**Principles of evidence in investor-state arbitration: burden, standards, presumptions & inferences**
Duggal, K.A.N.

**Author**: Duggal, K.A.N.
**Title:** Principles of evidence in investor-state arbitration: burden, standards, presumptions & inferences
**Issue Date**: 2019-02-28

# SUMMARY


The thesis seeks to answer: "Whether there are any principles of evidence as recognized and applied by investor-state tribunals or do the principles of evidence merely fall within a tribunal's discretionary powers?"

The starting point for the analysis is one of the bedrock principles of international arbitration wherein an arbitral tribunal is not bound by technical rules of procedure or evidence. This is perhaps why arbitral rules do not discuss evidentiary principles in any detailed manner in comparison to the domestic codes on evidence in most countries. The only criteria provided for is that a tribunal has discretion to determine evidentiary matters. On the other hand, investor-state cases are frequently dismissed solely on evidentiary grounds. Further, critics point out that the lack of any guidance relating to evidentiary rules and principles can be problematic because it provides a tribunal with very broad discretion. This discretion can be exercised in an *ad hoc* manner resulting in like cases being decided differently.

The research examines publically known investor-state cases, supplemented by views of leading commentators, to identify evidentiary principles dealing with burden of proof, standard of proof, presumptions and inferences. In this research, I conclude that investor-state tribunals have indeed recognized and applied evidentiary principles on burden of proof, standard of proof, presumptions and inferences. These principles do not always flow from the generally accepted view on arbitral discretion. Rather, these principles have been generally recognized under the rubric of general principles of law.

I conclude that the failure to meet the evidentiary principle can have consequences, although the precise consequence varies based on the principle. For example, the failure to meet some of the principles (*e.g.*, burden of proof) can have very severe

consequences (*e.g.*, annulment of an ICSID award) but for other principles like whether or not a tribunal should draw an inference would depend on its assessment of the evidence and, therefore, as a general matter cannot be the subject of an annulment.

Below is a summary of the key evidentiary principles examined in the research:

*Burden of Proof*: Principles relating to burden of proof (*i.e.*, who must prove), in the investor-state context, have the clearest principle—a party making a proposition (whether claimant or respondent) has the burden of proof (the "basic principle"). Tribunals have refused to relax or reverse this principle under any circumstances and have applied the burden of proof at all stages of an arbitral proceeding. The application of burden of proof at the jurisdictional phase does recognize and apply this basic principle, however, there is a slight difference in the application. At the jurisdictional stage, a party with the burden only has to allege the facts that relate to the merits of the dispute and does not have to prove them at the jurisdictional stage. This is called the "*pro tem*" principle.

Considering how ubiquitous the principles are relating to burden of proof, the failure to apply the burden of proof, or an improper reversal of the burden of proof, will have the most severe consequences for an award–annulment in the context of an ICSID award or rejection of enforcement in the context of a non-ICSID award. The underlying rationale for the basic principle is the generally accepted view that an investor-state tribunal does not have broad police powers, like a domestic court would have, to demand evidence. Recognizing this limited power, the basic principle requires the party that is putting forward a claim, or a defence to base such claim or defence, on a firm factual foundation.

*<u>Shifting the Burden</u>*: Investor-state tribunals have recognized that when a party that bears the initial burden puts forward evidence in support of its allegation, the burden of evidence will shift to the other party to rebut the evidence put forward, or concede the point (the "shifting principle"). At a minimum, the party with the burden has to provide *prima facie* evidence before the burden is shifted to the opposite party.

It is possible for a party to challenge an award on the grounds that a tribunal failed to shift the burden of evidence. However, the shifting principle is very closely linked to the free evaluation of evidence because a tribunal has to determine if a party with the original burden has met the initial burden to warrant a shifting. Therefore, the possibility of annulment or non-recognition before domestic courts becomes more difficult in comparison to the basic principle discussed above. The underlying rationale for the shifting principle enables parties to engage with the evidence produced by the other party and provides the tribunal with the best possible information to make a decision. This also explains why challenging an award on the basis that a tribunal failed to shift the burden would be difficult because the shifting process takes place *during* the course of an arbitration, and there is often limited involvement by the tribunal until the hearing. Therefore, it will be difficult for a party to allege that a tribunal failed to shift the burden of proof because the final award might not even factor in all the steps a tribunal took in arriving at its conclusion.

*<u>Standard of Proof</u>*: Principles relating to standard of proof determine how much evidence needs to be produced by the party with the burden of proof. Most arbitral rules are silent on principles relating to standard of proof and, therefore, do not provide much guidance. There are different standards of proof that apply in different circumstances.

- The most common standard is balance of probabilities, or preponderance test, that applies to most situations, except where the *prima facie* or the heightened standard applies. This standard is similar to the civil law "inner conviction" test;

- The other standard is the *prima facie* test that applies to the jurisdictional stage for matters that relate to the merits of the dispute (the *pro tem* principle) or for situations in which ICSID or a tribunal merely adopts a "screening" function since a subsequent court or tribunal will look at the issue more carefully and apply the appropriate standard of proof;

- The heightened standard of proof applies to situations in which there are allegations that are of a quasi-criminal nature (*e.g.*, allegations of wrongdoings, bribery, fraud, and the like) or when the rules expressly provide for a heightened standard of proof (*e.g.*, ICSID's reference to particular standards that use the term "manifest").

However, a tribunal has broad discretion to determine which standard of proof will apply to a particular situation but, at the same time, it does not possess unfettered discretion. Indeed, a decision on standard of proof must be appropriate in light of the circumstances of the case, otherwise the award could be challenged or even annulled. For example, if a tribunal decides to apply a heightened standard or a criminal law standard for a breach of contract, a party might be able to successfully challenge the award on the grounds that a tribunal manifestly exceeded its power. However, if a tribunal decides to apply the preponderance standard but in its application dismisses the claim on grounds that a party did not meet the standard, a high degree of deference would be provided to the tribunal's finding.

*<u>Presumptions</u>*: Tribunals can also make findings of fact by reliance of presumptions. Here, the tribunal makes a determination of fact that is not premised upon direct evidence or project-specific circumstantial evidence. Presumptions can be either "legal" or "judicial". A "legal" presumption is a finding based on the applicable law while a "judicial" presumption is a finding based on regular practice in a specific field. There is another important distinction that flows from this distinction: the failure to apply the applicable law, as a legal presumption, can be a "manifest excess of powers" under Article 52 of the ICSID Convention, however, it cannot be a mere error in the application

of the applicable law. A tribunal's use of judicial presumptions, however, falls within the scope of the tribunal's discretionary powers within the context of evidence. This is expressly provided in ICSID Arbitration Rule 34(1), which indicates that "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." Therefore, a challenge based on judicial presumptions will present a much greater difficulty.

*Inferences*: Tribunals can also make findings of fact by reliance of inference. An inference refers to a conclusion that, as a matter of *plausibility* of a fact, must be concluded to be true (i) in light of the record evidence as well as (ii) a party conduct in the arbitral proceedings. Inferences can therefore be drawn from a record inference (*i.e.*, derived from the overall record) or an adverse inference based on a party's misconduct in the arbitration. An inference is part of a tribunal's decision-making process and is typically within a tribunal's discretionary process. Therefore, as a general matter, inferences cannot be the basis for a party to seek annulment of an award unless severe material gaps can be identified in the process of drawing the inference.