Weighing the evidence

7.11" The weight ultimately assigned to evidence is directly tied to whether it contributes to establishing a relevant fact. Therefore, the persuasiveness of that evidence may be judged only in the context of the case. There is no steadfast rule determining what kind of evidence must be considered of higher or of better quality per se. This being said, international tribunals have traditionally preferred contemporaneous writings as the more reliable form of evidence, although, this preference should not be regarded as a binding rule and neither should it be strictly applied.

7.12" It is reserved to the tribunal to use its discretion to weigh the evidence. A reviewing court will rarely overturn an award because a tribunal incorrectly weighed the factual evidence before it, or because it found one party's evidence more persuasive than another's. To rule as such would require a supervising court to essentially reconsider all of the elements of the case, both legal and factual: a level of review that exceeds what is contemplated under most modern lex arbitri, such as the UNCITRAL Model Law, or, in the enforcement context, what is permitted by the New York Convention. The rare exception to this principle seems to lie in cases where a tribunal has unfairly penalised a party for a failure to produce evidence, when the omission results from directions given by the tribunal. In limited circumstances such as these, a reviewing court may consider it appropriate to question any reliance placed by the tribunal on such an omission in the record.

7.13" The predominant practice adopted in international arbitration is for the tribunal to provide reasoned explanations for the weight it has assigned to different pieces of evidence. Some principles which have been considered by international tribunals in their assessment of evidence are set forth below:

(iv) A tribunal may draw an adverse inference from a lack of evidence the record.
(v) When two witnesses offer contradictory testimony, a tribunal should not, based solely on the testimony, give greater weight to one over the other if both accounts appear to be equally plausible and to be given in good faith. In such a case,
a tribunal should consider circumstantial or other evidence in determining which testimony is more persuasive as to the veracity of a matter.\textsuperscript{19}

(vi) If witness testimony is contradicted by relevant documentary evidence, a tribunal need not automatically disregard such testimony.\textsuperscript{20} Nevertheless, in considering the weight to assign to the testimony a tribunal should explain the effect that previous, contradictory statements, inconsistencies or omissions have on the credibility of the witness.\textsuperscript{21}

(vii) Exaggerations or misrepresentations of fact by a party or a party witness do not destroy the value of their primary contentions per se.\textsuperscript{22}

(viii) Witness testimony may be assigned probative value when the witness has first-hand knowledge of the information to which he or she is attesting, but may be disregarded or assigned lesser value if the testimony simply repeats facts originally heard or witnessed by another individual.\textsuperscript{23}

(ix) Unless expressly agreed to by the parties ahead of time, evidence submitted by one party should not be regarded as irrefutable proof of a contention barring the consideration of counter evidence.\textsuperscript{24}

(x) That a witness of fact bears a connection to a party of employment, familial relation, shareholding, or other significant business relation, does not disqualify that individual from giving testimony. A party to an arbitration that is a natural person may also give witness testimony.\textsuperscript{25}

(xi) Where it is reasonable that a party by virtue of circumstance does not have the ability to provide the 'best' or primary evidence of a factual contention, a tribunal is able to accept lesser or secondary evidence for the purposes of establishing that fact.\textsuperscript{26}

7.14" This list should not be regarded as exhaustive, but rather as an illustrative listing of some of the recognised principles that have been applied in the past by various tribunals. Naturally, the discretion of the tribunal to weigh evidence is not limited to those rules set forth here, and may be exercised taking into account a variety of other factors or principles not mentioned above.

BURDEN OF PROOF, STANDARDS OF PROOF AND SHIFTING THE BURDEN

Article 27(1) UNCITRAL Rules: Each party shall have the burden of proving the facts relied on to support its claim or defence.

General discussion

7.15" A discussion of the "burden of proof" in international arbitration has the tendency to become complex, partly as a result of the varying terminology that is used. One finds that the phrase "burden of proof" is often used interchangeably with other phrases such as the burden of persuasion, burden of production, burden of going forward, the legal burden and burden of allegation. These concepts, primarily deriving from domestic practice, find awkward application in the international setting given that arbitral procedure often does not follow the domestic practices that underlie their development. Additionally, as commentators and practitioners from varying jurisdictional backgrounds assign different meanings to these phrases, it soon becomes clear why what would seem initially to be a relatively straightforward issue becomes difficult to accurately define.\textsuperscript{27}

7.16" The following section considers the burden of proof as it relates to evidence and more specifically the obligation to submit evidence and the risks associated with failing to do so.\textsuperscript{28} The three key facets of the burden of proof that are given transnational recognition and application in modern arbitral procedure, and which are considered below, are: \textit{onus probandi actori incumbit}, standards or proof, and the shifting of the burden of proof. Moreover, as is further discussed below, the substantive law may have an impact on the issue of the burden of proof.
The burden of proof: Onus Probandi Actori Incumbit

7.17" In 1930 the governments of Britain and France agreed to submit to arbitration claims arising out of the arrest by British authorities of a French national, a Mr Chevreau, who had been detained in what was then known as Persia. The agreement to submit the matter to arbitration omitted a number of procedural details, including any explicit allocation of the burden other than to say that both parties were expected to produce evidence in support of their respective allegations of fact. The French agent interpreted such a principle to mean that there was no respondent and no claimant in the matter, and thus there was no burden of proof. The British position was that France was the claimant, and, as such, it bore the burden of producing the evidence to support its case. The arbitrator, in weighing these arguments, took the following position:

"Although article 3 of the submission agreement imposed on both parties the 'obligation to establish to the satisfaction of the arbitrator the authenticity of all issues of fact asserted for the purpose of establishing or denying liability', this provision was not ... intended to exclude the application of the normal rules of evidence. It was merely intended to provide an additional obligation to prove the existence of facts alleged for the purpose of denying liability."

7.18" In determining the threshold question, the tribunal drew a distinction between two duties to aspects of the burden of proof. In the first instance, the tribunal acknowledged that both parties were under a procedural duty to provide evidence of the 'existence of facts alleged'. Second, it clarified that this rule did not displace the "normal rules of evidence".

7.19" Taking the first, it is clear that the procedural burden of proof is incumbent on both parties, in a manner similar to the principle of onus probandi actori incumbit or actori incumbit probatio: he who asserts a fact must prove it. The following discussion from an ICSID award in AAPL v Sri Lanka, further explains how this widely accepted formula is applied in practice: "The term actor in the principle onus probandi actori incumbit is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. Hence, with regard to 'the proof of individual allegations' advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact."

7.20" Thus, while the burden of proof will often be thought to lie exclusively with the claimant this is not entirely correct. From a procedural standpoint, the burden of proof under the principle of onus probandi actori incumbit attaches to both the claimant and respondent, who must substantiate their factual allegations.

For the respondent, this burden may mean inter alia that it is charged with producing evidence where it has challenged the reliability of claimant's evidence, such as by alleging a piece of evidence is tainted by fraud, or where it alleges rebuttal facts. As reflected from the discussion above, this principle applies to both the substantive claim and defence. Article 27.1 of the UNCITRAL Rules restates this rule.

7.21" However, onus probandi actori incumbit only explains one part of how the burden of proof operates in international arbitration as it relates to the duty to produce evidence. The second part is what was described in the Chevreau Claims case as the burden of proof that was found to exist under the "normal rules of evidence"; that is, determining the party who bears the risk of failing to substantiate their case. There, the arbitrator noted that, "the burden of proof rested with the French Government, and that, following the rule established in analogous cases, Mr Chevreau's allegations could not be considered as sufficient proof, absent other supporting evidence." Thus, while noting that both parties had a procedural obligation to submit proof of their factual
allegations, the tribunal found that the risk of to produce sufficient evidence rested initially with the party bringing the claim for relief. This too was the position adopted by a panel of the Iran-US Claims Tribunal, who considered the interplay between a rule similar to article 27.1, which called on both parties to submit their evidence, and the allocation of the risk of failing to produce evidence: "the Tribunal believes the Claim ... is best decided by reference to Article 24, paragraph 1 of the Tribunal Rules according to which '[e]ach party shall have the burden of proving the facts relied on to support his claim or 'It goes without saying that it is the Claimant who carries the initial burden of proving the facts upon which he relies." Therefore, while both parties must produce evidence to substantiate their cases, the tribunal may, as influenced by the logical sequence of facts involved in a claim or as imposed by the substantive law or other circumstances of the case, allocate to one side or the other the risk of not producing the evidence in support of their case.

7.22" If the tribunal will allocate to one party or the other the risk of failing to produce sufficient supporting evidence, what is the purpose of the procedural rule _onus probandi actori incumbit_ or article 27.1 of the UNCITRAL Rules? It may be said that _onus probandi actori incumbit_ is a rule of procedural flexibility which accomplishes the following: (1) it places both parties on notice that they are bound to substantiate their factual allegations with evidence; (2) it makes clear that both parties may bear the risk of failing on their allegations if they do not do so; and (3) because the parties are on notice, a tribunal is not under the procedural duty to inform each side at various stages of the proceedings as to whether the risk of non-production of evidence is placed or has shifted to them.

7.23" Finally, it is generally considered that a tribunal has wide discretion in allocating the burden of proof as an inherent part of its function to weigh and assess the evidence under article 9.1 of the IBA Rules and other similar arbitration rules. Reviewing courts rarely will overturn a tribunal's determinations regarding the allocation of the burden as it relates to its procedural discretion, with the possible exception of those jurisdictions where a tribunal's decision allocating the burden of proof may be reviewed for error of law.

[...]

Article 9.3(e): the need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules

[...]

9.62" The widely accepted solution to this problem is to apply the 'most favourable privilege' rule. This approach posits that the tribunal should apply the rule of privilege which affords the greatest, or widest protection, to both parties. Formerly, it was the view of some writers that article 9.2(g) (considerations of procedural economy, proportionality, fairness or equality of the parties) could be used as the basis for applying the same rule of privilege to both parties. However, with the addition of article 9.3 it is now expressly recognised that a tribunal may take this approach. It should be noted, however, that a clash of priorities may occur when a rule, which is perhaps unusual, is applied to both parties. In that instance, the parties may be afforded a wider or different measure of legal privilege than would normally be expected, and hence the consideration in article 9.3(c) (the contemporaneous expectation of the parties) is not met. At this point, the tribunal may be better advised to employ a survey approach to arrive at a rule of privilege given that the survey approach would identify common themes in privilege.
across jurisdictions and exclude any extreme aspects of such a rule.

10In the Island of Palmas case, the arbitrator noted: "The value and weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of the facts which are notorious for the tribunal." The Island of Palmas Case (USA v Netherlands), Final Award, 4 April, 1928, 2 RIAA pp. 827, 840. See also: Amy F. Cohen, "Options for Approaching Evidentiary Privilege in International Arbitration", in T. Giovannini and A. Mourre (eds), Dossier VI: Written Evidence and Discovery in International Arbitration, p. 433 (2009): "The assessment of relevance and materiality requires no special agreement, and the analysis can only be undertaken on the basis of the knowledge of the case at the time."


12See: the following summary of a ruling by the Hanseatic Court of Appeal of 14 May 1999: "The court stated that such a right [a right to be heard] only requires that a tribunal take into account arguments brought forward by the parties but does not limit the right of the tribunal to evaluate the evidence presented." Hanseatisches Oberlandesgericht Hamburg, CLOUT Case No. 457 (1999), in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXVIII, p. 265 (2003). See also: the following summary of a decision by the Swiss Federal Tribunal, where a party challenged an ICC final award because the tribunal had not assigned what the party perceived to be the proper weight to the witness statements it had proffered. Georg von Segesser, "18 November 2004 - Schweizerisches Bundesgericht, I. Zivilabteilung (Swiss Federal Court, 1st Chamber), Case No. 4p.140/2004", A Contribution by the ITA Board of Reporters: "In particular the supplier [a party] claimed that the arbitral tribunal had not given the statements of its witnesses the same weight as the statements of the other party's witnesses, thereby violating the right to equal treatment. The Swiss Federal Court held that a party may not argue a violation of its right to equal treatment, when in reality, it is merely criticizing the weighing of evidence by the tribunal." See also the decision by the US District Court for the Southern District of New York, Interdigital Communications Corp et al. v Samsung Electronics Co Ltd, 528 F.Supp 340, p. 352 (SDNY2007): "However, it is also clear that vacature is not appropriate.where the losing party in an arbitration merely takes issue with the weight accorded to such evidence...the losing party's assertion that the arbitrators failed to give the evidence the 'consideration it deserved' must be rejected as an improper 'attempt to probe the collective minds of the arbitrators as to how they reached their judgment.'" See also: a decision of the Netherlands courts where the President of the District Court of Zutphen rejected a challenge to the enforcement of an award based upon an argument that the tribunal had wrongly weighed the facts in favour of the party seeking an enforcement. The court found that it was not proper to second guess the assessment of the tribunal's weighing of the facts. Tianjin Stationary & Sporting Goods Import & Export Corp (China) v Verisport BV (the Netherlands), Arrondissementsrechtbank, Zutphen, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXII, pp. 766-767 (1997). See also: the position of the Canadian courts: "On a finding of fact, for which there is support in the evidence, the court must defer to the tribunal." Marvin Roy Feldman Karpa v United Mexican States, Court of Appeal for Ontario, Case No. C41169, para. 60 (2005).

13See: the following decision of the ICSID ad hoc committee: "The Arbitral Tribunal did not create a different standard of proof when it concluded that there was 'no conclusive evidence that Claimants defrauded KaR-Tel by causing it to enter into transactions with Telsim at excessive prices'. Rather, the Tribunal was merely expressing its failure to be convinced by the evidence put before it. On a fair reading of paragraphs 320-322 of the Award, the Tribunal is simply rejecting Kazakhstan's case of fraud on the evidence adduced by it." Dietmar W. Prager and Samantha J. Rowe, "Republic of Kazakhstan v Rumeli Telekom AS, ICSID Case No. ARB/05/16, 25 March 2010", A Contribution by the ITA Board of Reporters, para. 97.

14In a dispute before an Iran-US Claims Tribunal panel, the claimant ("Avco") had been advised by the original tribunal that for procedural economy reasons it should not submit the whole of the evidence (invoices) in its possession on a particular issue, but instead provide audited accounts reflecting the invoices. Later, the tribunal, after two arbitrators were replaced, ruled against the claimant citing the lack of proper evidence for the claim, and in particular the failure to provide original invoices instead of the accounts: "At the pre-hearing conference, Judge Mangard specifically advised Avco not to burden the Tribunal by submitting 'kilos and kilos of invoices'. Instead, Judge Mangard approved the method of proof proposed by Avco, namely the submission of Avco's audited accounts receivable ledgers. Later, when Judge Ansari questioned Avco's method of proof, he never responded to Avco's explanation that it was proceeding according to an earlier understanding. Thus, Avco was not made aware that the Tribunal now required the actual invoices to substantiate Avco's claim. Having thus led Avco to believe it had used a proper method to substantiate its claim, the Tribunal then rejected Avco's claim for lack of proof. We believe that by so misleading Avco, however unwittingly, the Tribunal denied Avco the opportunity to present its claim in a meaningful manner. Accordingly, Avco was 'unable to present [its] case' within the meaning of ArticleV(1)(b), and enforcement of the Award was properly denied." Iran Aircraft Industries v -Avco Corp, 980 F.2d 141 (2nd Cir. 1992). See also: the following discussion of the rules developed in the jurisprudence of the
In general, international tribunals have given full weight to circumstantial evidence. Two independent factors are considered by Arbitral Tribunals when assessing the weight that should be given to such evidence ... the first factor is the party's attitude in the proceedings. If a party, as was the case with Respondent, does not comply with its obligations, for instance by refusing to produce the requested documents and witnesses, the Arbitral Tribunal is authorized to draw adverse conclusions from the party's behavior. The same applies when witnesses manifestly lack independence, as was the case with those produced by Respondent, [and] the second factor is whether direct evidence of fact is unavailable". Dietmrn W. Prager and Joanna E. Davidson, "Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan, ICSID Case No. ARB/05/16, 29 July 2008", A Contribution by the ITA Board of Reporters, para. 444. See also: the following consideration of "indirect" proof concerning a bribery claim by an ICC tribunal: "In the present case, bribery has not been proved beyond doubt. It is true that it is possible to prove something through indirect evidence and that Art. 8 of the Swiss CC does not exclude indirect evidence. However, it is necessary that a sufficient ensemble of indirect evidence be collected to allow the judge to base his decision on something more than likely facts, i.e., facts which have not been proven." Broker v Contractor, ICC Case No. 5622, Final Award, in Albert Jan van den Berg (ed.), Yearbook of Commercial Arbitration, vol. XIV, p. 112 (1994).

As an example of this principle, in ICC Case No. 5562 where a tribunal, noted the total absence in the arbitral record of correspondence which in normal circumstances would have been exchanged between the parties, drew the following factual conclusion: "These considerations lead us to believe that claimant saw its task as totally different from what was initially provided for in the Protocol of Agreement, that claimant informed defendant orally regarding its activities, that defendant did not in any way object to claimant's activities - which were different from those provided for in the Protocol of Agreement - and that, on the contrary, it even approved of it ... In fact, how else could it be explained that, during a period of three years, a company aiming at obtaining a major contract ... neither worried about nor requested information on its broker's work? Such behaviour can only be logically explained if we admit that defendant tacitly approved of claimant's activity. The consequence of this approval - which is not necessarily the validity of the contract - will be examined below." Ibid., ICC Case No. 5622, pp. 105, 117. See further below.

20See: Plama Consortium Ltd v Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (2005). The tribunal noted with respect to witness testimony certain inconsistencies with documentary records produced in the proceedings, but was not minded to reject the testimony as false. The tribunal did, however, take a more permissive standard in regard to the evidence, due to the general view that testimony may be accepted during a jurisdictional phase on face value, with greater scrutiny reserved for the merits phase.
22Francisco Malien (United Mexican States) v United States of America, 27 April 1927, 4 RIAA, pp. 173-174.
23ICC Case No. 4815, Procedural Order of 9 June, 1987", in Dominique Hascher (ed.), Collection of Procedural
Decisions in ICC Arbitration 1993-1996, p. 130 (2nd edition, 1998). In this procedural order a witness was to testify only to those matters that he or she had personally witnessed as the tribunal limited testimony by noting that the witness "was invited to state orally before the arbitrators the facts of which he had personal knowledge". This being said, hearsay evidence is admissible in international arbitration. See generally comments to art. 8.2.


25See: comments to art. 4.1.

26Frederica Lincoln Riahi v The Government of the Islamic Republic of Iran, Case No. 485, Award No. 600-485-1, para. 415 (27 February 2003)." While the Claimant must shoulder the burden of proving the value of the expropriated concern by the best available evidence, the Tribunal must be prepared to take some account of the disadvantages suffered by the Claimant, namely its lack of access to detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place." See also: "In cases where proof of a fact presents extreme difficulty, a tribunal may be satisfied with less conclusive proof, i.e., prima facie evidence." Asian Agricultural Products Ltd (AAPL) v The Republic of Sri Lanka, Final award of 27 June 1990, Case No. ARB/87/3, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XVII, p. 124 (1992).

27Confusion as to the proper use of the term "burden of proof" is also common within domestic practice, as the following excerpt from a standard American text explains: "The phrase burden of proof as used by the courts, is one of double meaning, which circumstance has been the cause of confusion so great as to suggest the propriety of adopting a less objectionable term." Owens and Immodio (eds), Corpus Juris Secundum: Complete Restatement of the Entire American Law as Developed by all Reported Cases, 31A Evidence, s. 103.

28Or as some may consider it, the 'burden of producing evidence'. While not necessarily endorsing this author's view on the classification of these concepts, Marossi provides an interesting consideration of the various aspects of the burden of proof question in, Ali Z. Marossi, "Shifting the Burden of Proof in the Practice of the Iran-United States Claims Tribunal", Journal of International Arbitration, vol. 28, No. 5, p. 427 (2011).

29Summary of Chevreau Claim (United Kingdom and France), in P. Hamilton et al. (eds), The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, p. 129 (1999).

30Ibid., p. 132.

31Bin Cheng describes burden of proof as it relates to the obligation to produce evidence as follows: "The term burden of proof may, however, also be used in a more restricted sense as referring to the proof of the individual allegations advanced by the parties in the course of proceedings. This burden of proof may be called procedural." Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, p. 334 (2nd edition, 1987).

32The ICSID tribunal in Salini v Jordan noted with approval the wide acceptance of actori incumbit probatio and considered also the application of the rule by the International Court of Justice: "The Permanent Court of International Justice and the International Court of Justice applied this principle in many cases and the Court stated explicitly in 1984 in the case concerning military and paramilitary activities in and against Nicaragua that "it is the litigant seeking to establish a fact who bears the burden of proving it." Dietmar W. Prager, "Salini Costruttori SpA Italstrade SpA and others, ICSID Case No. ARB/02/13, 31 January 2006", A Contribution by the ITA Board of Reporters, para. 72.

33AAPL v Sri Lanka, supra n. 11, p. 121. The tribunal in this case was borrowing from Bin Cheng’s formulation of this principle. Bin Cheng, supra n. 31, p. 332. See also: where another tribunal noted with approval the rule set forth in AAPL: "The Tribunal agrees with the standard articulated by the AAPL tribunal that, with regard to ‘proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact.” Dietmar W. Prager and Rebecca Jenkin, "Alpha Projekt Holding GmbH v Ukraine, ICSID Case No. ARB/07/16, 8 November 2010", A Contribution by the ITA Board of Reporters, para. 170. See also: the decision by an ICC tribunal which followed this principle: "The burden of proof for the conclusion of a contract is on the party claiming rights out of the contract. Since the arbitration clause is also a contract, the same rules are applicable for the arbitration clause. Thus, in the case at hand the claimant must establish the conclusion of the alleged contracts and of an arbitration clause for each alleged contract." ICC Case No. 10274 of 1999, Final Award, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXIX, p. 94 (2004).

34See: the following observations of the tribunal in ICC Case No. 7365: "the basic principle of proof ‘actori incumbit probatio’ relates to the determination of the tribunal of disputed facts, not to the final result of a dispute. Accordingly the issue does not necessarily depend on the parties' role as a claimant or defendant." ICC Case No. 7365, Final Award, para. 15.2 (1997) (unpublished). See: the ruling of an ICC tribunal, "Any facts that are favorable towards the position of the defendant must be proven by it," ICC Case No. 8547 of 1999, Final Award, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, Vol. XXVIII, p. 35 (2003). See also: Mojtaba Kazazi, Burden of Proof and Related Issues: A Study of Evidence Before International Tribunals, p. 221 (1996): "According to this rule, which is rooted in Roman law and is applied in different legal systems of municipal law, the burden of proof, as a point of departure, is on the ‘actori’. However, the ‘actori’ is the party who alleges a fact, not necessarily always the party who instated the proceedings."

35In an Iran-US Claims Tribunal case, the tribunal explained, "The Tribunal believes that the analysis of the distribution of the burden of proof in this Case should be centered around Article 24, paragraph 1 of the Tribunal Rules which states that
[e]ach party shall have the burden of proving the facts relied on to support his claim or defence. It was the Respondent who, at one point during the proceedings in this Case, raised the defence that the Deed is a forgery. Specifically, the Respondent has contended that the Deed, dated 15 August 1978, was in fact fabricated in 1982. Having made that factual allegation, the Respondent has the burden of proving it. Abraham Rahman Golshani v the Government of the Islamic Republic of Iran, Award No. 546-812-3 of 2 March 1993, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XIX, p. 429 (1994).

36See: the determination of one ad hoc tribunal regarding the burden on the respondent: "The seller of guaranteed machinery does, according to common burden of proof principles, carry the burden of proving that deficiencies which emerge during the guarantee period are not due to deficiencies which were there at the time of delivery." Owner of the Tanker Wingull v BMV (Norwegian supplier), Award of 10 April 1978, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XI, p. 108 (1986).

37See: the acknowledgement of this principle by an ICC tribunal as a general rule of law. "One can acknowledge the existence of a general principle according to which a claimant who seeks damages for non-performance carries the burden of proving the existence and the contents of the obligation while it rests upon the defendant to claim and to prove the fact that he has performed this obligation." Final Award in ICC Case No. 1434, Journal du Droit International, p. 982 (1976). See further: for the summary of the Swiss view on the matter: "in most cases, each party shall bear the burden of proof for the facts on which it is basing its case (actori incumbit probatio)." Georg van Segesser and Dorothee Schramm, "Swiss Private International Law Act (Chapter 12), Article 184 (Procedure: taking of evidence)" in Loukas A. Mistelis (ed.), Concise International Arbitration, p. 938 (2010). See also: the following position adopted by an ICC tribunal, as a classic example of where a party's failure to meet the burden of proof resulted in an adverse finding: "In view of these contradictions and of the fact that the loan agreement concluded with the bank was not produced, nor any bank statements concerning the amount of the debts of the Plaintiff towards the bank, during the period under scrutiny, the Arbitral Tribunal considers that it is impossible to take into account the interests claimed by the Plaintiff, which has not brought the necessary proof although the burden of proof laid on it." ICC Case No. 6896, Final Award, in ICC Bulletin, vol. 15, No. 1, p. 15 (2004). See also: a decision of the High Court of Ireland approving this principle, "It was also submitted on behalf of the respondent that the Danish Arbitration Board had wrongly refused to consider the counterclaims of the respondent when making its award. I consider this submission is misconceived and also unsupported by the facts. The award clearly indicated that the Board considered the respondent's counter claims, made in correspondence, but simply found that they were not proven in evidence. The burden of proof for any claim in an arbitration made by the respondent is obviously on that respondent. The Arbitration Board simply stated that the respondent had not proved the claims. This was the fact. There was no evidence before the Board. Therefore the claim could not be allowed. The principle of 'he who asserts must prove' is applicable. Furthermore, as is evident from the award, the written counterclaims were considered during the oral hearing as the applicant itself accepted two of the counterclaims, in fact even lowering its own claim because of these counterclaims - a matter mentioned directly in the arbitration award." Kastrup Trae-Aluvinduet AS v Aluwood Concepts Ltd in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXXV, p. 406 (2010).

38Chevreau Claim case, supra n. 29, p. 133.

39See: the following determination by an ICSID tribunal regarding the burden of proof pertaining to requests for interim measures: "While the Tribunal has a certain discretion whether it considers that it should recommend provisional measures, the party requesting provisional measures must be considered to have the burden of proof regarding its request." Dietmar W. Prager and Rebecca Jenkin, "Caratube International Oil Go LLP v Republic of Kazakhstan, ICSID Case No. ARB/08/12, 31 July 2009", A Contribution by the ITA Board of Reporters, para. 75.

40See: Noble Ventures v Romania where the tribunal stated that while both parties were to bring their evidence, the claimant bore the initial duty to substantiate its claims. "Finally the Tribunal notes that, insofar as a Party has the burden of proof it is sufficient for the other Party to deny what the respective Party has alleged and then, later in the procedure, respond to and rebut the evidence provided by that respective Party to comply with its burden of proof. Dietmar W. Prager, "Noble Ventures Inc v Romania, ICSID Case No. ARB/01/11, 12 October 2005", A Contribution by the ITA Board of Reporters (quoting from Procedural Order No. I at para. 5). In commenting on this case and the risk of non-production of evidence, Bin Cheng notes, "The ultimate distinction between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst that of the defendant does not." Bin Cheng, supra n. 31, p. 332.

41Reza Said Malek v The Government of the Islamic Republic of Iran, Case No. 193, Award No. 534-193-3 of 11 August 1992, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XVIII, p. 289 (1993). See: a similar formulation used by a well-experienced panel of arbitrators in an NAI arbitration: "In the Tribunal's view Claimant has done nothing more than articulate the usual burden of proof Standard, i.e. that Claimant must prove its claims and, if it does, Respondent bears the burden of proving its defenses." NAI Case No. 3702, Final Award, p. 37 (2011) (unpublished). See also: where this standard was articulated in regard to jurisdictional claims: "Where an investment is owned and/or controlled by the investor/claimant through a series of corporations, typically the claimant will adduce evidence as to how it owns or controls such investment. In this case it is the investment rather than a French investor till it has brought the claim and it has sought to adduce evidence of how it is controlled by four non-parties to the arbitration who are nationals of France. The burden of proof to establish the facts supporting its claim to standing lies with the

42See also: the considerations of the Tradex v. Albania tribunal which after reviewing the requirements of the substantive law, noted as follows: “The wording of these provisions confirms what can be considered as a general principle of international procedure - and probably also of virtually all national civil procedural laws - namely that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim (…)”. Tradex Hellas v Albania, supra n. 2, Decision on Jurisdiction of 24 December 1996 as referred to in the Award of 29 April 1999, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXV, p. 239 (2000).

43For instance, it has been argued by some parties that a tribunal had the duty to notify the party it that its evidence was not sufficient to meet its burden of proof. In regard to a particular case before the Swiss Federal Tribunal, it was noted: “The Swiss Federal Supreme Court found there is no duty of a court or an arbitral tribunal to inform a party that the documents it has produced are not sufficient to establish the facts of the case. The right to be heard does not mean that an arbitrator has to draw the parties’ attention to the facts which are decisive for his decision.” Georg von Segesser and Andrea Meier, “9 January 2008, Federal Supreme Court”, A Contribution by the ITA Board of Reporters. This being said, it is not unheard of for a tribunal to give indications on how it has allocated the burden in the case prior to the final award, in particular where arbitrators have called upon one or both sides to produce evidence. See: the decision of an ICC tribunal, where it noted in the final award that a party had not met its burden of proof even though the tribunal had alerted it to its obligation to bring forth its evidence in an earlier ruling on document production: “The Tribunal wants to add that it indicated quite clearly, in particular in Procedural Order No. 6, that Claimant bears the burden of proof for its allegations (…) “Since neither Respondent nor the Tribunal are yet sufficiently informed about the fulfilment of the State X Entity Contract and any replacement contract, it is in Claimant’s own interest to submit any relevant document.” ICC Case No. 13133, Final Award, in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration, vol. XXXV, p. 142 (2010).

44See: the following observation of the ad hoc committee in the ICSID case Continental Casualty Go v The Argentine Republic in response to the Claimant’s argument that the tribunal had wrongly applied the burden of proof, the ad hoc committee reasoned: “The Committee notes that the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.” Continental Casualty Go v The Argentine Republic, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, p. 51 and 52 (16 September 2011).

45See: for instance, the decision of the English courts in Milan Nigeria Ltd v Angeliki B Maritime [2011] EWHC 892 (Comm), where the allocation of the burden of proof by a panel of the London Maritime Arbitrators Association was judged an error of law and a basis for setting aside the award under s. 69 of the Arbitration Act of 1996.

86In proposing this rule, Von Schlabrendorff and Sheppard write, “In cases where there is a conflict of privileges and the rules differ as significantly as they do between the common law and civil law systems, it does not appear acceptable to us, for practical as well as legal reasons, simply to rely on a choice-of-law analysis and to apply different rules of privilege to different parties…For greater predictability, we propose that international arbitrators, after determining which privileges may be applicable based on the closest connection test, adopt an approach that allows any party to the arbitration to claim the same legal privileges as are available to any other party. This will generally mean, when a common law party is involved, that a civil law party can claim common law privileges. This will result in the application of the most favourable privilege”. Von Schlabrendorff and Sheppard, supra n. 26, p. 773.

87While some authors regard the "most favourable privilege" rule to be a manner or means of selecting a rule, it is the more widely accepted consensus that it is in fact a means of ensuring that the rule arrived at, through whatever approach is used in determining it, is equally applied between the parties. For instance Carter notes the following after describing the closest connection test: "And then there is another step: if a conflicts-of-law analysis produces a different privilege rule applicable to each party, arbitral tribunals can invoke an 'equality of arms' approach to avoid any unfair treatment." James H. Carter, "Privilege Gets a New Framework", International Arbitration Law Review, vol. 13, No. 5, p. 178 (2010).


Referring Principles:

XII.1 - Distribution of burden of proof

XII.7 - Most favorable privilege rule