

The Concept of Burden of Proof in Arbitration

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1. Introduction

In a realm of dispute resolution, it's always one party asserting a fact and the other disputing it or asserting a counterfact. The duty of the court or the tribunal, depending upon the forum of resolution, is to rule on which party has been able to prove a fact, if relevant to the dispute. Thereby making the concept of 'burden of proof' very crucial to dispute resolution. The concept is derived from two of the oldest maxims, "*onus probandi actori incumbit*," which means the one who claims, must prove and "*ei incumbit probatio qui dicit, non qui negat*," which means the consequent obligation to prove any particular fact lies on the party who alleges it and not on the party who denies it.

Let's break it down for easier understanding of the concept:

- First, the party bringing a claim must provide a factual basis for their claim, as this process encourages the party to provide clear and persuasive evidence to support each claim before the law is applied in their favor or otherwise.
- Second, it is inherently more difficult to prove a negative than it is to prove an affirmative assertion of fact. For example, it is easier to prove an assertion that '*Mr. A was having dinner at Restaurant B*' rather than '*Mr. A was not having dinner at Restaurant B*'. Asking a party to prove that something did not occur or does not exist can be both impractical and unreasonable. Thus, the law correctly places the evidentiary burden on the party who makes the positive assertion of fact.

Burden of Proof is often confused with *Standard of Proof*, however, both of these concepts are entirely different. Burden of proof refers to the obligation of a party to prove a disputed fact, while the Standard of Proof determines the level of evidence required to satisfy this obligation, according to the Merriam-Webster Dictionary.

In arbitration, determining which party bears the burden of proof is crucial for the substantive and procedural aspects of a dispute. It influences the tribunal's decision-making process and establishes which party bears the burden of proving facts essential to their claims or defenses. As per the general rules and requirements of this principal, in civil (including commercial) cases, a party only needs to

prove their case using a *preponderance of probabilities*, as against *beyond a reasonable doubt*, required mostly in criminal proceedings. The party on whom the burden of proof lies must show that their version of facts is more likely to be correct than not. If they fail to provide the necessary evidence to prove such facts, which are denied by the other party, this standard isn't met, and the tribunal may dismiss the asserted fact as not proved. Unfortunately, in recent times, it is seen that these concepts are not applied strictly in arbitration proceedings, often leading to challenges to the award. There is a growing need to apply the basic standards of evidence to be considered while deciding cases by courts and tribunals alike.

2. General rules and requirements to determine the onus of *Burden of Proof*

Burden of proof is the beginning and end of the investigation related to the facts. To determine which party bears the burden of proof, a few key questions need to be addressed by the tribunal as well as the disputing parties in arbitration proceedings:

- i. Which party has asserted a *fact* that needs to be proved?
- ii. Which party must provide sufficient evidence to persuade the tribunal that its version of the *fact* is correct? (also called Burden of Persuasion or Legal Burden)
- iii. How does the evidential burden of proof shift among the parties during the proceedings based on pleadings and evidence tendered? (also called Burden of Going Forward or evidential burden)

To answer these, we need to understand which party bears the *Burden of Persuasion* and the *Burden of Going Forward*.

2.1 Burden of Persuasion:

The "burden of persuasion" is the legal obligation to prove a case to a certain standard (like "beyond a reasonable doubt" or "preponderance of the evidence"), which generally remains with one party throughout the proceeding. This burden is assigned to the party asserting a fact and does not shift; it is fixed by the issues raised in the case as well as established legal principles. Commentators universally view this burden as being fixed by the issues presented in the case by a particular party. While most arbitration rules do not address the burden of persuasion, Article 24(1) of the UNCITRAL Model

Law on International Commercial Arbitration (**'Model Law'**)¹ makes an exception, stating that "*Each party shall have the burden of proving the facts relied on to support his claim or defense*". Further, *Guidelines on Evidence* published by China Economic and Trade Arbitration Commission (**'CIETAC'**) under Article 1.1 makes it clear that "*Each party shall bear the burden of proving the facts that it alleges*". This burden is therefore extremely important.

2.2 Burden of Going Forward:

The "*burden of going forward*" is the obligation to produce enough evidence to raise an issue and can shift back and forth between parties during the proceedings. Initially, the burden of going forward lies with the party that also holds the burden of persuasion. For example, the initial burden of going forward to prove a case will be on the claimant, but once the claimant has established a *prima facie* case, the burden of going forward then shifts to the respondent, who must refute the claimant's evidence or risk having the issue decided against him. Similarly, if the claimant does not provide enough evidence to meet the *prima facie* standard, the burden of going forward remains unchanged, and the respondent is likely to win the case even if the respondent does not offer any evidence. This burden is essentially about raising an issue and presenting evidence for it. It requires a party to "go forward" with evidence.

In summary, the *Burden of Persuasion* is the ultimate duty to prove a case that is fixed and does not shift. *Burden of going forward*, on the other hand, is the duty to produce evidence as the case progresses and can shift between the parties.

3. Where is the standard of burden found?

Parties rarely mention the rules to govern the burden of proof in arbitration agreements, and even the national arbitration laws of different jurisdictions and institutional rules are typically silent on this subject. As a result, the arbitral tribunal has to decide which rules apply on the party in respect to the burden of proof.

¹ Article 24(1), UNCITRAL Model Law on International Commercial Arbitration

The most commonly used standard in international commercial arbitration is the "*preponderance of probabilities*." This standard is based on the principle that the party making a claim must demonstrate that its evidence is stronger than that of its opponent, rather than simply balancing the two. To prevail, the claimant must effectively push its evidence beyond the point of equal strength. This approach, which slightly favors the defendant, reflects the general belief that the *status quo* should be maintained unless there is clear and convincing evidence to justify a change.

In international arbitration, disputes frequently involve parties from different countries or cases that cross national borders. This situation usually brings multiple legal systems to determine which law should apply and how this determination will affect the burden of proof. Also, having parties from different jurisdictions means that they may be exposed to a different set of rules for determining burden and standard of proof.

In this situation, the tribunal may treat the burden of proof as a procedural issue and determine the rules on the basis of any of the following to bring certainty for the parties while pleading their respective cases:

3.1 Principles of law

A general principle of law states that when a governing law is chosen, its standard should be applied to the arbitration proceedings. This principle reflects the idea that the substantive legal rules chosen by the parties or by the arbitrator contain an inherent evidentiary standard that serves as the legal framework for the dispute.

3.2 Law of the place of Arbitration

It is widely accepted in several jurisdictions, including India, that arbitrators have to follow the technical rules of evidence applicable domestically unless the parties agree otherwise. However, this is not the case in international arbitrations, if the parties have not agreed on a particular law, the arbitrator has the flexibility to decide whether to adopt those local rules of the seat or not. Therefore, it is prudent for the Tribunal to make it clear to the

parties the set of rules or the law it would apply to determine the burden and standard of proof in deciding the case.

4. Approach of civil vs. common law jurisdictions

The approach towards the concept of burden of proof varies between civil and common law jurisdictions. In common law systems, the burden of proof is considered as a procedural issue. The burden initially rests with the Claimant to prove its *prima facie* case, and once it is proved, the onus shifts to the opposing party to rebut or provide counterevidence. The standard of proof varies according to the circumstances of the case. In civil disputes, the standard is usually the "balance of probabilities," which means that the claim must be more likely to be true than false. In criminal cases, the standard is much higher and the case has to be proved "beyond a reasonable doubt." Furthermore, common law systems rely heavily on witness testimony, cross-examination, and adversarial procedures, in which each party presents its case independently while the tribunal takes a more passive role.

In contrast, civil law systems view the burden of proof as part of substantive law rather than procedural. The legal provisions governing the burden of proof are frequently incorporated into substantive law, and judges play an active role in gathering and evaluating evidence. Civil law systems follow the principle of "*inquisitorial justice*," in which the tribunal or court has the authority to request evidence, which also includes the collection of evidence from the persons who are not the parties of the dispute, question witnesses, and appoint experts. The standard of proof is generally similar to that of common law jurisdictions, which requires a reasonable level of certainty but not an absolute proof in civil cases. However, unlike common law systems, civil law jurisdictions place less emphasis on cross-examination and allow judges to weigh evidence more freely without being bound by strict procedural rules.

While international arbitration involves participants from different jurisdictions, there is no universally binding rule that determines which approach has to be taken in the context of the burden of proof. Major national arbitration laws do not expressly mention the concept of burden of proof, which indicates a general reluctance to classify it as a purely procedural issue. Arbitrators typically take a pragmatic approach by balancing elements from both legal traditions.

Even the Model Law, due to the party autonomy principle does not explicitly address the burden of proof and leaves it to be determined by the arbitration agreement, the parties' procedural rules, or the tribunal's discretion. As a result, arbitrators frequently apply the principle that the party asserting a claim bears the burden of proving it, but they may also consider substantive rules relevant to the dispute. Such considerations would be subject to Article 28² of the Model Law, which governs the law applicable to the substance of the dispute.

In the case of ***BG Oleochemicals SL v Evyap Sabun Malaysia Sdn Bhd***³ in the Kuala Lumpur High Court, decided by Ong Chee Kwan J, claims were raised for infestation and other damages to cargo which arose during the execution of a contract for the sale of goods and carriage of goods by sea route. The primary question raised was whether the cargo's deterioration and damage resulted from poor preparation and packaging, for which the shipper or seller would be liable, or from damage sustained during transit or in storage after discharge, which could implicate the carrier or later handlers. The court ruled that, the defendant, Evyap Sabun Malaysia Sdn Bhd, failed to adequately prepare and package the goods in the container in a way that was appropriate for the entire transit from Malaysia to Spain as a full container load shipper. Upon arrival, the goods were discovered to be melted, wet, and infested. The court determined that, on the balance of probabilities, the damage was caused by the shipper's failure to take adequate precautions while preparing and packaging the cargo. The court also found that the plaintiff had fulfilled the required burden of proof and observed as follows:

[86] Based on the aforesaid and in the absence of any evidence from the defendant that suggests that the cause for the damage to the cargoes could possibly be from other sources, it is my judgment that the plaintiff has discharged its burden on the balance of probabilities that the defendant had not performed its duty as it ought to have performed as a seller and manufacturer in preparing, packing and shipping the cargoes to the plaintiff.....

² Article 28, UNCITRAL Model Law on International Commercial Arbitration

³ Bio BG Oleochemicals SL v Evyap Sabun Malaysia Sdn Bhd [2024] MLJU 19

[87] Although the plaintiff had contended that the defendant ought to have fumigated the containers and the cargoes, there is no express provision in the sales contract that required the defendant to do so. There is also insufficient evidence placed before this court to support the contention that it is customary in the industry for shipment of lauric acid that fumigation is obligatory. However, for the reasons given, even without an obligation to fumigate, the plaintiff has satisfactorily met the burden of proof that the defendant had not prepared, packed, loaded and shipped the cargoes onto pallets adequately into the empty containers at the defendant's premise and then sealed the containers in customary manner as required of them under the law.

5. IBA Rules on the Taking of Evidence

The IBA Rules on the Taking of Evidence in International Arbitration (***IBA Rules***) provide a structured yet flexible approach to evidence presentation and evaluation, as it bridges the gap between civil and common law traditions. These rules do not replace the parties' agreed-upon procedural framework, but rather supplement existing arbitration rules and institutional guidelines. The primary goal of these Rules is to establish an efficient, fair, and cost-effective process for gathering evidence, particularly in arbitrations involving parties from various legal traditions.

One of the IBA Rules' most significant contributions is its approach to evidence admissibility and evaluation. Article 9⁴ gives arbitral tribunals broad discretion in determining the relevance, materiality, and weight of evidence. Unlike common law jurisdictions, where discovery obligations can be broad, the IBA Rules limit document production to narrow and specific categories of documents that are relevant and material to the outcome of the case. These Rules allow parties and arbitrators to define what constitutes a "narrow and specific" category of documents when making document requests that go beyond individually specified documents. This flexibility enables case-specific determinations while maintaining a structured approach to document production and avoiding excessive discovery practices while providing reasonable access to evidence that may be critical to resolve the dispute.

⁴ Article 9, IBA Rules on the Taking of Evidence

Additionally, these Rules apply uniformly to both paper and electronic documents. This approach aligns with standard practice in international arbitration, where there is no fundamental difference between the disclosure of physical and digital records.

The IBA Rules also govern the use of eyewitness testimony and expert opinion. In common law systems, the parties usually present their own experts, who are then cross-examined. In contrast, civil law systems enable tribunals to appoint its own experts. The IBA Rules accommodate both approaches by allowing parties to submit expert reports while also granting tribunals the discretion to appoint independent experts as needed. Furthermore, the IBA Rules also include a method known as "witness conferencing" to allow multiple witnesses to be heard concurrently, which increases efficiency and reduces procedural delays.

6. Shared Principles of Burden of Proof in India and Singapore

From a procedural viewpoint, as explained above, the concept of the burden of proof is applicable as a well-established principle in International Arbitration, in line with the *onus probandi actori incumbit* principle. Claimants have the burden of proving claims, and Respondents have to prove their facts in defences, counterclaims, or set-off rights.

The law governing the rules of Evidence in Singapore is *pari materia* with that in India. For example, Section 104⁵, 105⁶ and 106⁷ of Bharatiya Sakshya Adhinyam, 2023 ('BSA') are *pari materia* to Sections 103⁸, 104⁹ and 105¹⁰ of Singapore's Evidence Act, 1893 ('SEA'). Which states that the burden of proof in relation to a particular fact lies on the person who wishes the court to believe its existence. Despite the fact that Rule 19 of the Singapore International Arbitration Centre ('SIAC') prohibits the direct application of these laws to international arbitrations, they nevertheless adhere to the generally recognized concept of burden of proof in arbitral proceedings.

⁵ Section 104, Bharatiya Sakshya Adhinyam, 2023

⁶ Section 105, Bharatiya Sakshya Adhinyam, 2023

⁷ Section 106, Bharatiya Sakshya Adhinyam, 2023

⁸ Section 103, Singapore's Evidence Act, 1893

⁹ Section 104, Singapore's Evidence Act, 1893

¹⁰ Section 105, Singapore's Evidence Act, 1893

The Gujarat High Court in **Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.**¹¹ observed that:

*“The general rule as to the onus of proof and the consequent obligation of beginning is, that the proof of any particular fact lies on the party who alleges it, not on him who denies it, “ei incumbit probatio qui dicit, non qui negat”.*¹²

A similar view was adopted by Singapore’s Court of Appeal in **Yogambikai Nagarajah v. Indian Overseas Bank**¹³, wherein it was reiterated that the burden of proof is on the party alleging the forgery.

In **Britestone Pte Ltd v Smith & Associates Far East Ltd.**¹⁴, V K Rajah SC, while delivering the grounds of decision in the Court of Appeal in Singapore, addressed the following questions in relation to the burden of proof:

1. When is it the responsibility of the plaintiff in a case to produce evidence to prove his case?
2. Conversely, when is it the responsibility of the defendant to produce evidence to rebut the plaintiff’s evidence?

The Court said that the term “*burden of proof*” is used with reference to the obligation to prove. As far as the introduction of evidence is concerned, there are actually two types of burden:

“The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. This obligation never shifts in respect of any fact, and only “shifts” in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to

¹¹ Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors., Civil Appeal No. 7528 of 2019

¹² Amir Ali and Woodroffe’s Law of Evidence page 603 (Eighth Edition)

¹³ Yogambikai Nagarajah v. Indian Overseas Bank 1996] 2 SLR(R) 774

¹⁴ Britestone Pte Ltd v Smith & Associates Far East [2007] SGCA 47

adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.”

In other words, at the start of the plaintiff's case, the evidential burden, which involves providing evidence to demonstrate the existence of a fact, and the legal burden, which requires proving the existence of any relevant fact the plaintiff is required to establish, converge. When such evidence is introduced, the onus of proof shifts to the defendant, who must then submit evidence in rebuttal, if applicable.

The court may conclude from the plaintiff's evidence that the legal burden is also discharged and reach a factual conclusion against the defendant if no rebuttal evidence is presented. However, the burden of proof returns to the plaintiff if rebuttal evidence is presented. The plaintiff would have had the burden of proving that pertinent fact if the defendant had ultimately been found to have the burden of proof.

There are only two possible values in the binary system that the law uses: zero and one. The event either occurred or did not. It is a rule that assigns the duty of burden of proof to one party and the other settles any doubts that the tribunal may have. The fact is regarded as not having occurred and a value of zero is returned if the party with the burden of proof is unable to fulfill it. A value of one is returned, and the fact is regarded as having occurred if he discharges it.¹⁵

7. Why does the different rules of International Arbitration in current use say about the Burden of Proof?

International arbitration rules generally lack detailed provisions on evidentiary matters, such as the burden of proof. Instead, they prioritize party autonomy, allowing the parties to determine the procedural framework and evidentiary rules that apply to their dispute. If the parties do not specify such rules, the arbitral tribunal is usually given discretion to determine the relevant standards.

¹⁵ *Re B (Children) (HL(E))* [2009] 1 AC 11

Most major international arbitration rules, including those of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), SIAC, the Hong Kong International Arbitration Centre (HKIAC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), do not prescribe rigid rules regarding the burden of proof.

The Model law lacks explicit provisions governing the burden of proof. However, it contains a general reference in Article 27(1), which states that "*each party shall have the burden of proving the facts relied on to support its claim or defense.*" This principle corresponds with the widely recognized legal maxim "*ei incumbit probatio, qui dicit, non qui negat*".

Certain arbitration rules, such as those of the Dubai International Arbitration Centre (DIAC)¹⁶, the Hong Kong International Arbitration Centre (HKIAC)¹⁷, and the New Zealand International Arbitration Centre (NZIAC)¹⁸, explicitly address the burden of proof and adhere to the same underlying principle. These rules broadly state that each party must prove the facts on which it bases its claims or defenses.

In cases where the parties do not establish an evidentiary framework, arbitrators may use the IBA Rules on the Taking of Evidence in International Arbitration as a guide. While these rules are not legally binding, they provide a structured approach that incorporates elements from both the common law and civil law traditions. The IBA Rules reaffirm that each party is responsible for proving its claims and defenses while ensuring procedural fairness in evidentiary matters.

8. Conclusion

In arbitration, the concept of the burden of proof is crucial as it determines which party must provide evidence to support its claims, and it guides the tribunal's decision-making process. This concept ensures that the arbitral awards are founded on factual certainty rather than opinions by offering an organized framework for evaluating the evidence and clearing up any doubts. Therefore, this concept

¹⁶ Article 25, DIAC Arbitration Rules 2022

¹⁷ Article 22, HKIAC Administered Arbitration Rules 2018

¹⁸ Article 26.1, Standard Arbitration Rules 2018

supports the legitimacy and integrity of arbitration proceedings by outlining the parties' evidentiary obligations, which promotes confidence in the arbitral process across different jurisdictions.