The Standard of Proof in International Commercial Arbitration

by

Michael J. Bond

Reprinted from
(2011) 77 *Arbitration* 304-317
Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

SWEET & MAXWELL

The Standard of Proof in International Commercial Arbitration

Michael J. Bond

Introduction

Is there a standard of proof that is or should be used in international commercial arbitration? If so, what is the standard, where is it to be found and is it a matter of procedure or a matter of the substantive law governing the contract? Or is this enquiry just another one of those issues that only American counsel seem to care about, as one prominent British arbitrator told me recently? The goal of this article is to prompt a discussion of these questions.

The article is presented in five sections. First, I use a comparative law approach and review the literature addressing the standard of proof. Secondly, the article reports on a survey of lawyers around the world who describe how a standard of proof applies in their jurisdictions. Thirdly, I discuss the meaning and context for the more common expressions of the standard of proof in the common and civil law systems. Section four introduces a UNIDROIT proposal. In section five, I argue that the standard of proof is a matter of substantive law and not mere procedure. Finally, I conclude with a call for more explicit consideration of the standard of proof in international arbitration.

This article does not address the burden of proof, the burden of presenting evidence in support of a claim or defence, or the admissibility, relevance or weight of the evidence—issues that are related in some respects. Most national arbitral laws and institutional rules deal with those issues without controversy. It is universally recognised that the party who makes the claim or defence has the burden of presenting evidence in support of the facts necessary to its claim or defence, and the arbitrators are empowered to admit, reject or weigh the evidence as they see fit. For example, art.24(1) of the Arbitration Rules of the United Nations Commission on International Trade Law ("the UNCITRAL Arbitration Rules") provides that "each party shall have the burden of proving the facts relied on to support his claim or defence" while art.19 of the United Nations Commission on International Trade Law Model Law on International Arbitration ("the UNCITRAL Model Law") guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. According to the Explanatory Note by the UNCITRAL Secretariat on the UNCITRAL Model Law para.30, the tribunal's power includes the power to determine the admissibility, relevance, materiality and weight of any evidence. The Model Law or a variant with this language has been adopted in over 40 countries around the world.[1]

English law is the same; under the English Arbitration Act 1996 s.34, (1) it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter, and (2) procedural and evidential matters include: (f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion.[2]

Under the International Chamber of Commerce ADR Rules ("the ICC Rules") art.17, in the absence of an agreement by the parties on the rules of law to be applied to the merits of the dispute, the arbitral tribunal shall apply the rules of law which it determines to be

[1] J.W. Rowley (ed.), *Arbitration World, Jurisdictional Comparisons*, 2nd edn (London: The European Lawyer Ltd, 2006), p.clviii.

[2] The same rule appears, not surprisingly, in the arbitration legislation of Singapore (Arbitration Act 2001 s.23) and Hong Kong.

appropriate. Under ICC practice, "rules of law" is thought to be broader than "law" and now includes the International Institute for the Unification of Private Law (UNIDROIT) Principles,[3] but as we shall see later, the latest UNIDROIT Principles have their own difficulties.

Article 9(1) of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules") states, "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence". None of these statutes or rules, I submit, establish or even suggest a standard of proof.[4]

This article is concerned, not with the procedural mechanisms by which an arbitration is conducted, but with what an arbitral tribunal does with the evidence and arguments once they are submitted and the proceedings are closed. By what measure, if any, are the admissible evidence and arguments of the parties to be evaluated in order to reach a decision?

1. A Comparative Law Approach

Using a comparative law approach, we find five expressions to describe what national judges do when reaching a decision in a civil case: "balance of the probabilities", "clear and convincing", "beyond a reasonable doubt", "*intime conviction*" and "free assessment". The first three are found in the common law system, and the latter two come from the civil law tradition. Is there any sense in which these expressions from the two most prevalent legal systems in the world correspond to each other?

There is, oddly, a dearth of literature discussing this issue in the context of international commercial arbitration, and scholars who have written about it have expressed wildly divergent opinions. Very little discussion of the standard of proof that is or should be used in international commercial arbitration appears in the leading texts. The leading treatise, now known as *Redfern and Hunter on International Arbitration*,[5] summarises the issue in two sentences:

> "The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the 'balance of probability'. This standard is to be distinguished from the concept of 'beyond all reasonable doubt' required, for example, in countries such as the US and England to prove guilt in a criminal trial before a jury."[6]

The authors provide no guidance as to whether this standard is a matter of procedure or substantive law or why this standard, which is very familiar to common law practitioners, is or should be applied in an arbitral proceeding where the claim is governed by the law of a civil law country and the tribunal is seated in, say, Paris.

One of the leading textbooks on international commercial arbitration is completely silent about the issue.[7] Other guides to practice are similarly silent about the standard of proof.

The standards and burden of proof in international arbitration were considered at a Joint Colloquium of the School of International Arbitration at the Centre for Commercial Law Studies, Queen Mary and Westfield College, University of London and the Institute of International Business Law and Practice of the ICC in London in 1992.[8] The papers presented

[3] Y. Derains and E. Schwartz, *Guide to the ICC Rules of Arbitration*, 2nd edn (The Hague: Kluwer Law International, 2005), p. 237.

[4] According to David W. Rivkin, a member of the IBA International Construction Project Committee, the standard of proof has not been discussed in the committee's consideration of the IBA Rules.

[5] N. Blackaby and C. Partisides with A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: OUP, 2009).

[6] *Redfern and Hunter*, 2009, at p.388.

[7] W.M. Reisman, W.L. Craig, W. Park and J. Paulsson, *International Commercial Arbitration: Cases, Material and Notes on the Resolution of International Business Disputes*, University Casebook series (New York: Foundation Press, 1997).

[8] A. Redfern, C. Reymond, A. Reiner, B. Hanotiau, Rt Hon. Sir E. Eveleigh, I.W. Menzies and A. Philip, "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317.

were published in *Arbitration International* in 1994, and the speakers introduce the standards of proof generally and without analysis; and as will be shown below, two of the speakers address the issue of whether a standard of proof is substantive or procedural.

In a discussion of state court practice, Professor Michele Taruffo, an Italian scholar, wrote in 2003 that in some countries:

> "… such as France, Italy and Spain, there simply are no fixed standards of proof, since the evaluation of proofs is left to the free discretion of the judge". [9]

More recently, Belgian lawyer and well-respected arbitral chair, Vera Van Houtte, has argued that "most legal systems rely on the principle of free assessment of the evidence by their national judges".[10] The standard of proof, if we can call it that, is known by civil lawyers as *intime conviction*.[11]

One of the United Kingdom's leading arbitrators and scholars, Arthur L. Marriott QC, while noting the differing expressions of a standard of proof among civil and common lawyers, concluded, "in practice the result is the same".[12] It would be interesting to explore some quantitative evaluation of that proposition. Are the outcomes truly the same when one expression of the standard or the other is applied or, as Redfern and Hunter et al. seemingly contend, is the standard applied in either case a balance of the probabilities?

Picking up on Mr Marriott's conclusion, one scholar more recently concluded that:

> "… there appears to be little practical difference between these standards, as shown by the frequency with which arbitrators from different legal systems concur in the fact finding process."[13]

But even this conclusion is, I submit, an intuition in view of the lack of actual evidence of what standard, if any, was applied; and he concluded that a "more frequent articulation of the standard of proof by international tribunals would enhance the appearance of fairness in international arbitration".[14]

Professor S.I. Strong appears to abandon all hope that we can look for, let alone find, such a standard in her recent compilation.[15] She says:

> "[P]oints may be hotly disputed, but close calls are a part of any dispute resolution process. There is typically no way to control how an arbitrator exercises his or her judgment, just as there is no way to control how a judge exercises his or her judgment. Different people will find different arguments and authorities more persuasive than others."[16]

And in an article about the standard of proof in EU competition cases, Professor Gippini-Fournier argues that the concept of a standard of proof is natural only to lawyers educated in common law systems, and the quest to find it "by reading fine distinctions in or between the lines of hundreds of judgments is a *delusional* one".[17]

If no standard of proof is applied, even unconsciously, then Professor Strong might be correct and there can be no control over the arbitrator's discretion. But control of discretion is too blunt an expression for what is at issue; arbitration must maintain the flexibility to

[9] M. Taruffo, "Rethinking the Standards of Proof" (2003) 51 Am. J. Comp. L. 659 at 669.

[10] V. Van Houtte, "Adverse Inferences in International Arbitration", in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (ICC Publishing, 2009), p.197.

[11] V. Van Houtte, "Adverse Inferences in International Arbitration", in T. Giovannini and A. Mourre (eds), *Written Evidence and Discovery in International Arbitration*, 2009, at p.198.

[12] A.L. Marriott, "Evidence in International Arbitration" (1989) 5 Arb. Int'l 280.

[13] R. Pietrowski, "Evidence in International Arbitration" (2006) 22 Arb. Int'l 373.

[14] Pietrowski, "Evidence in International Arbitration" (2006) 22(3) Arb. Int'l 373.

[15] S.I. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (Oxford: OUP, 2009).

[16] Strong, *Research and Practice in International Commercial Arbitration*, 2009, at p.35.

[17] E. Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases" (2010) 33 *World Competition: Law and Economics Review* 187 (emphasis added).

resolve disputes efficiently and the issue is more aptly framed not as one of control but, rather, by what measure the evidence should be weighed to determine who wins and who loses. Using Professor Strong's expression, a standard of proof may be one method of control over the exercise of otherwise unfettered discretion, and surely all arbitrators use some standard in making a decision even if that standard is what my Tajik lawyer friend, Buna, referred to as the "louff test".[18] Even Professor Gippini-Fournier, in the final analysis, resorts to explaining the "factors" that "determine where the standard is along the continuous sliding scale which is the *intime conviction*".[19]

2. A Survey of Practising Lawyers

My interest in this set of issues arose from a discussion that occurred on the electronic discussion list of the IBA's International Construction Projects committee during the spring of 2009. The list's moderator, international project lawyer Edward Corbett, posed the following question to the list:

> "In English law and elsewhere we have different standards of proof. For criminal law, the standard is 'beyond reasonable doubt' which has come to mean 'sure' or perhaps 80% certain. In civil law, the standard is 'on a balance of probabilities' which is taken to mean 51% certain.
>
> When discussing this in Central Europe recently, the lawyers there looked entirely blank. There was no such distinction; the term 'standard of proof' had no resonance. The only issue was whether the judge was persuaded. The idea of burden of proof, on the other hand, was entirely familiar.
>
> Is this concept of standard or standards of proof just a common law idea? What happens elsewhere in the civil law world?"

Practising lawyers from 18 countries responded to the enquiry, including those from Belgium, Chile, Colombia, France, Germany, Greece, Hong Kong, Italy, Japan, Mexico, Nigeria, Scotland, Senegal, Dubai, South Africa, Spain, Switzerland and England. Nigeria, Hong Kong and England, of course, are common law countries. Scotland and South Africa have a mixed common and civil law tradition, while the others are well within the civil law tradition. The respondent from Dubai provided a short analysis of the issue under Sharia.

What follows is a summary of the responses, in the words of each respondent, with an occasional brief editorial intervention.[20]

Belgium

We are familiar with the civil law concept of the "*intime conviction*".

Chile

In Chile's civil law system, the general rule regarding appraisal of evidence is the "legal or statutory evidence" system where the law:

1. establishes which are the means of evidence (e.g. in a claim against ruinous construction the personal inspection by the judge is mandatory; the purchase of real estate can only be proved through a public deed; etc.);

[18] Upon enquiry, I learned that she found an expression called "the laugh test" that was described in a dictionary of American court practice. While I have encountered many difficult cases in over 30 years of trial and arbitration work, fortunately I have yet to be laughed out of court.

[19] Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases" (2010) 33 *World Competition: Law and Economics Review* 187 at 12.

[20] I apologise if the editing changes the meaning that was intended. A very brief summary of the responses, with author attribution, appears in (2010) 5 *Construction Law International* 35.

2. establishes for each type of evidence its individual and comparative value, by which the judge must abide;
3. limits the admissibility of some means of evidence; and
4. establishes the manner in which evidence must be submitted in a trial.

Only where the law does not contemplate a specific solution in cases of conflicting evidence shall the judge decide according to the evidence he or she considers "more in accordance with the truth".

Colombia

We do not really have "standards of proof" in the same sense as described for English law. Basically our theory of the proof simply consists in persuading the judge.

Nevertheless, in the past the Colombian legislation included a mechanism that was called "legal rate" (*tarifa legal*), which basically established the minimum number of requisites of proof in certain situations. Thus, for example, the law used to require at least two witnesses to prove a particular event. Although this scheme is no longer used in Colombia it meant, in a way, the establishment of a kind of standard of proof.

Similarly, we currently have specific regulations in civil law that obligate the plaintiffs or defendants to prove certain situations through the application of specific means. In these cases, it is not enough to persuade the judge, but is also necessary to use those specific means that are required by law. Consequently, even if the judge is positive about a posture he or she cannot declare anything or take any decision if such situation has not been proved by using the formal evidence that the law requires.

In this sense we find, for instance, that the only means by which to prove the ownership of a plot of land is the public deed and the registration before the designated authorities. Likewise, the only legal means by which to prove the existence or the particularities of an insurance contract is the insurance policy. Equally, the sole means by which to prove the existence of a corporation is the certificate issued by the chamber of commerce in which there is evidence of the incorporation.

Thus, we do not really have the expression "standards of proof" in Colombia. Nonetheless, our legislation provides some specific rules for proof in a number of situations which cannot be freely proved.

England

The requisite standard of proof is a matter to be determined according to the *lex arbitri*. Admittedly, there is ambiguity as to the limits of *lex arbitri* on some issues (for example, in how to deal with issues of privilege and confidentiality), but in support of this contention I would refer to the English Arbitration Act 1996 s.34, which provides that in procedural and evidential matters:

"(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include—

…

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented."

Singapore has something similar (Arbitration Act 2001 s.23), as does the special Dubai DIFC jurisdiction (Arbitration Law of 2008 s.26). I would note that the UNCITRAL Model Law art.19 includes a similar provision.

France

There is no equivalent to the English law approach to standard of proof under French law. Thus, the concept of balance of probabilities is unknown in French law. The reasoning is confined to the issue of burden of proof: if the judge has a doubt, the party who has the burden of proof will fail. Since French judgments are generally quite short and concise, judges do not expand on their reasoning. In practice, a balance of probabilities-type of argument may be used by the parties and may be taken into account by the court although courts will generally avoid mentioning it in the judgment as it could be invoked as a ground to quash the ruling before the Cour de Cassation. Ultimately, it is generally said that what matters is the *intime conviction*.

Germany

The German criminal procedure code s.261 reads: "the court shall decide on the result of the evidence taken according to free conviction gained from the hearing as whole". The civil procedure code s.286 reads: "The court shall decide in consideration of the whole contents of the proceeding, the results of the evidence taken and according to its free conviction whether an alleged fact shall be considered true or untrue. Within the judgment the court shall indicate the conductive reasons for its opinion."

The standards of proof in criminal and civil law are the same. The standard in both proceedings is pretty much "beyond reasonable doubt", which has come to mean "sure", or rather, the judge must be "sure". Burden of proof only comes into play if the judge or (if a chamber has to decide) the majority of the judges are not "sure". In these cases the court will issue a *non liqed* decision.

Greece

As a general rule, the standard of proof laid down by Greek law is the standard of "beyond any reasonable doubt", which means that (a) the Greek courts should require full proof of the truth of the litigants' allegations and (b) their judgment should be free of doubt. There are, however, circumstances where the law deems that full proof is not required and that a "balance of probabilities" is sufficient; this would be explicitly provided for by the law.

Italy

In the Italian legal system, the standards of proof are not as defined in common law. There are two types of evidence "*prove legali*" (binding evidence), which is like confession, and "*prove libere*", i.e. where the evidence has to be assessed by the court. If a party provides a "*prova legale*", the court cannot express an opinion that differs from the results of that proof. The other evidence is subject to assessment by the court. It may include data of common experience, *facta concludentia* (manifest conduct), and several concurring and strong presumptions. The court must provide reasons for its assessment of the evidence and if its reasoning is contradictory, insufficient or contrary to logic, this may be a ground to challenge its decision.

Japan

Opinions about this issue vary in Japanese civil procedure. Some authorities contend that a decision based on "a preponderance of evidence" is sufficient, but the majority views require a higher degree of persuasion that is called "a high probability" (*kodo no gaizen-sei*). The Supreme Court adopted the latter view and defined the required degree of proof in a medical malpractice case. In that case, the Supreme Court found a patient's injury was caused by the negligence of a doctor, based on the following standard:

> "Proving causation in litigation, unlike proving causation in the natural sciences, which permits no doubt at any point, requires proof of a high degree of probability that certain facts have induced the occurrence of a specific result by taking into consideration all evidence based on the empirical laws. It is necessary and sufficient that the judge has been persuaded of the truthfulness to the degree that an average person would not have doubt."

The standard above has provided courts with guidance in deciding civil cases, and the Supreme Court confirmed the standard in a later case. It is very difficult to express the required degree of persuasion using a numerical formula, but the majority of judges appear to require a 70 to 80 per cent probability to uphold facts based on evidence submitted in a civil suit.

Mexico

In Mexico's civil law system, there are two types of assessment of evidence (standard of proof): "legal assessment" and "free assessment". In legal assessment the law prescribes, in advance, the evidence effect that the judge should give the various elements (i.e. judicial and extrajudicial confession, public instruments and judicial inspection provide full proof, so long as certain requirements are satisfied). Free assessment is founded on sound criticism, and uses the rules of proper human understanding. These take into account the rules of logic and the judge's experience, which help in the analysis of the proof according to reason and experimental knowledge of things.

Standard of proof principles are laid down in Mexican legislation, establishing that the evidence provided and accepted as a whole will be assessed by the judge, taking into account the rules of logic and experience, who will carefully explain the basics of the legal assessment and the decision. So except in cases where the law gives a legal assessment effect, the judge must decide according to sound criticism. The rules of sound criticism consist in the correct appreciation of experiences and logical analysis. Hence, in "free assessment" the judge's experience contributes as much as logical principles to the assessment of evidence.

Nigeria

In Nigeria, the burden of proof differs in criminal and civil matters. In criminal matters, accused persons are presumed innocent and the prosecutor must establish the accused person's guilt "beyond a reasonable doubt", which is a very difficult burden to meet. However, in civil matters, the standard is on a preponderance of evidence. The evidence is weighed on a balance scale.

Scotland

In Scotland, as in England, there are two standards of proof, i.e. that relating to criminal law, of beyond reasonable doubt, and that applicable to civil law, of the balance of probabilities. However, there has been an acceptance of an intermediate standard of proof in that it may vary with the gravity of the allegation to be proved. For example, the weight

of evidence required to prove fraud in a civil case may be greater than that required to prove breach of contract although the standard of proof is expressed as "the balance of probabilities". It could be a higher standard; for example, breach of interdict (injunction) or of, say, contempt of court where there may be circumstances giving rise to a risk of imprisonment.

Senegal

The same rules described in the Nigerian system apply in Senegal and most of the francophone civil law systems in West Africa. It is important to note, however, that the notion of "beyond a reasonable doubt" does not exist in these systems. In criminal procedure, the prosecutor has to reach the "*intime conviction*" of the court and/or the jury (where it exists). In civil matters, the burden of the proof lies on the party who alleges.

Sharia

From a Sharia (Islamic jurisprudence) perspective and in criminal cases a heavy standard of proof is needed, whereas doubt will be interpreted in favour of the accused person.

In civil suits the rule will be that "evidence must be brought by [the] complainant and if the other party denies he will take oath", which means the court will rule in favour of the defendant who took oath against the failure of the complainant bringing satisfactory evidence.

South Africa

All South African cases show that no matter how serious an allegation of fact may be, the onus of proving the fact is in civil cases discharged on a single standard, namely preponderance of probability, i.e. the most likely version wins, regardless of the substantive law of the contract. The same standard of proof, namely preponderance of probabilities, would apply to adjudication and arbitration in South Africa unless the parties had explicitly agreed on certain presumptions in their agreement. These presumptions could relate to, for example, the presumed accuracy of measurements by a third party (e.g. a quantity surveyor), etc.

Spain (1)

In our civil law countries, particularly in Spain, the standard of proof as a general rule is applied according to the availability and possibility of obtaining the evidence from each party in the proceedings. Let's think about the various cases when the burden of proof turns into a real "*probatio diabolica*" or when it would be nearly impossible to obtain any evidence (e.g. simulation cases).

Such general principle is applicable taking into account that:

- The claimant is required to prove the certainty of the facts from which would normally result the legal consequences of the claim deducted.
- The defendant has the burden of proving the facts that, according to the applicable rules, may be questioned or may in some way cancel or extinguish the legal effects of the facts referred to in the claim.
- Exceptions: when a law provides specific criteria for proving the relevant effects; unfair competition and unfair publicity proceedings change the burden of proof required of the defendant, who must give evidence of the truth of the expressions used or the material data referred to in the publicity.

Notwithstanding the aforesaid, the law provides that the awards and resolutions made shall be based on the factual and legal background that led to the evaluation of the evidence as well as the applicability and interpretation of the law. The decision shall take into account the different factual and legal aspects of the proceedings, both individually considered and as a whole, always in accordance with the rules of logic and reason.

Spain (2)

The main principles that apply to evidence in civil proceedings in Spain are:

- By law, some evidence has an established legal value (e.g. public documents and confession).
- There are also some legal presumptions which exempt the parties from having to prove the presumed fact.
- The general principle is that the judges evaluate the evidence at their discretion (known as the principle of the "free appreciation of the proof").
- However, there are patterns in Spanish case law establishing different standards of proof depending on the type of case: in some cases, the standard of "more likely than not" will apply; sometimes, it will suffice to prove the possibility, and there will be a shift in the burden of the proof; and in other cases, the requirements regarding the proof will be very strict. Therefore, we must consider the kind of case we are handling to assess the standard of proof.

Switzerland (1)

In civil law countries, we apply varying standards of proof, measured according to each individual circumstance, and according to the availability of—and ability of the party to furnish—proof or evidence. Often, a preponderance of evidence has to suffice. Often, also, the burden of proof is even transferred to the opposite party, e.g. in competition law cases, in access cases and in merger control cases, where the claimant only needs to meet a prima facie test. This is my short answer; the more detailed answer could easily fill 100 or more pages.

Switzerland (2)

The first question is about the assessment of the evidence. This is a matter for the *lex arbitri*.

In international arbitration, we have the principle of the free assessment of the evidence, as reflected in the IBA Rules of Evidence art.9. Proof may also be brought in certain cases through so-called adverse inferences, see the IBA Rules of Evidence art.9. But what can be proven that way is limited. If a party withheld proof, the allegation is deemed to be supported by the element of proof that was withheld. There is no general inference against the party that withheld a particular proof. The inference is limited to the impact of that particular proof had it not been withheld.

Then comes the question of the standard of proof. "Standard of proof" is a concept also known in civil law jurisdictions. In German, it is called "*Beweismass*". Which law applies to set the standard of proof? In my view, this is a procedural matter governed by the *lex arbitri*. In France, in the state courts "*intime conviction*" is required, obviously a subjective test. This seems to be the test in some other jurisdictions also. In Germany, before state courts, it is said that the test must be "beyond a reasonable doubt" in all cases, but I am not sure that this is right.

In my view, none of this applies to an international commercial arbitration. In international commercial arbitration, we apply the "preponderance of the evidence" or "more likely than not" or "balance of probabilities" test (I do not think that there is a difference between these three).

3. The Meaning of the Words and the Context

Lawyers from the common law tradition are familiar with the concept of a standard of proof. Our colleague from Nigeria referred to the standard of proof as if it was a scale of justice. This standard in a business dispute or any other typical private claim for damages is based on probabilities. In my jurisdiction the expression of the standard of proof is "more likely than not". The standard's formulation in a civil claim in my state would say:

> "A 'preponderance of the evidence' means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true."[21]

In a civil suit alleging claims of fraud or malice, the standard of proof is higher: "clear and convincing", and it is defined in my jurisdiction as follows:

> "When it is said that a proposition must be proved by clear and convincing evidence, it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt."[22]

The standard of proof in criminal cases in all common law countries is "beyond a reasonable doubt". Reasonable doubt is stated in my jurisdiction to exist when:

> "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."[23]

The standard of proof in the common law system is the measure by which the tribunal makes its decision; it purports to be an objective guidepost for the judge who resolves the issue: is the evidence in a civil case more likely than not proof of the fact in dispute? The result may, in fact, be wrong but it is more likely than not correct, and that is good enough for common law justice when the defendant's freedom is not at stake; in that case the court will demand a higher standard, requiring proof that establishes the facts beyond a reasonable doubt.

The context in which this plays out in a common law jurisdiction is an adversarial system in which the lawyers submit the issues to be decided and the lawyers submit such evidence as they believe will advance their client's claim or defence. The judge is like an umpire calling a foul or a referee raising a yellow card when one side breaks a rule but, usually, the judge does not play an active role until the case is submitted for decision. While there are features of the civilian system that bear adversarial characteristics, the civil inquisitorial tradition has the judge in control of the issues to be decided and the evidence that will be submitted, and the judge actively participates in shaping the evidence and issues and the resolution of the matter well before it is submitted for decision. The context in which disputes are resolved in the civil law world is wholly different.

One does not find a standard of proof in civilian jurisprudence; instead, one finds a description of how the judge decides the case. It is a deeply personal, secret, subjective and intimate process. Two typical expressions of this process are *intime conviction* and free evaluation of proof. These expressions are not uniformly described in the civil law jurisprudence.

For example, in France the traditional formula of *intime conviction*:

[21] *In re Sego*, 82 Wn.2d 736, 739 n.2 (1973).
[22] *Bland v Mentor*, 63 Wn.2d 150 (1963).
[23] *State v Bennett*, 161 Wn.2d 303 (2007).

> "[which] is not stated anywhere in the civil codes, stresses the value of the subjective 'intimate' persuasion of the single judge, relying mainly upon her individual and even emotional beliefs". [24]

As one illustration of the use of *intime conviction*, in a French criminal case, the jury is instructed in accordance with the French Code of Criminal Procedure art.353:

> "The law does not ask judges to justify the means by which they have been convinced, it does not set any particular rules by which they must gauge the fullness and sufficiency of the evidence; it stipulates that they must search their conscience with sincerity, and serenely and thoughtfully ask themselves what impression the evidence given against the accused and the defense's argument have made upon their mind. The law asks them only one question which sums up all of their duties: 'What is your personal conviction'?"[25]

In French, the ultimate question is: "*Avez-vous une intime conviction?*" I submit that translating *intime conviction* to mean "personal conviction" strips the words of the complexity at the root of their meaning, leaving a dry husk that does not adequately convey the depth of contemplation that a French jurist uses in deciding cases. In French, *intime* means *qui est contenu au plus profond d'une être*.[26] Its synonyms are *personnel* and *privé*; and its antonym is *public*.[27] Its emphasis, I submit, is on *plus profond*, or the most profound, private and deeply conjured conclusion.

In German practice, by contrast, the "free evaluation of proof" (*frie Beweiswürdigung*) is described less subjectively. Zivilprozessordnung (ZPO), the German code of civil procedure, prescribes in s.286:

> "The court is to decide upon consideration of the entire content of the arguments and the results of reception of evidence according to its free conviction whether a factual assertion is to be regarded as true or untrue. The reason which led to the court's convictions are to be stated in the judgment."[28]

Among German scholars, some argued for "preponderant probability", but prevailing opinion rejected that standard as "too low to fit with the idea of establishing the truth of the facts that is at the basis of section 286".[29] In German practice, quantitative or statistical probability is thought to be inapplicable to judicial reasoning about facts.[30] Some scholars conclude that in civil cases under the German system the judge must be convinced beyond a reasonable doubt, unless a statute mandates another specific standard.[31] Others concede that a measure of "high probability" may be enough, but that expression's equivalence to "beyond a reasonable doubt" is unproven.[32] In any event, we can conclude that in the German way of thinking the risk of error is unacceptably large when judges rely on nothing more than mere probabilities.[33]

[24] Taruffo, "Rethinking the Standards of Proof" (2003) 51 Am. J. Comp. L. 659 at 5.

[25] Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases" (2010) 33(2) *World Competition: Law and Economics Review* 187 at 6. The translation is Prof. Gippini-Fournier's. I would translate the ultimate question, "*Avez-vous une intime conviction?*" to read "Do you have personal, profound and convincing proof?"

[26] *Micro Robert, Dictionnaire du Français Primordial* (Paris: S.N.L., 1971), p.577.

[27] *Micro Robert, Dictionnaire du Français Primordial* (Paris: S.N.L., 1971), p.577.

[28] P.L. Murray and R. Stürner, "German Civil Justice", in O.G. Chase and H. Hershkoff (eds), *Civil Litigation in Comparative Context* (New York: Thomson West, 2007), p.272.

[29] Taruffo, "Rethinking the Standards of Proof" (2003) 51 Am. J. Comp. L. 659 at 6.

[30] Taruffo, "Rethinking the Standards of Proof" (2003) 51 Am. J. Comp. L. 659 at 6.

[31] K.M. Clermont and E. Sherwin, "A Comparative View of Standards of Proof" (2002) 50 Am. J. Comp. L. 243.

[32] Taruffo, "Rethinking the Standards of Proof" (2003) 51 Am. J. Comp. L. 659 at 6.

[33] The field of linguistics may shed light on some of these differences; and a recent study (G. Deutscher, *Through the Language Glass: Why the World Looks Different in Other Languages* (New York: Metropolitan Books, 2010)) argues that one's mother tongue can have a profound impact on how we see the world. The author argues that the language we learn at birth obliges us to speak in certain ways, and one result is an impact on our very perceptions about the world in which we live.

4. The UNIDROIT Proposal

In 2004, the American Law Institute in conjunction with the International Institute for the Unification of Private Law (UNIDROIT) adopted the Principles of Transnational Civil Procedure ("the ALI/UNIDROIT Principles") which explicitly attempt to bridge the apparent gap in the common and civil law expressions of a standard of proof.[34] The Reporters were Professor Geoffrey C. Hazard, Jr. and Professor Michele Taruffo.

The ALI/UNIDROIT Principles are specifically limited to international commercial disputes in order to avoid difficulties presented by family law or personal injury tort claims and other contexts.[35] Each of these principles, with one exception, addresses the means and method of the court's process, including: notice of the hearing, statements of the claim or defence, production of documents or other evidence and the nature of the hearing; in other words these principles deal with what happens before the proceedings are closed and the judge retires for the deliberation of the decision. The exception is Principle 21.2, which is entitled Burden and Standard of Proof. It boldly states: "Facts are considered proven when the court is reasonably convinced of their truth." Comment P-21B asserts:

> "[T]he standard of 'reasonably convinced' is in substance that applied in most legal systems. The standard in the United States and some other countries is 'preponderance of the evidence' but functionally that is essentially the same."

But how, we might ask, can the Reporters conclude that the standard used in the United States is the standard used in most legal systems? This is, I submit, a remarkable assertion that fails to take into account the vastly different ways in which the Continental scholars (including Professor Taruffo in prior work) express themselves on these issues.

The committee also developed a set of proposed rules, which were not adopted, and in these proposed rules we find a more explicit conflation of common and civil law conceptions of how to measure the proof. Proposed Rule 28.2 states:

> "The court should make a free evaluation of the evidence and attach no unjustified significance to evidence according to its type or source. Facts are considered proven when the court is reasonably convinced of their truth."

The comments that accompany this proposed rule shed no light on what this proposed rule means, saying only:

> "Rule 28 specifies various aspects of the authority of the court with reference to evidence. The court may exercise such powers on its own motion or on motion of a party."[36]

5. Is the Standard of Proof Substantive or Procedural?

What do we make of the contention that the standard of proof is subject to the *lex arbitri*? The *lex arbitri*, or the arbitral law of the place or seat of arbitration, governs procedural issues such as the conduct of the arbitration, interim measures, rules empowering court intervention in support of arbitration or in a supervisory jurisdiction, and the composition of and challenges to the tribunal.[37] By what authority can it be said that the standard of proof is a matter of procedure and not so embedded in the governing law of the contract as to be a matter of substantive law? The only authorities I can find indicate that the standard of proof is a matter for the law governing the contract and not mere procedure.

[34] ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (New York: Cambridge University Press, 2006).
[35] ALI/UNIDROIT Principles, 2006, at p.xxvii.
[36] ALI/UNIDROIT Principles, 2006, at p.143.
[37] *Redfern and Hunter*, 2009, at pp.176–177.

With a reference to the 1980 EC Convention on the Law Applicable to Contractual Obligations (the Rome Convention) art.14(1), Andreas Reiner argues forcefully for the proposition that "the burden and the applicable standard of proof are always … governed by the law applicable to the substance of the dispute".[38] The Rome Convention art.14(1) states:

> "The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof."[39]

Mr Reiner notes that there are decisive and crucial differences in the level of proof required, depending on the issue, under German, Austrian and French law.[40] These differences "determine how easy or how difficult it is for the claimant to enforce a claim" and "consequently affect the value of the claim and actually decide whether a claim exists at all".[41] Applying the standard of the substantive law of the contract increases the foreseeability of the parties prior to commencement of any proceedings.[42] And due process implications arise if the arbitrators and counsel do not openly discuss the applicable burden and standard of proof and the parties are surprised by the outcome.[43]

In US state and federal practice the standard of proof is not set forth in any civil code or legislation; instead, it is found in case law. And, I daresay, all US trained lawyers who are asked about it would respond that the standard of proof is a matter of substantive law and not mere procedure.

Some of the correspondents responding to Mr Corbett's enquiry argued that the standard of proof must be the local standard or *lex arbitri* because most arbitral statutes and institutional rules grant the tribunal the procedural authority to give the evidence such admissibility, relevance, materiality and weight as it sees fit. But granting the tribunal the authority to give the evidence such weight as it sees fit tells us nothing about how much weight will be required to prove the case. And in some jurisdictions, like Italy, the admissibility, relevance, materiality and weight of the evidence are considered to be questions of substantive law.[44] The substantive law is the law that governs the contract, and it may or may not be the same as the *lex arbitri*.

Conclusion

The last issue is, does any of this matter? I think it does matter. If the contract of a German seller of power equipment to an Italian contractor specified German law as the governing law of the contract with an LCIA arbitration seated in London, would the parties expect that the rights and responsibilities under the contract would be measured by mere probabilities? Or if the contract of a British seller of that power equipment to a Singapore contractor specifies the law of England and Wales as the governing law with an ICC arbitration seated in Paris, would the parties expect that the rights and responsibilities would be measured by the standard of *intime conviction*? It is likely that the subtleties of that dilemma are not considered at the time of contracting. Perhaps they should be. Professor Park states the issue eloquently:

[38] A. Reiner et al., "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317.

[39] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41980A0934:EN:NOT* [Accessed June 13, 2011].

[40] Reiner et al., "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317.

[41] Reiner et al., "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317 at 331.

[42] Reiner et al., "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317 at 332.

[43] Reiner et al., "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'l 317 at 340.

[44] H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Arbitration: Legislative history and commentary* (Kluwer/T.M.C. Asser Instituut, 1989), p.586.

> "At a minimum, most litigants hope that the process for proving their case will be reasonably foreseeable and orderly. While few business managers wish to put an arbitrator into a procedural straitjacket, neither do they feel comfortable committing their property and financial welfare to binding dispute resolution without knowing what to expect on critical matters as to which different cultural baselines exist."[45]

The expressions of the standard of proof in the civil and common law systems are not equivalent; their meaning and context are different; and the survey of practising lawyers shows a great variety of practice within the world's legal traditions. The UNIDROIT proposal, if adopted, would lead to a harmonisation of these traditions. My conclusion is that the issue does matter and I join the call for explicit consideration of the standard of proof that will be applied in international commercial arbitration.

[45] W.W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* (New York: OUP, 2006), pp.65–66.