisions follow the principle of “freeing the fact finder from biding legal rules concerning the analysis of evidence”.100 The “degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition”.

101 But to use common law terminology, the general standard of proof in international arbitration may be assumed to be close to what is contemplated by the balance of probabilities standard in the fact-finding process.102 In other words, a scenario of evidence enough to reasonably convince the adjudicator that one position prevails over the other.103

Although not making the same distinction between burden and standard of proof, the ICSID tribunal in Ron Fuchs v. Georgia found applicable “the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings” and then held that it “does not impose on the Parties any burden [rectius, standard] of proof beyond a balance of probabilities”.104

In international tribunals, it is also said that the evaluation “comes down to whether a tribunal considers that the evidence supports one proposition better than it does another”.105 In case of damages, for instance, arbitral

---

98 TARUFFO, Michele. Admission and presentation of evidence. Op. cit., 173. In common law, however, before such moment, courts still exercise control over admissible evidence and there is a substantial number of exclusionary rules of evidence.

99 See JARVIN, Sigvard. The sources and limits of the arbitrator’s powers. 2 Arb. Int’l, 1986, p. 151 (“In the ICC Case No 3410, the arbitral tribunal held that the arbitrator has the “power to make a free evaluation of the evidence”).


101 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. Op cit., p. 388.

102 REDFERN, Alan. Op. cit., p. 321-22. See also CARON, David D.; CAPLAN, Lee M. Op. cit., p. 561 (affirming that “in general, a ‘balance of probability’ standard may be said to reflect the arbitral practice and also to accord with Article 27(1)”).


105 BROWN, Chester. Op. cit., p. 101. See also Gold Reserve Inc. v. Venezuela, ICSID Case n° ARB(AF)/09/1, Award dated of September 22, 2014 (“The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities”). Using the terms “balance of probability”, “reasonable degree of probability” and
tribunals constantly find that the degree of evidence should be enough for the adjudicator admit with sufficient probability the existence and extent of the damage, excluding the idea of certainty. It is just a matter of “sufficient certainty”.106

In practice, this should be the same balance of probabilities standard mentioned above as applicable to litigation, which is arguably applied by arbitrators from civil and common law systems.107 Regardless of their own legal systems, however, arbitrators in practice demand a lower or higher level of proof according to the claim at hand.108 Allegations of particularly serious wrongdoing, such as fraud and corruption, according to these decisions, require more convincing evidence, in spite of not necessarily requiring the adoption of a “clear and convincing evidence” standard.109 In *Oil Field of Texas, Inc. v. Iran*, a commonly mentioned case of bribery, the Iran-U.S. Claims Tribunal held that “if reasonable doubts remain, such an allegation cannot be deemed to be established”.110

An important practical aspect is that, because of the private nature of the services rendered, arbitrators – as compared to judges in most countries – may generally invest more time in the case to try to reach a point as close as possible to the most likely scenario.111 It is generally unsatisfactory to decide a

---

“preponderance of the evidence” as equivalents, see *Marion Unglaube and Reinhard Unglaube v. Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award dated of May 16, 2012, ¶34.

106 See *Gold Reserve Inc. v. Venezuela*, ICSID Case no ARB(AF)/09/1, Award dated of September 22, 2014 (“The Tribunal finds no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities”). Using the term “sufficient certainty” see e.g. *Gemplus SA v. United Mexican States*, ICSID Case no ARB(AF)/04/3, Award dated of June 16, 2010, ¶13.91; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case no ARB/97/3, Award dated of August 20, 2007, ¶8.3.4; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case no ARB/84/3), Award dated of May 20, 1992, ¶215.


109 BLACKABY, Nigel; PARTASIDES, Constantine; REDFERN, Alan; HUNTER, Martin. *Op. cit.*, p. 388. In *Siag v. Egypt*, by majority, the tribunal found that “it is common in most legal systems for serious allegations, such as fraud, to be held to a high standard of proof” and adopted a standard of “clear and convincing evidence” (see Waguih Elie George Siag & Torinda Vecchi v. Egypt, ICSID Case no ARB/05/15, Award dated of June 1, 2009, ¶¶325-6). The dissenting opinion, issued by Professor Francisco Orrego Vicuña, disagrees with such standard of proof applied and defends that the tribunal should have more discretion on the matter (“While the Award has chosen the United States standard of clear and convincing evidence, it is my view that arbitration tribunals, particularly those deciding under international law, are free to choose the most relevant rules in accordance with the circumstances of the case and the nature of the facts involved, as it has been increasingly recognized”). See also *Wena Hotels Ltd v. Egypt*, ICSID Case ARB/98/4, Award dated of December 8, 2000, ¶¶325-6 and *EDF (Services) Limited v. Romania* (ICSID Case no ARB/05/13), Award dated of October 8, 2009 (affirming that there is “general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing”).


111 PARK, William. * Arbitrators and accuracy: 1(1) J Int’l. Disp. Settlement, 2010, p. 25 (affirming that “arbitrators aim to get as near as reasonably possible to a correct picture of those disputed events, words, and legal norms that bear consequences for the litigants’ claims and defences. They recognize that some answers are better than others, even if perfection proves elusive”). See also BÖCKSTIEGEL, Karl-Heinz. *Presenting evidence in international arbitration*. 16 ICSID Rev. FILJ 1, 2001, p. 4 (emphasizing the need for “international arbitrators to use their discretion in shaping the procedure to find tailor-made solutions considered most effective for the particular case before them”). Article 2(3) of the IBA Rules on the Taking of Evidence in International Arbitration states that the “Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
case based on insufficiency of evidence when, for instance, an order to produce documents would have permitted a decision on the basis of evidence rather than lack of evidence.\footnote{112}

Additionally, arbitrators will often adopt “evidentiary methods which will give them the possibility to come closer to the truth of the case and confirm or invalidate the various possible solutions which they have extracted from their reading of the parties’ briefs and documents”\footnote{113}. In a case dating back to 1961, for instance, the U.S. Court of Appeals for the Second Circuit, acknowledging the arbitral tribunal accepted a hearsay evidence, found the appeal “quite insubstantial” and correctly held that if “parties wish to rely on such technical objections, they should not include arbitration clauses in their contracts”.\footnote{114} U.S. courts frequently uphold awards premised on evidentiary decisions that would not be accepted before courts litigations, recognizing that arbitrators have “broad discretion to make evidentiary decisions”.\footnote{115} This approach is enhanced by the flexibility of international arbitration and an arbitrators’ authority to order the measures most suited to the fact-finding process.\footnote{116} It is further supported by the parties’ own submission to arbitrate and, most often, their participation in selecting the members of the tribunal.\footnote{117}

Finally, the case Inceysa Vallisoletana S.L. v. El Salvador is illustrative of this practical difference.\footnote{118} In order to reach the conclusion that Inceysa presented false information concerning its own experience and capacity and, therefore, violated the bid process initiated by El Salvador, the arbitral tribunal was very careful in affirming in several parts that such conduct was “fully proven”.\footnote{119} It was not necessary, therefore, for the arbitral tribunal to rely on considerations of burden and standard of proof.

\textbf{(c) Control of errors as to burden and standard of proof}

An erroneous finding on burden and standard of proof has the potential of being a ground for non-recognition or annulment of an arbitration award either

\footnote{113}{HANOTIAU, Bernard. Op. cit., p. 348.}
\footnote{114}{Petroleum Separating Co. v. Interamerican Refining Corp., 296 F.2d 124, 124 (2d Cir. 1961).}
\footnote{115}{Int’l Chemical Workers Union v. Columbian Chem. Co., 331 F.3d 491, 497 (5th Cir. 2003).}
\footnote{116}{SMIT, Hans. Roles of the arbitral tribunal in civil law and common law systems with respect to presentation of evidence. Op. cit., p. 160 (affirming that arbitrators “have evolved a system that is neither civil law nor common law, but a hybrid that has drawn upon both systems to cull from them rules that are most suited for international arbitration”).}
\footnote{117}{Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (affirming that a party agreeing to arbitrate “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”).}
\footnote{118}{ICSID Case n° ARB/03/26, Award dated of August 2, 2006.}
\footnote{119}{Idem, ¶118.}
by national courts or, under the ICSID Convention, by an *ad hoc* committee (Article 52(1)).

In practice, however, challenges to arbitral awards based on violations of burden and standard of proof should not be easily accepted. As a general rule, courts do not review factual or legal errors made by arbitrators.\(^{120}\) The control imposed over arbitral awards is, as explained by Michael Reisman, a question of “maintaining the vitality and integrity of a process of dispute resolution by providing the degree of supervision sufficient to correct violations of parties’ expectations in a way that sustains confidence in the efficiency and fairness” of the system.\(^{121}\) Consequently, in principle, questions dealing with admissibility, type and weight of evidence and burden and standard of proof also belong to the authority given to arbitrators.\(^{122}\) Moreover, arbitral legislation in almost all jurisdictions provides limited avenues for challenging an award.\(^{123}\)

Due to the publicity of the awards, decisions issued by *ad hoc* committees in applications of Article 52(1) of the ICSID Convention may be illustrative of the control exercised over issues of burden of proof. Even though, as mentioned by commentators, the “Convention knows no formal rules of evidence”, parties repeatedly attack awards “alleging a serious departure from a fundamental rule of procedure”.\(^{124}\)

In *Amco v. Indonesia*, for instance, the moving party argued that the way the arbitral tribunal dealt with the evidence constituted lack of impartiality and equal treatment.\(^{125}\) By contrast, in *Klöckner v. Cameroon*, Cameroon complained that the tribunal had reversed the burden of proof and that it had no opportunity to submit the relevant evidence and then claimed a serious departure from a fundamental rule of procedure.\(^{126}\) Likewise, in *Wena v. Egypt*, the moving party argued that when the arbitral tribunal made certain findings in respect of a consultancy agreement between the Claimant and an Egyptian individual, it seriously departed from a fundamental rule of procedure.\(^{127}\) In all

\(^{120}\) *United Paperworkers Int’l Union v. Misco*, Inc., 484 U.S. 29, 37-38 (1987) (“Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.”)


\(^{123}\) SMIT, Hans. *Contractual modification of the scope of judicial review of arbitral awards*. 8 Am. Rev. Int’l Arb., 1997, p. 149 (affirming that “if arbitral awards could be reviewed for errors of law or fact, arbitration would easily degenerate into a device for adding still another instance to the usual three instances of litigation in the ordinary courts”).


\(^{125}\) *Amco Asia Corporation and others v. Indonesia*, ICSID Case n° ARB/81/1, Decision on Annulment dated of May 16, 1986, ¶90-1.


three cases, however, the ad hoc committees denied the challenges. As observed by the Wena ad hoc committee, a serious departure from a fundamental rule of procedure should be recognized only when a “violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed”.128

Even though adjectives like “manifest”, “serious”, and “fundamental” stress the limited role of ICSID ad hoc committees,129 the same rigorous conclusion should be obtained before courts, granting considerable leeway to arbitrators.130

Basically, one should not confuse divergent appreciation of evidence and departure from a fundamental rule of procedure or excess of authority. When exercising control over arbitral awards, national courts or ad hoc committees “should defer to the tribunal where the latter considers that the claimant has, as a matter of law, failed to present evidence in support of a theory”.131 It means that an annulment tribunal should not permit a party to “reargue its case on the ground that the party could have presented some other set of facts to the tribunal and those new facts could have supported a legal theory that the tribunal held it was not supported by the facts actually presented”.132

IV – BURDEN AND STANDARD OF PROOF AS A SUBSTANTIVE OR PROCEDURAL MATTER AND ITS CONSEQUENCE AS TO THE APPLICABLE LAW

(a) Applicable law for burden and standard of proof

Qualifying the burden and standard of proof as a matter of substance or procedure is not an easy task. It is essential, therefore, to define the concepts of substance and procedure. It is generally accepted that matters of procedure concern aspects linked to the activity of arbitrators and the conduct of the arbitral proceedings, such as provisional measures, admissibility of discovery, and examination of witnesses. By contrast, matters of substance embrace all issues pertaining to the parties’ relationship and the merits of the dispute subject

---

128 Wena Hotels Ltd. v. Egypt, cit, ¶58. For a more comprehensive review on these cases, see SCHREUER, Christoph H.; MALINTOPPI, Loretta; REINISCH, August; SINCLAIR, Anthony. Op. cit., p. 992-4.
129 It is argued, however, that the limited role of ad hoc committees is not always evident in the actual decisions. See e.g. SCHREUER, Christoph. From ICSID annulment to appeal: half way down the slippery slope. 10 L. & Prac. of Int’l Cts. & Tribunals, 2011, p. 216.
130 See e.g. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (“The party still can ask a court to review the arbitrator’s decision, but the court will set that decision aside only in very unusual circumstances (...) the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances”).
131 TROOBOFF, Peter. To what extent may an ad hoc committee review the factual findings of an arbitral tribunal based on a procedural error? In: GAILLARD, Emmanuel; BANIFATEMI, Yas (ed.). Annulment of ICSID Awards, 2004, p. 264. This position has been expressly endorsed by SCHREUER, Christoph H.; MALINTOPPI, Loretta; REINISCH, August; SINCLAIR, Anthony. Op. cit., p. 993.
132 Idem, ibidem.
to arbitration, such as contractual interpretation, determination of liability and assessment of damages.\textsuperscript{133}

The characterization of the burden and standard of proof as a procedural or substantive matter has consequences on the applicable law. Based on whether the matter is procedural or substantive, arbitral tribunals will decide whether to apply (i) the law of the place of arbitration; (ii) the substantive law governing the merits of the dispute; or (iii) some international arbitral standard.\textsuperscript{134} In a nutshell, if burden and standard of proof are considered to be procedural, they should be governed by the \textit{lex arbitri} or some international arbitral standard. By contrast, if they are considered substantive, then the law governing the underlying substantive issues governs them.\textsuperscript{135}

Defining burden and standard of proof as procedural or substantive is therefore extremely important to the arbitrators’ adjudicatory task. Such definition, however, will only be possible by reviewing each of these issues separately.

\textbf{(b) Three general approaches on the nature of burden and standard of proof}

Different legal systems do not always classify burden and standard of proof in the same way. It is commonly said that while common law system tends to see both of them as procedural in nature, civil law counterparts treat them as substantive.\textsuperscript{136} It is possible to identify at least three approaches on the nature of burden and standard of proof in the literature.

The first approach is advanced by those who classify burden and standard of proof as procedural. In this case, it seems that more weight is given to the role that the burden of proof plays during the arbitral proceedings by means of allocating the responsibility and the degree of interest of the parties to prove the allegations or facts on which they rely in support of their case. Commentators also submit that evidentiary matters available in the case might influence rules on burden of proof (such as the availability or unavailability of discovery).\textsuperscript{137}

The second approach is advanced by those who see burden and standard of proof as a substantive matter. The main argument is that these determine “how easy or how difficult it is for the claimant to enforce a claim”.\textsuperscript{138} Andreas Reiner argues that burden and standard of proof are related to the claim presented by the party and they also have the ability to indicate whether a claim exists


or not. It is also argued that this approach enhances foreseeability since the parties either choose the substantive law prior to the commencement of any proceedings or have an easier determination of the applicable substantive law. Moreover, arbitrators have to respect parties’ choice of law agreement, while not bound to a particular national system of procedural law.139

Some commentators of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), for instance, also support this substantive approach. This view is justified on the grounds that “the CISG itself provides at least one rule on the burden of proof, namely the one to be found in Article 79, which is why it cannot be asserted that the CISG does not govern the issue at hand”.140 According to this view, since the issue of burden of proof is so closely linked to the substantive law, the burden of proof must be necessarily obtained from the same CISG.141

The third approach reflects an intermediate position. Acknowledging the difficulties of a strict classification, Gary Born submits that arbitrators should allocate the burden of proof in the light of its assessment of the applicable substantive law and procedures adopted in the arbitration. In his view, therefore, “the tribunal need not apply the burden of proof rules of any specific jurisdiction, but can instead fashion specialized rules in light of the particular substantive issues and procedures at issue in a specific instance”.142

To sum up this overview, the first approach has the strength of considering the role played by the parties in the process and establishing some certainty on the allocation of responsibility in connection with burden of proof. The second approach profits from considering particularities of the substantive law generally chosen by the parties. The third approach presents the advantage of giving arbitrators significant flexibility on burden of proof in light of the particular substantive issues. Yet, by including burden and standard of proof in the same basket and not identifying specific circumstances, all three approaches fail to provide clear guidance to parties and tribunals.

Indeed, the classification of burden and standard of proof lies in a grey area.143 As a consequence, general and abstract propositions seem to only bring confusion to the issue and fail to create practical guidance for practitioners. The next step of this paper, therefore, is to propose an alternative approach as to the treatment of burden and standard of proof in international arbitration.

139 Idem, at 330 et seq.
141 Idem, ibidem.
V – GUIDELINES FOR THE TREATMENT OF BURDEN AND STANDARD OF PROOF

(a) Burden of Proof

Burden of proof, as previously discussed, is a mechanism to enable adjudicators to resolve disputes that could otherwise remain undecided. Its basic purpose is to control who bears the risk of not being able to prove a claim, since adjudicators cannot escape from their duty to adjudicate and cannot rule favorably on unproved claims. As a result, burden of proof functions clearly as a rule for judging under uncertainty.\(^{144}\)

Due to its function and purpose, establishing which party is responsible for bringing evidence and persuading arbitrators is naturally a procedural matter. Albeit arbitrators generally have broad discretion as to procedural matters, there is a consolidated international understanding in this field. Notwithstanding some terminological confusion, it is widely accepted that the person who alleges a claim or defense bears the burden of proving the facts on which he or she relied on, regardless of formal positions taken in the proceedings. This is doubtless the traditional and prevalent rule.\(^{145}\)

The traditional rule may nonetheless be subject to at least three generally applicable exceptions.

First, the parties are in principle free to agree to different allocations of the burden of proof. In other words, there might be circumstances where the parties carve out in their agreement a specific allocation on burden of proof.\(^{146}\) For instance, in contract for the sale and purchase of goods, the parties may agree that the buyer who asserts the non-conformity of the goods does not have the burden to prove such non-conformity – but rather that the seller shall prove conformity.\(^{147}\) Depending on the goods subject to the transaction, this type of clause enables a significant reduction to the transaction costs. The agreement of the parties thus, in principle, must be respected despite the traditional allocation on burden of proof.

Second, a specific provision may reverse the traditional rule and therefore the burden of proof not borne by the party making the allegations. Arbitrators may be bound by a substantive law that provides, for instance, that in a certain type of claim the burden is borne by the one against whom such claim is brought (\textit{i.e.}, the respondent for that specific claim, instead of the claimant).

---

\(^{144}\) See supra Parts II(a) and III(a). See also BÖCKSTIEGEL, Karl-Heinz. \textit{Op. cit.}, p. 2.

\(^{145}\) REDFERN, Alan. \textit{Op. cit.}, p. 320 (noting that “exceptions relate to propositions which are so obvious, or notorious, that proof is not required”).


There are at least two practical scenarios to exemplify when this situation may occur. In the first one, the governing law creates legal presumptions, whose goal is to facilitate the production of evidence. As such, these presumptions determine that certain facts are given in a specific situation, without requiring them to be proved.\(^{148}\) Once a legal presumption is established in favor of a moving party, then the opposing party bears the burden of proof (\textit{i.e.}, the opposing party must in practice disprove that allegation).\(^{149}\) In the second case, the governing law directly specifies a non-traditional rule on burden of proof. Accordingly, distinct legal norms may distribute the burden of proof differently.\(^{150}\) This kind of condition might take place, for example, in disputes involving particularly sensitive rights, such as consumer or employment, which the law may wish to protect.\(^{151}\) It could be argued that the choice-of-law clause should not be extended to “procedural issues, which are instead considered to be subject to the generally-applicable rules of civil procedure of the parties’ contractual forum”.\(^{152}\) Even though this underlying idea is correct, the modification on the traditional allocation of the burden of proof is a mere consequence of the governing law, which may contain hybrid function (procedural and substantive at the same time). It is not the case thus of a mere importation of procedural rules from national courts.

Third, arbitrators may allocate the burden of proof in a non-traditional form when sanctioning a party that has unjustifiably refused to produce certain evidence. As a general rule, the party who affirms is expected to come to arbitration with sufficient evidence to sustain it. In exceptional circumstances, however, it may happen that essential evidence is not available to such party – but rather rests exclusively in the hands of the opposing party.\(^{153}\) As arbitration is a private process, arbitrators do not have the same powers of a judge to enforce compliance with evidentiary rulings.\(^{154}\) By contrast, arbitrators may advise the parties that a failure to comply with an order to produce evidence may lead to adverse inferences.\(^{155}\) Even if one considers that “arbitrators would be disturbed at the thought of deeming the burden of proof discharged by an inference”,\(^{156}\) the reality is that in appropriate circumstances “arbitrators do employ adverse inferences to enable parties to discharge their burdens of proof in the absence of evidence otherwise sufficient to make their cases”.\(^{157}\) Additionally, while one may argue that adverse inferences do not properly modify the traditional

\(^{151}\) Of course, this statement presumes the arbitrability of these matters according to the applicable law.
allocation on burden of proof, it is hard to ignore that at least in certain cases this practical result might be reached. As such, arbitrators may use their broad authority in respect to procedural matters and then, albeit indirectly and after giving a party the opportunity to object to the request and explain its failure to make the evidence available, modify the traditional allocation on burden of proof as a consequence of drawing adverse inferences against a noncomplying party.

Such examples of non-traditional allocation on burden of proof corroborate its procedural aspect. Taking into account a more detailed review of traditional and non-traditional allocations of burden – which has been generally ignored in arbitration contexts – it is crystal clear that burden of proof is a mechanism whose primary purpose is to assist fact-finders in the task of adjudicating disputes. Of course these non-traditional allocations on burden of proof must respect the due process of law. Surprises are not welcome in any fair system of dispute resolution.

As mentioned above, the control of potential errors in the application of burden of proof is a difficult task. In fact, a factual or procedural error by the arbitral tribunal, albeit flagrant, in principle does not constitute a ground to set aside or refuse enforcement of an award. Also, as some commentators have put it, while “an award applying a national law other than that chosen by the parties could be set aside or refused enforcement”, an error in the application of such law is not subject to review by the courts. As such, if the governing law determines a non-traditional allocation of burden of proof and by any reason arbitrators do not observe such determination, a challenge to the arbitral award may be daunting. Nonetheless, a different scenario might arise when arbitrators exceed their authority. This may be the case, for instance, where the parties specifically set up a different allocation on burden of proof and the arbitral tribunal’s findings simply take into consideration the traditional allocation.

159 VAN HOUTTE, Vera. Adverse inferences in international arbitration. In: GIOVANNINI, Teresa; MOURRE, Alexis (eds.), Written evidence and discovery in international arbitration. International Chamber of Commerce, 2009, p. 201 (affirming that since “the adverse inference is based on a reversal of the burden to produce, fairness requires that this burden be imposed exclusively on a party that can actually discharge it”).
160 See supra Part III(c).
162 PARK, William. National law and commercial justice, Arbitration of international business disputes. Oxford, 2012, p. 567 (“Controlling an arbitrator’s excess of authority may be the most important of these national judicial functions. A legal system will not normally support an (...) arbitrator who exceeds the scope of the mission given to him by the parties”).
(b) Standard of proof

Standard of proof is a more difficult issue. Yet, it is less likely to present itself in practice. As mentioned earlier, civil law countries generally do not set a positive standard of proof – at least not using the same common law “statistical probability” – and parties from those countries should naturally seek to establish a probability or likeliness that is sufficient to convince the adjudicator, according to his or her inner conviction, of a certain disputed fact. As a result, in an international arbitration involving parties from civil law countries, it is unlikely that a dispute as to which standard of proof is applicable should arise.

Perhaps more surprising is the assessment that a divergence on standard of proof is also unlikely to surface when an international arbitration involves parties from civil and common law countries. And the reason for this conclusion is that arbitrators from civil and common law traditions will require a similar amount of proof to consider a contractual claim as proved. In practice, both civil and common law arbitrators will require enough evidence to be convinced that a version of the facts is more likely to be true than not.164 In short, differences may be more apparent than real.165

A simple hypothetical may be helpful to exemplify the above-mentioned conclusion. Under New York law, judges apply the “preponderance of evidence” standard in contractual cases. Under Brazilian law, such standard will be met when one reasonably demonstrates the existence of a fact. In an international arbitration involving a Brazilian and a New Yorker company in a contractual dispute, the expectation of both parties as to standard of proof will be in practice similar. In case of reasonable doubt, arbitrators will rule against the moving party. Despite different terminologies, there is no real conflict. This is the most typical scenario in international commercial arbitrations.

A more complicated hypothetical may arise if, instead of analyzing a regular contractual claim, the claimant alleges a fraud. Under New York law, judges apply a “clear and convincing” standard of proof to protect important individual interests in cases such as fraud. Under Brazilian law, there is no clear indication that judges would require a fraud claim to be proven by a standard highly more likely to be true than not, although judges arguably may demand more evidence than in a contractual dispute. In view of potential conflicting views on the subject, two different scenarios should be considered: (i) an arbitration placed in Brazil where the parties have chosen the New York’s substantive law to govern; and (ii) an arbitration placed in New York where the parties have chosen the Brazilian substantive law to govern.

165 For empirical evidence of such statement, see SCHWEIZER, Mark. Op. cit.
In the first scenario – arbitration placed in Brazil with New York’s substantive law governing – would the arbitrators need to apply the “clear and convincing” standard generally used by the New York courts or should they simply demonstrate that they are reasonably satisfied with the evidence presented by an interested party in a certain issue? If one considers that the standard generally used by the New York courts is a procedural matter, because it essentially aims to help adjudicators to decide whether the evidence presented in support of an argument is enough, the arbitrators in Brazil should not be concerned with such standard. Technical rules of evidence and the strict degree of proof used by national courts are not necessarily applicable in international arbitration. Arbitrators should not be bound by the procedural rules laid down in courts, insofar as that procedure respects the fundamental principle of fairness and equality between the parties. According to this view, when the parties choose New York law to govern the contract, they make reference to New York substantive law – and not to procedural rules applied by New York courts. Such substantive law does not set forth any rule on “preponderance of evidence” and, therefore, does not have any impact in the outcome of the case. As mentioned above, the choice-of-law clause that selects the substantive law governing the parties’ dispute does not serve to import “procedural” rules.

On the other hand, if the applicable law clearly imposes a standard, one may reasonably reach the opposite conclusion. According to Michael Bond, in “the U.S. state and federal practice the standard of proof is not set forth in any civil code or legislation; instead, it is found in case law”. Thus, the applicable standard of proof is “either created by statute because of a determined cause of action or, where there is no specific statute, controlled through jurisprudence”. Yet according to this view, standard of proof is deemed as a substantive provision governed by the same law that sets forth the claim or defense and, therefore, should be applied by arbitrators. Even though the line of argument proposed by Michael Bond does not seem to necessarily support the conclusion that standard of proof is a substantive matter for U.S. courts – once case law obviously is capable of developing both procedural and substantive law – it is clear that if a specific substantive law provision creates a specific standard of proof, arbitrators should in principle be bound by such substantive provision.

---

166 It is argued that at least ten states in the U.S., including California, Colorado, and Florida, use a preponderance of the evidence standard in all civil cases, including fraud. See ROSENTHA, John L; ALTER, Robert T. Clear and convincing to whom? The false claims act and its burden of proof standard: why the government needs a big stick. 75(4), Notre Dame L. Rev., 2000, p. 1445.
169 BORN, Gary. Op. cit., p. 2737 (“Procedural issues may be bound up with questions of judicial administration, as to which local public policy will require application of the forum’s law. Moreover, application of foreign law to some procedural issues will often be regarded as impracticable (e.g., pleading requirements”)).
This position is coherent with the one adopted in connection with burden of proof. The characterization of the standard of proof as procedural or substantive matter, therefore, will have an important impact on the outcome of a dispute.

In the second scenario – arbitration placed in New York with Brazilian substantive law governing – the same reasoning presented above should apply. Even if the “clear and convincing” standard is considered an important matter of judicial organization reflecting the values of the New York state, the arbitrators would not be bound to apply the mentioned standard. This conclusion would be divergent only if the parties’ agreement had an express provision intended to incorporate also the procedural aspects of the place of arbitration or if New York standard of proof were a mandatory provision. On the other hand, as Brazilian substantive law does not make any reference to standard of proof in cases of fraud, arbitrators have full discretion to adjust the degree of proof necessary to their inner conviction according to the case at hand.

The take away should be that no proposition is sufficiently adequate in abstract, without due consideration to the claim and potential applicable laws. Generalizations, therefore, are not helpful to fully appreciate the nature of standard of proof and its legal consequences.

In any event, the control of potential errors in the application of standard of proof seems to be even harder than the one in connection with burden of proof. Actually, considering the arbitral tribunal’s broad authority in measuring the amount of evidence submitted, the likelihood of success in a challenge depends on an absolute disregard of the governing law – which equals a failure to apply the governing law. Otherwise, the case would fall under the category of improper control over the arbitral tribunal’s findings and re-evaluation of the evidence.

(c) Proposal for arbitral rules on burden and standard of proof

William Park, in his article on arbitration’s protean nature, has challenged the benefits of arbitrators’ discretion, suggesting arbitral institutions should give “serious consideration to adopting provisions with more precise procedural protocols to serve as default settings for the way arbitrations should actually be conducted”. One of the propositions he presents is precisely that arbitral rules should explicitly address questions of burden of proof. Additionally, there seems to be a perception within the arbitral community that issues on burden of proof are frequently determinative of the outcome of arbitration, but
only occasionally articulated by arbitral tribunals.\textsuperscript{177} It seems timely for arbitral institutions to create rules on burden and standard of proof and, therefore, enhance predictability in the context of international arbitration.

While some rules already regulate some aspects of burden of proof allocation – such as Article 27(1) of the 2010 UNCITRAL Arbitration Rules – these provisions do not seem to provide sufficient guidance to the arbitral community, parties and other stakeholders.

In light of the above considerations and conclusions, the following provisions are proposed to be included in arbitration rules to provide a short, but efficient, framework for the exercise of arbitrators’ authority when allocating burden of proof and weighting the evidence produced by the parties:

1. Unless otherwise agreed by the parties or expressly provided for under the applicable law, a party who alleges bears the burden of proving the facts on which he or she relies upon a claim or defense.

   (a) If a party, having possession or control of relevant evidence, fails to produce such evidence despite being ordered to do so, the arbitral tribunal may draw adverse inferences with respect to the issue for which the evidence is probative.

2. Unless otherwise expressly established by the governing law, the facts are considered proven when the arbitral tribunal is convinced with sufficient certainty.

The strength of this proposal rests on the fact that it affirms the traditional rule widely accepted by international tribunals on burden of proof, but at the same time avoids potential problems that may arise from ignoring relevant exceptions to the traditional allocation.

In relation to standard of proof, “sufficient certainty” seems to be a language widely used by international arbitral tribunals. Even though one may argue that “sufficient certainty” does not indicate a specific degree of evidence, it serves its purpose by eliminating the risk of having tribunals looking for some sort of absolute certainty or certainty beyond a reasonable doubt for civil cases. Likewise, the term “sufficient certainty” should be considered – in the same line of the ALI-UNIDROIT Principles of Transnational Civil Procedure’s suggestion – as functionally equivalent to the common law “preponderance of the evidence”, but it preserves potential directions of the governing law regarding the degree of evidence necessary to a specific claim. More importantly, although enhancing predictability, it also preserves the tribunal’s authority in connection with

evidentiary matters since it does not import the procedural rules of the place of arbitration.

This proposal, moreover, is not entirely new and clearly benefits partially from the work developed by those eminent jurists who drafted the ALI-UNIDROIT Principles of Transnational Civil Procedure and the IBA Rules on the Taking of Evidence in International Commercial Arbitration. They were nonetheless adapted to the context of burden and standard of proof in international arbitration, considering that evidentiary rules used by national courts should not necessarily be applicable in international arbitration.

VI – CONCLUSION

Although extremely relevant in assisting the resolution of disputes over factual matters in international arbitration, burden and standard of proof have not received enough attention. Burden and standard of proof have the potential to affect given disposition of a claim in the arbitrators’ fact-finding process. While burden of proof indicates who has to prove, standard of proof designates how much it has to be proven.

It seems well established in litigation generally and in international arbitration that each party, in principle, shall bear the burden of proving the facts relied on to support its claims or defenses. By contrast, standard of proof is an idea more developed in common law systems, which adopt a quantitative or statistical probability approach. In civil law systems, some commentators assume the standard of proof as being the inner conviction of the adjudicator. This paper showed, however, that such assumption is incorrect and that inner conviction does not present any positive standard of proof. Civil law judges will generally require that one reasonably demonstrate the existence of a fact, with no requirement of an absolute certainty. In the field of international arbitration, although not easy to assess the exact degree of proof necessary to convince arbitrators, it is unlikely to exist any substantial difference in practice between the degree of proof required by arbitrators from civil and common law jurisdictions.

While the classification of burden and standard of proof as a procedural or substantive matter will impact the applicable law, such task may not be performed by means of abstract propositions or by including burden and standard of proof in the same basket for all purposes.

In connection to burden of proof, this paper accepted the traditional approach that the person who affirms shall bear the burden, but also pointed out that arbitrators must also respect the choice made by the parties either through an express provision in the agreement or through the applicable law. Additionally, in exceptional cases, arbitrators may use their broad authority on allocation of burden to proof as a consequence of adverse inferences drawn
against an uncooperative party. In connection with standard of proof, it was submitted that arbitrators from civil and common law jurisdictions in general require a similar amount of proof to consider a claim as proved. However, if the governing law supporting a claim or defense establishes a specific standard, the arbitral tribunal must in principle apply that standard. Also, provided that the merits of the dispute and evidentiary decisions are not generally controlled by courts or ad hoc committees, the control of potential errors in the application of burden and standard of proof is a difficult task.

Finally, this paper proposed a language to be included in arbitration rules to provide a short, but efficient, framework for the exercise of arbitrators' authority when allocating burden of proof and weighting the evidence produced by the parties. The main concern of the proposal was to enhance predictability, but at the same time avoid the importation of evidentiary rules as applied by national courts.