CHAPTER 4

Demystifying the Burden of Proof in International Arbitration

Richard Garnett

§4.01 INTRODUCTION

As the chapters in this collection attest, evidence is a crucial topic in international arbitration. The outcome of any legal dispute depends mainly on the evidence adduced by the parties in support of their positions with the arbitral tribunal's role being to assess the evidence and render its conclusions based on the material provided.

The burden of proof plays a vital role in assisting the tribunal and the parties by indicating the facts that must be proven by a party to sustain its claim or defence. In certain cases, particularly where limited evidence is available, the burden of proof may even be decisive of the outcome. The nature of the burden of proof, and its relationship with other concepts such as presumptions and adverse inferences, is explored in this chapter.

§4.02 THE FUNDAMENTAL PRINCIPLE AND A SUGGESTED FRAMEWORK

[A] *Onus Probandi Incumbit Actori*

An International Centre for Settlement of Investment Disputes ('ICSID') tribunal in *The Rompetrol Group NV v. Romania* defined burden and standard of proof as follows:

> the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole.[1]

In addition, the tribunal explained that whether a fact or assertion has been proven by a party depends not just on the proponent's evidence but also on an overall assessment of the evidence provided by one or both parties for the proposition.[2]

An illuminating ('all or nothing') explanation of the consequence of proving (or not proving) a fact before a tribunal was provided by Lord Hoffmann of the United Kingdom House of Lords in *Re B (Children)*:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.[3]

In most cases, international tribunals will require each party to prove the facts upon which it relies to sustain its claim or defence, unless any of the facts were agreed among the parties or are so obvious that proof is not required.[4] This principle is often represented by the Latin maxim: *onus probandi incumbit actori* (he or she who asserts must prove).[5] Consequently, the 'burden of persuasion' is on the claimant to adduce enough evidence to prove the facts upon which it bases its claim, or else its case will fail.[6] Reciprocally, the same burden rests on the respondent to establish the facts necessary to sustain any defence or counterclaim.[7]

The principle of 'he or she who asserts must prove' is universally accepted in national legal systems and international judicial and arbitral practice.[8] For example, in *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, an ICSID arbitral tribunal stated that:

---

1. *The Rompetrol Group NV v. Romania* (Award) ICSID Case No. ARB/06/3 (6 May 2013) para. 178.
2. *Ibid*.
3. *Re B (Children)* [2008] UKHL 35, [2009] AC 11, para. 2.
4. Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 2487; Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 378.
5. Bernard Hanotiau, 'Satisfying the Burden of Proof: The Viewpoint of a "Civil Law" Lawyer' (1994) 10 Arb Intl 317, 342; Born, *International Commercial Arbitration* (n. 4) 2487; *The Rompetrol Group* (n. 1) para. 179.
6. *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (Final Award) UNCITRAL (23 April 2012) para. 148; *The Rompetrol Group* (n. 1) para. 179. *See also* James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little, Brown, and Co. 1898) 355.
7. A rare exception to this principle may arise where the claim and counterclaim relate to the same issue of fact. In such a case the tribunal would normally dispense with strict rules of burden of proof and reach a decision based on the evidence presented: Roman Khodykin, Carol Mulcahy and Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (OUP 2019) para. 12.48.
8. Frédéric Gilles Sourgens, Kabir Duggal and Ian A. Laird, *Evidence in International Investment Arbitration* (OUP 2018) paras 2.05 and 2.95.

> As to the burden of proof, the general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences.[9]

The arbitral tribunal in *Metal-Tech v. Uzbekistan* similarly observed:

> The principle that each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals. The International Court of Justice as well as arbitral tribunals constituted under the ICSID Convention and under the [North American Free Trade Agreement] have characterized this rule as a general principle of law. Consequently, as reflected in the maxim *actori incumbat probatio*, each party has the burden of proving the facts on which it relies.[10]

While not all sets of arbitral rules include this maxim, Article 27 of the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules 2010 provides that 'every party shall have the burden of proving the facts relied on to support its claim or defence'. To like effect are Article 24 of the Iran-US Claims Tribunal Rules of Procedure[11] and Article 41.1 of the China International Economic and Trade Arbitration Commission Arbitration Rules. Some writers and courts have suggested that the maxim's ubiquity makes it part of the *lex mercatoria* or general principles of international commercial law.[12]

[B] A Framework for the Burden of Proof

The obligation on the bearer of the burden of proof is to prove facts that support its legal claims or defences, not the legal rules themselves.[13]

Building on the fundamental principle that the person who asserts must also prove, many authors[14] and tribunals have suggested the following framework for the

9. *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (Award) ICSID Case No. ARB/05/15 (1 June 2009) paras 315 and 318.
10. *Metal-Tech Ltd v. Republic of Uzbekistan* (Award) ICSID Case No. ARB/10/3 (4 October 2013) para. 237.
11. For examples of application of the provision, *see Pointon v. Government of the Islamic Republic of Iran* (Award (Award No. 516-322-1)) Iran-US Claims Tribunal ('IUSCT') Case No. 322 (23 July 1991), reprinted in 27 Iran-USCTR 52 and *Islamic Republic of Iran v. United States of America* (Partial Award (Award No. 529-A15 (II:A and II:B))) IUSCT Case No. A/15 (II:A and II:B) (6 May 1992), reprinted in 28 Iran-USCTR 139, cited in Ali Marossi, 'Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal' (2011) 28 J Intl Arb 427, 431.
12. *See* International Chamber of Commerce ('ICC') Award No. 6653, Clunet 1993, 1046, in which the *onus probandi* concept is described as a principle of international commerce.
13. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 762-763.
14. Alan Redfern, 'The Practical Distinction Between the Burden of Proof and the Taking of Evidence: An English Perspective' (1994) 10 Arb Intl 317, 319; Gary Born, 'On Burden and Standard of Proof' in Meg Kinnear and Geraldine Fischer (eds), *Building International Investment Law: The First Fifty Years of ICSID* (Kluwer Law International 2015); Sourgens, Duggal and Laird (n. 8) Chapters 2 and 3; Waincymer (n. 13) 763-764 and 773; Robert Von Mehren, 'Burden of Proof in International Arbitration' in Albert Jan van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (International Council

operation of the burden of proof. First, the burden of persuasion remains on the claimant throughout the case and does not shift. Second, such burden also includes a secondary burden of *production*, which requires the claimant to adduce sufficient evidence of a fact or facts to sustain its case. This burden can, however, shift. Specifically, once the claimant has provided sufficient evidence of the facts necessary to support its claim to a prima facie level, the burden of production shifts to the respondent to rebut such an inference with evidence of its own.[15] If it fails to do so, the claimant will then normally be successful. Note however that there is no equivalent to the common law concept of the 'default judgment' in international arbitration.[16] For example, Article 25(b) of the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') provides that, where 'the respondent fails to communicate his [or her] statement of defence … the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations'. Consequently, a claimant will not be considered to have discharged its burden of proof by the respondent's non-participation in the arbitration.[17] The tribunal must still find that it has jurisdiction over the matter and that the claimant has established its case on the merits to a prima facie standard.

Equally, if the claimant fails to adduce evidence sufficient to meet the prima facie standard, the burden of production does not shift and the respondent will prevail, even if it remains mute.[18] There have been several investor-state arbitrations where investors' claims on the merits have been rejected by tribunals due to the claimant's failure to provide sufficient evidence to support its allegations and so discharge its burden of proof.[19] Decisions of the Iran-US Claims Tribunal are to the same effect.[20]

In general, however, there appears to be no equivalent of the common law 'strike out' or 'no case to answer' procedure in which a claim can be dismissed at an early stage of the proceedings.[21] Tribunals prefer to defer decisions as to whether a burden of proof has been discharged until the end of the proceedings. Yet some arbitral rules have tentatively moved in the direction of early review with Article 39 of the Stockholm Chamber of Commerce ('SCC') Rules providing for early dismissal where an allegation

for Commercial Arbitration ('ICCA') Congress Series No. 7, Kluwer Law International 1996) 123; Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (Martinus Nijhoff Publishers 2005); Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International and Comparative Law 2011); Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Martinus Nijhoff Publishers 1996); Marossi (n. 11) 431.

15. The 'shifting principle' has been defended on due process grounds, in that it gives both parties an opportunity to present their cases: Sourgens, Duggal and Laird (n. 8) para. 3.35.
16. *Id.*, paras 2.19-2.20.
17. *Mohammad Amma Al-Bahloul v. Republic of Tajikistan* (Partial Award on Jurisdiction and Liability) SCC Case No. V (064/2008) (2 September 2009) para. 113.
18. Von Mehren (n. 14) 124.
19. *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan* (Award) ICSID Case No. ARB/02/13 (31 January 2006) para. 163.
20. *JI Case Company v. Islamic Republic of Iran* (Award (Award No. 57-244-1)) IUSCT Case No. 244 (15 June 1983), reprinted in 3 Iran-USCTR 62, 65; *Abrahim Rahman Golshani v. Government of the Islamic Republic of Iran* (Final Award (Award No. 546-812-3)) IUSCT Case No. 812 (2 March 1993), reprinted in 29 Iran-USCTR 78, cited in Marossi (n. 11) 436-437.
21. Khodykin, Mulcahy and Fletcher (eds) (n. 7) para. 12.50.

of fact or law material to the outcome of a case is manifestly unsustainable and Rule 29 of the Singapore International Arbitration Centre Rules allowing such relief where a claim or defence is 'manifestly without legal merit'.

Alternatively, a presumption may exist in favour of the claimant that a certain fact has occurred, or the respondent may have admitted such fact.[22] In those circumstances, the burden of production also shifts to the respondent. Presumptions are discussed more fully later.

Finally, if the respondent files an affirmative defence to the claimant's allegation or a counterclaim, then the above process is reversed.[23]

The distinction between the burdens of persuasion and production was carefully explained by an ICSID tribunal in *Apotex v. United States*.[24] The tribunal agreed that, while the legal burden of proof or burden of persuasion always rests on the claimant to prove his claims, the burden of production can shift from one party to another, depending upon the state of the evidence.[25] The tribunal stated that:

> [V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. *If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption*.[26]

Hence, in the case where a claimant claims damages for a breach of contract, it bears the burden of persuasion of proving to a prima facie standard that there was a legally binding contract. The claimant, however, is not required to anticipate and pre-emptively address every possible contention of the respondent to the effect that the contract was *not* legally binding if no such argument is raised by the opposing party.[27] It is for the respondent to make its case, for example, that it only entered the contract by duress or fraud of the claimant, by adducing some evidence to that effect or through cross-examination of the claimant's witnesses. Once the respondent has raised such a contention and provided sufficient evidence to support it, then the burden of production shifts back to the claimant to negate the proposition.

The point is well made by the tribunal in *Waguih Elie George Siag v. Egypt*:[28]

22. Von Mehren (n. 14) 125.
23. Born, 'On Burden and Standard of Proof' (n. 14) 48.
24. *Apotex Holdings Inc and Apotex Inc v. United States of America* (Award) ICSID Case No. ARB(AF)/12/1(25 August 2014) para. 8.8.
25. *Id.*, paras 8.8-8.10.
26. *Id.*, para. 8.9, citing *Marvin Feldman v. United Mexican States* (Award) ICSID Case No. ARB(AF)/99/1 (16 December 2002) para. 177, in turn quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, 14 (23 May 1997) (emphasis added by the *Feldman* tribunal).
27. Waincymer (n. 13) 773.
28. *Waguih Elie* (n. 9) para. 317.

> Claimants stated that Mr Siag had provided extensive prima facie evidence of his Lebanese nationality, and that accordingly 'the burden of proof is now on Egypt'. The tribunal agrees with this contention … 'Egypt bears the burden of proof with respect to each of its jurisdictional objections. It is not Claimant's burden to disprove jurisdictional objections made by Egypt.'

It is interesting to note that the suggested framework has been applied by tribunals in cases where corruption has been alleged. The difficulties of proving corruption, the frequent lack of documentation and the inability of tribunals to compel the production of evidence strongly support a shifting of the evidential burden of proof to the respondent, after a claimant has produced prima facie evidence of corruption.[29] The respondent is often in a better position to gather and provide evidence in this situation. While authors have described this approach as 'controversial' and 'exceptional',[30] in truth, it conforms comfortably with the position earlier described.

Nevertheless, despite the apparent consensus, there have been attempts in several investor-state arbitration cases to alter the existing model of burden of proof where a party faces serious hardship in obtaining evidence. Such a situation has typically arisen where the bulk of probative evidence lies in the hands of the host state and the investor has insufficient material to reach even the prima facie level of proof. Claimants have therefore argued that the burden of *persuasion* should be reversed, with host states being required to produce evidence to negate the claimant's allegations even where little or no evidence has been initially filed. Tribunals have been understandably reluctant to accede to this argument, noting the strength and utility of the 'he or she who asserts must prove' principle. Therefore, the claimant must still meet its initial burden on evidence, but this task can be assisted through orders for disclosure of documents from the respondent and the tribunal's drawing of adverse inferences for non-compliance where necessary.[31]

[C] Presumptions

Presumptions are best understood as a substitute for evidential proof,[32] where certain facts are deemed to exist unless the contrary is proved. The effect is to shift the burden of production of evidence to the respondent, on the basis that the claimant is presumed to have established certain facts to a prima facie standard.[33] They may often arise in

29. Cecily Rose, 'Questioning the Role of International Arbitration in the Fight Against Corruption' (2014) 31 J Intl Arb 183, 218, citing (Final Award), ICC Case No. 6497, 1994, *Yearbook Commercial Arbitration 1999* (Vol. XXIV), 71.
30. *Id.,* 217-218.
31. Sourgens, Duggal and Laird (n. 8) paras 2.15-2.18, citing *Mohammad Al-Bahloul v. Tajikistan* (Partial Award on Jurisdiction and Liability) SCC Case No. V (064/2008) (2 September 2009) para. 115; *Lao Holdings NV v. Lao People's Democratic Republic* (Decision on the Merits) ICSID Case No. ARB(AF)/12/6 (10 June 2015) para. 11 and *Azurix Corp v. The Argentine Republic* (Decision on the Application for Annulment of the Argentine Republic) ICSID Case No. ARB/01/12 (1 September 2009) para. 215.
32. Von Mehren (n. 14) 127.
33. Sourgens, Duggal and Laird (n. 8) para. 3.24, citing Kazazi (n. 14) 273; Aristidis Tsatsos, 'Burden of Proof in Investment Treaty Arbitration: Shifting?' (2009) 6 Humboldt Forum Recht 91, 97.

circumstances where it is difficult for a party to prove its case because, for example, it lacks access to crucial evidence.[34] A presumption can be decisive in cases where it is 'irrebuttable'; that is, the respondent can provide no evidence to refute it, although such presumptions are rare.

An example of a presumption arises in a case where the bailor of goods alleges that the goods were delivered undamaged to the bailee but appeared damaged upon their return. In such a case, an evidential burden is placed on the bailee to overcome a rebuttable presumption (res ipsa loquitur: the thing speaks for itself) that the damage was caused by its negligence.[35] Such a presumption arises due to the defendant's exclusive control of the situation and the fact that the damage could not have occurred without someone's negligence. Therefore, while the legal burden of persuasion never shifts,[36] due to the presumption, the evidential burden has shifted, and it is for the bailee to bring some evidence to counter it or otherwise the bailor may prevail. Another example is where the unseaworthiness of a vessel is alleged by a cargo owner against a sea carrier. While the cargo owner has the burden of persuasion on this issue, if it establishes that the ship sunk soon after it left port, a presumption of unseaworthiness arises, which then shifts the burden of *production* to the carrier to adduce evidence to rebut this presumption. If the carrier provides no evidence in rebuttal, the claimant will succeed in proving its allegation.[37]

The above examples show that while the burden of persuasion never shifts from the claimant in respect of substantiating its cause of action, the burden of production, however, shifts to the respondent where either the claimant adduces evidence to meet the prima facie standard (referred to above) or a presumption arises. Where, however, a respondent files a defence or counterclaim then the roles are reversed: the respondent bears the burden of persuasion and production until it establishes its case to a prima facie standard or identifies a presumption in its favour that achieves the same result. If the respondent fails to establish either, then its counterclaim or defence fails.

[D] Forms of Evidence and Adverse Inferences

As has been noted, for a claimant or respondent to satisfy its burden of production, it must produce evidence. The most common forms of evidence are documentary materials and witness testimony, with lawyers from common law countries often placing more emphasis on the latter, especially in cases alleging fraud. Little difficulty arises when a party has access to the forms of evidence that it requires: they are produced to the tribunal who will then assess the material's relevance, weight and

34. Annette Keilmann, 'How to Prove Your Case: Conflict Between Substantive and Procedural Law in International Arbitration' (*Global Arbitration News*, 31 March 2016) https://globalarbitrationnews.com/how-to-prove-your-case-conflict-between-substantive-and-procedural-law-in-international-arbitration-20160324/ accessed 6 November 2021.
35. Von Mehren (n. 14) 128.
36. Waincymer (n. 13) 763.
37. *Ajum Goolam Hossen & Co v. Union Marine Insurance Co* [1901] UKPC 7, [1901] AC 362.

admissibility. Such a power, conferred on tribunals, is found in all major arbitration laws and rules.[38]

A trickier question arises when the claimant does not have possession or access to the material required for it to prove its case. In such a case, differences in approach can appear between common law and civil law traditions in relation to litigation. According to the common law view, a plaintiff may request the defendant to make disclosure or discovery of all materials in its possession or custody. While such a request can be resisted on various grounds, such as relevance and privilege, a defendant must normally comply with the order or face sanction(s) for contempt of court. In the civil law litigation regime, by contrast, it is common for a court to require a plaintiff to base its case solely on the documents or material in its possession and not to permit requests for information from the defendant. If the plaintiff cannot establish a case based on accessible material, then its action is dismissed.

Interestingly, some authors have suggested that the burden of proof may therefore play a greater role in civil law jurisdictions where the absence of documentary disclosure may operate to limit the quantum of evidence available.[39] In such a case, the burden of proof may become a 'judgment rule',[40] in which the tribunal relies on the burden more often to resolve the merits.

In international commercial arbitration practice, a middle ground for evidence gathering has taken root, which was inspired and encouraged by the International Bar Association ('IBA') Rules on the Taking of Evidence.[41] According to this model, a claimant may request specific, identifiable documents or classes of documents from the respondent, who then has several grounds to resist disclosure.[42] Such an approach avoids the (at times) expansive requests for discovery seen in common law countries (especially the United States), while at the same time, protecting claimants from having cases dismissed for want of prosecution. Note that a disclosure obligation on a respondent does not shift the burden of proof to that party; it only creates an obligation on the respondent to supply the claimant with the material needed to discharge the *latter's* burden of proof.[43] A request for material by a claimant to a respondent is a means by which the claimant can obtain the necessary evidence to discharge its burden.

The above discussion is also relevant to the issue of burden of proof in another respect. Suppose a claimant, to satisfy its burdens of persuasion and production, requires material documents or witness evidence from the respondent which are within its control. The tribunal issues a request for the material, but the respondent

38. *See,* e.g., Model Law 2006, Art. 19(2).
39. Keilmann (n. 34).
40. Guilherme R. Amaral, 'Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart' (2018) 35 J Intl Arb 1, 3.
41. IBA Rules on the Taking of Evidence in International Arbitration www.ibanet.org/MediaHandler?id = def0807b-9fec-43ef-b624-f2cb2af7cf7b accessed 6 November 2021.
42. *Id.,* Art. 9(6).
43. Hanotiau (n. 5) 349; Anne-Véronique Schlaepfer, 'The Burden of Proof in International Arbitration' in Albert Jan van den Berg (ed.), *Legitimacy, Myths, Realities, Challenges* (ICCA Congress Series No. 18, Kluwer Law International 2015) 132.

refuses to comply. An arbitral tribunal has no power to hold a party in contempt and, assuming court assistance in taking evidence is not available,[44] what can the claimant do? A general practice has developed where a tribunal may draw an 'adverse inference' or negative conclusion from the respondent's conduct, such as where it refuses to provide material evidence requested by the tribunal.[45]

The pertinent question regarding adverse inferences is: what status does such an inference have in the context of burden of proof? More specifically, what is the effect of a tribunal drawing an adverse inference against a respondent for non-production? Once again, the inference does not shift the burden of proof to the respondent but instead contributes to and assists in the *discharge* of the claimant's burden. An inference is an evidentiary gap filler in cases where direct evidence is missing.[46] It is a *substitute* for the evidence sought and may indeed 'found' a claim in certain cases.[47] Yet, this will not always be the case as 'an adverse inference with respect to one fact will not automatically be a substitute for all the other elements of a claim as to which the party bearing the burden of proof will have to provide sufficient and satisfactory evidence'.[48] Arbitral tribunals have commonly relied on adverse inferences in corruption cases.[49]

§4.03 BURDEN OF PROOF AND APPLICABLE LAW: SUBSTANTIVE, PROCEDURAL OR NEITHER?

Parties rarely, if ever, address the issue of burden of proof in their arbitration agreements. National arbitration laws and institutional rules are also normally silent on this issue. Consequently, it is up to the arbitral tribunal to decide which rules are to apply to the burden of proof.[50] Further, since international arbitration typically involves disputes between parties from different countries or causes of action that cross national boundaries, there is often contact between multiple legal systems. Questions regarding the applicable law may arise, which can also affect the burden of proof.

In terms of applicable law options, the tribunal may classify the issue of burden of proof as a procedural issue, and hence, governed by the law of the arbitral seat or the *lex arbitri*, or as a substantive issue, and hence, governed by the law applicable to the

44. For example, the respondent may reside outside the seat of arbitration and, therefore, not be amenable to the coercive powers of the court, such as under Art. 27 of the Model Law 2006.
45. Born, *International Commercial Arbitration* (n. 4) 2486.
46. Amaral (n. 40) 9-11.
47. Waincymer (n. 13) 776; Jeremy K. Sharpe, 'Drawing Adverse Inferences from the Non-production of Evidence' (2006) 22 Arb Intl 549.
48. Amaral (n. 40) 30, fn 114, citing (Final Award) ICC Case No. 11770, excerpted in (2011) 22(2) ICC Ct Arb Bull 66.
49. Claus Werner Von Wobeser Hoepfner, 'The Corruption Defense and Preserving the Rule of Law' in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity* (ICCA Congress Series No. 19, Kluwer Law International 2017) 219, citing *Europe Cement Investment & Trade SA v. Republic of Turkey* (Award) ICSID Case No. ARB(AF)/07/2 (13 August 2009) paras 150-164.
50. Redfern (n. 14) 321; Born, *International Commercial Arbitration* (n. 4) 2487.

merits of the dispute or the *lex causae*.[51] In international arbitration, the *lex causae* is typically the law governing the parties' contract and is often expressly chosen. In practice, however, such a process of classification or characterisation is rarely undertaken by tribunals, and if the question of burden of proof is addressed at all, it is usually by reference to the general concept mentioned earlier of *actori incumbit probatio.*

The applicable law enquiry is, however, significant because the relevant determination may affect the ambit of the tribunal's powers and the scope of court or committee review of the tribunal's award. Since there is considerable disagreement among commentators on this question, the following structure is proposed. At the outset, it is not correct to say, as many have assumed, that there is a clear line of demarcation between common law countries which regard the burden of proof as procedural and civil law systems which consider it substantive.[52] In fact, the preponderant view among common law commentators is to consider the issue of burden of proof substantive, on the basis that it is closely tied to the substantive law and the elements that must be proved in the case, and frequently has outcome determinative effect.[53]

The authority commonly cited in favour of the procedural view, on the other hand, is an English Admiralty Court decision from 1937, concerning the defence of unseaworthiness in a carriage of goods by sea claim.[54] In that case, the judge made the following statement: '[the question of burden of proof] is to be resolved according to the *lex fori, bearing in mind, of course, that unseaworthiness is limited by this bill of lading [governed by Dutch law] to lack of due diligence of the owner*'.[55] The italicised words are critical: the burden of proof is subject to the terms of the parties' contract and its governing law. Consequently, the burden of proof is governed by the *lex causae*. More recent English authority is consistent with this view. In *Fiona Trust and Holding Corporation v. Privalov*,[56] the English Commercial Court found that, in determining whether harm was caused by the defendant's fault under the Russian Civil Code, effect would be given to a provision in the said Code that placed the burden of proof on the defendant. Significantly, also, the *lex causae* is applied to the issue of burden of proof

51. *See* Richard Garnett, *Substance and Procedure in Private International Law* (OUP 2012) paras 7.15-7.17, where the general position in private international law is discussed.
52. *See,* e.g., Saar Pauker, 'Substance and Procedure in International Arbitration' (2020) 36 Arb Intl 3, 20 ('Some commentators, particularly from civil law jurisdictions, take the view that the burden and standard of proof are substantive rather than procedural, while common law traditions views [sic] those issues as procedural'); *see also* Matteus Aimore Carreteiro, 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability' (2016) 13 Revista Brasileira de Arbitragem 82, 98-99.
53. *See,* e.g., Garnett, *Substance and Procedure in Private International Law* (n. 51); Adrian Briggs, *The Conflict of Laws* (2nd edn, Clarendon Press 2008) 234; Ronald Graveson, *Conflict of Laws* (7th edn, Sweet & Maxwell 1974) 602; James Fawcett and Janeen Carruthers, *Cheshire, North and Private International Law* (14th edn, OUP 2008) 89.
54. *The Roberta* (1937) 58 Lloyd's Rep 159.
55. *Id.*, 177, col. 2 (emphasis added).
56. *Fiona Trust and Holding Corporation v. Privalov* [2010] EWHC 3199 (Comm) para. 94.

by most courts and commentators in the United States,[57] particularly where it affects 'the decision of the issue'.[58]

In civil law countries, it is well established that the burden of proof is substantive.[59] For example, under the European Union ('EU') Rome I Regulation, the applicable law of the contract will apply to the extent that it contains, in the law of the contract, rules which determine the burden of proof.[60] Arbitration law commentators have also supported a substantive characterisation, again for the principal reason that the burden of proof directly affects the claim, in terms of determining the claimant's likelihood of success,[61] and does not concern the process by which the facts are presented and verified. This conclusion accords with a survey conducted by the International Council for Commercial Arbitration ('ICCA') in 2014 of 552 practitioners, of whom 413 had served as counsel in at least 1 international arbitration and 262 had served as an arbitrator in at least 1 case.[62] In response to the question, 'is the burden of proof outcome determinative in international arbitration?', the most common response was to say 'frequently'.[63]

It is also pertinent to note that that the drafters of the Model Law did not include burden of proof in the text because of a concern that certain aspects of the burden of proof might be considered substantive, and so, properly fall under Article 28 of the Model Law, which deals with the law applicable to substance.[64] Furthermore, none of the major national arbitration laws refer to the burden of proof, which suggests a disinclination for a procedural classification. Finally, arbitral tribunals in *Oostergetel and Laurentius v. Slovakia*, an ad hoc UNCITRAL arbitration, and *Metal-Tech v.*

57. *See,* e.g., Russell Weintraub, *Commentary on the Conflict of Laws* (4th edn, Foundation Press 2001) 62 and Edmund M. Morgan, 'Choice of Law Governing Proof' (1944) 58 Harv L R 153, 185.
58. *Restatement (Second) of Conflict of Laws* (American Law Institute 1971) § 133.
59. *See,* e.g., Athanassios V. Skontzos, 'The Burden and Standard of Proof in Model International Procedural Law: Dealing with the Burden and Standard of Proof in International Disputes' (2018) 23 Unif L Rev 569, 576-578.
60. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, Art. 18(1) ('Rome I Regulation'). Note, however, that the Regulation does not apply to arbitration agreements: Art. 1(e).
61. Andreas Reiner, 'The Burden and General Standards of Proof' (1994) 10 Arb Intl 317, 331-332; Von Mehren (n. 14) 125 and 129; Abhinav Bhushan, 'Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line Rule?' (2014) 25 Am Rev Intl Arb 601, 607-608; Richard Kreindler, 'Practice and Procedure Regarding Proof: The Need for More Precision' in Albert Jan van den Berg (ed.), *Legitimacy, Myths, Realities, Challenges* (ICCA Congress Series No. 18, Kluwer Law International 2015) 165; Rolf Trittmann, 'The Interplay Between Procedural and Substantive Law in International Arbitration' (2016) SchiedsVZ/German Arb J 7; cf., Pauline Ernste, 'Het Toepasselijke Bewijsrecht in Arbitrage' (2020) Nederlands Internationaal Privaatrecht/Netherlands J Priv Intl L 687 (burden of proof is procedural because it forms part of the law of evidence).
62. Susan Franck et al., 'International Arbitration: Demographics, Precision and Justice' in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (ICCA Congress Series No. 18, Kluwer Law International 2015) 41-43.
63. *Id.,* 63.
64. Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (UN Doc A/40/17) (21 June 1985) para. 328.

Uzbekistan, an ICSID arbitration, both concluded that '[r]ules establishing presumptions or shifting the burden of proof under certain circumstances … are generally deemed to be part of the *lex causae*'.[65]

The above analysis similarly applies to presumptions, which, as noted earlier, have the effect of shifting the burden of production on a key element to be proven in the claim or defence. There are many instances of presumptions which are substantive as they directly impact upon and influence the outcome of the dispute.[66] The EU Rome I Regulation is again to the same effect (although not directly applicable to arbitration).[67]

Hence, there is greater international consensus on the substantive nature of the burden of proof and presumptions than has traditionally been assumed. The problem, however, with simply saying that rules relating to burden of proof and presumptions are substantive is that such a conclusion does not provide an easily identifiable or accessible set of principles for tribunals to apply. This is because the rules will differ depending upon the *lex causae* that governs the claim asserted. These rules will also be scattered across different areas of law (contract, tort, etc.) and are possibly difficult to ascertain. What is needed, therefore, is a set of 'general principles of law' or autonomous standards, perhaps forming part of a *lex mercatoria*, which provides an initial framework for tribunals in determining burden of proof questions. The suggested model would involve the tribunal presumptively applying the framework, but then adapting it in accordance with specific rules and directions in the substantive law. In this way, fidelity is given to the principle that the burden of proof is substantive, but guidance is also provided to the parties and the tribunal on the key overarching principles.

The suggested framework or general principles draw on the concepts mentioned earlier, which are widely accepted by commentators.[68] Specifically, the claimant bears the burdens of persuasion and production with respect to its claim, and if it establishes a prima facie case by evidence, then the burden of production shifts to the respondent. If the respondent fails to provide rebutting evidence or satisfy its own burden of persuasion with respect to a defence or counterclaim, then it loses. As noted earlier, a presumption may operate in place of the prima facie evidence rule by deeming certain facts to be established. A presumption may be rebuttable or irrebuttable.

The general framework is, however, subject to the applicable substantive law of the cause of action. Suppose an arbitral tribunal sitting in New York is adjudicating a claim concerning a contract for the carriage of goods by sea governed by English law. Under English law, in a suit by a cargo owner, when goods arrive damaged or do not arrive at all, a presumption exists that the loss or damage was the fault of the carrier. The carrier must then rebut the presumption with evidence that it was not negligent in handling and storing the goods or rely on a defence of external cause, such as a peril of

65. *Jan Oostergetel* (n. 6) para. 147; *Metal-Tech* (n. 10) para. 238.
66. *Re Cohn* [1945] Ch. 5 (Presumption as to order of death); *Henry v. Henry Estate* (2014) 325 Man R (2d) 1, para. 43 (HC Beard JA, concurring) (Presumption of paternity); *Fiona Trust & Holding Corp v. Privalov* [2010] EWHC 3199 (Comm) para. 98 (Presumption that payment of bribe in relation to a contract causes loss).
67. Rome I Regulation (n. 60).
68. *See* (n. 14) above.

the sea.[69] Note that the general principles of burden of proof apply but are modified in accordance with the presumption that arises under the substantive law. The claimant bears the burden of persuasion, but the *lex causae* interposes a presumption that relieves the claimant of the need to provide prima facie evidence of carrier fault.

Two other examples of how the substantive law can define and delimit the burden of proof are instructive. The first is where a contract provides for liquidated damages and the claimant must only prove breach, but not the amount of damages, to recover. The second is where the agreement excludes liability, except in cases of wilful misconduct or gross negligence, which consequently requires the claimant to prove more than simply breach. What is happening in these situations is that the contract (and substantive law) has reduced or expanded the burden of proof for the party asserting the claim.[70]

It is suggested that such a model is preferable to an approach that *entirely* displaces the substantive law in favour of an exclusive set of 'specialised' principles since the substantive law remains relevant in defining, at a concrete level, what must be proven in a particular case.[71]

That is not to say, however, that all issues concerning evidence in international arbitration are also substantive. For example, the question of what forms of evidence (e.g., documentary or oral testimony) may be relied upon to discharge a party's burden of proof is a procedural issue, governed by the *lex arbitri* and the parties' arbitral procedural rules. Similarly, whether a party has a right to request disclosure of documents from the other party or to examine witnesses is a procedural matter. Such issues are closer to the mechanics of the tribunal's evidence-gathering function rather than the substantive law of the dispute. Likewise, questions of the admissibility, relevance and weight of evidence fall within the procedural powers of the tribunal under arbitration laws and rules.[72] The status of adverse inferences, drawn by a tribunal after a party refuses to honour a request for evidence, is less clear. On one view, such inferences are procedural in nature since they act as a form of sanction analogous to a cost penalty or order for contempt of court for non-compliance with the tribunal's directions. Inferences, however, may also be seen as having an outcome determinative effect as they may operate to discharge a burden of production in the absence of assistance by the requested party and so found a claim.[73] On balance, however, the procedural view is more compelling since adverse inferences form part of the evidence collection machinery of a tribunal and are less closely tied to the substantive law.[74]

69. *Volcafe Ltd v. Cia Sud Americana de Vapores SA* [2018] UKSC 61, [2019] AC 358.
70. Schlaepfer (n. 43) 130-131.
71. Waincymer (n. 13) 765; cf., Born, *International Commercial Arbitration* (n. 4) 2489 and Vit Makarius, 'The Nature of the Burden and Standard of Proof in International Commercial Arbitration' in Alexander J. Belohlávek, Filip Cerný and Nadezda Rozehnalová (eds), *Czech (& Central European) Yearbook of Arbitration – 2013: Borders of Procedural and Substantive Law in Arbitral Proceedings* (Juris 2013) 54.
72. Model Law 2006, Art. 19(2); Arbitration Act 1996 (UK) s. 34; UNCITRAL Arbitration Rules 2013, Art. 27(4); ICSID Arbitration Rules 2003, Rule 34(1).
73. Waincymer (n. 13) 776.
74. Amaral (n. 40) 8.

§4.04 JUDICIAL REVIEW OF ARBITRAL BURDEN OF PROOF DETERMINATIONS

An important consequence of the determination of whether the issue of burden of proof is procedural or substantive in nature is the potential impact on challenges to and enforcement of the arbitral award. An arbitration award may be contested at two stages.[75] First, the award debtor may seek to set aside the award in the courts of the seat of the arbitration in accordance with the relevant *lex arbitri*. Second, a party may resist enforcement of the award in any country where the award creditor seeks recognition of the award. In setting aside applications, many jurisdictions have adopted principles similar to Article 34 of the Model Law, although the English Arbitration Act 1996[76] goes further in one key respect, as discussed later. Where enforcement of the award is sought outside the seat of arbitration, Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention') will be the key provision in almost all cases.[77] Conveniently, Article V of the New York Convention largely mirrors Article 34 of the Model Law, and these provisions will form the basis of the discussion that follows.

The question of burden of proof has not featured prominently in court or annulment committee decisions on challenges to awards, no doubt because arbitral tribunals rarely explicitly refer to the concept, as noted earlier. Where award debtors have suggested that tribunals have misallocated or misapplied the burden of proof in their awards, most courts and annulment committees have accepted that, in principle, an award can be challenged for this reason on procedural fairness or due process grounds. In such cases, courts have not explicitly stated that the burden of proof is a substantive or procedural issue but have simply accepted that its misapplication may have due process consequences. In almost all these decisions, however, courts have found tribunals not to have misapplied the burden of proof. Contrastingly, some courts have expressly held that questions concerning the burden of proof are substantive, rather than procedural matters, and so beyond the scope of judicial review, in the absence of a specific ground that allows an appeal from the award for error of law.

Before examining the decisions in detail, it is useful to set out the relevant grounds for challenging an award under Article 34(2) of the Model Law in the context of disputes concerning the burden of proof:

> (a) (ii) the party making the application was … unable to present his [or her] case …
> (iv) … the arbitral procedure was not in accordance with the agreement of the parties … or, failing such agreement, was not in accordance with [the law of the seat of arbitration]; or …
> (b) (ii) the award is in conflict with the public policy of this State.

75. Subject to possible preclusion doctrines, such as issue estoppel and the rule in *Henderson v. Henderson* (1843) 3 Hare 100, *see* Richard Garnett, 'Estoppel and Enforcement of International Arbitration Awards' (2021) 95 Austrl LJ 337.
76. Arbitration Act 1996 (UK).
77. As of 4 July 2021, there were 168 Member States to the New York Convention.

The relevant ground for annulment of an award under the ICSID Convention is where 'there has been a serious departure from a fundamental rule of procedure'.[78]

The English Arbitration Act 1996 contains similar grounds of challenge to the Model Law, based on the principle of 'serious irregularity' affecting the award.[79] Serious irregularity includes a failure by the tribunal to act fairly and impartially as between the parties, not giving each party a reasonable opportunity of putting his or her case and dealing with that of his or her opponent,[80] or that the award was procured in a way that was contrary to public policy.[81] Significantly, and additionally, however, the English Arbitration Act 1996 also allows a party a right of appeal to the court on a question of law arising out of an award.[82]

Examples of the first category of case above, where a reviewing body has been unwilling to find a breach of the burden of proof on factual grounds, can be seen in decisions of ICSID Annulment Committees and national courts.

In the early ICSID case of *Amco Asia Corporation v. Republic of Indonesia* ('*Amco*'), an award was attacked by the host state on the ground that the allocation of the burden of proof by the tribunal constituted an unequal treatment of the parties.[83] The annulment committee, without directly addressing the characterisation of burden of proof as substantive, procedural or autonomous, did accept in principle that a misallocation of the burden may be challenged on due process grounds. Yet, on the facts, there was no indication that an improper distribution of the burden of proof had occurred.

A similar approach is apparent in the decision of the annulment committee ('the Committee') in *Klöckner v. Cameroon* ('*Klöckner*').[84] In that case, it was argued by the host state that the tribunal's reversal of the burden of proof at the expense of the state amounted to a departure from a fundamental rule of procedure.[85] The Committee accepted the correctness of the argument in principle, but noted that its success depended on the 'importance for the decision of the tribunal of the subject regarding which the burden has been reversed'.[86] In the circumstances of the case, however, like *Amco*, the Committee found that no reversal of the burden of proof had in fact occurred.[87]

The principle from the *Klöckner* case was, more recently, cited with approval by the annulment committee in *Caratube v. Kazakhstan*.[88] In that decision, the issue was

78. ICSID Convention, Art. 52(1)(d).
79. Arbitration Act 1996 (UK) s. 68(1).
80. *Id.*, s. 68(2)(a) read with s. 33(1)(a).
81. *Id.*, s. 68(2)(g).
82. *Id.*, s. 69(1).
83. *Amco Asia Corporation v. Republic of Indonesia* (Ad hoc Committee Decision on the Application for Annulment) ICSID Case No. ARB/81/1 (16 May 1986).
84. *Klöckner Industrie-Anlagen GmbH v. United Republic of Cameroon* (Second ad hoc Committee Decision on Annulment) ICSID Case No. ARB/81/2 (17 May 1990).
85. *Id.*, para. 6.73.
86. *Id.*, para. 6.80.
87. *Id.*, para. 6.81.
88. *Caratube International Oil Company LLP v. Republic of Kazakhstan* (Decision on the Annulment Application of Caratube International Oil Company LLP) ICSID Case No. ARB/08/12 (21 February 2014).

whether an ICSID tribunal had jurisdiction over a dispute between a Kazakh company ('CIOC') and the state of Kazakhstan. In such a case, jurisdiction may exist where the company is under the control of a foreign entity.[89] The tribunal found that CIOC was not under the control of a US citizen, despite said person owning 92% of the shares in the company. The claimant challenged this decision, again on the ground that the tribunal had committed a fundamental breach of procedure by placing the burden of proof on it, rather than on the respondent state. The Committee disagreed, finding that this was a straightforward application of the principle of *actori incumbit probatio*, with the burden of proof properly placed on the applicant since it was 'the one seeking to benefit from [the US person's] nationality and control'.[90] Simply put, the claimant had the burden as the party seeking to establish jurisdiction in the tribunal and failed to discharge it, of both persuasion and production.[91]

More importantly, however, the Committee again accepted that, in principle, a misapplication of the rules on burden of proof *could* form the basis of a challenge to an award on due process grounds.

A rare example of a successful challenge to an award under the above approach can be seen in a recent English decision, *Punch Partnerships (PTL) Ltd v. Jonalt Ltd* ('*Punch*').[92] In *Punch,* the court found that the tribunal's decision to reverse the burden of proof, without inviting submissions from the parties on the issue, constituted a serious irregularity under section 68(1)(a) of the English Arbitration Act 1996.

Punch involved a proposed lease of a pub in England with the tenant arguing that a provision in the lease that required it to purchase 60% of its drinks from the pub owner was unreasonable under United Kingdom legislation. The arbitrator invited submissions on the issue of reasonableness but neither party submitted any evidence on the question with the tenant simply asserting that a 20% figure would be reasonable. The tribunal found in favour of the claimant on the basis that the respondent owner had not proven reasonableness. The court upheld a challenge to the award. It first noted that the 'usual rule … is that the burden of proof lies upon the party who asserts the affirmative of an issue …' '[i]f, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. [Such a rule] should not be departed from without strong reasons'.[93] The court then found nothing in the substantive law that governed the case (the United Kingdom legislation in question) that suggested a reversal of the burden of proof.[94]

89. ICSID Convention, Art. 25(2)(b).
90. *Caratube International* (n. 88) para. 268.
91. For another example of a claimant investor not discharging its burden of proof on the issue of jurisdiction: *see ICS Inspection and Control Services Ltd v. The Argentine Republic* (Award on Jurisdiction) Permanent Court of Arbitration Case No. 2010-9 (10 February 2012) para. 280. *See also Victor Pey Casado and President Allende Foundation v. Republic of Chile* (Decision on Annulment Proceeding) ICSID Case No. ARB/98/2 (18 December 2012) para. 199, where the Committee found that there was no 'improper allocation of the burden of proof which could be characterized as a serious departure from a fundamental rule of procedure'.
92. *Punch Partnerships (PTL) Ltd v. Jonalt Ltd* [2020] EWHC 1376 (Ch).
93. *Id.,* para. 43 (citing Hodge M. Malek et al. (eds), *Phipson on Evidence* (19th edn, Sweet & Maxwell 2017) § 6-06).
94. *Id.,* para. 46.

Implicit in these observations is the view expressed earlier that the burden of proof is a key principle linked to the administration of justice: although shaped by the substantive law, its misapplication can offend due process.

In *Punch*, however, there was further misconduct of the tribunal which made the allegation of procedural irregularity even stronger: it failed to invite submissions from the parties on the question of who bore the burden of proof. Such failure clearly denied the respondent a reasonable opportunity to present its case. As Bingham J (as he then was) said: 'matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties'.[95] Consequently, because the tribunal never suggested to the parties that it was going to decide the case on the basis of what was seen by the court as a reversal of the burden of proof, the tribunal 'had neither acted fairly nor given each party a reasonable opportunity of putting its case'.[96]

In other cases, courts have simply dismissed challenges to awards on the ground that the claimant has not discharged its burden of proof. For example, in *Kastrup Trae-Aluvinduet A/S v. Aluwood Concepts Ltd*,[97] the High Court of Ireland successfully enforced a Danish award under the New York Convention despite the award debtor complaining that the tribunal had wrongly refused to consider its counterclaims in the award and so left it unable to present its case. The court found that the counterclaims had been considered by the tribunal but were simply 'not proven in evidence'. The proof of any counterclaim by a respondent to an arbitration 'obviously' lies with that party under the principle of 'he or she who asserts must prove'. No evidence was provided to support the allegations made and so the burden of proof was not discharged by the award debtor.

Furthermore, Hong Kong courts have taken a similar approach to that adopted by the ICSID Annulment Committees referred to earlier, in rejecting arguments on the facts that the arbitrator had impermissibly reversed the burden of proof.[98]

The above decisions show that, while the general principles relating to burden of proof are governed and framed by the substantive law of the cause of action, the application of such rules by tribunals is subject to the requirements of procedural fairness. Exceptionally, however, courts have set aside awards based on a misallocation of the burden of proof. This tendency is most likely explained by the proximity of the burden of proof to the merits of the case and the general reticence of courts to review arbitral awards on the merits.

Before leaving this topic, it is worth mentioning another group of decisions in which a substantive classification of burden of proof has been adopted in reviewing challenges to arbitral awards. In this category, however, courts have shown less awareness that a determination on burden of proof may nevertheless have due process

95. *Zermalt Holdings v. Nu Life Upholstery Repairs* [1985] EGLR 14, 15, cited in *Punch* (n. 92) para. 47.
96. *Punch* (n. 92) para. 48.
97. *Kastrup Trae-Aluvinduet A/S v. Aluwood Concepts Ltd* [2009] IEHC 577.
98. *Paloma Co Ltd v. Capxon Electronic Industrial Co Ltd* [2018] HKCFI 1147 para. 28; *Gingerbread Investments Ltd v. Wing Hong Interior Contracting Ltd* [2008] HKCFI 218 para. 29.

consequences. In two cases, from Japan and Greece, respectively, the courts' reliance on the substantive approach resulted in the award debtor being unsuccessful in its challenge to the award. In the third case, from England, the award debtor was successful because the English arbitration legislation uniquely allows a party to file an appeal against an award based on an error of law.

In 2016, the High Court of Tokyo in *Company X v. Company Y*[99] had to consider a challenge to an award made in Japan, with Japanese law as the *lex causae* (law governing the contract). The award debtor argued that the tribunal had incorrectly allocated the burden of proof under Japanese law. Because the burden of proof is a procedural issue, the award debtor argued that the award should be set aside on the ground that the arbitration procedure was in breach of Japanese law. The court, however, disagreed, finding that the allocation of the burden of proof, at least where it relates to the merits of the case, is substantive. It would have been interesting to note the outcome had the award debtor relied on another ground for setting aside the award, such as the award debtor being denied procedural fairness due to it being unable to present its case. In that situation, the Japanese court may have had to confront the question discussed earlier: whether the burden of proof, despite being closely connected to the substantive law, nevertheless may implicate due process concerns in certain cases.

A similarly narrow approach was taken by the Greek Supreme Court in a decision in 2016.[100] Again, the award debtor sought to challenge an award on the ground that the tribunal had incorrectly distributed the burden of proof between the parties. The court first found that improper allocation of the burden was not an express basis to set aside an award. Second, it was also not a violation of the principle of equality between the parties since this would amount to an 'indirect' attack on the award. The court seemed particularly concerned to limit the grounds for setting aside arbitral awards.

Finally, an English court, in *Milan Nigeria Ltd v. Angeliki Maritime Company* ('*Milan*'),[101] allowed an appeal on an error of law arising from an arbitral award under section 69 of the English Arbitration Act 1996. The claimant in the arbitration was a cargo owner suing for loss and damage arising from a contract of carriage which was governed by English law. The seat of the arbitration was in London. The tribunal found the shipowner only liable for part of the damage because the cargo owner had not discharged its burden of proving that all of the damage suffered to the cargo was due to the shipowner's breaches of contract.

The court allowed the appeal, on the basis that the burden of proof had been incorrectly allocated by the tribunal to the cargo owner instead of the shipowner, which amounted to an error of law. Both parties in *Milan* proceeded on the assumption

99. Koki Yanagisawa and Takiko Kadono, 'Setting Aside Arbitral Awards Before Japanese Court: Consolidating Japan's Position as an Arbitration-Friendly Jurisdiction?' (*Kluwer Arbitration Blog*, 22 January 2018) http://arbitrationblog.kluwerarbitration.com/2018/01/22/post-2/ accessed 6 November 2021.

100. Antonios Tsavdaridis, 'Burden of Proof Rules and Setting Aside Arbitral Awards' (*Lexology*, 9 March 2017) www.lexology.com/commentary/arbitration-adr/greece/rokas-law-firm/burden-of-proof-rules-and-setting-aside-arbitral-awards accessed 6 November 2021.

101. *Milan Nigeria Ltd v. Angeliki B Maritime Company* [2011] EWHC 892 (Comm).

that the application of the rules on burden of proof was a matter of substantive law and that an appeal under section 69 of the English Arbitration Act 1996 was admissible. In most jurisdictions, however, such a basis for challenge would not be available and an award debtor would have to rely on a lack of procedural fairness or equality, as discussed earlier, although reliance on this ground has rarely been successful.

§4.05 TRIBUNAL GUIDANCE ON BURDEN OF PROOF

A final question to consider is whether the issue of burden of proof may be best addressed in practice by a tribunal informing the parties of its views on where the burden lies, early in the proceedings. Some commentators have supported such a measure to provide guidance and assistance to the parties in the presentation of their cases,[102] and to enhance the efficiency[103] and focus of proceedings. Such a duty does not, however, mean that the tribunal should warn or notify the parties about their respective burden on every evidentiary issue[104] or that they suggest to the parties areas where additional evidence may be required. A tribunal must be careful not to infringe its duties of impartiality and of giving each party an opportunity to be heard.[105]

§4.06 CONCLUSION

The burden of proof is an important, yet underrated, issue in international arbitration. While most national arbitration laws and institutional rules do not expressly refer to the concept, a consensus exists among tribunals and commentators that the party who asserts a claim or defence bears the burden of substantiating it with sufficient evidence. While the burden of persuasion remains with the party bringing the claim, the burden of production of evidence can shift to the respondent, where the claimant adduces evidence to a prima facie standard or a presumption operates to the same effect. Where a claimant fails to produce such evidence, normally its claim will be dismissed.

The methods of discharging the burden of proof include the provision of documentary evidence and oral testimony, which can be supplemented in some jurisdictions by requests for disclosure. Where a party refuses to comply with such a request, then an adverse inference may be drawn by a tribunal, which can, in some cases, discharge the burden.

In terms of applicable law, the burden of proof is best seen as substantive, not procedural, as it is closely tied to and influenced by the substantive law of the cause. Nevertheless, there is utility in identifying certain general principles underlying the burden which tribunals can presumptively apply, subject to specific rules in the parties' contract and the substantive law. Despite the burden of proof being classified as substantive, courts have properly recognised that a tribunal's decision on burden of

102. *See especially* Kreindler (n. 61) 173 and 179, and Amaral (n. 40) 3.
103. Carreteiro (n. 52) 84; Kreindler (n. 61) 173.
104. Waincymer (n. 13) 773.
105. Schlaepfer (n. 43) 130 and 132.

proof may be subject to review on due process or procedural fairness grounds. Awards, however, have been rarely set aside or not enforced on this basis.

Finally, an important means by which the burden of proof could be highlighted would be for tribunals to give express guidance to parties on the issue during the proceedings, subject, of course, to their overriding duty to treat both parties equally.