"Standard of proof in international arbitration"

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This article deals with the definition and scope of standard of proof in international arbitration. The author draws attention to the place of the standard of proof in the international arbitration rules and in the arbitration proceedings. The conception of the standard of proof in law systems and legal grounds for application of this standard in international arbitration practice are analyzed in the article as well.

Key words: international arbitration, standard of proof, burden of proof, onus probandi actori incumbit, clear and convincing evidence, preponderance of the evidence

The actuality. There is the global growth of arbitration in recent years. The reason for it is an expanding regionalization because the international trade becomes more global, disputed continue to arise and their number grows. That's why the problematic issues in international arbitration arise too. One of these issues concerns the standard of proof in international arbitration. **Firstly,** the international arbitration system is like a hybrid process formed by a balance between different legal cultures and systems. Thus, one can find different understandings of the standard of proof. **Secondly,** the law on international commercial arbitration in many countries, as well as most of the known rules of arbitration only in general terms governing the issue of evidence and proof, leaving their decision to the discretion of the arbitrators and, to some extent, parties arbitration. **Thirdly,** the right application of the standard of proof is related with correct and fair arbitration award.

Analysis of research works and publications. A contribution to the study of the standard of proof in international arbitration has been made by such outstanding scholars in the sphere of international arbitration as Nathan D O'Malley, Linne A.L., Christopher Kee, Jeff Waincymer, Clyde Croft, George M.von Mehren, Claudia T.Salomon, Borzu Sabahi, Andreas Reiner, M. Scherer, Florian Haugeneder, Christoph Liebscher etc. One can also identify such Ukrainian practitioners and scholars who have paid attention to the issue of the standard of

proof in international arbitration as Y. Prytyka, T. Slipachuk, K. Pilkov, A. Panov and others.

The aim of the article is to analyze and research the role and current issues of the standard of proof in international arbitration based on the international legislation and practical cases.

The main material. The modern international arbitration systems have among fundamental principles the norm according to which one should give the equal possibilities to the parties to produce their arguments and adduce the evidence. So adducing the evidence is considered as a right of the parties. While there is a formula in major arbitration regulations that asserts the necessity of proving the allegations of claims and defence – burden of proof. Discharge of the burden of proof plays in consequence an essential role in arbitral as well as in court proceedings [15; 653]. The burden of proof in the theory of international arbitration is divided into two components:

- ✓ burden of production or evidentiary burden;
- ✓ burden of persuasion [13; 33].

These components generally but not always are relied on the same person. Thus the party is obliged not only to adduce the evidence, but also persuade the tribunal in the verity of the asserted allegations. Allocation is based upon the principle "*ei incumbit probatio, qui dicit, non qui nega*" – the proof lies upon the one who affirms, not the one who denies [13; 32-33][1]. It is generally accepted in international law that the burden of proof is on the party who makes an assertion.

The notion "burden of proof" describes a fundamental principle required for a fair trial, namely the obligation to prove. Claimant bears the burden of proof in substantiating its claims, and respondent bears the burden of proving its defence. This principle of **onus probandi actori incumbit** – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals: in the Article 27 (1) of the **UNCITRAL Arbitration Rules**, Article 19

[1]See Leonardo Graffi, Overview of Recent Italian Court Decisions on the CISG, 4 EuR.LEGAL F. 240, 243 (2000/01).

(1) of the **International Arbitration Rules of the AAA**, Article 24 (1) of the **Swiss Rules of International Arbitration,** Article 42 (1) **of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry**. It determines who has the onus of proving the allegations made in a judicial proceeding [2; 92]. The same approach is enshrined in the Rules of the International Bar Association to obtain evidence in international arbitration (IBA Rules), which is a document designed with the approaches adopted in different legal systems, and therefore serves as a landmark recognized practice of proof [21].

The significance of this burden was stated effectively by the tribunal in **Asian Agricultural Products, Ltd. v. Sri Lanka (ARB/87/3),** which noted that: "Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof" [3; 51].

If the party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. One calls this **"shifting" burden** [11].

Clyde Croft argues that the concept of burden of proof indicates which party must establish any particular proposition. It does not indicate the degree of proof that is required. The latter is described as the standard of proof that assists to determine the level when the circumstance is considered to be proved.

Definition of the standard of proof

The legal dictionary describes the general definition of the **standard of proof** as "the amount of evidence which a plaintiff must present in a trial in order to win" [12]. The standard of proof is often used in the doctrine of common law legal systems defined as the level of probability, which factors must be supported

by evidence that they can be considered valid, truthful[2]. In civil law jurisdictions standard of proof is considered to be similar to the principle of assessment of the evidence by intime conviction. However, the principle of assessment of evidence by intime conviction, that directly or indirectly fixed the procedural laws of most European countries, answers the question of how the court assesses the evidence. In contrast, the standard of proof is a measure that helps navigate to whether it should be considered a proven fact [21].

Levels of the standard of proof

Unfortunately, the UNCITRAL Arbitration Rules, like most rules, make no mention of the appropriate degree of proof that is required. As a rule, there are no arbitration rules, laws or conventions providing rules on the standard of proof. One reason for it is that different legal families treat the notion of standard of proof differently, common law systems generally treating it as procedural while civilian systems see it as substantive. Despite that fact one can distinguish three common standards of proof that apply to jurisdiction practice:

- **beyond a reasonable doubt;**
- **clear and convincing evidence;**
- **preponderance of the evidence** [12].

These abovementioned standards are the levels of proof which required in a specific case. The highest level of proof is in criminal cases – beyond a reasonable doubt. Intermediate level of proof is in civil cases – clear and convincing evidence. The lowest level of proof is preponderance of evidence that indicates a 'more likely than not' probability. All these levels are established by assessing the associated evidence [13; 32-33].

In civil proceedings, the party with legal burden also **bears the evidential burden** and the standard in each cases is on **the balance of probabilities.** When a crime is alleged in civil proceedings, the standard of proof is the balance or **preponderance of probabilities.**

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[2] V.Van Houtte. Adverse Inferences in International Arbitration./Written Evidence and Discovery in International Arbitration. Edited by: Teresa Giovannini, Alexis Mourre. ICC Publication No. 698E , 2009. – p. 197.

A distinction is made between criminal cases in which the evidential burden but not the legal burden on a particular issue such as provocation or self-defence is bourne by the accused and criminal cases where the evidential burden is bourne by the prosecution. In case of the accused, such evidence must suggest a reasonable possibility. In case of the prosecution, "such evidence, if believed, and is left uncontradicted be accepted by the jury as a proof". The standard of proof required is "proof beyond reasonable doubt" [17].

The common law describes the standard in non-criminal matters as **the balance of probabilities**. Civilian legal systems were inclined to speak of the inner conviction of the adjudicator. There is also a suggestion that there is no practical difference between the civil and common law standards, each being concerned to determine the 'preponderance of evidence' [6; 303].

Consequently, the standard of proof is different in the various legal systems. From the requirement to satisfy the arbitrator beyond any reasonable doubt, which is similar to 'volle Überzeugung' (full conviction) **in Austria**, one moves to the balance of probabilities **in England**, as held in Miller: "It must carry a reasonable degree of probability but not so high as required in a criminal case. 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"[3] [15; 654].

According to **Nathan D O'Malley** "the standard of proof in international arbitration 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" [14; 207]. The balance of probabilities is considered to play an important role in determination the standard of proof in international arbitration. This standard, as the rule, calls for a claim to be upheld if the tribunal is convinced by the evidence that the claim more likely than not true [16; 208]. Nathan D O'Malley

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[3] Miller v Minister of Pensions[1947] 2 All CN 372, cited by A. Reider, Burden and General Standards of Proof, 10 Arb Int. 3, 328 [1]

reports that this standard has been applied the great majority of categories of claims in international arbitration, including causes of action arising from a breach of contract or other obligation, interpretation of contractual clauses or the intent of the parties to the contract, and claims based on breach of international treaties regulating the treatment afforded to investors [16;208].

Thus, the standard of proof **does not have an aim to sift out the truth**. It is only the indicator of that fact whether the parties managed to fulfilled successfully the burden of proof. At least, this is not the search for truth as an absolute category or even clarify the circumstances of the case to the extent sufficient to have no doubts about their veracity [21].

The main task of the arbitral tribunal at this stage is to make sure that the parties understand the standard of proof that applies to each claim in the arbitration and identify the party that gas to satisfy this burden. The decision on the standard of proof should also be incorporated as a substantive decision in the final award [9].

Andreas Reiner argues that there are **three basic standards of proof** generally applied in international arbitrations:

- a general underlying standard;
- an elevated burden of proof;
- a very low standard or insufficient explanation of the reasoning [1].

Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions. Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence [10; 291].

Certain matters, however, do in fact require a higher standard of proof that will certainly change the advocate's approach. Both common law and civil law systems recognize elevated standards of proof for bribery and other types of fraud.

The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to non-legal equitable standards. In some unpublished International Chamber of Commerce (ICC) awards, for example, the tribunal simply decided to award damages at "rounded" figures it came up with or simply cut in half actual damages for the sake of equity without giving reasons. Thus, the lesson to be learned is that counsel must always ensure that their calculations and methods of calculation are near to infallible, at least to cause the arbitrators to think about their decision, if not only to preserve an argument during an enforcement proceeding that there was a lack of due process in presenting the case [10; 292].

The degree or level of proof that must be achieved in practice in the international arbitration is no capable of precise definition, but it may be safety assumed that it is close to the balance of probabilities indirectly [10; 291].

As a general rule, the standard "preponderance of evidence" applies in international arbitration. But if the matter concerns the allegation of corruption one should apply the standard "clear and convincing evidence".

The standard of proof is part of the procedural law in some jurisdictions and part of the substantive law in others. The doctrine is divided as to whether the standard of proof is governed by the law applicable to the procedure or by the substantive law. **On the one hand,** the substantive law determined by the arbitral tribunal or chosen by the parties should always govern the applicable standard of proof. **On the other hand,** the reason put forward for this is that **the standard of proof determines to a large extent the value of a claim.** The parties expect the substantive law to govern all issues concerning the value of a claim. Party autonomy and the greater foreseeability would therefore favour applying the rules on the standard of proof contained in the substantive law. This approach using the standard of proof of the substantive law was applied by the arbitral tribunal in the Westinghouse case[4] [8; 6].

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[4] In ICC case no. 6401 (Westinghouse) the arbitral tribunal held that the principle of 'preponderance of the evidence' would apply for substantive claims. However, with respect to

It should however be borne in mind that the substantive law which is applicable, may establish a special standard of proof for certain circumstances, as is sometimes the case, for example, to determine the amount of loss.

What place does the standard of proof take in arbitration proceedings?

George M.von Mehren and Claudia T.Salomon state that arbitration rules grant the arbitrator broad discretion regarding the admission of evidence [10; 290]. According to Article 27 (4) of the UNCITRAL Arbitration Rules "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".

The arbitral tribunal also has wide discretion to assess and weigh the evidence adduced by the parties. This discretion is limited by the duty to treat the parties equally and to grant them a full right to be heard [14; 31].

Florian Haugeneder and Christoph Liebscher argues that, generally, arbitrators will try to avoid basing a decision solely on the standard of proof and will try to establish the relevant facts with reasonable certainty irrespective of the standard of proof. In "ordinary" contractual arbitrations, the parties will usually adduce sufficient evidence for the arbitrators to determine the facts without having to refer to rules of evidence. **As a consequence**, the standard of proof is rarely discussed in arbitral awards [8; 6].

By agreement of the parties to the arbitration may apply the rules of the International Bar Association on the representation of evidence in international commercial arbitration (IBA Rules on Taking Evidence in International Arbitration) [23].

There are some standard of proof indications in international arbitration cases and arbitration awards.

The first example of such case where one can find the standard of proof statements is Case No. ARB/02/18 Tokios Tokeles v. Ukraine.

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the allegation of corruption, the tribunal argued that pursuant to the laws of the Philippines and the United States (which were the relevant jurisdictions) a higher standard would apply [17; p. 496].

After analysis Tokios Tokeles v. Ukraine case one can distinguish such standard of proof rules:

1) The party that makes an assertion has to persuade the tribunal that it is more likely than not true.
2) In Tokios Tokeles v. Ukraine case the standard is higher than the balance of probabilities [11].

Another example of standard of proof statement made by tribunal one can find in ICSID CASE NO. ARB/05/13) EDF v. Romania. In dismissing all claims by EDF (Services) Limited ("EDF") against Romania, the tribunal's decision affirms that allegations of corruption must be substantiated by "clear and convincing" evidence [7]. While hearsay evidence is admissible in international arbitration, confirmatory evidence is normally required [4; p. 97].

ICSID Case No. ARB/07/9. Bureau Veritas v. Paraguay concerns the reliance on newspaper reports. The Claimant invoked a number of newspaper articles in support of its claims. Despite that fact the Tribunal is wary about placing too much reliance on newspaper reports, which may provide an incomplete or partial account of what has been said, even assuming that the quotations are accurately recorded and reproduced [5; p. 7].

Conclusion. Summarizing, it should be noted that usually neither the applicable investment treaty or customary international law nor the applicable procedural rules contain provisions on the standard of proof. Consequently, it is important to be aware that taking into account the competitive nature of international arbitration it becomes important to ensure the arbitrators that the adduced evidence have probative value. The standard of proof assists to determine the level when the circumstance is considered to be proved. The parties' failure to fully understand the standard to which their claims are subjected has the potential and has in fact undermined the integrity and fairness of the arbitration process. Common law systems are very familiar with the standard of proof applicable in civil cases, which is predominately a "preponderance of the evidence" standard.

Parties have to prove that their factual assertions are more likely than not truthful and sufficient to satisfy each element of their claims [9].

Finally, the standard of proof should be applied as an instrument of persuading the arbitrators in the reasonableness and lawfulness of the position of the party. It should be noted that in international arbitration the standard of proof should be determined by the applicable procedural rules and laws, and, in their absence, by the procedural discretion of the arbitrators.

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