I. Introduction

It has become the hallmark of modern international commercial arbitration that arbitrators are expected to be neutral and independent. Moreover, although arbitral rules place the power to decide in the arbitrator, they do not confer either the power or the facilities to gather evidence independently. Accordingly, the arbitrator is expected to preside in a neutral and even-handed fashion over a proceeding in which the parties themselves present the evidence upon which the arbitrator will base his decision. Finally, in most international commercial arbitrations, the award of the arbitrator is expected to apply to the facts as found by him. Thus, the obligations which the burden of proof creates for the parties becomes a critical part of arbitral procedure. Consideration of the problems presented by the burden of proof is an initial question which must be met in the development of the strategy to be employed in the arbitration and in the planning of the party's presentation of the facts.

II. What Truth does the Arbitrator Seek?

The arbitrator must organize the arbitral proceeding so as to permit him to determine what the relevant facts are. If he is proceeding under the ICC Rules, he is specifically charged by Art. 14 "to establish the facts of the case by all appropriate means". This charge reflects one of the essential elements of the task of an arbitrator in producing a reasoned award. He must decide, on the basis of the usually conflicting material presented by the parties, what the facts relevant to his decision are. He must establish the "truth" of the matter before him so that it, together with the applicable legal principles, will produce a reasoned award that decides the case.

Any system of dispute resolution must have some rules or structure for determining the truth of the dispute being judged. The concept of the burden of proof is such a rule. Perhaps the need for rules with respect to how facts are to be established is less important in an inquisitorial system than in an adversarial one. However, international commercial arbitration cannot function as an inquisition. Such a system requires the support of the State so that the judge has the facilities available necessary to gather and assess evidence. Any such support system is necessarily lacking in arbitrations. The arbitral tribunal is the creation of the agreement of the parties and has little or no access to the sovereign power of
the State. As a practical matter, the tribunal does not have the
authority or the facilities available to conduct – except to a very
limited extent – its own inquiry into the facts. As a matter of
necessity, it must rely on the parties to gather and present the
evidence. Accordingly, it has the same need for the structure and
discipline created by the principles of burden of proof as a common
law court.

The “Burden of Proof” contains the alpha and omega of the inquiry
into the facts. It imposes on the arbitrator two rules which can be
stated as two questions: “Who has the burden of going forward?”
and “Who has the burden of persuasion?” Which side must
introduce the factual inquiry into the arbitration and which side must
present the evidence necessary to convince the finder of fact that
its version of the ultimate fact is to be accepted as the truth? These
two burdens frequently, but not always, are borne by the same
party.

III. The Burden of Going Forward

Generally, the burden of going forward rests initially on the party
having the burden of persuasion. Thus, if the claimant asserts that
the respondent broke the contract at issue by failing to perform a
given act, the claimant would initially have both the burden of going
forward and the burden of persuasion. Once the claimant has put in
a prima facie case, the burden of going forward shifts to the
respondent who must rebut the proof presented by the claimant or
face the prospect of this issue being decided against him. (5)

The burden of going forward, therefore, is a principle which relates
to when proof should be presented by a party. It rests essentially on
concepts of logic and orderly presentation. Just as in debate where
the affirmative speaks first and the negative second, the proponent
of a position in an arbitration presents evidence on that position first
and thereafter the respondent presents his proof in
rebuttal. The sequence of presentation may be termed a general
procedural principle.

It should be noted, however, that the burden of going forward can be
satisfied without actually presenting evidence. For example, it can
be satisfied by a presumption or by an admission; these methods of
proof can also in some circumstances meet the burden of
persuasion as well. (6)

IV. The Burden of Persuasion

This burden is universally viewed by commentators as being fixed
by the issues presented in the case and by legal principles. It
attaches to one party at the outset of the case and does not shift. It
must be met by the party that bears it, if that party is to prevail on
that factual issue. Arbitral rules are for the most part silent as to the
burden of persuasion. Art. 24(1) of the UNCITRAL Arbitration Rules
is an exception and provides: “Each party shall have the burden of
proving the facts relied on to support his claim or defense.”

This burden is thus of critical importance. The arbitrator should
apply it unless he is functioning as an amiable compositeur. In
application, two major issues arise: First, where is the standard of
proof to be found and, second, what is the content of that standard?

1. Where Is the Standard to Be Found?

This is a very difficult question. The various arbitral rules give no
guidance and there are only a few helpful arbitral awards in the public domain. Certain propositions should be set down as a foundation for our discussion of the question:

a. The arbitrator derives his authority from the agreement of the parties.
b. Arbitrators, at least in complex international commercial arbitrations, are usually skilled in receiving and evaluating evidence. The same standards which apply to a jury should not necessarily apply to them.
c. Subject to the principles of equality of the parties and due process, the arbitrator is for the most part free of restrictive rules of evidence which apply in courts.

With these propositions in mind, where should the standard be found? The choices would seem to be among the following three possibilities:

– General principles of law – a concept analogous to lex mercatoria
– The law of the place of arbitration.
– The law selected by the parties or the arbitrators to control the substance of the proceeding.

Each of these three alternatives deserve analysis. I shall consider the second and third alternatives first.

a. The law of the place of arbitration

It used to be the general view in many jurisdictions, including England “that arbitrators are bound by the technical rules of evidence unless the parties expressly or impliedly agreed otherwise.”(7) This is probably no longer the case with respect to international arbitrations. By and large, matters of burden of proof and evidence are not viewed today as “mandatory” rules of procedure which the arbitrator must follow.

Consequently, the arbitrator is free to select or to reject the procedural rules of the situs unless the parties have specifically agreed that those rules should govern. A number of considerations militate against an analysis which requires such a choice. First, the choice of the place of arbitration is often fortuitous, especially if the choice is made by the administrative body. Second, unlike the burden of going forward, the burden of persuasion is better viewed as a matter of substance than procedure and thus not required to be governed by the law of the forum. It does not concern the process of presenting the case but rather the standard of proof on which the ultimate decision will rest. This standard represents such an important consideration in the decision of the case that it has the quality of substance rather than procedure.

b. The governing law

However the burden of persuasion is classified, there are strong considerations in support of the proposition that the governing law should attract the standard of proof of its jurisdiction. The parties have either chosen by agreement the controlling law or the arbitrator, in the absence of choice by the parties, has selected the controlling law, usually on the basis of the law that has the most contacts or the closest connection with the case. If the governing law attracts the standard of proof, the factual aspect of the
determination of the dispute is most closely assimilated to the legal rules which are being applied. This would seem to harmonize with the presumed intent of the parties in choosing the controlling law, or, if that law is to be selected by the arbitrator, to be consistent with the approach of applying the standard of proof which has the closest connection with the case.

c. General principles of law

If the standard of the governing law is selected, an issue arises as to when, if ever, the arbitrator can properly modify that standard by the application of general principles. This question may be approached by considering a hypothetical case. Assume that a principal issue in an international arbitration is fraud; that the arbitrators have concluded that the governing law should attract the standard of proof; and that the governing law provides for a higher standard of proof in civil cases for fraud than for other issues. Would the application of general principles justify an arbitrator in an international arbitration applying the usual civil standard?

This question turns in large measure on whether in arbitration the same results are expected and desirable as in litigation. In litigation, where a higher standard is imposed, the justification can probably be found in notions of public policy. Since fraud is inherently criminal, the public policy argument might run as follows in a common law jurisdiction: The plaintiff in a civil case should be required to prove its case against the defendant by a standard which is closer than the usual civil standard to the standard of “beyond a reasonable doubt”, which the State would have to meet in a criminal prosecution. The claimed improper acts being closer to a criminal than a civil wrong, the defendant should have the protection of the higher standard of proof.

This higher standard of proof in civil litigation involving fraud may be justified, at least in common law jurisdictions, by the jury system. Certainly it is the jury system which explains the application of many restrictive rules governing the admissibility of evidence. Should the same standard be applied where the trial is before what is usually a panel of sophisticated and experienced arbitrators? The tension here, it seems to me, is the desire to achieve similar results in judicial and arbitral proceedings. Personally, I am not clear in my own mind whether that desire should control where one or more of the fundamental reasons for the existence of the standard applies in litigation but not in arbitration.

2. What Is the Standard?

The standard most generally applied in international commercial arbitration is probably the “preponderance of evidence”. This standard reflects the general view that the proponent of a position must do more than create an equilibrium between its position and that of its opponent to prevail. Somehow, the proponent must push its evidence beyond the line of equal weight to a weight greater than that of the other side. This approach is consistent with the general view that the proponent of a position does not prevail unless it obtains some edge over its opponent's position. Thus, the standard tilts slightly in favor of the defendant and reflects the rather common notion that the status quo should not be changed if the contending positions have equal strength.

This standard has various formulations. The generally accepted American rule can be found in 3 E. Devitt, C. Blackmar & M. Wolff, Federal Jury Practice and Instructions: Civil Sect. 72.01 (4th ed.)
1987), which discusses the federal jury instruction on the burden of proof:

The burden is on the plaintiff in a civil action … to prove every essential element of his claim by a preponderance of the evidence….

(…)

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.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

In other jurisdictions, the idea of "preponderance of the evidence" is formulated in terms such as the "superior weight of evidence" and establishes that its version of the facts is "more likely true than not true".

In a recent important international arbitration, lead counsel for a party articulated the applicable standard as follows: "Does the evidence tested against human experience and common sense persuade or does it not?" The arbitral tribunal accepted this formulation as the equivalent of the preponderance of evidence test.

From the point of view of arbitration, the fundamental principle should be that the standard to be applied is that prevailing in the jurisdiction from which the controlling law is taken. This, as noted above, is consistent with the presumed intent of the parties where they have selected the controlling law. The arbitrator might, however, deviate from the higher standard where he finds that the reasons which explain its use in litigation do not apply to arbitration.

3. Ways in Which the Standard Can Be Met – The Use of Presumptions

The burden of persuasion can be met directly by documentary evidence and oral testimony. It can also be met by admissions of the parties or through presumptions.

The question of presumptions is a difficult one and one which the author could only approach within the framework of American practice and authority. A detailed analysis of presumptions is, moreover, outside the scope of this paper. However, a short review confined to American practice is useful to explain the theory of presumptions and how they operate within the framework of the burden of proof.

A presumption is a substitute for evidentiary proof. A classical example, often used in American treatises, is the presumption that,
if the posting of a letter has been proved, its receipt will be presumed.\(^{(11)}\) The effect, therefore, is to satisfy the burden of going forward and to meet the burden of persuasion as to the fact of receipt of the letter. The burden of rebuttal is shifted to the other party which must introduce evidence to overcome the presumption of receipt. Since the burden of persuasion cannot be shifted and remains with the proponent of receipt, if the evidence of non-receipt persuades the finder of fact, the proponent of receipt will lose on this issue unless it in turn submits further evidence to show receipt. The presumption of receipt settles that issue unless page “128” and until the other party puts the issue into contention by submitting evidence of non-receipt.

Another example of presumption is the doctrine of res ipsa loquitur (the thing speaks for itself). This is applied in the common law to many situations including that of the bailee. Where goods have been committed to a bailee and have been lost or returned in a damaged condition, the bailee is liable for the damage caused by its negligence. The bailor by proving the undamaged condition of the goods upon delivery to the bailee and the damaged condition upon their return by the bailee triggers the presumption that the damage has been caused by the bailee’s negligence. This places upon the bailee the burden of producing evidence of some other cause of the damage.\(^{(12)}\)

In international commercial arbitration, however, the presumption or adverse inference which is most often encountered is that invoked if a party, known to have a document in its possession or control, refuses to provide the document to the arbitral tribunal.

Unlike a court, the tribunal has no sovereign power to compel production. Its power is limited to its use of the fact of refusal as a factor in its decision of the case. Examples of the international use of this presumption or adverse inference are found in the jurisprudence of the Iran-United States Claims Tribunal. In William J. Levitt and Islamic Republic of Iran, et al., Award No. 520-210-3, para. 64-66, Chamber Three summarized the basis for its use:

64. Based on the foregoing, the Tribunal finds, as foreshadowed by some of its production Orders, that the Respondents have failed to submit the majority of the documents requested and have done so without supplying adequate reasons for this failure. It bears emphasis that the requested documents were ones that they had referred to in their own pleadings. Their often contradictory and evasive explanations suggest deliberate non-compliance rather than an inability to produce. The introduction by the Respondents of exhibits not previously filed in support of their counterclaims lends further support to this suggestion.

65. As this Chamber determined in Arthur J. Fritz & Co. and Sherkate Tavonie Sherkathaye Sakhtemanie, et al., Award No. 426-276-3, para. 42 (30 June 1989), reprinted in 22 Iran-U.S. C.T.R. 170, 180, ‘it is an accepted principle that an adverse inference may be drawn from a party’s failure to submit evidence likely to be at its disposal.’ There, the Tribunal concluded that it must take into account the party’s failure to produce ordered documents in weighing the evidence that page “129” was before it. See also INA Corporation and The Government of the Islamic Republic of Iran, Award No. 184-161-1, p. 14 (13 Aug. 1985), reprinted in 8 Iran-U.S. C.T.R. 373, 382.
Accordingly, while the Tribunal does not accept the Claimant's request to grant a 'default judgment', the Tribunal must interpret the incomplete record with respect to the claim and the counterclaims in the light of the Respondents' failure to comply with the Tribunal's production Orders.

The existence of this negative inference and its appropriate use in international commercial arbitration are of great importance to the proper conduct of such arbitrations. The inference provides a sanction to the tribunal that is, at least in part, a substitute for the power to compel production.

V. Conclusion

Arbitration, as a process for the resolution of disputes through a neutral and impartial inquiry into the facts and the law applicable to the particular dispute before the arbitrator, requires a framework for the presentation of evidence and the resolution of disputed factual issues. This framework has in large measure been drawn from judicial experience and has been modified in important respects particularly insofar as the rules of evidence are concerned.

Included within this framework is the subject of this paper – the "Burden of Proof". This concept, which plays a critical role in judicial proceedings and is ultimately rooted in logic and common sense, operates in the field of arbitration. It has two branches – one which affects the order of presentation of proof and one which governs the standard to be applied by the arbitrator in establishing the facts upon which the final award will rest. These are, respectively, the burden of going forward and the burden of persuasion. Of these, the latter is of the greater significance and essential to the process of decision making.

The burden of persuasion should follow the controlling substantive law whether that law has been chosen by the parties or selected by the arbitrator. It is appropriate to attach that burden to the governing legal principles under which the decision of the arbitrator will be reached. Since most arbitral awards, like most judicial decisions, decide mixed questions of fact and law, the assimilation of the principles for finding the facts to those for finding the law is desirable.

In international commercial arbitration, the power of the tribunal to draw negative inferences from the failure of a party to produce evidence in its possession or control is a partial substitute for the power of a court to require documentary production from parties before it.

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1 Member of the Bar of the State of New York; Of Counsel to Debevoise and Plimpton, New York; Vice Chairman, International Law Association; Member, Executive Committee of the Board of Directors, American Arbitration Association; Member of the ICC Institute of International Business Law and Practice.

2 This general proposition is subject to some exceptions, e.g., the arbitrator may have the power to appoint experts and to visit the site of important facilities.

In international arbitrations, the decision of the arbitrator is generally contained in a reasoned award which considers both the facts and the applicable law. The arbitrator may act as an amiable
compositeur, if the parties agree to give him that power.

3 The “truth” found in both judicial and arbitral proceedings is relative rather than absolute. It is derived from the evidence presented by the parties and is dependent upon the standard of proof applied to the evidence. Thus, the same evidence could produce one result in a criminal case in a common law country where the standard of proof is “beyond a reasonable doubt” and a different result in a civil case where the standard is the “preponderance of the evidence”.

4 A distinction has often been drawn between the common law and the civil law judicial systems, the former being called adversarial and the latter inquisitorial. Recently, this categorization has been called in question and it has been noted that there are many similarities between the two systems. See, ICC Institute of International Business Law and Practice (Pub. No. 440/8, 1990), in particular, M. DE BOISSESON, Comparative Introduction to the Systems of Producing Evidence in Common Law Countries and Countries of Roman Law Tradition, pp. 100 et seq.

5 Of course, if the arbitrator concludes that the proof presented by the claimant does not meet the burden of persuasion, the respondent will prevail even if he remains silent.

6 See IV.3, infra.


8 In some jurisdictions, the rule is that fraud “must be proved to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by mere speculation.” Other formulations are that fraud must be established by “a clear preponderance of the evidence” or by “clear, precise and convincing evidence”.

9 See IV.1, supra.


11 The general deterioration of the United States Postal System is such that this presumption may not be valid for the 1990's. It does, however, illustrate the principle.

12 The first case which I ever tried turned on the doctrine of res ipsa loquitur. It was a case in the Small Claims Court for the District of Columbia in the spring of 1948. I was at the time a Law Clerk to Justice Stanley F. Reed of the Supreme Court of the United States. The plaintiff was my Aunt who had had a piano moved and who claimed that it had been damaged in the course of moving through the negligence of the moving company. I put her on the stand and examined her on the condition of the piano before delivery to the trucking company and upon return to her. I then put in evidence on the quantum of damage, invoked the doctrine of res ipsa loquitur and rested. The moving company could not explain the cause of damage and the court returned a judgment (a small one) in my Aunt’s favor.
Sales staff at sales@kluwerlaw.com or call +31 (0)172 64 1562.