

# BURDEN OF PROOF IN INTERNATIONAL ARBITRATION

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KIEV ARBITRATION DAYS: THINK BIG!  
5 NOVEMBER 2015

- Each party must prove the facts upon which it relies in support of the case
- Parties/counsel rarely consider it to be an issue in the course of the proceedings



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## Burden of Proof: Common Ground (2)

- l Look to Arbitration Rules for determination of applicable rules on Burden of Proof [UNCITRAL Arbitration Rules (2010), Art. 24(1)]
- l Do not overlook local law
  - l Query: substantive law or procedural law?
- l In practice, each party bears its own burden of proof: claimant shall prove the claims, respondent shall prove the defenses.
- l Real burden of proof issue: when there is a presumption

## Requirements of applicable law

- Different degree and specificity of evidence needed to prove damage incurred under Swiss, French and German law

## Nature of the asserted fact

- Example: varying burden (and degree) of proof for allegations of corruption

## Personal background of arbitrators and counsel

- Reliance of written vs. oral evidence

- Role of cross-examination

## Parties can amend the general rules on burden of proof

### ***Alleviation: Liquidated damages clauses.***

Claimant only needs to prove breach by the other party and existence of damage, but not quantum of damage

### ***Aggravation: Limitation of liability to wilful conduct or gross negligence.***

Claimant needs to prove the existence and quantum of damages due to the breach that was the result of wilful conduct or gross negligence of the opposing party

### ***Shift: Penalty clauses***

Claimant only needs to prove the breach. Respondent ends up with a burden of proof that penalty is excessive

## Discharge of Burden of Proof

- l Burden of Proof is discharged by adducing evidence sufficient to reach the Standard of Proof
  - l Common ground: there must be *some* evidence
  - l “Ping-Pong Principle”: parties bounce the burden of proof to one another by successive exchange of arguments/evidence
  - l Practically speaking, all evidence is adduced in “batches”, and arbitrators weight its totality



World Anti-Doping Code (2015): Athlete tests positive for doping

3.1. The anti-doping organization shall have the burden of establishing that an anti-doping rule violation has occurred.

3.2.2. Laboratories are presumed to have conducted sample analysis in accordance with relevant standards. The Athlete may rebut this presumption by proving that ***there was a departure*** from the standard that ***could have reasonably caused*** the AAF.

If the Athlete successfully proves it, the anti-doping organization gets back the burden of proving that the departure ***did not cause the AAF***.

- Allegations of corruption complicate things
- No uniform approach to the issue of burden of proof of corruption
- Two main schools of thought
  - “Tough arbitrator’s approach”: a party alleging corruption in an arbitral proceeding retains the burden of proof of its allegation, deals with the increased standard of proof.
  - “Suspicious arbitrator’s approach”: a party alleging corruption in an arbitral proceeding needs only to establish a prima facie case of corruption, at this point the burden of proof shifts to the other party that needs to prove absence of corruption

## Proving Corruption: To Shift or not to Shift?

- l Shifting of the Burden of Proof sometimes linked to the Standard of Proof Dilemma – High or Low?
  - l Could it be used as a compromise?
- l General rule for Burden of Proof exists for a reason: prevents the party from making baseless allegations
- l If departure from this rule is permitted in corruption cases, why not make other exceptions?
- l Realistically speaking, isn't the point moot?

## Specific Instance: Metal-Tech

- l *Metal-Tech v. Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, paras 236 et seq.*
- l Respondent: “There was corruption on Claimant’s part!”
- l Claimant: “If you allege corruption, go prove it”
- l Respondent: “Claimant wants a finding of jurisdiction, so he needs to provide evidence of lack of corruption, since a strong presumption of corruption follows from evidentiary record’
- l Tribunal: We will look for guidance in *lex causae* (BIT), and relevant caselaw of investment arbitration tribunals

## Specific Instance: Metal-Tech (2)

### Tribunal:

- While the debate about standards of proof and presumptions is an interesting one, the Tribunal finds that *it does not require the application of the rules on burden of proof or presumptions to resolve the present dispute*. In this case, facts emerged in the course of the arbitration. *Because those facts raised suspicions of corruption, the Tribunal required explanations* [para 239]
- [P]resent factual matrix does not require the Tribunal to resort to presumptions or rules of burden of proof *where the evidence of the payments came from the Claimant and the Tribunal itself sought further evidence* of the nature and purpose of such payments. Instead, the Tribunal will determine ***on the basis of the evidence before it*** whether corruption has been established with reasonable certainty [para 243]

## Proving the Negative

- l Proving the non-existing event is considered to be impossible
- l Shifting of the burden of proof upon establishment of *prima facie* case may be seen as a requirement to prove the negative
- l Peculiar instance from the world of Sports Arbitration: Appellate Proceedings at CAS (match-fixing context)
  - l Earlier stages of legal proceedings – clear “prosecution v. defense” format, prosecution bears the burden of proof
  - l When the “defense” side appeals to CAS, the burden of proof may be seen as having shifted: in appellate proceedings the appealing party bears the burden of proof that the lower instance has erred.
  - l CAS hears cases *de novo* – as a court of the first instance. There may be a tendency to place the burden of proof of its innocence on the “defense” party



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