Relevancy of the Single Standard of Proof in International Arbitration

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In Ukraine, international arbitration becomes more and more popular every year. More than that, international arbitration is quite widespread throughout the world. For example, in 2013 (there is still no data on 2014) 767 Requests for Arbitration were filed with the ICC Court and those Requests concerned 2,120 parties from 138 countries and independent territories [17]. High prices, elitism, availability, mainly for huge companies only, and nevertheless prevalence of arbitration in the world clearly bespeaks an undisputable success of international arbitration as a method for resolving disputes.

There are particular qualities of international arbitration which have led to its fantastic success as an instrument for dispute resolution in many countries of the world. Although certain risks when using international arbitration exist, benefits of this method exceed possible difficulties that can occur during arbitration proceedings. From our point of view, the main advantage of international arbitration is a really huge amount of different ways to approach solution of disputes that may arise between parties. It is due to the fact that international arbitration is a very flexible and at the same time extremely efficient method for resolving disputes. Basically it is a hybrid system of court procedures which means that parties can freely choose from a vast range of possible rules and standards creating their own procedure. The rules and standards selected by parties are mandatory for the court of arbitration and will be followed by it. For example, according to the Article 19 of the Rules of Arbitration of the International Chamber of Commerce ('ICC Rules') the proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on [5]. Furthermore according to the ICSID Arbitration Rules ('ICSID Rules') parties can decide how certain procedures during proceedings are adjusted. For instance, according to Rule 2 of the ICSID Rules parties can individually constitute the method of arbitrators' appointment [18]. Only if parties have not suggested their own method of appointment the procedure described in the ICSID Rules is used. Also, according

to Rule 29 of the ICSID Rules the proceedings shall comprise two phases only if there was no other agreement between parties [18]. In Article 18 of the JAMS International Arbitration Rules ('JAMS Rules') it is stated that the Tribunal will decide the merits of the dispute on the basis of the rules of law agreed upon by the parties [7]. In point of fact, many arbitration rules give an opportunity to the parties to independently set up rules, which regulate proceedings. Also international arbitration is a hybrid form of dispute resolution, because normally during arbitration proceedings rules of several law systems are used. For example, when governing law of the contract is law of the civil law country (civil law or Continental European law), and lex loci arbitri is law of the common law country (case law). Also claimant and respondent, as well as arbitrators very often represent different law systems. As T. Slipachuk notices: "every international arbitration means not just clash of two different parties, but also clash of representatives of different systems of law, which have different legal traditions" [16; 122]. In our point of view, it is a vast advantage of international arbitration, because it provides an opportunity to use benefits of a certain law system. Moreover, it is very important within the framework of the research of the process of proof, because proving is an inalienable element of every arbitration proceedings. Furthermore, the process of proof differs in every law system and there are no strict requirements to the process of proof in arbitration rules. The most interesting aspect is that on every case and on every issue of every case there must be certain single criterion, according to which it is possible to affirm "it is proved" or "it is not proved". As M. Kazazi writes: "it is necessary to determine a measure to be applied equally in all cases" [8;323]. Otherwise, questions may arise concerning impartiality of arbitrators and lawfulness of their inferences on facts of the case. If there is one measure of proof, then proof of any issue (or lack of it) is obvious for both professionals and laymen.

That is why the standard of proof is necessary. However, before we provide the definition of the term "standard of proof", it will be interesting to study how it is

defined in legislation and in legal doctrine. We have analyzed such arbitration rules as ICC Rules, JAMS Rules and ICSID Rules; also we investigated international legislation and national legislation of Ukraine. We came to conclusion that at the legislative level the term "standard of proof" is not defined. Moreover S. Elsing (cited N. O'Malley) notices that "National and Institutional arbitration rules do not define any standard of proof" [11; 210]. A. Marriott (cited N. O'Malley) alleges that "Neither the main institutional rules for international arbitration of which I am aware, nor the UNCITRAL rules fix a standard of proof" [11; 210]. That is why we have to turn to definitions provided in law doctrine. For instance, M. Kazazi marks: "This measure or criterion, on basis of which the adjudicating body ultimately determines whether or not the burden of proof in a given case has been met, is called the standard of proof" [8, 324]. N. O'Malley notices: "The standard of proof is used to determine whether the evidence a party has produced in support of its factual allegations is sufficient to establish the facts in question. The standard may be determined by the relevant substantive law, but in some instances tribunals will appeal to customary practice to devise the threshold standard of proof" [11; 207]. K. Pilkov observes that "the term "standard of proof" is used mostly in doctrine of common law systems, often is defined as probability level, according to which circumstances must be confirmed by evidence to be treated as valid and factual. It is settled by and depends on circumstances, which are subject to proof and cannot depend on performance of obligation of the parties to submit evidence" [13; 191]. It can be concluded that the standard of proof is the level of conviction by passing of which the proof of certain allegation occurs. If the standard of proof is achieved, the "barrier of uncertainty" is overwhelmed. As we stated before, theoretically the single level is needed, such that could be used in any case. However, the question arises: is it possible to establish such single standard of proof and is it truly necessary practically?

It must be acknowledged that there are several standards of proof and they differ on a number of qualities. No conventional classification of standards of proof exist,

every scientist or researcher has its own point of view on classification of standards of proof. In this work we will propose our own classification. Taking into account the fact that there is a number of standards of proof that are not common for international arbitration (for instance, such standards as "reasonable to believe" or "some credible evidence"), only standards of proof that are spread in international arbitration will be stated in our classification. Standards of proof will be ordered by such attribute as "required level of arbitrator conviction". Consequently, the more an arbitrator must be confident that some statement is truthful, the higher the standard of proof must be.

The first and the lowest level that is needed to prove the lightest allegations is the **prima facie standard of proof**. The prima facie standard of proof can be regarded as the floor of proof, without it there is no point in initiating proceedings. As K. Pilkov states, "prima facie means, that claimant submitted sufficient evidence to the court so that he can come to conclusions, in support of which the evidence was submitted, only if respondent does not provide evidence that refute these conclusions" [13; 191]. It must be acknowledged that this level does not provide possibility to prove allegations on the merits of the case (actually it's not intended for such arguments). For example, prima facie standard is used in jurisdictional objections. When it is needed to prove that arbitral tribunal has no jurisdiction over the case it is sufficient to allege the arbitral tribunal's lack of authority and this is already the grounds for examination of issue on the competence of arbitral tribunal to resolve the dispute (it is important to note that such allegation is not an evidence of the arbitral tribunal's lack of authority). On the other hand, there is no need for claimant to prove that arbitral tribunal has jurisdiction over the case if respondent does not raise any objections to it. Evidence provided by claimant in support of arbitral tribunal's jurisdiction has the prima facie standard of proof. Consequently the arbitral tribunal prima facie has jurisdiction to arbitrate. For example, in case *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* a Hong Kong corporation filed a Request for Arbitration against the Democratic Republic of Sri

Lanka ('Sri Lanka'). Sri Lanka raised no objections to jurisdiction. Consequently, the Arbitral Tribunal took its jurisdiction to decide the dispute between parties, however, the only evidence which provided Asian Agricultural Products Ltd. was a provision of the Bilateral Investment Treaty ('Treaty') party to which was Sri Lanka. According to the Article 8.(1) of the Treaty: "Each contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (...) any legal disputes" [2].

After the prima facie standard of proof **preponderance of the evidence** and **balance of probabilities** standards follow. In spite of the fact that both standards establish similar level needed to prove certain allegations, they are different. "Preponderance of the evidence" is a term that is used in the United States of America. E. Devitt states that: "To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case" [3]. The term "balance of probabilities" is widely used in English law. Generally it is used in countries with the common law system outside the United States. Lord Denning in case *Miller v Minister of Pensions* summarized that: "The…[standard of proof]…is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not" [9]. According to these standards, which are used in civil cases the probability of accurateness of the certain allegation must be higher than probability of its incorrectness or probability of more than fifty percents that allegation is truthful. The allegation must be rather "true" than "untrue". It must be acknowledged that it is not a question of mathematical probability – level of certainty cannot be measured as a mathematical

value. The question is about the level of arbitrator's conviction. As R. Wright describes, "Contrary to the common assumption among academics, the preponderance standard in the United States has traditionally been understood by judges and presented to juries as a standard of conviction or belief regarding the truth of the fact(s) at issue rather than a matter of mere mathematical or statistical probability" [20; 87]. For example, in case *Sapphire International Petroleums Ltd. v National Iranian Oil Co.* one of arbitrators said: "It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behavior of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage" [15].

The clear and convincing evidence standard of proof. We consider it as an intermediate standard of proof. The level of conviction is higher than in the balance of probabilities standard of proof, but lower than in the standard of beyond reasonable doubt. The clear and convincing standard of proof is commonly used in the United States. Usually it is applied in different types of equity cases; however it can also be used in international arbitration. As N. O'Malley notices, "the clear and convincing standard can be applied in sports arbitrations, especially in cases concerning "doping" [11; 210]. The clear and convincing standard of proof is used, because accusations of doping are very serious and arbitrators need higher level of conviction than the level provided by the balance of probabilities standard of proof. For example, in *United States Anti-Doping Agency ('USADA') v Floyd Landis* arbitrator stated: "USADA must establish that an anti-doping rule violation occurred to the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made. The standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt" [19].

The beyond reasonable doubt standard of proof. The standard that is much higher than the preponderance of the evidence standard. It is usually used in

criminal cases in common law countries. In criminal prosecution the beyond reasonable doubt standard of proof means that the only conclusion that can be derived from facts that defendant is guilty. This standard does not allow any doubts. In international arbitration, the standard of beyond reasonable doubt would probably be applied only in cases involving bribery, forgery, fraud or corruption, which are uncommon for international arbitration [11, 210; 10, 174]. As M. Kazazi notices, "proof beyond reasonable doubt is, presumably, the favorite standard of proof with international tribunals since it relieves them of the task of searching for other standards which may be appropriate in the context of a given case. Unfortunately it is a luxury that the party which carries the burden of proof in international proceedings cannot always afford" [8; 347]. For example, in ICC Case No. 5622 (Hilmarton) the arbitrator concluded that proof 'beyond doubt' is needed to prove the alleged corruption [4; 497].

Civil Law countries – the personal discretion of judges standard of proof. Also in law doctrine this standard of proof is often called "the inner conviction test". The inner conviction test is an alternative to the balance of probabilities standard of proof and it is used in civil law countries. However, in our point of view, this standard is a lot more higher than the balance of probabilities standard of proof and stands closer to beyond reasonable doubt standard. When inner conviction test is used it's not enough to prove that the probability of accurateness of certain allegation is higher than probability of its incorrectness. It is necessary to convince the arbitrator that this specific statement is truthful. Arbitrator from the very beginning remains indifferent in a dispute and continues to be neutral until he is convinced. In a few words it can be described as: arbitrator is in doubt until he is convinced. It should be noted that there is no such term as a "standard of proof" in civil law countries, that is why in decisions of International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry there are no mentions of such standards. Nevertheless, it does not mean that the standard of proof is not used in Ukrainian arbitration proceedings. Use of the standard of proof

is just not as obvious as in common law countries, Ukrainian judges simply do not explain in decisions, why they are convinced that certain allegation is truthful. However, they could explain the reason if they were asked to.

Beyond any doubt currently the "balance of probabilities" standard is the most popular standard of proof in international arbitration. As respected authorities in the field of international arbitration L. Fortier, F. Vicuna and V. Lowe noticed in *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia,* "the Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities" [6]. The same approach is heldby M. Moses [10; 175]. Also A. Redfern and M. Hunter state "the degree of proof...before an international tribunal is not capable of precise definition, but it may be safely assumed that it is close to the "balance of probability" [14; 388]. But questions arise: can the prevailing standard become the only standard and can we use it in every case? In our point of view, it is possible. However, there are situations, in which this standard is not sufficient. These situations are sports-related legal disputes or cases on corruption or forgery, etc. On the other hand, in international commercial arbitration (where the balance of probabilities standard of proof is used) there are awards of billions of dollars. For example, in *Occidental Petroleum Corporation v The Republic of Ecuador* the arbitral tribunal awarded damages of US$1.77 billion (US$2.3 billion with interest applied) [12]. It is the vast sum of money and result of such arbitration proceeding indirectly has an effect on millions of lives. If the balance of probabilities standard is sufficient for such cases, it will satisfy the proof requirements for disputes related to "doping", bribery or fraud, etc. P. Ashford notices that in ICC Case No. 6497 (of 1994) the arbitral tribunal was satisfied by evidence that had "high degree of probability" provided in support of bribery [1; 171-172]. However, a situation can arise when the balance of probabilities standard of proof will not satisfy the level of proof

needed for civil inner conviction test. As we mentioned above, it is much closer to the beyond reasonable doubt standard. Consequently, it is essential to find the single standard that will always satisfy any level of proof and such standard could be the beyond reasonable doubt standard of proof. It is the standard with the highest level of proof, it will satisfy any requirements. However, the beyond reasonable doubt standard is the hardest to achieve, that's why its establishment as the single standard of proof will complicate life to both arbitrators and parties. Moreover, the beyond reasonable doubt standard is rarely used. Therefore it is possible to come to conclusion that theoretically it is possible to establish the single standard of proof, but it is not helpful and necessary from the practical point of view.

It can be concluded that the standard of proof is a level of arbitrator's conviction that is needed to prove any statement. Basically there are five different standards of proof in international arbitration and they are used depending on the circumstances of the case. Such flexibility of the standard of proof makes it truly useful for both arbitrators and parties. Certainly the most widespread is the balance of probabilities standard of proof. It is useful, comprehensible and what is the most important efficient. However international arbitration has always offered an alternative. Without a doubt there is no need to establish a single standard of proof – this will deprive arbitration of its great advantage.

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