BURDEN OF PROOF
IN INTERNATIONAL ARBITRATION

MARKIYAN KLIUCHKOVSKYI, PARTNER, EPA&P UKRAINE
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.
THANK YOU FOR YOUR ATTENTION!

38 Volodymyrska St., Kyiv, 01034, Ukraine
Tel.: +380 (44) 492 82 82
Fax: +380 (44) 492 88 72
www.epap.ua

Markiyan Kliuchkovskyi
Partner
m.kliuchkovskyi@epap.ua
BURDEN OF PROOF
OF CORRUPTION
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Look to Arbitration Rules for determination of applicable rules on Burden of Proof [UNCITRAL Arbitration Rules (2010), Art. 24(1)]

Do not overlook local law

Query: substantive law or procedural law?

In practice, each party bears its own burden of proof: claimant shall prove the claims, respondent shall prove the defenses.

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
Burden of Proof is discharged by adducing evidence sufficient to reach the Standard of Proof.

Common ground: there must be some evidence.

“Ping-Pong Principle”: parties bounce the burden of proof to one another by successive exchange of arguments/evidence.

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.
Shifting of the Burden of Proof sometimes linked to the Standard of Proof Dilemma – High or Low?

Could it be used as a compromise?

General rule for Burden of Proof exists for a reason: prevents the party from making baseless allegations

If departure from this rule is permitted in corruption cases, why not make other exceptions?

Realistically speaking, isn’t the point moot?
Specific Instance: Metal-Tech

**Metal-Tech v. Uzbekistan, ICSID Case No. ARB/10/3, Award of 4 October 2013, paras 236 et seq.**

**Respondent**: “There was corruption on Claimant’s part!”

**Claimant**: “If you allege corruption, go prove it”

**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’

**Tribunal**: We will look for guidance in *lex causae* (BIT), and relevant caselaw of investment arbitration tribunals
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]

Present 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 non-existing event is considered to be impossible

Shifting of the burden of proof upon establishment of *prima facie* case may be seen as a requirement to prove the negative

Peculiar instance from the world of Sports Arbitration: Appellate Proceedings at CAS (match-fixing context)

Earlier stages of legal proceedings – clear “prosecution v. defense” format, prosecution bears the burden of proof

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.

CAS hears cases *de novo* – as a court of the first instance. There may be a tendency to place the burden of proof it its innocence on the “defense” party
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