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THE BURDEN OF PROOF IN ARBITRATION

O ÔNUS DA PROVA NA ARBITRAGEM

LA CARGA DE LA PRUEBA EN EL ARBITRAJE

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ABSTRACT: This article aims to establish the appropriate rule regarding the burden of proof in arbitration, given the importance of evidence production in this alternative dispute resolution method. The main goal is to understand the rules and determine the most suitable one for application. The deductive method was used, based on a bibliographic review of principled texts and arbitration manuals, along with qualitative analysis of decisions to annul arbitration awards due to the allocation of the burden of proof. As a result, indicators were established for deciding on burden of proof rules. Firstly, the burden of proof derives from the Due Process of Law Principle. Secondly, the effects of the burden of proof within the arbitration procedure are analyzed. Thirdly, the applicability of the Actori Incumbit Probatio rule is evaluated. Fourthly, a comparative study between common and civil law traditions is necessary. Lastly, it is concluded that applying the actori incubit probatio rule is most appropriate for arbitration, minimizing the risk of award annulment.

KEYWORDS: Burden of Proof; Arbitration; Common Law; Civil Law; Actori Incumbit Probatio.

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RESUMO: Este artigo tem como objetivo estabelecer qual regra deve ser aplicada no âmbito arbitral em relação ao ônus da prova, dada a importância da produção de provas nesse método alternativo de resolução de disputas. O objetivo principal é compreender as regras e definir a mais adequada para a aplicação. Foi utilizado o método dedutivo, baseado na revisão bibliográfica de textos principiológicos e manuais de arbitragem, além da análise qualitativa de decisões de anulação de sentenças arbitrais devido à distribuição do ônus probatório. Como resultado, foram estabelecidos indicadores para a decisão sobre as regras do ônus da prova. Primeiramente, o ônus da prova deriva do Princípio do Devido Processo Legal. Em segundo lugar, analisam-se os efeitos o ônus da prova no procedimento arbitral. Em terceiro, avalia-se a aplicabilidade da regra *Actori Incumbit Probatio*. Em quarto, destaca-se a necessidade de um estudo comparativo entre as tradições do common law e do civil law. Por fim, conclui-se que a aplicação da regra *Actori Incumbit Probatio* é a mais adequada para o procedimento arbitral, reduzindo os riscos de anulação da sentença arbitral.

PALAVRAS-CHAVE: Ônus da prova; Arbitragem; Common Law; Civil Law; Actori Incumbit Probatio

RESUMEN: El presente articulo tiene como objetivo establecer qué regla debe aplicarse en el ámbito arbitral en cuanto a la carga de la prueba, dada la importancia de la producción de pruebas en este método alternativo de resolución de disputas. El objetivo principal es comprender las reglas y definir la más adecuada para la aplicación. Se utilizó el método deductivo, basado en la revisión bibliográfica de textos principiológicos y manuales de arbitraje, además del análisis cualitativo de decisiones de anulación de laudos arbitrales debido a la distribución de la carga de la prueba. Como resultado, se establecieron indicadores para la decisión sobre las reglas de la carga de la prueba. Primero, la carga de la prueba se deriva del Principio del Debido Proceso Legal. Segundo, se analizan los efectos de la carga de la prueba en el procedimiento arbitral. Tercero, se evalúa la aplicabilidad de la regla Actori Incumbit Probatio. Cuarto, hay una necesidad de estudio comparativo entre las tradiciones del common y civil law. Por último, se concluye que la aplicación de la regla actori incubit probatio es la más adecuada para el procedimiento arbitral, reduciendo los riesgos de anulación del laudo arbitral.

PALABRAS CLAVE: Carga de la Prueba; Arbitraje; Common Law; Civil Law; Actori Incumbit Probatio.

1 INTRODUCTION

Approximately 70% of the arbitral cases have been decided by facts rather than on the law[1]. That is why, arbitration cherishes for facts as opposed to doctrinal arguments[2]. The arbitral tribunal tends to see document evidence as more reliable[3]. Therefore, the burden of proof and its rules will only become outcome-determinative in the arbitral procedure, if the facts cannot be stablished or if parties fail to prove the disputed fact[4].

In this regard, the arbitral community has committed to develop mechanisms for the production and admission of evidence, due to the concern with the evidentiary issue and its consequences.

Even though the discussion concerning the production of evidence is wide and has numerous rules that regulate it, authors such as Gary Born[5] agree that little has been written on the specific topic of allocating the burden of proof in arbitration.

The importance of defining and allocating the burden of proof consists on the fact that only then the arbitral tribunal will be able to conclude, through an evidentiary analysis, whether there was a violation of any sort and who caused the damage.

The issue is not usually addressed, conceptualized or even determined by Brazilian or International legal systems. In other words, besides article 27 (1) from the 2010 UNCITRAL Arbitration Rules 2021[6], there are few rules that regulate or even refer to the matter[7].

Based on this gray area, there is a significant increase in transaction costs [8] that can overload the arbitration procedure. Therefore, it is essential to establish parameters for the procedure, these being, for example, the need of a party to prove or not a claim, since it is their right to know the rules of the game before it has started[9]. Also, it is important to emphasize that proving a claim often results in significant costs, which should be consider by the parties.

1 BLAVI, Francisco; VIAL, Gonzalo. **The Burden of proof in international commercial arbitration: are we allowed to adjust the scales?** Hastings Int'l & Cino. L. Rev. 41. p. 40.

2 MAROSSI, Ali Z. **Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal.** Journal of Transnational Law, v. 28, 2011. See also: FEUTRILL, M.; RUBINS, N. Preparation of expert evidence in international commercial arbitration: Practical aspects. **International Business Law Journal** 20. p. 307-332.

3 O'MALLEY, Nathan. **The Law and Practice of International Courts and Tribunals**. Martinus Nijhoff Publishers. 2008. p. 27.

4 MARGHITOLA, Reto. **Document Production in International Arbitration**. Kluwer Law Arbitration 2015. p. 56-57.

5 BORN, Gary. **International Comercial Arbitration**. Hague: Kluwer Law Int'l, 2014, p. 2312.

6 Article 21 – Each party shall have the burden of proving the facts relied on to support its claim or defence. UNCITRAL 2010. Available in <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf> Acessed in 13 jul. 2024.

7 LANDOLT, Phillip; NEAL, Barbara Reeves. **Chapter 5:** Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration. In: BLANKE, Gordon; LANDOLT, Phillips (eds). EU and US Antitrust Arbitration: A Handbook for Practitioners, 2011. p. 155 – 178.

8 O conceito foi abordado pela primeira vez pelo Economista Ronald Coase, em 1937, em seu artigo *The Nature of the Firm*, porém foi apenas utilizado nesta nomenclatura em 1970, no artigo *The Problem of Social Cost*. Todavia, foi a partir do trabalho do economista Oliver Eaton Williamson que o termo tomou proporções maiores. Segundo Williamson custos de transação são fricções à circulação de riqueza entre agentes econômicos, ou seja, custos para participação no mercado. Vide: KLAES, M. History of transaction costs. In: *THE NEW Palgrave Dictionary of Economics*. 2. ed. [s.l.]: [s.n.], 2008; COASE, Ronald. The nature of the firm. *Economica*, v.4, n.16, p. 386-405, 1937; COASE, Ronald. The problem of social coast. Journal of Law and Economics, v.3, p. 01-44, 1960. Disponível em: https://www.law.uchicago.edu/files/file/coase-problem.pdf. Acesso em: 07 abril 2022.; e WILLIAMSON, Oliver Eaton. The Economics of Organization: the transaction cost approach. *The American Journal of Sociology*, v. 87, n.3, p. 548-577, 1981. Disponível em: https://www.jstor.org/stable/2778934?seq=1. Acesso em: 07 abril de 2021.

9 KREINDLER, Richard. **Practice and Procedure Regarding Proof:** The Need for More Precision. In: VAN DEN BERG, Albert Jan (ed.). Legitimacy: Myths, Realities, Challenges. ICCA Congress Series, vol 18. ICCA & Kluwer Law International, 2015. p. 164

In this perspective, the present article provides indicators that can/should permeate the evidence, especially related to the rules regarding the burden of proof. In other words, the goal of the present study is to point out which rule should be applied by the tribunals over the burden of proof.

Therefore, this article is divided in four main topics, apart from this introduction and the conclusion, which are: (2) The Relationship Between the Burden of Proof and the Due Process of Law Principle; (3) The General Rule for the Burden of Proof (4) Comparative Study Between Civil Law and Common Law Systems; and finally (5) The Paradox: The Importance of the Burden of Proof and the Lack of Rules or Decisions by the Tribunals concerning the matter.

2 THE RELATIONSHIP BETWEEN THE BURDEN OF PROOF AND THE DUE PROCESS OF LAW PRINCIPLE

Due to the lack of legislation concerning the issue, there is a need to stablish where the institute comes from. The few rules that deal with the burden of proof are related to the guiding principle of arbitration - and even jurisdictional procedure: The Due Process of Law Principle.

This Principle incorporates the parties' right to a fair and correct procedure, and even relates to legal certainty[10]. Among such rights there is the right to proof[11], which is, the right to prove the grounds around their claim. Furthermore, it presents the party with the opportunity to react and defend itself against the dispute of allegations arising from the procedure[12].

It also incorporates the Broad Defense, which is present in the predictability of the procedure and the possibility for the parties to have the same opportunities to express themselves through the evidence[13].

Additionally, due to the lack of rules concerning the matter, whenever parties feel the need to request an annulment based on the burden of proof, they often resort to the violation of the Due Process of Law Principle[14].

In this sense, the burden is defined as a risk distribution mechanism in the context of procedural adjudication, which allows the arbitral tribunal to decide based on the evidence submitted in the procedure records, resulting in legal certainty[15].

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[10] LOPES, Paulo Guilherme de Mendonça. Algumas observações sobre a produção de provas nas arbitragens nacionais e internacionais. **Revista de Arbitragem e Mediação**, v. 56, p. 95-110, 2008.

[11] In the words of Nicoló Trocker "è incostituzionalmente rifiutata o limitata 'se si nega o si limita alla parte il potere processuale di rappresentare al giudice Ia realtá dei fatti, ad essa favorevole, se le si nega o le si restringe il diritto di esíbire i mezzi rappresentativi di quella realta". TROCKER, Nicoló. Processo civile e Costituzione. Milano: Giuffré, 1974. p. 517 apud LOPES, Paulo Guilherme de Mendonça. Algumas observações sobre a produção de provas nas arbitragens nacionais e internacionais. **Revista de Arbitragem e Mediação**. v. 56. 2008. p. 99

[12] Ibidem, p. 102.

[13] LEMES, Selma M. Ferreira. Arbitragem: Princípios Jurídicos Fundamentais, Direito Brasileiro e Comparado. **Revista de La Corte Espanhola de Arbitraje**. v. 7, p. 31-57, 1991. Veja também: LEMES, Selma M. Ferreira. Arbitragem: Princípios Jurídicos Fundamentais, Direito Brasileiro e Comparado. **Revista de Informação Legislativa**. v. 115. p. 441-468, jul/set. 1992. Senado Federal.

[14] ALMEIDA, Pedro Francisco da Silva. **Burden and Standards of Proof in International Arbitration**. Orientador: Philipp K. Wagner. 2020. 67 f. Dissertação (International Dispute Resolution L.L.M.) - HUMBOLDT-UNIVERSITÄT ZU BERLIN, Berlin, Germany, 2020. p. 35.

[15] BLAVI; VIAL. op. cit. p. 41.

Makariu conceptualizes as being "a legal mechanism that allocates the obligation of establishing facts between the parties by determining which of them bears the risk of a given allegation not being upheld and the claim relying on [being] dismissed"[16].

Therefore, several authors understand that the rules regarding the burden of proof represent the manifestation of the Due Process of Law Principle[17], since they encourage the parties to adopt efficient evidential conduct that contributes to the presence of predictability upon the consequences of their own omissions[18].

In order to better understand the consequences of a party's omission in the evidential phase, as well as to identify if the burden is an obligation or a faculty, is essential to analyze the effects of the burden of proof.

The definition of the burden follows the idea of risk[19]. In other words, if the party that owns the burden does not exercise it, it will then assume a risk within the procedure[20]. Hence, the burden of proof by its nature is a risk distribution mechanism between the parties in the arbitral procedure[21].

Which evidences why something so relevant within the arbitration is rarely dealt with in the arbitration or chambers rules.

The burden of proof is full of nuances and consequences for the parties; however, it should not be confused with an obligation[22]. This is due to the fact that in case of non-compliance, the party will not be failing to fulfill its obligation, nor committing an unlawful conduct since it is not obliged to prove what it claims.

Nevertheless, if it fails to do so, it is assumed that the allegation will not be considered true, or it will not be taken into consideration by the tribunal, or, in the worst-case scenario, it may produce negative inferences[23].

Thus, the idea of obligation should not be taken into account, since the burden of proof arises from the Due Process of Law Principle and has the effect of the parties' self-responsibility.

3 THE GENERAL RULE FOR THE BURDEN OF PROOF

In a deeper analysis, the burden must be studied in its subjective and objective aspect. The first aspect assigns the parties the burden for achieving success within the process. The second, however, shows much greater relevance, since it is a consequence of the legal prohibition of the *non liquet*.

16 MAKARIUS, Vit. **The Nature of the Burden and Standard of Proof in International Commercial Arbitration.** Czech & Central Eur. Y. B. of Arb, n. 54, 2013.

17 KREINDLER. op. cit. p. 164.

18 AMARAL, Paulo Ostemark. **Provas: Atipicidade, Liberdade e Instrumentalidade**. Col. Lebman – 2ª Ed. 2017 pp. 47-48.

19 ALMEIDA. op. cit. p. 5.

20 AMARAL, P. op. cit. p 44. See also, "L'incertitude ou le doute subsistant a la suite de la production d'une preuve doivent nécessairement être retenus au détriment de celui qui avait la charge de cette preuve." Cass Fr, 31 January 1962, Bull Cass, 1962, C.I.V.IV, no 105 as cited by Hanotiau, p. 343.

21 FRANCK, Susan D.; FREDA, James et al., **International Arbitration: Demographics, Precision and Justice**. in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series. vol. 18 ICCA & Kluwer Law International, 2015. pp. 61-62.

22 AMARAL, P. op. cit. p.32.

23 AMARAL, Guilherme Rizzo. Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart. **Journal of International Arbitration**. Kluwer Law International. Volume 35. 2018. p. 25.

Non liquet is one of the greatest concerns of arbitrators and even judges, since they cannot refuse to issue decisions due to uncertainties over the law and/or the evidence presented or even not presented[24].

Therefore, the following concern arises: if a party cannot prove a fact, in light of the prohibition of the *non liquet*, how should the tribunal decide on the matter without any evidence?

Such question is answered by the very existence of the burden. In the event of a situation in which parties cannot prove the allegation and in order to escape the legal prohibition of not rendering a ruling to resolve the dispute, the tribunal must use the objective burden and apply the rules of its distribution.

Due to the very nature of the burden of proof, although the tribunal may distribute it and demand the production of evidence, it is totally up to the party to choose whether or not to do so. If the party decides not to prove some aspect of the allegations, it becomes possible for the tribunal to apply the rules regarding negative inferences[25].

Notwithstanding, which rule should the tribunal apply? That is exactly the goal of the present study: to point out which rule should be applied over the burden of proof.

Firstly, it is mandatory to analyze the most used rule which is that "party shall prove its own allegations"[26]. Based on this perspective, this rule would be the modern manifestation of Roman Law's Principle [27] the *actori incumbit probatio* or *onus probandi actori incumbit*, which means that the burden is on whoever claims. The concern here is to establish that the *actori* is not necessarily the plaintiff but the one who claims a fact.

Arbitral tribunals can apply it in an implicit or explicit manner. The reasoning of the Roman principle is related directly to the Due Process of Law Principle, as well as with the effect of the burden of proof, since when incumbent on a party to prove its claim if it fails to do so, it may result in a decision contrary to its allegations[28].

It is important to note that the above-mentioned principle is used as a general rule[29], but many factors should influence the definition of the rule in the specific case. One of these influences lies in the doubt about which law should be applicable: the applicable law to the substantive issues[30] or the *lex arbitri*[31].

An allocation method arises from the parties' autonomy, which decide the rule previously when signing the contract or the arbitral convention. This is perfectly legal as long as it is not unfair or unequal for the parties as well as it does not violate the public order or good faith[32].

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[24] CARMONA, Carlos Alberto. **Arbitragem e Processo: um comentário à Lei n. 9.307/96.** 3a edição. São Paulo: Atlas, 2009. p. 407.

[25] ALMEIDA. op. cit. p. 9.

[26] LOPES. op. cit. p. 99. See also: UNCITRAL Arbitration Rules, Article 27(1) Available in < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf > Accessed in 13 jul. 2024; AAA Commercial Arbitration Rules, R-32(a) Available in < https://www.adr.org/sites/default/files/CommercialRules_Web.pdf> Accessed in 13 jul. 2024; HKIAC Arbitration Rules, Article 22.1 Availble in <https://www.hkiac.org/sites/default/files/ck_filebrowser/2024%20HKIAC%20ADMINISTERED%20ARBITRATION%20RULES%20-%20English.pdf> Accessed in 13 jul. 2024.

[27] BLAVI; VIAL, Gonzalo. op. cit. p. 50.

[28] LANDOLT; NEAL. op. cit. p. 159.

[29] SOURGENS, Fréderic Gilles; DUGGAL, Kabir; LAIRD, Ian A. **Part II Burden and Standard of Proof in International Investment Arbitration.** In: Evidence in International Investment Arbitration. 2018.

[30] FEUTRILL; RUBINS. op. cit. p. 310-311.

[31] AMARAL, G. op. cit. p. 32.

[32] BLAVI; VIAL, Gonzalo. op. cit. p. 53.

However, the concern remains, due to the fact that usually parties do not discuss the burden of proof rules in advance, and neither does the tribunal, as it will be further analyzed on topic V.

Even when the tribunal has to establish the burden of proof, the parties cannot and should not be surprised by the tribunal's decision on the matter. However, there will be cases where obtaining the proof by the party who holds the burden becomes time consuming or even impossible, which may result in negative evidence (also called "diabolic" and "tortuous").

It is important to emphasize that these are exceptional cases that must be weighted by the tribunal. Also, the mere allegation that the other party is in better position to produce the evidence should not guide the tribunal since that is not the general rule. This is exactly the reason for the annulment of the arbitration award on the *Azurix Corp v. Republic of Argentina* Case[33] which will be further analyzed below.

As such, the tribunal is entitled to decide on the production of evidence via the Roman Principle or to reverse the burden in order to guide procedure on the events under discussion. Nevertheless, it is up to the party to accept or deny the production of evidence.

As a result of the last scenario, the tribunal may impose a monetary sanction or even order the party that does not comply with its requirement to produce evidence, to bear the costs of the procedure[34].

4 COMPARATIVE STUDY BETWEEN CIVIL LAW AND COMMON LAW SYSTEMS

Thus far it has been established that the burden is a result from the Due Process of Law Principle. Furthermore, it is not an obligation but a responsibility of the party. In this concern, as it is a burden, the parties and the tribunal must apply the most accepted rule in the arbitral and judicial scope, being that "party shall prove its own allegations"[35]. It is now necessary to understand how the legal traditions approach the issue. Therefore, it is essential to establish the application of the burden and how it is done on domestic and international arbitrations.

There are several differences between the common law and civil law systems, especially concerning evidence. While in the civil law tradition, there is a party's duty to prove its allegations that must be fulfilled early in the procedure, in the common law tradition there is no need to submit all evidence in a detailed manner *prima faci*e and therefore it is not an immediate duty.

In the common law jurisdiction, the presence of documents is crucial to the result of the procedure. Therefore, all documents that are relevant to the dispute must be revealed and submitted by the party in the *discovery* phase[36], which does not necessarily mean that all evidence must be detailed.

Further, it is not necessary to distinguish the criminal and civil systems of those countries that adopt this system, it is enough to establish that the present research is based on the civil criteria of *the balance of probability* and not the *beyond reasonable doubt* as a standard of proof.

Common law jurisdictions are adversarial and, therefore, see the burden of proof as a burden of persuasion[37]. This presumption relates to the fact that the party alleging an event must not only produce the

33 **ICSID Case No. ARB/01/12**. Annulment Procedure.
34 BLAVI; VIAL, Gonzalo. op. cit. p. 67
35 LOPES. op. cit. p.99.
36 MARGHITOLA. op. cit. p. 13-14.
37 DWYER, Stephen I. **Presumptions and Burden of Proof**. Loyola Law Review, v. 21, n. 2, p. 377-404, Spring 1975.

evidence that will corroborate with its claim, but also, it must persuade the arbitral tribunal to understand this as true.

Also, in the common law system the burden of proof is characterized as a procedural law issue[38], which could attract the application of the *lex fori* or leave it to the discretion of arbitrators, whereas the civil law systems tent to regard them as substantive law[39].

The civil law jurisdiction values the impossibility of any sort of State intervention in the evidentiary phase. This tradition is extremely focused on the burden of proof and the mere fact of producing the evidence is a fulfillment of the party's responsibility[40]. In this regard, for civil law countries the rules regarding the burden of proof must be established from the beginning, by the parties or by the tribunal, and must not be changed during the procedure.

To this effect most civil law countries regulate burden of proof for certain disputes in their civil codes, but supplementary rules for cases not expressly dealt by substantive provisions may be found elsewhere[41]. This is the case of Austria[42], France[43] and Italy[44] where the general principle *actori incumbit probatio* (a party shall prove its own allegations) is brought by their code of civil procedure. Brazilian[45] procedural law goes even further containing provision on shifting the burden of proof instead of leaving it solely to the case law.

The connection with the establishment of a claim is the primary reason why the burden of proof is characterized as a substantive law issue[46]. For example, the Art. 79 (1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) places the burden of demonstrating the occurrence of force majeure on the party wishing to rely on it[47].

Also, applying rules connected to the substantive law is the best way of giving effect to the choice of law provision, because "the factual aspect of the determinations of the dispute is most closely assimilated to the legal rules which are being applied"[48]. Therefore, there are positive consequences with the burden of proof being seen as a substantive law issue as it brings a greater level of foreseeability to the dispute.

On that account, the civil law is classified as an inquisitorial system, due to the fact that the parties focus more on limiting the production of evidence, since this would be itself a State intervention in the rules of private law[49]. In other words, the evidence phase can discourage a party to litigate if it has no means of

38 LANDOLT; NEAL. op. cit. p. 158.

39 ALMEIDA. op. cit. p. 19.

40 MARGHITOLA. op. cit. p. 15.

41 ALMEIDA. op. cit. p. 20.

42 Austrian Code of Civil Procedure (Zivilprozessordnung) 1983, Sections 226(1) and 239(1). Available in < https://e-justice.europa.eu/content_taking_of_evidence-76-at-en.do?member=1> Accessed in 13 jul. 2024.

43 French Code of Civil Procedure (Code de procédure civil) 2007, Article 9. Available in <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070716/ > Accessed in 13 jul. 2024.

44 Italian Code of Civil Procedure (Codice di procedura civile italiano) 2016, Articles 228 and 229. Available in < https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-di-procedura-civile> Accessed in 13 jul. 2024.

45 Brazilian Code of Civil Procedure (Código de Processo Civil) 2015, Article 373. Available in <http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm > Accessed in13 jul. 2024.

46 ALMEIDA. op. cit. p. 20.

47 **The United Nations Convention on Contracts for the International Sale of Goods 2010 (hereinafter 'CISG'**). Art 79: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences. Available in <https://cisg-online.org/Text-of-the-Convention> Acessed in 13 jul. 2024.

48 ALMEIDA. op. cit. p. 21.

49 MARGHITOLA. op. cit. p.17.

proving its allegation. For this reason, it is understood that in this system the burden has more procedural importance than in the common law system.

This is exactly why the burden of proof should be articulated as early as possible in the proceedings, because they might affect the strategy relied upon by the parties. Clarity as to who should produce evidence and how much evidence should be produced may create significant economy[50].

In short, both jurisdictions conflict in three aspects. Firstly, in civil law countries the burden is classified by substantive law rules whereas in the common law countries it is categorized by procedural law rules. Secondly, in the inquisitorial tradition the burden of proof only means the party's duty to prove its allegation while for the adversary the duty of persuasion is added.

Lastly, there is a difference in the procedure phase where the evidence is presented. Although in the common law tradition there is the discovery phase, as already mentioned, both the facts and the legal issues do not need to be extremely detailed. Meanwhile, in civil law tradition the burden of proof keeps up with the initial phase of the allegation, which must contain all the information from the beginning[51].

Consequently, it is key to point out that the legal systems behave differently, and this brings back the idea of why the issue is not ruled in the arbitration scenario. Now, if different procedures are used by different traditions, how could soft laws such as the IBA Guidelines or even the Prague Rules regulate in a way to converge these two systems?

An inconsistency arises: the purpose of creating theses soft laws is exactly to integrate the two systems, however when faced with antagonistic situation the gray area and the legal gap are formed.

As a side note, since it is a soft law there is no imposition on the arbitral tribunal or the parties for its use, except if the parties have agreed to use it on the procedure as a binding rule, in other words, they never apply automatically[52].

The International Bar Association was created in 1947 in order to contribute to the stability of the administration of justice[53]. It then, published the Guideline on the Production of Evidence in International Arbitration[54] in view of proposing a standard in evidence production, specially to diminish the differences between the evidential instruction of the adversarial system of common law[55] and the inquisitorial system of civil law[56].

Despite this intention, there are still many scholars[57] that claim that the attempt to stablish a standard was not successful. For example, the IBA Rules require the party to be as specific as possible about the documents it is requesting, proving it is more inclined to the common law approach[58].

As a result, in 2018, the Rules on the Efficient Conduct on Proceedings in International Arbitration or simply Prague Rules[59] were published, with the purpose of bringing a more punitive characteristic to the tribunals.

50 ALMEIDA. op. cit. p. 27.
51 FRANCK; FREDA. op. cit. pp. 61-62.
52 LANDOLT; NEAL. op. cit. p. 158.
53 IBA Rules on the Taking of Evidence in International Arbitration, approved in 17.12.2020
54 IBA Rules on the Taking of Evidence in International Arbitration, approved in 17.12.2020
55 LANDOLT; NEAL. op. cit. p. 157.
56 LOPES. op. cit. p. 104.
57 ALMEIDA. op. cit. P. 19.
58 ALMEIDA. op. cit. p. 8.
59 Rules on the Efficient Conduct of Proceedings in International Arbitration approved in December of 2018. Available in < https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> Accessed in 13 jul. 2024.

Returning to the IBA Rules, courts often use them to facilitate the production of evidence. In particular articles 3 and 9. The soft law represents a great step towards dissociating the international arbitration from the moorings of domestic laws, both in substantive law[60] and the *lex arbitri*[61].

Notwithstanding, neither the 1999 Rules nor the current 2020 Rules mention the burden of proof. According to a member of the IBA Rules of Evidence Review Committee, the topic was part of the discussion agenda in 2010, but the deliberation was not productive enough to make into the rules[62].

This silence can be interpreted in several ways. Foremost, it can be understood that there is no need to establish the rule "a party shall prove its own allegation" since it should be already understood as a general rule, as well it can be implied as an attempt to evade a possible discussion and disagreement on the topic[63].

Additionally, in international arbitration, in which there is a confrontation between civil and common law, leaving burden of proof untouched might favor one of the parties in detriment of the other[64].

Thus, to escape the decision of settling on civil law or common law rules there is a third alternative to the tribunal. Some Arbitration Rules leave the decision of establishing the burden of evidence to the arbitral tribunal, as it can be seen on the article 7.4.1. of the CAM-CCBC Arbitration Rules: "it will be the responsibility of the Arbitral Tribunal to grant and establish the burden of evidence it considers useful, necessary and appropriate in the manner and order held to be convenient under the circumstances[65]".

Leaving burden of evidence to the discretion of the arbitral tribunal seems to be the best way to avoid disparities potentially caused by misplacing rules out of their original context.

At the same time, such important aspects of the arbitral proceeding cannot be overlooked. "Predictability promotes reliability"[66]. The parties need to know in advance any points that may influence the strategy of their case.

Therefore, the burden should be articulated as early as possible in the proceedings because they might affect the strategy relied upon by the parties[67]. Clarity as to who should produce evidence and how much evidence should be produced may create significant economy[68], not only in the procedure itself but also by not facing a possible annulment of the arbitral award.

5 THE PARADOX: THE IMPORTANCE OF BURDEN OF PROOF AND THE LACK OF RULES OR DECISIONS BY THE TRIBUNALS CONCERNING THE MATTER

At the end of the arbitral procedure, it is up to the arbitral tribunal to decide whether the parties have fulfilled their duty to prove their case[69]. Thereby, as already mentioned the rules concerning evidence

60 O'MALLEY. op. cit. p. 29.
61 O'MALLEY. op. cit. p. 28.
62 MARGHITOLA. op. cit. pp. 55-56.
63 ALMEIDA. op. cit. p. 21.
64 ALMEIDA. op. cit. p. 25.
65 CAM-CCBC Arbitration Rules, Article 7.4.1. Available in <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/resolucao-de-disputas/arbitragem/regulamento-de-arbitragem-2022> Accessed in 13 jul. 2024
66 ALMEIDA. op. cit. p. 26.
67 ALMEIDA. op. cit. p. 29.
68 ALMEIDA. op. cit. p. 27.
69 RODRIGUEZ, Francisco, ICCA 2014. **Standard of Proof A Plea for Precision or an Unnecessary Remedy?** 10 April 2014, <http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-standard-of- proof-a-plea-for-precision-or-an-unnecessary-rem3edy/ > Accessed in 13 jul. 2024.

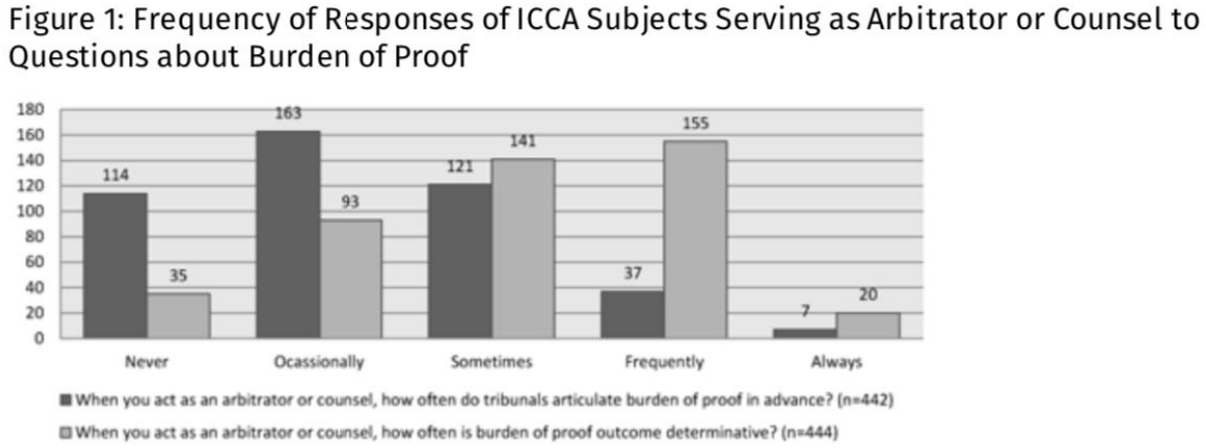
and its burden must be established early on. However, it is not uncommon to the debate whether the parties understand the relevance of the issue, but worse than that, if arbitrators understand the risks and relevance, since there is also a tendency for them to not decide on a rule at the beginning of the arbitration procedure.

The International Council for Commercial Arbitration Conference of 2014 indicated that the burden of proof was frequently determinative to the result of the arbitration, though the tribunal rarely articulate the burden in advance[70].

The research made by the ICCA in 2014 demonstrates a disconnection between the importance of the evidence aspects and the lack of prior articulation by the tribunals. This can be seen in the result of the two questions that were prepared to be answered by arbitrators and former arbitrators: 1) In your experience as arbitrator or counsel, how often do tribunals articulate in advance what burden of proof they will require parties to meet? 2) In your experience as arbitrator or counsel, how often has the burden of proof been outcome determinative[71]?

To the first question, most respondents (62.9%) answered that the tribunal *never* or *occasionally* articulates on the subject in advance, while the answer to the second question was that the burden of proof is *frequently* (34.9%) decisive for the outcome, as can be seen in the chart below[72].

Chart 1: ICCA Research



Fonte: FRANCK, Susan D.; FREDA, James et al., International Arbitration: Demographics, Precision and Justice. In Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series. Vol. 18 ICCA & Kluwer Law International, 2015.

From the 444 respondents, just over 9.8% stated that the burden was *frequently* or *always* articulated in advance, whereas only 7.9% of the respondents believe that the burden of proof was *never* outcome determinative. Which shows clearly the existence of the paradox.

It was also noted that the responses among professionals who came from a civil law context were different from the ones with a common law context[73]. The results, even, imply that individuals with a civil law background strongly believe in the determinative role of the burden of proof in arbitration, which goes along side with the predictability goal established on topic IV.

70 FRANCK. op. cit. p. 63.
71 FRANCK; op. cit. p. 64.
72 FRANCK; FREDA. op. cit. p. 66-69
73 FRANCK; FREDA. op. cit. p. 69.

Here, then, is the main paradox of the issue: if the burden is so important to the outcome of the arbitration why do tribunals occasionally to never decide on the subject? If they did so early on, there would be the possibility for the parties to develop efficient and precise strategies for the evidence production, which consequently would reduce the risk of dissatisfaction of the opposing party. If the burden is a risk, again, logically the party will want to know its potential obstacles at the beginning of the arbitration.

In the words of Pedro Almeida[74]:

> Even though the resolution of the vast majority of arbitration cases lies on factual issues rather than legal issues, research has shown that arbitral tribunals tend to ignore the elephant in the room. These questions are rarely articulated during the proceedings or in arbitral awards, despite being impossible not to apply a certain standard or burden allocation in a concrete case.

A series of questions arises from the implementation of rules regarding the burden of proof such as: which party shall prove what? When shall it prove? And finally, how shall it prove? There is no "fits all" answer and therefore that should be a case-by-case analysis. However, the present study aims to identify which is the most suitable rule and why it should be applied.

If there are no specific and explicit rules and the tribunal rarely decide on the topic[75] where should they base their decision? Or even better, with what should the flexibility and discretion of the tribunals be aligned with?

This gap must be filled with the few precedents on the subject[76], such as the "*Azurix Corp, versus the Argentine Republic*"[77] case, from 2009, where the *ad hoc* committee annulled the arbitration award after understanding that the burden of proof was wrongfully distributed.

Although the case has many discussions that are relevant to arbitration itself, the present article will only analyze on the burden of proof issue. By doing that, it became possible to glimpse what follows.

The Republic of Argentina argued that the general rule from the burden of proof would be "the party that has better conditions shall prove the fact", and that reasoning was accepted by the arbitral tribunal. Nevertheless, the *ad hoc* committee understood that this principle should not be applied, since the general rule is that "party shall prove its own allegation" which is the *actori incumbi proabatio* principle. For this and other reasons, the tribunal's decision was annulled by the committee.

This decision is of remarkable importance to the burden of proof discussion. Because, despite being outcome-determinative, the misapplication of burden of proof hardly gives grounds for annulment of the arbitral award. In this sense, neither the New York Convention nor the Model Law specifically address the situation where the arbitral tribunal has improperly allocated or even reversed the burden of proof[78].

As a matter of fact, the Background Paper on Annulment for the Administrative Council of the ICSID[79] noticed that *ad hoc* committees when analyzing evidence or burden of proof issues tend to understand any mistakes or wrongdoings of the tribunals as a breach a fundamental rule. And this rule is nothing less than the Due Process of Law Principle, exactly where the subjects derivates from.

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74 ALMEIDA. op. cit. p. 2.

75 LANDOLT; NEAL. op. cit. p. 157.

76 O'MALLEY. op. cit. p. 29.

77 **ICSID Case No. ARB/01/12**. Annulment Procedure.

78 ALMEIDA. op. cit. p. 35.

79 World Bank Group. **Updated background paper on annulment for the administrative council of ICSID**. Washington, D.C. May 5, 2016. Available in <https://icsid.worldbank.org/sites/default/files/Background%20Report%20on%20Annulment_English.pdf> Accessed in 13 jul. 2024.

It is important to emphasize that one of the characteristics of arbitration is its flexibility which meets the discretion of tribunals to regulate the issue. Essentially there is an entire logic for the burden of proof, where it comes from, how it should be applied and the consequences for its incorrect application. Once the tribunal understands the importance of articulating the issue in advance and apply the general rule based on the logic constructed by this study, the risk for annulments related to burden of proof shall be remote.

6 CONCLUSION

The article is based on the assumption that the burden of proof is outcome-determinative to arbitration, however, there are controversial points regarding the appropriate course of action when a party is unable to prove a fact, which rule should be applied, and how it should be applied. These are the questions that drove the research, along with the purpose of contributing to filling legal gaps based on a rational perspective of the institute.

The burden of proof is defined as a risk distribution mechanism and because of this, it is believed that it is the party's right to know the rules of the procedure at the beginning. Acting clearly on who should produce the evidence and how much evidence should be produced can result in significant savings, with an effective reduction in transaction costs and also ensuring a sense of justice.

As a consequence of the Due Process of Law Principle, it becomes possible to infer that the burden is a self-responsibility of the party. Even if the tribunal chooses a certain rule to apply it is up to the party to decide whether to prove or not, which will always bring consequences.

The comparative study between the common law and the civil law concept of burden of proof allows the institute to be seen as a substantive law and procedural law issue, which enriches the discussion. Even with its particularities, it shows the importance of finding a connection point and understand the positive and negative effects of each system. By understanding that, the arbitrator may apply the most suitable understanding for the specific case.

Leaving burden of evidence to the discretion of the arbitral tribunal seems to be the best way to avoid disparities potentially caused by misplacing rules out of their original context. At the same time, such important aspects of the arbitral proceeding cannot be overlooked. Predictability promotes reliability.

Using the general rule “party shall prove its own allegations”, which like the burden of proof, is also a consequence of the Due Process of Law Principle, is the most effective way of avoiding a possible annulment of the arbitral award.

According to the study carried out, the arbitral tribunals rarely decide in advance about the burden of proof. However, if arbitrators keep in mind that the burden of proof is often decisive for the outcome of the arbitration, reflecting on the application of the general rule based on the logic constructed by this article will favor a strong probability of low risk of annulment of decisions based on burden of proof, while ensuring that the parties are treated equally during the procedure.

REFERENCES

AAA COMMERCIAL ARBITRATION RULES, R-32(a). Available in: https://www.adr.org/sites/default/files/CommercialRules_Web.pdf. Accessed in: 13 jul. 2024.

ALMEIDA, Pedro Francisco da Silva. **Burden and Standards of Proof in International Arbitration**. Orientador: Philipp K. Wagner. 2020. 67 f. Dissertação (International Dispute Resolution L.L.M.) - Humboldt-Universität zu Berlin, Berlin, Germany, 2020.

AMARAL, Guilherme Rizzo. Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart. **Journal of International Arbitration**. Kluwer Law International. Volume 35. 2018.

AMARAL, Paulo Ostemark. **Provas: Atipicidade, Liberdade e Instrumentalidade**. Col. Lebman – 2ª. Ed. 2017.

AUSTRIA. **Austrian Code Of Civil Procedure (Zivilprozessordnung)** 1983, Sections 226(1) and 239(1). Available in < https://e-justice.europa.eu/content_taking_of_evidence-76-at-en.do?member=1> Accessed in: 13 jul. 2024.

BLAVI, Vial SCHARF MP, Day M. The International Court of Justice's treatment of circumstantial evidence and adverse inferences. **Chicago Journal of International Law**. 2012.

BLAVI, Francisco. VIAL, Gonzalo. **The Burden of proof in international commercial arbitration: are we allowed to adjust the scales?** Hastings Int'l & Cino. L. Rev. 41.

BHUSHAN A. **Standard of burden of proof in international commercial arbitration: is there a bright line rule?** American Review of International Arbitration. 2014.

BORN, Gary B. **International Arbitration: Cases and Materials**, 2a Ed., 2014. Kluwer Law International.

CAM-CCBC Arbitration Rules. Available in <https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/resolucao-de-disputas/arbitragem/regulamento-de-arbitragem-2022> Accessed in 13 jul. 2024

CARMONA, Carlos Alberto. **Arbitragem e Processo: um comentário à Lei n. 9.307/96.** 3a edição. São Paulo: Atlas, 2009.

COASE, Ronald. **The Problem of the Social Costs**. Journal of Law and Economics, 1960.

DWYER, Stephen I. **Presumptions and Burden of Proof**. Loyola Law Review, v. 21, n. 2, p. 377-404, Spring 1975.

FEUTRILL, M.; RUBINS, N. Preparation of expert evidence in international commercial arbitration: Practical aspects. **International Business Law Journal** 20. p. 307-332.

FRANCK, Susan D. et. Al. **Precision and legitimacy in international arbitration: empirical insights from ICCA**. 2014. Kluwer Law Arbitration.

FRANCK, Susan D.; FREDA, James et al., **International Arbitration: Demographics, Precision and Justice**. in Albert Jan Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series. vol. 18 ICCA & Kluwer Law International, 2015. p. 33 – 122.

FRANCE, French Code Of Civil Procedure (Code De Procédure Civil) 2007, Article 9. Available in <https://e-justice.europa.eu/content_service_of_documents-371-fr-en.do?member=1> Accessed in 13 jul. 2024.

HANOTIAU, Bernard. **Written Evidence and Discovery in International Arbitration New Issues and Tendencies**. Edited by Teresa Giovannini and Alexis Mourre. International Chamber of Commerce, 2009.

HKIAC Arbitration Rules, Article 22.1 Available in <https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-1#22?> Accessed in 13 jul. 2024.

IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, approved in 17.12.2020.

ICSID Case no ARB/02/18, Award dated of July 26, 2007 **ICSID Case no ARB/02/13**, Award dated of January 31, 2006. **ICSID Case No. ARB/01/12**. Annulment Procedure.

ITALY. Italian Code Of Civil Procedure (Codice Di Procedura Civile Italiano) 2016, Articles 228 and 229. Available in < https://www.altalex.com/documents/codici-altalex/2015/01/02/codice-di-procedura-civile> Accessed in 13 jul. 2024.

KREINDLER, Richard. **Practice and Procedure Regarding Proof:** The Need for More Precision. In: VAN DEN BERG, Albert Jan (ed.). Legitimacy: Myths, Realities, Challenges. ICCA Congress Series, vol 18. ICCA & Kluwer Law International, 2015. p. 164

LANDOLT, Phillip; NEAL, Barbara Reeves. **Chapter 5:** Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration. In: BLANKE, Gordon; LANDOLT, Phillips (eds). EU and US Antitrust Arbitration: A Handbook for Practitioners, 2011. p. 155 – 178.

LEMES, Selma M. Ferreira. Arbitragem: Princípios Jurídicos Fundamentais, Direito Brasileiro e Comparado. **Revista de La Corte Espanhola de Arbitraje**. v. 7, p. 31-57, 1991.

_____. Arbitragem: Princípios Jurídicos Fundamentais, Direito Brasileiro e Comparado. **Revista de Informação Legislativa**. v. 115, p. 441-468, jul/set. 1992. Senado Federal.

LOPES, Paulo Guilherme de Mendonça. **Algumas observações sobre a produção de provas nas arbitragens nacionais e internacionais**. Revista de Arbitragem e Mediação, v. 56, p. 95-110, 2008.

MAKARIUS, Vit. **The Nature of the Burden and Standard of Proof in International Commercial Arbitration.** Czech & Central Eur. Y. B. of Arb., n. 54, 2013.

MARGHITOLA, Reto. **Document Production in International Arbitration**. Kluwer Law Arbitration 2015.

MAROSSI, Ali Z. **Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal.** Journal of Transnational Law, v. 28, 2011.

O'MALLEY, Nathan. **The Law and Practice of International Courts and Tribunals**. Martinus Nijhoff Publishers, 2008.

O'MALLEY, Nathan, Lloyd H. **Rules of evidence in international arbitration: an annotated guide**. London: Informa; 2012;2013, p. 212.

RODRIGUEZ, Francisco, ICCA 2014. **Standard of Proof A Plea for Precision or an Unnecessary Remedy?** 10 April 2014, Available in <http://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-standard-of- proof-a-plea-for-precision-or-an-unnecessary-rem3edy/ > Accessed March 23th 2020.

RODRIGUEZ, Francisco. ICCA 2014. Standard of Proof: A Plea for Precision or an Unnecessary Remedy? 10 abril 2014. Avaliable in: < https://arbitrationblog.kluwerarbitration.com/2014/04/10/icca-2014-standard-of-proof-a-plea-for-precision-or-an-unnecessary-remedy/> Acessed in: 13 jul. 2024

RULES ON THE EFFICIENT CONDUCT OF PROCEEDINGS IN INTERNATIONAL ARBITRATION, approved in december of 2018. Available in < https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf> Acessed in 13 jul. 2024.

SOURGENS, Fréderic Gilles; DUGGAL, Kabir; LAIRD, Ian A. **Part II Burden and Standard of Proof in International Investment Arbitration.** In: Evidence in International Investment Arbitration. 2018.

UNCITRAL Arbitration Rules. Available in < https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> Accessed in 13 jul. 2024.

UNITED NATIONS. **United Nations Convention on Contracts for the International Sales of Gods. Viena**. 1980. Available in <https://cisg-online.org/Text-of-the-Convention> Accessed in 13 jul. 2024.

World Bank Group. **Updated background paper on annulment for the administrative council of ICSID**. Washington, D.C. May 5, 2016. Available in <https://icsid.worldbank.org/sites/default/files/Background%20Report%20on%20Annulment_English.pdf > Accessed in 13 jul. 2024