

Standard of proof

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I. Definition

1.

While the burden of proof deals with the responsibility of a party to establish a proposition, it does not indicate the level (or standard) of proof that is required.¹ Standard of proof deals with (a) the degree of conviction that the adjudicator must have to be satisfied that the burden has been met,² and (b) the sufficiency of evidence relied upon by a party to establish facts germane to its case.³

2.

Furthermore, whereas the burden of proof has been described to be “absolute”, the standard of proof has been said to be relative.⁴ This is due to the fact that the tribunal’s conclusion depends on an overall assessment of both the claimant(s) and the respondent(s) evidence and not just that of one party.⁵ See also Burden of proof, Section III.A.

II. Discretionary powers of the arbitral tribunal

3.

The practice in international arbitration is to assess the weight to be given to the evidence presented in favour of any particular proposition by reference to the nature of the proposition to be proved.⁶ International law and institutional arbitration rules often do not specify the standard of proof to be adopted.⁷ The tribunal is therefore the judge of the probative value of any evidence.⁸ See further Evidence in investor-State arbitration, Section II.

III. The default standard of proof: "balance of probability"

A. Meaning of the "balance of probability" standard

4.

Generally, the standard of proof applied in international arbitration is that a claim must be proven on the “balance of probabilities” or on the preponderance of evidence.⁹ This standard is also known as the “*inner conviction test*” in civil jurisdictions.¹⁰

5.

Some tribunals have described this standard as requiring proof that an assertion is “more likely than not to be true”,¹¹ “requir[ing] the trier of fact to stand back and make an overall assessment”.¹²

B. Application of the "balance of probability" standard

6.

Arbitral tribunals apply the balance of probabilities standard by default unless the circumstances require a heightened standard.¹³ To this extent, it is applied to many issues including *inter alia*:

1. the tribunal’s jurisdiction¹⁴ although a heightened standard may be applied for consent related issues (see further Consent, Section III);
2. breaches of standards of protection and defences;¹⁵
3. allegations against people or bodies in high authority;¹⁶
4. claims to damages¹⁷ (see further Section III.D for further analysis);
5. requests for provisional measures¹⁸ although a heightened standard may also be required in certain circumstances (see further Provisional measures, Section V.B); and
6. requests for a stay of enforcement or the continuation thereof under Article 52(5) of the ICSID Convention.¹⁹ See further Stay of enforcement of ICSID Awards, Section VI.

IV. Other standards of proof adopted by arbitral tribunals

7.

Although the “balance of probabilities” standard is applied in most situations, the standard of proof may vary for certain legal propositions.

8.

Notably, “*the more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.*”²⁰ This is especially true with regards to “defences to what may otherwise be a valid claim” such as abuse of process, estoppel and waiver.²¹ See further Section IV.B. below.

A. Prima facie evidence

9.

Tribunals applying the *prima facie* test for jurisdictional purposes have held that claimants must show that their claims are capable of falling within the ambit of the investment agreement but do not have to prove that their claims are well founded.²² See further *Prima facie test*.

10.

The *prima facie* standard may also apply to facts that an arbitral tribunal considers extremely difficult to prove.²³

B. Fraud, corruption and bad faith

11.

When it comes to proving bad faith or illegalities (such as corruption, forgery, fraud, abuse of process, duress, *etc.*), there is no uniformity in arbitral practice. See further Corruption, Section V and *Bona fide principle*.

12.

Some tribunals have found that these allegations require a “*high standard of proof*”²⁴ or “*clear and convincing*” evidence.²⁵ A recent award also highlighted that the standard is “*higher than the balance of probabilities but less than the criminal standard of beyond reasonable doubt*”.²⁶

13.

Other tribunals held that the standard remains the “*balance of probabilities*”,²⁷ and even allowed the consideration of circumstantial evidence.²⁸

14.

Others refrain from deciding on the issue where unnecessary.²⁹

C. Denial of justice

15.

While some tribunals found that to establish denial of justice, the standard of proof is “*balance of probabilities*”,³⁰ others considered that it is rather “*high*” and there must be “*clear evidence of an outrageous failure of the judicial system*” or a demonstration of “*systemic injustice*” or that “*the impugned decision was clearly improper and discreditable*.”³¹ The latter view is based on the following reasoning: one must prove lack of procedural fairness in local court proceedings resulting in such an egregiously wrong decision that no honest or competent court possibly have given.³² See further Denial of justice in FET.

D. Valuation of damages

16.

The tribunal exercises discretion in determining the valuation method³³ and the quantum of compensation,³⁴ taking into consideration the evidence submitted by the parties.

17.

The standard of proof for the quantification of damages does not require a “*scientifically precise*” valuation – rather, the tribunal must be convinced that the proposed valuation will produce a sufficiently reliable result.³⁵ As the exercise of valuation involves a degree of estimation, a claimant only needs to provide a basis upon which a tribunal can, with reasonable confidence, estimate the extent of the loss.³⁶

18.

However, the standard required for proving the causal link between the breach and the loss may be subject to a higher standard of proof.³⁷ See further Causation in International Law and Compensation.

19.

Claims for lost profits are determined with reference to a high standard of proof as well.³⁸ The claimant must prove with “reasonable certainty” that the anticipated profits were probable and not merely plausible.³⁹ However, they do not need to be proven “with complete certainty”.⁴⁰ See further Damages: lost profits.

E. Mentions of "manifest" in the applicable rules

20.

The applicable investment agreement(s) or rules of arbitration may explicitly provide for a heightened standard of proof by using terms such as “manifest” or “serious”.⁴¹

1. Grounds of annulment of ICSID awards

21.

Article 52(1) of the ICSID Convention requires that the tribunal manifestly exceed its powers or that there be a serious departure from a fundamental rule of procedure for the award to be annulled.

2. Disqualification of Arbitrator

22.

The standard of proof required under the ICSID Convention is that the challenging party must prove that the lack of independence is “*manifest*” or highly probable, not just possible.⁴² It is an “*objective standard based on a reasonable evaluation of the evidence by a third party*”.⁴³ Instead of proving actual dependence or bias; it is sufficient to establish the appearance of dependence or bias.⁴⁴ See further Arbitrator disqualification, Section VII.A.2 and Arbitrator impartiality and independence.

3. Claims manifestly without legal merit

23.

An objection that a claim is manifestly without legal merit, raised on the basis of Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings is subject to a heightened standard of proof.⁴⁵ The party raising the objection must establish the manifest or clear and obvious lack of legal merit.⁴⁶

Bibliography

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