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Content:

Part Two: General Aspects of the Burden of Proof

II. Claimant's Duty: actori incumbit probatio

C. Summary of the Chapter

In the present chapter the rule of actori incumbit probatio, as the broad basic rule with respect to the allocation of the burden of proof in international procedure, was discussed. As shown in the cases referred to above, both municipal and international law recognize and apply the rule of actori incumbit probatio. In the realm of municipal law, the rule actori incumbit probatio, with a history going far back into ancient times, is applied by different legal systems of the world today. While the social and cultural characteristics of each nation as well as particularities of each legal system taints the implementation of the rule with a different shade, the essence of the rule remains the same, in that the party who asserts a fact, whether claimant or respondent, is responsible for providing proof thereof.

There is a consistency in this respect between municipal law and international law. As shown in this chapter, various international tribunals, including conciliation commissions, mixed claims commissions, the Permanent Court of International Justice, the International Court of Justice, and different ad hoc arbitral tribunals, in particular the Iran United States Claims Tribunal, have consistently applied the rule. A study of the practice of international tribunals shows that it could easily be concluded that, in spite of a variety of approaches and differences of opinions as to the degree of applicability of the rule under different circumstances, the logical and legal concept of actori incumbit probatio has generally been accepted and applied by international tribunals.

It should be added, on the other hand, that the rule of actori incubit probatio, which emphasizes the role of the claimant in a proceeding, is not the only rule with respect to the burden of proof in international procedure. The flexibility of the procedure and the rules of evidence in international law, require a balanced application of this rule, which is only achieved by taking account of the roles of the other two main actors in each proceedings, i.e., the respondent237 and the tribunal238.

Part Three: Particular Issues Concerning the Burden of Proof

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B. The Duty of the Claimant

Onus probandi actori incumbit. This is the basic rule of the burden of proof. According to this rule, the party who makes allegations regarding a disputed fact or issue bears the burden of proving such fact or issue. This rule places the brunt of the burden of proof on the claimant. This is a principle which is generally recognized and accepted in different legal systems and in international law. There are, of course, differences between international law and the municipal laws of different countries. For instance, in municipal law the burden of proof should usually be discharged in accordance with the law and through the means prescribed by the law. The method of interpreting the rule may be different, from country to country and from court to court. But such differences do not alter the fact that they all have one point in common, namely that the burden of proof falls on the party alleging a disputed fact. The basic rule of the burden of proof, i.e., the duty of the claimant to discharge the burden of proof, has been applied by different international tribunals. The same rule applies with respect to negative propositions, so that the party alleging a negative fact bears the burden of proving it.

In fact, in spite of dramatic changes and developments in the way of life and their impact on international relations, the old Roman adage actori incumbit probatio still holds as the magic word to start with, in considering the practice of both municipal and international fora concerning the burden of proof. It should be emphasized, however, that the applicability of the rule stems from the flexibility built into it by the interpretation of the term "actor" as signifying not only the party that sets the wheels of the proceedings in motion, but equally the party that claims a fact in defence. Indeed, this is a main difference between the concept of the burden of proof today and that of Roman times.

Saying that each party to a proceeding should prove what it claims, might seem to be a mere statement of the obvious. But there are cases in which it is difficult to determine who is the claimant with respect to each issue, and what has been claimed. In these instances the rule provides a valuable guideline, on the basis of which different situations may be decided. It is to be noted, on the other hand, that the application of the rule is not always free of complications, and that there are instances in which the allocation of the burden of proof between parties becomes a major point of contention in an international litigation.

The basic rule of the burden of proof may also be stated differently, as is usually done in civil law countries; that is, the party who claims to the contrary of an existing or acquired situation which is in favour of the other party bears the burden of proof. In some countries the notion of the burden of proof stems from another general principle, according to which everybody is presumed to be free of liability until proved otherwise. Thus, each party should prove the facts and contentions which it puts forward, and there is no difference between the claimant and the respondent in that regard.

C. Effects of Presumptions

The rule actori incumbit probatio is affected by the operation of presumptions in the sense that, in the process of evaluating evidence, the tribunal takes account of any presumptions applicable in favour of the party that carries the burden of proof and not refuted by the other party. Generally speaking, presumptions affect the burden of proof insofar as they create prima facie evidence or proof in favour of the party that benefits from them. This results in the shifting of the burden of evidence from one party to the other. Moreover, in international procedure, presumptions are not immune to defences that may establish the opposite of the presumed facts.

Presumptions do not reverse the burden of proof on a given issue. Rather, they relieve the party to whose benefit a presumption exists from initiating proof, by creating prima facie evidence in its favour. That situation, however, may per se
have the effect of reversing the burden of proof on occasions where there is no evidence against the presumption in question, since this may lead to a ruling in favour of the proponent. A similar situation arises when the presumption contains a peremptory norm of general international law which is irrebuttable. In such a case, an irrebuttable legal presumption has conclusive probative value and, depending on whether it supports the claim or not, it either relieves the proponent from the burden of proof or makes its burden impossible to meet.

[...]

237 For a discussion on the respondent’s role see infra Ch. III.
238 For a discussion on the tribunal's role see infra Ch. IV.

Referring Principles:

XII.1 - Distribution of burden of proof