STANDARD OF PROOF IN INTERNATIONAL ARBITRATION

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Introduction

International arbitration is gaining the popularity for a long time as the more just and unprejudiced way of justice. It is supposed to be more understandable and less formalized. However, many people still do not trust arbitration because there is no defined procedure and it is still unclear how arbitrators make their decisions. There were some publications devoted to this question but they did not develop the topic in full. This question was also included into the agenda at the 2014 conference of the International Council for Commercial Arbitration (ICCA) which shows its importance and uncertainty till now.

What the Standard of Proof is and Where It Is Used

The purpose of any trial is to make a fair judgment and to protect violated rights. Reaching this goal is impossible without studying evidence of the particular case. The court decision is based on the evaluation of this evidence, and it seems that the amount of evidence necessary to be presented in order to win the case cannot vary much in different countries. But it turns out that two main legal systems have opposite ideas of quality and quantity of evidence.

Countries belonging to the Anglo-Saxon legal system, i.e. USA, Great Britain and its former colonies, for evidence evaluation use the category "standard of proof" – the level of proof required in a specific case, established by assessing the associated evidence [3]. It is used to determine whether the evidence produced by the party in support of his factual statements is sufficient to establish the facts in question [15; 207]. This term is not fixed in legal documents but it is often used in court decisions as a part of its motivation, and as it is widely known courts in common law jurisdictions have some legislative powers.

There are several standards of proof but their number and name vary from state to state. E.g. British judges use only two standards – beyond reasonable doubt and balance of probabilities. The U.S. courts established three standards, which are

beyond reasonable doubt as well, preponderance of the evidence and clear and convincing evidence.

The beyond reasonable doubt standard is common for criminal cases and provides that no questions should be left about the accuracy of some fact. This standard is supposed to be the strictest one because it makes the accusing party to collect all the possible evidence, otherwise the accused will be free. The mentioned standard is aimed to protect the defendant's rights. However, there are no criteria which allow to state that a certain amount of facts is strong and clear enough to comply with this standard [21; 195].

The next one is balance of probabilities or, as it called in the United States, preponderance of evidence and it is used in civil-law court procedures. This standard has its synonym in civil law countries – the sufficiency of evidence [20; 107]. It means that the evidence must be something more probable that not (or more likely true than not true) [18; 8]. The party whose evidence is a little bit more convincing becomes the winner. At the same time it does not mean that if one party provided evidence and other one did not this other one will lose. There is also no need for the judge to be 100 per cent sure, he should be only convinced that something is more probable than not.

In some civil cases there are heightened standards, e.g. clear and convincing evidence used in the USA. This one is supposed to mean the party giving evidence should convince the judge that reliability of the fact is highly probable or he should create a form belief that the fact is true. At the same time the standard does not require to remove all the reasonable doubt [18; 9]. Despite its usage in the USA, the House of Lords in Great Britain refused to recognise the heightened standard for civil cases [8].

Such standards proved their validity as they have been used for centuries. But they are common only for the Anglo-Saxon legal system, and their existence is caused by the judicial system of these countries – adversarial. At the same time the civil law countries do not use such category as standard of proof, and the reason for this is the special way of judicial system development. Firstly it was

inquisitorial one with a huge judge's role in it, then it transformed into adversarial-inquisitorial or mixed system, which works till our time. Here the judges evaluate the evidence due to their own belief which cannot be even called a standard as it is too subjective while the abovementioned standards are objective categories.

This principle was firstly fixed in the Napoleon Code and then it was borrowed by other acts, mostly procedural ones, such as Criminal Procedural Court of France, Civil Procedural Code of Germany or Arbitration Procedural Code of Russia. The principle was named principle of inner conviction according to which an arbitrator decides whether the evidence have reached the level where the arbitrator is personally satisfied of the veracity of allegation [15; 209]. However, it is stated that inner conviction should be based on objective factors [13; 7].

The principle of inner conviction is not understood by some American comparative scientists who can not explain why this standard (if it is standard at all) is used both for criminal and civil procedures.

It is argued whether both inner conviction and balance of probabilities determine the preponderance of evidence [1; 304]. In our opinion, these categories cannot be mixed up as they belong to different legal systems and the first one is subjective, while the other one turns out to be objective.

It seems that unification of principles of evidence evaluation is impossible due to the difference of thinking and traditions. That is why both standards of proof and principles of civil law countries coexist in nowadays world.

Standards of Proof in International Arbitration

Today many contracts contain an arbitration clause which allows parties in case of breach of contract to seek protection in international arbitral tribunals. It does not mean that parties do not trust each other or national court systems are unjust or have complicated procedure. Arbitration allows parties to choose the arbitrators who can be even more competent than professional judges in national courts. It allows choosing the law applicable to the trial, and parties are not limited

only with their own legal systems but they can also chose the law of the third country or the law of court (law of the country where the court is located). Parties can choose either institutional arbitration or ad hoc arbitral tribunal.

What is more, parties may even fix in their arbitration clause the procedure for submitting their evidence and its evaluating by the arbitral tribunal. Otherwise the tribunal will be free to choose the procedure itself [19; 17].

The main advantage of arbitral tribunals is that their decisions are obligatory but they are not bound with obligatory procedures which are used in national courts. It means standards and principles used during the arbitration are left to their discretion. In addition, it is not mandatory for arbitrators to follow the standards which exist in the country, the law of which is used in dispute solution by this tribunal. They choose the most appropriate ones [5; 64]. At the same time the U.S. Supreme Court decided that arbitrational procedure is incomplete, and usual rules of evidence do not apply to it [12; 984]. There is also no prima facie evidence, i.e. list of evidence necessary for specific cases fixed in laws, which is typical for some national processes.

International arbitration as an alternative to national judicial systems may seem to be a non formalized process but it also has its regulations where the main procedural issues are described. Each arbitral tribunal develops its own regulations, though many of them are based on UNCITRAL Arbitration Rules.

Like any other judge arbitrators face the need to evaluate the evidence provided by parties. The abovementioned rules do not contain any provisions on how to evaluate the evidence or any principles on which arbitrators should base their evaluation. The only provision in UNCITRAL Arbitration Rules on evidence is that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered [17; 18]. But it does not show what amount of evidence is enough for the arbitrator to make a decision in favor of one of the parties. Though in some countries, e.g. in Ukraine, the regulations of international commercial arbitration provide the evidence evaluation is due to arbitrators' inner conviction [14]. At the same time rules of Arbitration Institute of the Stockholm

Chamber of Commerce as the most popular and authoritative institution do not contain any standards at all [2].

It is common for some international arbitral tribunals not to use standards of proof during the trial. They weigh the evidence without referring to specific standards which differs them from national courts. To our mind, this is not always the best way of case solving. Without standard or principles usage it is very hard to motivate the arbitral decision. It should be based on certain fundamentals which can explain this or that judgment.

The problem in using any of the listed standards and principles is in the arbitration nature. Tribunals may consist of arbitrators belonging to different legal systems with different ideas about these standards. Also international arbitration assumes conflict of law due to the fact that the parties are from different countries and may use other law than their own one or the law of tribunal.

In order to understand which standards should be applied by international arbitral tribunals it is necessary to find out what kind of process is typical for them. According to the UNCITRAL Arbitration Rules tribunals may require the parties to produce documents, exhibits or other evidence [17; 18]. In this case arbitrators are not passive which is typical for adversarial process but are active in reclamation of proofs. Also in many cases witnesses' testimonies are not studied directly, i.e. face to face but are fixed in written form and are studied as written evidence, which is common for inquisitorial system. On the other hand the parties are free to provide any necessary evidence and prove the truth of the facts with any permitted tools which is inherent for adversarial procedure. In addition, the whole arbitration procedure is voluntary and contains many elements which can be chosen by parties themselves (arbitrators, applied law etc.).

Such comparison allows thinking arbitration has both features of inquisitorial and adversarial processes. Nevertheless, to our mind, it is more appropriate to use objective standards than subjective ones. Objective standards are the basis for uniformed and predictable procedure. Applying to the tribunal claimant will know in advance whether his evidence will be enough for arbitrators

to make a judgment in his favor or not. Of course, it is never possible to foresee everything but at least the plaintiff will know how his evidence will be evaluated. The inner conviction principle brings kind of uncertainty in the arbitration process. Therefore any arbitral tribunal should be guided by unified rules, no matter where a certain tribunal is located or where the parties come from.

It is also necessary to make clear what kind of cases international arbitral institutions are empowered to hear. Mostly their jurisdiction is limited by commercial disputes because business is interested in fair and impartial trial the most and it is possible to provide an arbitration clause in a contract. That is why civil cases do not fall under arbitral jurisdiction because the majority of civil relationships do not provide contractual regulation, such as marriage, inheritance, termination of parental rights, limitation of legal capacity etc. Of course, contracts may be signed between two individuals but if each civil contract contained an arbitral clause, arbitration would replace national courts, which is unacceptable. In addition, the arbitration procedure is not rather cheap, so ordinary individuals usually do not have enough money for this. That is why only commercial cases reach arbitral tribunals. Criminal cases are not an object to arbitration because it is states' prerogative.

As it was mentioned above, the standard of proof for civil cases is balance of probabilities. Commercial disputes in many countries are solved in the same manner, which means this standard is applied to them as well. Balance of probabilities standard has been applied to the great majority of categories of claims in international arbitration, including causes of action arising from a breach of contract, interpretation of contractual clauses or the intent of the parties to the contract, claims based on breach of international treaties regulating the treatment afforded to investors [15; 208]. It seems that such approach is more than acceptable due to the following.

All the standards were once established for solving different types of cases. Using one instead of other would cause many mistakes. For instance, positions of parties in civil process are more or less equal. So, using the standard beyond

reasonable doubt in civil cases could result in mistakes in favor of respondent because in this situation claimant would need to fully persuade arbitrators in his rightness, otherwise his claim would be rejected by reason of lack of evidence. Such position has been suggested by the U.S. Supreme Court in 1991 [4; 23]. In addition, if such standard is used in arbitration, the party whose rights have been violated will not apply at all, foreseeing the possible negative outcome for itself. That is why it is more reasonable to use balance of probabilities as the main standard in international arbitration.

Although the abovementioned standard satisfies the main purposes of arbitration, sometimes there can be cases where the heightened standard may be used. For example, if one of the claims is to impose penalties, it is justified to use such standard as clear and convincing evidence. Such practice exists in many states of the USA [18; 17]. This gives the respondent some additional guaranties in his rights protection.

It is also offered to use lower standards of proof to issues of consent [12; 238]. In Ukrainian litigation such issued of consent are also possible: if both parties acknowledge some fact, the court may refuse from investigating its validity due to inner conviction. Obviously, arbitrators should take into account such parties' statement, though anyway they need to examine the evidence which prove the validity of this fact due to some lower standard, for instance, probable cause.

All the abovementioned reasoning referred to international commercial arbitration, which is more widespread in nowadays world. Nevertheless we should not forget about another type of arbitration – international investment arbitration. In this case the parties are foreign investors and the state receiving investments. Here should be some specific features of arbitration process.

The cases in international commercial arbitration refer to the breach of bilateral investment treaties. Though one of the parties is a state, both of them are supposed to be equal partners; this allows to use balance of probabilities standard. However, there are state authorities that sometimes may misuse their powers.

Partially this can occur in corruption or forgery which interferes in normal performance of contract between the investor and the state.

Here it is extremely important to understand that accusation in bribery is serious as it is actually a crime in most states. That is why in spite of parties' equality and contractual nature of their relationship, there should be stricter standard of proof. As far as it is not a criminal procedure itself as it is known in national courts the standard beyond any reasonable doubt cannot be used here because investor does not have all the opportunities and powers in evidence collection as a prosecutor. However, it is impossible to use a balance of probabilities standard since it can lead to a mistake which can be the reason of conviction of an innocent person in future. That is why there need to be a standard in the middle.

It was suggested to establish a standard called a higher degree of probability. We support the position that such standard is vague and inexact and cannot be used in arbitration proceedings [7; 213]. It seems that the best way out is usage of "clear and convincing evidence".

There also was an idea to apply lower standards of proof for some corruption cases if party's reputation is bad enough [11; 503]. We cannot agree with this position according to which we almost presume party's guiltiness. Such concept is discriminatory, and we believe that even in case party was formerly found guilty, it does not mean arbitrators need to discriminate against it next time.

Conclusion

International arbitration almost does not have formalized rules, and it does not prevent it from being popular all over the world. Its nature provides the mixture of opinions and approaches which need to be unified in a certain way. It has been suggested to use three standards of proof in international arbitration. For commercial arbitration the general one is balance of probabilities, which equalizes parties' opportunities, and specific ones – clear and convincing evidence in cases

of awarding penalties and lower standard for issues of consent. Investment arbitration may also use the first two previous standards with the only difference that standard clear and convincing evidence is necessary in cases of corruption.

Although these standards are objective and can be used for the motivation part of the arbitral decision, there are no criteria which show how to weigh the probabilities. Here is the place for the subjective arbitrators' opinion, or the place for the inner conviction principle, though in the limited form.

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