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The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales?

BY FRANCISCO BLAVI AND GONZALO VIAL**

Abstract

This work discusses the ability of parties and arbitral tribunals involved in international commercial arbitration to change the burden of proof rules, concluding that the parties are entitled to alter the referred rules subject to some limitations, such as the principle of fair and equal treatment, mandatory rules, and considerations of public policy and good faith. In addition, we observed that even though arbitrators have broad powers to determine the burden of proof, they are generally obliged to respect the agreements reached between the parties consistent with that burden.

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I. Introduction

International commercial arbitration has been adopted around the globe as an efficient method to solve commercial disputes, promoting the participation of parties from different jurisdictions and legal systems. The dissimilar backgrounds of the parties have often resulted in gaps or unfamiliarity with the parties’ rights and duties during the arbitration proceeding; including those related to the rules for the taking of evidence.¹

There is no doubt as to the importance that each party prove the facts specified in a claim or defense in the context of an international commercial arbitration. Some authors have assessed that between sixty and seventy percent of disputes are decided upon the facts of the case, rather than on issues of law. Whether that percentage is accurate or not, the huge relevance of determining the facts in any international arbitration procedure is something we can all agree upon.² Evidentiary issues are “as important in international arbitration as they are in litigation.”³

The concept of burden of proof plays a key role in the

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³ GARY BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 768 (Viki Been et al. eds., 1st ed. 2011).
evidentiary process, particularly in determining the facts being disputed and the ability of the arbitral tribunal to support its decision based on the different evidence presented by the parties.\textsuperscript{4} The widely accepted rule in international commercial arbitration is that each party has to prove the facts on which it relies to support its case.\textsuperscript{5} In practice, each side tends to offer evidence to prove their own case and disprove the facts put forth by the other.

There is also no doubt that the burden of proof rules require special consideration in any adversarial adjudicative proceeding where one side or the other must prove its case.\textsuperscript{6} Moreover, the burden can be highly determinative, especially in close decisions where a party fails to satisfy its burden of proof might end up having its claim dismissed. As stated, "decisions about the burden of proof are often critical for the result of the proceeding and the findings in the award and securing access to justice especially if the evidence is scarce, and thus they have a due process connection."\textsuperscript{7}

Notwithstanding the aforementioned, there is not a great amount of academic literature regarding the definition, allocation, scope, and implications of the burden of proof in international commercial arbitration.\textsuperscript{8} In fact, most institutional rules and authors are silent as to what this concept really means.\textsuperscript{9} This article aims to contribute to the academic discussion by analyzing the limits of the parties’ authority to modify the burden of proof rules in international commercial arbitration practice, as well as the arbitral tribunals’ powers regarding this issue.


\textsuperscript{7} MATTI S. KURKELA & SANTTU TURUNEN, \textit{DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION} 147 (2d ed. 2010).

\textsuperscript{8} Winarta, \textit{supra} note 1, at 4 ("Despite its importance, it is interesting that in international commercial arbitration proceedings, the burden of proof between the parties is not explicitly defined.").

\textsuperscript{9} Redfern, \textit{supra} note 5, at 321.
II. The Burden of Proof

This section defines the concept of burden of proof, as it has been generally understood in the legal science and practice, in order to later address the issue of determining how it has been specifically applied in the field of international commercial arbitration.

A. Definition of Burden of Proof

"Burden of proof" is a complex legal term that is not equally defined in all jurisdictions and is susceptible of being illustrated in different ways. The challenge of clarifying its meaning is connatural to the juridical nature of international commercial arbitration, a system consisting of a "hybrid process formed by a delicate balance between different legal cultures and systems."11

Despite the divergence of interpretations, the concept of burden of proof has been generally understood as a mechanism for distributing risks in the context of an adjudicating procedure, which enables the tribunal to make a decision based on the evidence submitted in the record and provides legal certainty to the parties with regards to their evidentiary responsibilities in the proceeding.12 More precisely, the burden of proof can be characterized as the "legal mechanism that allocates the obligation of establishing facts between the parties by determining which of them bears the risk of a given allegation not being upheld and the claim relying on it [being] dismissed."13

In other words, the burden of proof refers to the rule that allows the tribunal to solve the controversy in favor of the party who does not bear it, in case the evidence presented is not sufficient enough to
provide conviction of the issue under discussion. These rules serve as important guidelines to overcome the challenges to which a court or tribunal might be subject when deciding a dispute. An author has explained the following regarding the notion of burden of proof:

Burden of proof often means what Wigmore has called the risk of non-persuasion. Wherever in human affairs a question of the existence or non-existence of a fact is to be decided by somebody, there is the possibility that the decider, or trier of the fact, may at the end of his deliberations be in doubt on the question submitted to him. On all the material before him, he may, for example, regard the existence or nonexistence of the fact as equally likely a matter in equipoise. If, now, the trier is operating under a system which requires him to decide the question one way or the other, then to avoid caprice that system must furnish him with a rule for deciding the question when he finds his mind in this kind of doubt or equipoise.

In any system that claims to adjudicate rights among competing sides, the outcome of the decision will ultimately depend on whether the evidence presented satisfies a predetermined burden and a standard of proof. Such rules are essential for having a decision based on objective standards, rather than impulse or chance. As stated, "no lawsuit can be decided, rationally, without the application of the common place concept of burden of proof." In the end, the burden of proof rules are intended to help guarantee that a rational decision is reached. They play an important role in every case,

especially in those having unclear or incomplete evidence, where their application may determine the outcome of the dispute.19

B. Burden of Proof in International Commercial Arbitration

Due to the different legal definitions of burden of proof, there has been little consensus found regarding the scope and allocation of said obligation in the field of international commercial arbitration. Generally, it has been accepted that a party relying on a particular fact, has to establish it. This is just a modern manifestation of the Roman law maxim *ei qui affirmat non ei qui negat incumbit probatio*, which states that the burden of proof lies upon him who affirms, not upon him who denies.20 In other words, each party must prove the facts upon which it relies to support its case.21

It is possible to characterize the burden of proof in international commercial arbitration as the parties’ procedural obligation before the arbitral tribunal to prove their own claims.22 Although no international rules exist to divide the burden of proof responsibilities’ between the parties of an international arbitration, ultimately everyone agrees that the party who asserts a fact is obliged to prove it.23 When the burden is met, the arbitral tribunal gives the other party the opportunity to “explain himself in order to create eventually in his turn a contrary likelihood.”24

The principle of *actori incumbit probatio* in international commercial arbitration requires the claimant to establish the elements of fact to obtain a decision in its favor. Somehow, all legal systems recognize this rule or at least a variation of the principle that a party putting forward an allegation must demonstrate its elements of fact

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23. Id.
and sometimes of law as well. Some authors have explained that the tribunals “will formally require the party putting forward a claim or a particular contention to establish the elements of fact and of law on which a decision in its favor might be given.” The aforementioned principle can be observed in international arbitration case law, as illustrated by the International Court of Justice in the Temple of Preah Vihear case, where it held:

As concerns the burden of proof it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her in the second Submission of the Counter-Memorial and which relates to the sovereignty over the same piece of territory. Both Cambodia and Thailand base their respective claims on a series of facts and contentions which are asserted or put forward by one Party or the other. The burden of proof in respect of these will of course lie on the Party asserting or putting them forward.

In addition to international arbitration case law, the principle of acti incumbit probatio can be observed in the arbitration rules of different institutions. For instance, Article 27, section 1 of the UNCITRAL Arbitration Rules (“UNCITRAL Rules”) provides that each one of the parties “shall have the burden of proving the facts relied on to support its claim or defense.” As explained by Redfern and Hunter, the rule applied by “nearly all international arbitral tribunals is to require each party to prove the facts upon which it

25. Marossi, supra note 4, at 427.
26. Foster, supra note 19, at 35.
28. See Winarta, supra note 1, at 4 (“None of the international arbitration rules contain a provision concerning burden of proof, except for the American Arbitration Association (“AAA”) International Arbitration Rules and the United Nations Commission on International Trade Law (“UNCITRAL”) Rules. Those regulations stipulate that each party has the burden of proving the facts relied on to support its claim or defense, with the only exception related to the propositions that are so obvious, or notorious, that proof is not required.”).
relies in support of its case. This practice is recognized in the UNCITRAL Rules. The only exceptions relate to propositions that are so obvious, so notorious, that proof is not required.\textsuperscript{29}

In a similar way, Article 24, section 1 of the regulation for international arbitration of the Arbitration and Mediation Center of the Chamber of Commerce of Santiago (Chile) provides that “each party shall have the burden of proof regarding the facts in which its allegations or defenses are based.”\textsuperscript{30} In turn, Article 34 of the arbitration rules of the Mediation and Commercial Arbitration Centre of the Argentinian Chamber of Commerce states that “each party shall assume the burden of proving the facts or exceptions on which its claims or defenses are based,” while Article 27 of the arbitration rules of the Australian Centre for International Commercial Arbitration mandates that, “each party shall have the burden of proving the facts relied upon to support its claim or defense.”

The problem is that in almost every case there are different claims, defenses, and counterclaims that usually involve intertwined material facts. This poses a great challenge to the parties and the arbitrators because the plain application of general principles is rendered insufficient to apply to more complex cases. Notwithstanding the common recognition of the principle of \textit{actori incumbit probatio} in international commercial arbitration, such a general definition of burden of proof does not provide further explanations that may help determine, for instance, which party has the burden of going forward with the arbitration, or who has the burden of persuading the arbitral tribunal that its allegations are true.

The burden of going forward addresses the issue of \textit{when} proof

\textsuperscript{29.} ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 314 (3d ed. 1999).

should be presented by a party; or put more simply, the order in which the evidence must be presented. As one author explains, one of the primary issues within the scope of burden of proof is to determine which party bears the weight of proving the facts and should assume the duty of “providing the evidence” to the arbitral tribunal.

Unlike the burden of going forward that only addresses the moment in which evidence should be submitted, the burden of persuading the arbitral tribunal is ultimately referred to demonstrating that the allegations are true. Indeed, in order to obtain a favorable judgment, each party needs to convince the arbitrators of the effectiveness or truthfulness of the facts relied on to support its claim or defense. The burden of persuading the arbitral tribunal is fixed by the issues presented in the case and the applicable legal rules because it governs the standard to be applied by the arbitrators in establishing the facts upon which the final award will rest.31

Some authors have emphasized the importance of determining whether the burden of going forward and the burden of persuading the arbitral tribunal always rests on the same party. For instance, one scholar has stated the following:

The “Burden of Proof” contains the alpha and omega of the inquiry into the facts. It imposes on the arbitrator two rules which can be stated as two questions: “Who has the burden of going forward?” and “Who has the burden of persuasion?” Which side must introduce the factual inquiry into the arbitration and which side must present the evidence necessary to convince the finder of fact that its version of the ultimate fact is to be accepted as the truth? These two burdens frequently, but not always, are borne by the same party.32

In the end, despite the agreement in international commercial

32. Id.
arbitration practice regarding the application of the principle of *actori incumbit probatio*, developing the scope of the burden of proof rules is essential to answer questions surrounding *how* and *when* a party has discharged its burden in a particular case.

Among the efforts in the aforementioned sense, it is extremely important to determine if the parties and the arbitrators are allowed to modify the burden of proof rules and whether such decisions affect the inherent powers of the arbitral tribunal. There is no legal system that could be praised if there is no predictability or “if there [is] vagueness, uncertainty or confusion as to the scope or extent of the burden [of proof], or if the language commonly employed to describe its scope or extent is not easily comprehensible to those whose duty it is to determine whether the burden has been sustained.”

### III. The Possibility of the Parties to Modify the Burden of Proof Rules

As explained below, the possibility of the parties to modify the burden of proof rules is supported by the principle of party autonomy, the juridical nature of international commercial arbitration, and the goals pursued by said institution.

#### A. The Principle of Party Autonomy and the Burden of Proof Rules

Arbitration is a creature of contract. In the field of private international law, few principles are more recognized than the one entitling the parties to establish the law of the contract, having “[arbitral] tribunals, international conventions and national laws accord a primary place to the will of the parties when deciding the applicable substantive and procedural law to an arbitration.” As stated by an author:

Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but by international arbitral institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition.35

Consequently, there is little that the parties should not be able to do or modify in the context of an international commercial arbitration. For instance, they have the opportunity to choose the procedural rules that will be applied in the process of resolving the dispute, the law governing the contract, and the forum of the arbitration. They may even appoint decision-makers who will settle the conflict and the language to be used during the proceedings, along with many other essential issues.36 Furthermore, it has been sustained that the principle of party autonomy is broader in the field of international commercial arbitration than in other areas of law, as observed from the following excerpt:

The principle of party autonomy, in general sense, started to develop in the nineteenth century. Actually, party autonomy is based on choice of law in a contract. However, this principle has broader meaning in international commercial arbitration. In other words, the parties to the arbitration agreement are free not only to choose laws but also to conduct the arbitration process.37


As it can be noted, the theory suggests that the parties should have broad powers to determine how the arbitration is going to proceed, including the authority to change the burden of proof rules. Indeed, it has been stated that “party autonomy is a major factor in determining the rules of evidence, including those on the burden of proof.” Thus, the parties can shift the existing burden, alleviate or increase the standards that must be met, define which elements a party will need to prove, or determine the level of evidence they will be required to submit to succeed on its claims.

For example, the parties can agree to apply liquidated damages for delays in a construction project. In such a case, the owner will only need to prove the breach of the contract on the part of the contractor (the delay), yet he will be relieved from demonstrating damages. The parties might also agree that such a breach will only give right to damages if the party failed to perform with willful misconduct or gross negligence. In that scenario, the claimant will need to prove both the breach and the willful misconduct or gross negligence.

The general approach concludes that the parties are authorized to expand, limit, or waive almost any arbitration-related right, and consequently, are free to modify the burden and standard of proof in the way they consider appropriate.

**B. The Juridical Nature of International Commercial Arbitration Supports the Parties’ Authority to Modify the Burden of Proof Rules**

Many theories have been given to explain the juridical nature of international arbitration. Some conceive it as a consequence of the power of states to allow privately administered justice systems within their territories, while others find in arbitration a purely contractual character. Determining whether the arbitration derives from state power or contractual agreement is not a trivial matter because each
standpoint might take different approaches as to the extent of the arbitral tribunal’s powers and the limits to the parties’ autonomy to determine how their dispute is going to be decided. However, this is not an easy task as both positions have solid arguments to support their statements.41

Somewhere in the middle ground are those arguing that the jurisdictional and the contractual standpoints can be reconciled in a hybrid theory.42 They note that international arbitration relies on elements from both theories, since arbitrations have their origins in a private contract, but there is also domestic law that determines the validity of the agreements to arbitrate and the enforceability of the awards.43 As some authors have stated, for “pragmatic reasons, a compromise has emerged which recognizes arbitration as a hybrid of the two extremes.”44

The most recent theory, however, suggests that international arbitration has an autonomous juridical nature because it cannot be classified as purely contractual or jurisdictional, nor should it be subject to a localized law. They believe that international arbitration operates in the arena of the international business world in which the need for flexibility, predictability, and fair procedures is opposed to national public policy or mandatory laws.45

Whatever theory one might adhere to, what seems to be undisputed is that the rules governing the arbitration depend primarily on the parties’ agreement,46 and therefore, special deference shall be given to their decisions regarding different procedural and substantive issues, which includes the burden of proof. In this regard, it is worth quoting an author that explains the

41. EDUARDO PICAND, ARBITRAJE COMERCIAL INTERNACIONAL VOL. 1, 45 (2005).
42. Lew, supra note 40, at 78-79.
43. Id. at 86.
44. Baraclough, supra note 34, at 207.
45. Lew, supra note 40, at 81.
46. Baraclough, supra note 34, at 209-10 (Notwithstanding that we acknowledge the fact that the closer arbitration is to the contractual theories that explains its juridical nature; more weight shall be given to the autonomy of the parties. As stated, “The closer in proximity arbitrators are to the contractual end of the continuum, the less inclined they will be to deny party autonomy, and vice versa.”).
harmonic relationship existing between the dispositive principle of the arbitral process and the juridical nature of the arbitral institution:

This principle is fully justified in international commercial arbitration, due to its juridical nature, that is, an institution aimed to resolve private interpersonal conflicts. Indeed, we well know that the parties are the ones that, through their autonomy, decide to exclude from an ordinary judge the controversies derived from a particular private right that they could freely dispose, with the purpose that, in the end, an arbitral tribunal solve the dispute. This freedom owned by the parties has enabled them to conduct the process and the procedure through their own elections; in a way that the start of the procedure, the submission of evidence, and the continuity of the process would be under their control. In international commercial arbitration, more than in any other jurisdictional procedure, the parties own the impulse of the process, being the tribunal activity subsidiary to a lack of agreement by the parties.47

Ultimately, it is clear that special deference should be given to the parties’ authority to determine the legal framework of the proceedings. One of the greatest advantages to international arbitration is that the parties can agree on the substantive and procedural rules that will govern the arbitral process.

C. International Commercial Arbitration Aims to Be an Efficient Tool

The principle of party autonomy and the promise of broad control over the arbitration proceedings have contributed significantly to promoting international arbitration as one of the most convenient means of dispute resolution in the transnational context.48 Indeed, the

47. Picand, supra note 41.
ability of the parties to determine the arbitral procedure – with the informality and flexibility that comes with it – has been pointed out as one of the great advantages of arbitration over domestic litigation.\textsuperscript{49} In this context, the capability of the parties to shift the burden of proof is supported by the purpose that the institution of international commercial arbitration was construed upon, that is, to develop an efficient system of settling disputes in the transnational business world.

IV. Limits to the Parties’ Authority to Modify the Burden of Proof Rules

The parties’ authority to master the arbitration procedure has been widely accepted within some bounds\textsuperscript{50} and “subject to some restrictions.”\textsuperscript{51} The primary limitations to the parties’ authority to modify the burden of proof rules are given by the principle requiring that both sides must be treated fairly and equally and by the mandatory rules applicable to a particular international commercial arbitration.\textsuperscript{52} In addition, considerations of public policy, good faith, and external interpretation among other circumstances have also been syndicated as boundaries to the parties’ autonomy to modify the burden of proof rules.

A. Fair and Equal Treatment of the Parties

Perhaps the most important requirement for any international commercial arbitration procedure is that both parties must be treated fairly and equally, giving them the opportunity to adequately present their case,\textsuperscript{53} as clearly stated in Article 18 of the UNCITRAL Model

\textsuperscript{50} Perepelinska, \textit{supra note 35}, at 39.
\textsuperscript{51} Gör, \textit{supra note 37}.
\textsuperscript{52} However, as we will observe later in this work, public policy norms are not necessarily equal to mandatory norms. Therefore, it is possible to consider both of them as separate limitations to the autonomy of the parties to control the arbitration.
\textsuperscript{53} Redfern, \textit{supra note 5}, at 321.
Law. The same restrictions to party autonomy might arise from the institutional rules that govern the arbitration. Therefore, if the burden of proof rules are structured by the parties in a way that makes it impossible, or unreasonably burdensome, for one side to have the ability to present its case with a real chance to obtain a favorable award, then such an agreement should be deemed inapplicable – null or void according to what the relevant law considers a proper remedy.

Moreover, the arbitrators should not tolerate an unfair procedure because it might be the basis for refusing the recognition and enforcement of the final award under the New York Convention. Indeed, Article V of the convention establishes that recognition and enforcement of an award may be refused when it “would be contrary to the public policy” of the country where recognition and enforcement is sought. The UNCITRAL Model Law, which was adopted in sixty-seven states and a total of ninety-seven jurisdictions, contains a similar provision.\(^{54}\)

International arbitration cannot operate in a vacuum. Accordingly, *unequal treatment* based on international law or public policy, is an argument that may be invoked by a party to argue that altering the laws governing burden of proof could warrant setting aside an arbitral award.

**B. Mandatory Norms**

An accepted classification of the rules regulating a particular international commercial arbitration is one that distinguishes between those that can be changed by the parties involved and those that “purport to apply irrespective of the law chosen by the parties to govern their contractual relations.”\(^{55}\) The norms in the first group are known as dispositive, while the others are called mandatory. The difference between them has been explained in the following terms:

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\(^{55}\) Barraclough, *supra* note 34, at 205.
Peremptory (mandatory), as opposed to dispositive (non-peremptory, non-mandatory, jus dispositivum) norms, are those norms from which non-derogation is allowed. Whereas dispositive norms envisage a model of behavior from which derogation is allowed if parties (e.g. parties to a contract) wish to do so. It should also be kept in mind that the concept of mandatory norms "has at its basis special importance for [the] particular state of social relations constituting [the] subject matter of these norm[‘]s regulation."\(^5\)

The distinction between mandatory and dispositive norms is of huge relevance in the field of international commercial arbitration because the former imposes important restrictions to parties’ authority to define the arbitration framework. In fact, this discussion has been declared as "one of the most burning issues in daily international arbitration practice,"\(^5^7\) especially because of the current trend in which states are increasingly adopting mandatory norms (having been told, anecdotally, that issues regarding mandatory norms “arise in over 50 percent of cases”).\(^5^8\)

Despite its relevance, distinguishing between mandatory and dispositive norms is not an easy task. As stated:

Party autonomy is a guiding principle in determining the procedure to be followed in international commercial arbitration. An important practical question in this regard concerns actual limits to party autonomy. The parties shall comply with respective mandatory requirements established by law governing arbitration agreement in respect to both form and content of the latter. But the UNCITRAL Model Law, as well as national laws based on it, including Ukrainian legislation, provide no guidance

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57. Barraclough, supra note 34, at 207.
58. Id. at 207-08.
on how to divide its provisions into mandatory and dispositive rules. In some Model Law jurisdictions the parties may waive the right to set aside future arbitral awards, while in others, including Ukraine, it is not permitted. The majority of institutional rules establish certain limitations with regard to procedures of appointment and challenge of arbitrators. But still some questions remain unclear, such as how a rule should be qualified which is not designed so apparently dispositive and does not mention the parties’ agreement, and if the parties have agreed on certain issues whether such agreement is always binding for the arbitral tribunal.  

As it can be seen, determining what is mandatory and what is dispositive law might also be different between jurisdictions. Under Chilean law there are mandatory law issues that should be considered in the international commercial arbitration practice. Chilean authors have explained that there are certain procedural rights that cannot be waived or limited, such as, the right to request interim relief. Accordingly, the arbitral proceeding must comply with the applicable mandatory rules of law. Furthermore, there is even an international debate regarding the strictness of the actual limits created by mandatory norms on the parties’ autonomy to set the rules of the arbitration. Some have a more flexible approach, while others tend to believe that the mandatory laws should always be respected.

Determining the juridical nature of the burden of proof rules is of the essence because generally mandatory rules have been developed with the purpose of overriding the parties’ agreement for different policy considerations.  

59. Perepelynska, supra note 35.
60. BRUNO CAPRILE, LA BOLETA BANCARIA DE GARANTÍA. UNA GARANTÍA A PRIMER REQUERIMIENTO 212, EDITORIAL JURÍDICA DE CHILE (2002).
61. Barraclough, supra note 34, at 224-225, 226 (Whatever is the case, it seems at least convenient that the parties and the arbitral tribunal respect the mandatory norms governing the seat of the arbitration, the place where the award wants to be enforced and of the place of performance).
62. When there is inequality of bargaining power in the contract and the weaker party
Model Law confirms this interpretation as it provides that, "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings," however "subject to the provisions of this Law." Therefore, if the norms dictating the scope and/or allocation of the burden of proof are considered mandatory rules under the applicable law then the parties are prevented from changing them. Conversely, the parties will have the possibility of amending such norms only if they are deemed dispositive. In other words, considering the burden of proof rules as mandatory norms could limit the parties' autonomy to modify them.

C. Public Policy

Some argue that public policy rules are not necessarily the same as mandatory norms because "a domestic mandatory rule does not fall within the relevant definition of public policy,"\(^6\) and therefore, they could be considered an additional limit to the parties' authority to modify burden of proof rules. In any case, scholars agree that the parties cannot go against the public policy of a country. This has been recognized by legal doctrine and the most important international arbitration treaties that deal with the enforcement of the final awards.\(^6\) For example, Article V of the New York Convention provides that an arbitral award may be unenforceable when it goes against the public policy of the country where recognition and enforcement is being sought.\(^6\)

\(^6\) See id. at 217 (Or as the words from Maniruzzaman quoted by Barraclough and Wayncimer warns us: "Although the parties' freedom of choice is a general principle of private international law and is to be respected in principle, it should operate within the limits imposed by such equally important general principles of law or subject to any restraint of public policy.").

\(^6\) New York Convention, Art. V 2 (Indeed, article V(2)(b) provides the following:...
Due to the inherent limitations of international arbitration, both the parties and the arbitral tribunal are forced to consider several policy issues including the position of the domestic courts regarding the enforcement of the award. As explained by certain scholars:

> [T]he philosophy underlying arbitration is that questions of procedural and substantive laws are best answered by the parties themselves. The parties of an international arbitration certainly have the flexibility to agree on substantive alternatives to a national system of law to best redress the issues between them. However, the parties' freedom to choose their governing law will be rendered futile if it is subsequently incapable of being enforced by the courts.\(^66\)

In the end, behind the freedom of the parties and the powers of the arbitral tribunal, we can find the need to protect the award from becoming unenforceable under the domestic laws. Policy issues arise from the position taken by states in areas like competition, insurance law, and labor law. In those cases, the parties' agreement is limited by the policy underlying the statutes, which usually seeks to protect the weaker party. The same can be said from matters that cannot be subject to arbitration in some jurisdictions, such as criminal, tax, administrative, or family disputes.

From a procedural standpoint, we can easily find policy issues as well, particularly regarding due process in the course of international commercial arbitrations. As one author stated, at its "most fundamental level, the concept refers to the idea that no one should be deprived of his rights without due process of law."\(^67\)

Therefore, every procedure must comply with certain standards. Even though this concept originally emerged as a way to protect individuals from sovereign power, the fact that states have authorized

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\(^{66}\) Livingstone, supra note 48, at 531.

\(^{67}\) Kurkela, supra note 7, at 1.
a delegation of their jurisdictional powers to arbitrators is enough to warrant due process standards. As it has been explained, "with this delegation of powers comes a type of trade-off in the form of standards of quality applicable to arbitration."  

Both the New York Convention and the UNCITRAL Model Law seek to ensure due process; or, what has been considered in international arbitration as fair and just proceedings between the parties. The appointment of the arbitrators may be invalid if they show a bias towards one of the parties (Article V(1)(b) of the New York Convention and article 12(1) of the Model Law) and the proceeding may be void if one of the parties was not given proper notice of the arbitration (Article V(1)(b) of the New York Convention).

The burden of proof rules are also permeable to such policy considerations. The aim of due process or fairness, rather than equality *per se*, is one of the strongest concerns as a guiding principle that has conducted the development of an international rule relating to the burden of proof.  Whether it is in the name of "due process," "natural justice," or "fair and just treatment," the award may be unenforceable if the parties agree on procedural issues (including burden of proof rules) that prevent one of them from adequately presenting their case or that override public policy concerns.

**D. Good Faith**

Under the good faith principle, arbitration agreements must respect the rights of both contracting parties, regardless of any possible power, position or negotiating imbalance.  This guideline restriction is no surprise considering that the concept of good faith in international arbitration can be understood as a moral principle "reflective of all good senses such as honesty, good conscience,

68. *Id.*
69. Foster, *supra* note 19, at 35.
70. Livingstone, *supra* note 48, at 532.
fairness, equity, reasonableness, equitable dealing or fair dealing.” To summarize, it is possible to argue that any alterations of the burden of proof by the parties must be done in good faith or in other words, that modifications to the burden of proof cannot be done in bad faith.

E. Burden of Proof as a Substantive or Procedural Law Issue and Its Effect on the Parties’ Agreement

The taking of evidence is usually considered to be a procedural issue, governed by the laws applicable to the arbitration proceeding. However, the burden of proof rules reside in a grey zone between procedural and substantive law. In some legal systems they will be governed by the law governing the arbitration, while in others the arbitrators will apply the law that governs the merits of the case. The UNCITRAL Model Law did not include a clear approach regarding this issue because the Commission accepted that certain matters of the burden of proof could be regarded as issues of substantive rather than procedural law.

As presented below, determining if the burden of proof amounts to a procedural or a substantive norm has implications on the likelihood that an arbitral tribunal would uphold the parties’ agreement modifying those rules. This is, however, not an easy task, bringing a great challenge within the limits of the “insatiable quest to categorize an issue as procedural or substantive.” To address this matter, we will first refer to the distinction between substantive and procedural norms. Second, we will explain the implications of considering burden of proof as a procedural or a substantive norm to finally express the arguments that lead us to conclude that the burden of proof rules are intertwined both with substantive and procedural law.

74. Id. at 560.
75. Rodriguez, supra note 11.
1. The Distinction Between Procedural and Substantive Norms

In order to determine the nature of a particular norm, it is most important to understand its function – rather than where it is located. As one author stated in the criminal law context, “an accurate distinction between procedural and substantive criminal norms must be based on the purpose of the specific norms.” Therefore, one logical way of distinguishing substantive from procedural norms is by their definitions. Substantive laws are the ones aimed at regulating the rights, powers and duties of the parties, while procedural norms are more related to “the rules the parties must follow as they bring their case and the rules for the courts’ administration.” In other words, substantive norms regulate the rights and obligations between parties, while procedural rules set chronological steps to enforce those rights and obligations through the administration of justice.

2. Implications of Considering the Burden of Proof Rules as Substantive or Procedural Norms

Determining whether the burden of proof rules in international commercial arbitration are substantive or procedural is relevant because it affects the chances that the parties’ agreement will be respected by the arbitrators. In other words, it affects the parties’ autonomy by defining the arbitrators’ approach when reviewing


77. GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW 50 (Springer-Verlag Berlin Heidelberg eds., 1st ed. 2010) (In this regard the referred author states the following: “An accurate distinction between procedural and substantive criminal norms must be based on the purpose of the specific norm. The purpose of the substantive criminal norm is to define the criminal liability, whereas the purpose of the procedural criminal norm is to impose the defined criminal liability. Thus, the major question in the distinction between substantive and procedural norms is about the purpose of the specific norm. In many cases there are interactions between various types of criminal norms, but the purposes of these norms still remain different.”).

these types of agreements.\textsuperscript{79}

On the one hand, if the burden of proof is considered a procedural norm it is likely that the tribunal would be forced to uphold the parties' agreement. Otherwise, if the arbitral tribunal does not apply the procedure agreed by the parties, the award could be rendered useless under Article V, section 1, part d of the New York Convention. This norm provides that the recognition and enforcement of the award may be refused when "the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."\textsuperscript{80}

However, even if the burden of proof rules are considered a matter of procedural law, it could be argued that the parties' autonomy is not absolute. The arbitral tribunal should not apply whatever unfair burden of proof rules the parties might have agreed upon. Indeed, to avoid any possible challenges, the arbitrators should be cautious when reviewing the parties' agreement to ensure that both sides have been given the opportunity to adequately present their case. Otherwise, the enforceability of the award might be at risk.

On the other hand, if the burden of proof is a matter of substantive law, then arbitral tribunals should also apply the parties' agreement but in such a case, the arbitrators would have the power to override the agreement, with less risk of the award being unenforceable under Article V, section 1, part D of the New York Convention,\textsuperscript{81} as there would not be an infringement of the procedure agreed by the parties. In this regard, one scholar stated:

\textsuperscript{79} Bhushan, \textit{supra} note 24, at 601.

\textsuperscript{80} Makarius, \textit{supra} note 2, at 59-60 (As one author states, "if regarded as procedural law, application of the burden and standard of proof may in certain circumstances be subject to challenges in set-aside proceedings or invoked as grounds for refusing the recognition and enforcement of arbitral awards pursuant to article V(1)(d) of the New York Convention. Under this provision the enforcement of an arbitral award may be refused where the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, in accordance with the law of the country where the arbitration took place.").

\textsuperscript{81} Indeed, if this is the case, the award should be recognized and enforced unless its enforcement violates public policy, which has been interpreted restrictively in several jurisdictions.
The determination of whether a matter is substantive or procedural would also be relevant [...] in view of the provisions in national laws concerning the setting aside of arbitral awards and of the provisions of international conventions concerning the recognition of such decisions and their control. First, these conventions only provide for the recognition and enforcement of awards. Secondly, while the erroneous application of substantive law is generally not a ground for refusing enforcement under the New York Convention (unless the award and its enforcement would violate (international) public policy), recognition and enforcement can be refused under Article V(1)(D) of the Convention if: the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.\(^2\)

In the end, whether the burden of proof is a substantive or a procedural norm does not only limit the parties’ authority to modify the rules, but it actually influences the arbitral tribunal’s approach to those types of agreements. In other words, the likelihood of upholding the burden of proof rules agreed upon by the parties is higher when those rules are considered to be procedural law in nature, rather than substantive law. This is because of the chances that the award might be unenforceable.

### 3. Burden of Proof Rules as Intertwined with Substantive and Procedural law

Different views have been expressed as to whether the burden of proof is a procedural or a substantive issue. Unsettled doctrine discussions and silent legal instruments lead to a lack of clarity on the question of whether the burden of proof is a substantive or procedural issue in international commercial arbitration.\(^3\) Generally, civil law systems are more inclined to consider it a substantive matter, while

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83. Makarius, *supra* note 2, at 56.
common law jurisdictions usually consider burden of proof procedural in nature.\textsuperscript{84} Evidence has traditionally been considered as a procedural issue. However, the burden of proof needs to be analyzed, keeping in mind that it is inherently intertwined with the substantive law in a way that affects the outcome of the case; just as every other substantive law.\textsuperscript{85}

There are different reasons for suggesting that the law applicable to the substance of the dispute should also be the one that governs the burden of proof. First, this approach is consistent with the broad autonomy that the parties have to determine the rules that will govern the dispute adjudication process. Also, the enforceability of the award would be better assured since an incorrect application of substantive law is usually not enough to set aside an award.\textsuperscript{86} Moreover, the burden of proof rules determine how easy or difficult it may be to enforce a claim, which is highly related to the merits of the case (i.e., presumptions), unlike the procedural issues. Another advantage to considering the burden of proof as part of substantive law rules is that this would give more foreseeability to the parties, even prior to the commencement of the arbitration because they will frequently have agreed on a choice of substantive law. On the contrary, procedural rules are commonly chosen only at the beginning of the arbitration.\textsuperscript{87}

All in all, it is important to consider the burden of proof rules in their entire complexity as they have consequences both in procedural and substantive issues.\textsuperscript{88} The better view, indeed, seems to take the approach of having specialized rules regarding the issues of burden and standard of proof in international arbitration, superseding the discussion of procedural versus substantive law.\textsuperscript{89}

\begin{itemize}
\item \textsuperscript{84} Schlaepfer, \textit{supra} note 21, at 127.
\item \textsuperscript{85} Bhushan, \textit{supra} note 24, at 608.
\item \textsuperscript{86} Reiner, \textit{supra} note 82, at 332.
\item \textsuperscript{87} Reiner, \textit{supra} note 82, at 331 (In addition regarding this matter, the same author states that a decision concerning the burden of proof rules should be taken by the full arbitral tribunal, irrespective of whether procedural decisions can be taken by the chairman alone).
\item \textsuperscript{88} Etienne Verges, \textit{El derecho francés de la prueba civil}, \textit{Actualidad Jurídica Universidad del Desarrollo} 81 (2013).
\item \textsuperscript{89} GARY B. BORN, \textit{INTERNATIONAL COMMERCIAL ARBITRATION} 2314 (Kluwer L. Int’l 2nd ed. 2014).
\end{itemize}
Complementing this approach, other authors have suggested that prior to the commencement of the arbitration the parties should carefully draft the arbitration clause, taking advantage of the silence of institutional rules for adopting clear rules on burden and standard of proof. During the arbitration, the arbitral tribunal should encourage the parties to reach an agreement or, in the absence of an agreement, inform the parties about their expectations.90 Such a position would not only help the arbitrators in deciding the dispute, but would reduce the possibility of the award being unenforceable under the New York Convention.91

To summarize, despite the position one may take when defining the burden of proof as a procedural or a substantive matter, what cannot be denied is that the answer adopted will undoubtedly affect the capability of the parties to shift the burden in different ways.

F. External Interpretation of an Agreement Regarding the Burden of Proof

Usually the parties recognize the terms and consequences of what they have agreed upon. Generally, provided that those conditions are self-sufficient, the arbitrators will only need to apply them to regulate the procedural relationship of the parties. However, sometimes an agreement modifying the burden of proof rules may be unclear or rendered impossible to apply in its strict literality. In such a case, the arbitral tribunal is in charge of providing an external interpretation that enables the parties to identify their duties and risks within the context of the arbitration proceeding.

In this regard, an author has mentioned that there are “situations in which this assumption [self-sufficiency of the parties agreement to regulate their relationship] may prove false: for example, if a difference arises between the parties, and they disagree on what the legal framework is (notwithstanding that they may have agreed in the past, prior to the conflict); if third parties’ interests or public interests are affected, and mandatory rules or policies override the parties’ agreement; or if the agreed terms or legal framework may be

90. Bhushan, supra note 24, at 610.
91. Id. at 611.
interacted in more than one way or need specification by external sources."

Regardless of whether the agreement modifying the burden of proof rules is ambiguous or not, the arbitral tribunal should always interpret what the parties agreed to in light of the principles of equal treatment and due process, keeping in mind any risk of unenforceability. Such interpretation, however, will constitute a limit to the parties’ freedom to modify the burden of proof rules when the agreement is unclear or impossible to apply in a literal manner. In other words, the parties’ capability to modify the burden of proof is limited by their own capacity to establish that new burden in clear terms.

G. Final Considerations Regarding Limits of Party Autonomy

To determine when the principle of party autonomy should be limited, some have given a great deal of importance to the different theories that explain the juridical nature of international arbitration. In this sense, whether it is considered of contractual, jurisdictional, or hybrid nature, authors have assumed a different approach to the scope of the parties’ authority to govern the framework of international arbitration. As some have explained:

The difficulty (and goal of this article) is in deciding just when party autonomy should be trumped. To answer this question we must know what weight party autonomy deserves in each factual scenario. This will usually be dictated by one’s understanding of the nature of arbitration. The more that contractualist arguments are favoured, the greater the inclination will be to uphold party autonomy, and vice versa.93

The fact that nowadays the hybrid and the autonomous theories are the ones favored by the majority does not help to solve the

93. Barraclough, supra note 34, at 217.
problem. Indeed, the hybrid-nature theory only suggests that party autonomy might have some limitations, but does not clarify where those limitations are established or the precise weight of parties' authority in the context of international arbitration. The same can be sustained with respect to those who consider arbitration as having its own and autonomous juridical nature.

Notwithstanding the aforementioned, we consider the nature of international commercial arbitration to favor the parties' autonomy to modify the burden of proof, rather than limit that ability. Therefore, it is improper to consider it a restriction to the parties' autonomy.

V. The Powers of the Arbitral Tribunal to Modify the Burden of Proof Rules

With the objective of examining the powers of the arbitral tribunal to modify the burden of proof rules, we will first explain the existing discussion regarding the role of the tribunal in the arbitral proceeding. Second, we will analyze whether arbitrators have any power to allocate the burden of proof and discuss later whether they are entitled to modify a previous agreement made by the parties altering the burden of proof norms. Finally, we will evaluate whether the arbitral tribunal could change the rules on the burden of proof established by domestic laws when the parties have not previously modified them.

A. Role of Arbitrators in the Arbitral Proceeding

While the parties of an international commercial arbitration are responsible for demonstrating the facts that support their claims or defenses, arbitral tribunals are expected to evaluate such evidence in light of the burden and standard of proof rules applicable to the proceeding. However, the distribution of responsibilities between the arbitral tribunal and the parties is generally not regulated in the national laws of international commercial arbitration.

94. Bhushan, supra note 24, at 601.

Some scholars have noted that the inquisitive character of the procedure suggests that the tribunal should act in a proactive way, giving the arbitrators the duty of explaining to the parties what is expected from them. They argue that the arbitral tribunal should make sure that the parties understand the standard of proof applicable to the case and “identify the party that has to satisfy that burden.”

As stated by one author:

On balance, I tend to think that the arbitrator has the duty and the authority to indicate to the parties that if they want to prove or to disprove a fact or set of facts that is central in the arbitration, they have to adduce the evidence that he considers as appropriate [...]. It is always awkward for an arbitrator to dismiss a claim on the basis of failure of a party to bring evidence which it had the burden of providing unless there was a clear indication to that effect beforehand.

In a similar way, Gary Born explains that in the absence of voluntary evidence-taking, the way of evidence-taking and evidence-presentation in international arbitration would be subject to the parties’ arbitration agreement, the applicable institutional rules and national laws, and finally the discretion of the arbitrators as well. Even though the aforementioned usually produces a complex interplay of rules, as a practical matter “it will often mean that the arbitral tribunal will have fairly substantial discretion to define the manner of evidence-taking.”

On the other side, some authors have argued that arbitral tribunals shall observe a more passive role, and that only under exceptional circumstances should the arbitrators order the production of evidence despite negligence or inactivity of the interested party. Among the arguments given in this sense, it has been sustained that the other party – the one not interested in the production of new evidence – cannot be held responsible for it.

96. Schlaepfer, supra note 21, at 130.
97. Rodríguez, supra note 11.
98. Reymond, supra note 95, at 325.
evidence – shall have designed its litigation strategy considering only the evidence already submitted by its rival.100

Currently, there is a growing tendency in international arbitration where arbitral tribunals remain passive, due to several reasons. First, arbitrators are afraid of procedural complaints. Second, the common law tradition, where the judge plays a passive role, has influenced the way in which arbitrations have been conducted. Third, the fact that in some cases the arbitrators are appointed by a party makes them act more carefully. Finally, arbitrators might prefer this approach because it makes their jobs easier, as an active role requires “a much better command of the facts of the case.”101

In our opinion, arbitral tribunals generally should not assist the parties by requesting additional evidence to demonstrate a fact because such position might undermine the arbitrators’ impartiality by favoring one party over the other.102 We acknowledge situations may occur where the arbitrators would need to take a more active role, for example, if it is sufficiently justified under an “international due process” standard. Notwithstanding agreement or not with our position, in close call decisions and especially if the tribunal has a passive role, it is extremely important to determine who has the burden of proof and the applicable standard. Only in this manner will the arbitral tribunal have a juridical basis for deciding the dispute.

Regarding the ways of facing the aforementioned problem, some scholars have explained that arbitral awards that deal with questions of burden of proof generally apply the law governing the merits of the dispute. Others seem to apply an international or “autonomous approach by adopting their own rules without reference to national law [. . .] often limit[ing] themselves to general statements or rules such as actori incumbit probatio. Obviously such general and rather abstract principles can hardly be in conflict with any national law and rightly have been considered to constitute universal rules.”103

100. Aleman, supra note 49, at 51.
102. Schlaepfer, supra note 21, at 130.
103. Reiner, supra note 82, at 333.
B. Broad Powers of the Arbitral Tribunal to Allocate the Burden of Proof

Under the international commercial arbitration practice, the arbitral tribunal has the authority to determine which side has the burden of proving any given fact, regardless of what the applicable law actually provides. The great discretion of the arbitral tribunal to determine the burden of proof applicable in an international arbitration proceeding is confirmed, for example, by Article 19, section 2 of the UNCITRAL Model Law. The provision is phrased in the broadest possible terms and states that the authority of the arbitral tribunal “includes the power to determine the admissibility, relevance, materiality and weight of any evidence.” Its purpose is to ensure that in making rulings on the evidence, arbitrators enjoy the greatest possible autonomy and are therefore free from having to observe the strict legal rules of evidence. A similar provision is contained in Article 27.4 of the UNCITRAL Rules, Article 9 of the IBA Rules on the Taking of Evidence, and Article 22.2 of the HKIAC Arbitration Rules.

Additionally, Article 25 of the ICC Rules enables the arbitrators to establish the facts of the case “in the shortest time possible [. . .] by all appropriate means.” Similarly, Article 16 of the Singapore International Arbitration Centre allows the arbitrators to conduct the proceeding in any manner they consider appropriate after consulting with the parties. Article 14.2 of the LCIA Rules also empowers the arbitral tribunal with the “widest discretion” to conduct the proceedings, subject to fairness and national legislation.104

As it can be noted, most international arbitration rules do empower the arbitral tribunal with discretion to alter the applicable procedure in accordance with the requirements of the case, enabling the parties to present their claims in a reliable, equitable and efficient manner.105 The jurisdictional powers of the arbitral tribunal to determine or shift the burden of proof can also be noted in the following comment on an ICC award:

104. Bhushan, supra note 24, at 602.
105. Id.
The arbitral tribunal in this case applied the somewhat obvious rule that the market price of oil constituted an objective criterion for determining the existence or non-existence of a loss at a given day and that the other party had to prove the contrary in order to rebut this presumption.106

It is clear that the arbitral tribunal here applied a presumption based on common sense and asked the other party to prove the contrary. The same author also comments on ICC award 2216 to reinforce the point:

In that case the arbitral tribunal rightly presumed that the buyer’s refusal to accept delivery of the contractually agreed quantity of oil and to pay the corresponding price because prices had gone down caused loss to the seller. The arbitral tribunal further stated that this presumption could only be reversed by the buyer if he proved that the oil was in fact resold to a third party at a price above the market price.107

These two common sense examples confirm the idea that the arbitrators have a broad and discretionary power to determine which side has the burden of proving a particular fact or set of facts that will highly influence the outcome of the decision.

On another issue, the powers of the arbitral tribunal can also be noted when the arbitration deals with the issue of unavailable evidence. In another ICC case, the arbitral tribunal shifted the burden of proof, disregarding what the applicable law provided. In that case, the tribunal decided the following:

106. Reiner, supra note 82, at 333.
107. Id.
The destruction of the samples by X (the owners’ consultant) has prevented a possible clarification as to whether or not the samples submitted by the contractor did correspond in an adequate manner to the original sample approved on August 28, 1985. The responsibility for the destruction of the sample lies with the owner and a fair evaluation of this situation leads to the conclusion that the contractor is to be put in the same position as if it had brought the required proof. In view of the foregoing the claims of the owner with regard to the submission of unsuitable samples must be rejected. It has to be assumed that one or several of the samples presented could have been approved.108

Moreover, it has been explained that as a practical manner, “most arbitrators will conclude that ‘‘[w]hen a party . . . has access to relevant evidence, the Tribunal is authorized to draw adverse inferences from the failure of that party to produce such evidence.’’”109

This shows that in practice, arbitral tribunals have broad powers to determine which party has the burden of proof, or to shift that burden by applying abstract principles that are generally accepted in all jurisdictions with absolute independence from what the applicable national law provides. Notwithstanding the aforementioned, the question remains whether the arbitrators are obliged to respect a previous agreement of the parties which shifts the burden of proof rules.

C. Are Arbitrators Obliged to Respect the Parties’ Agreement?

Generally, arbitral tribunals do not have the power to change the burden of proof rules determined by the parties. Indeed, if the arbitral tribunal disregards the express agreement made by the parties, that might be a reason to render the award unenforceable under Article V, section 1, part d of the New York Convention, which provides that recognition and enforcement of an award may be refused when “the

108. Id. at 335.
arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.” The risk of unenforceability is not a meaningless issue because the arbitral tribunal’s “duty to render an enforceable award is referred to in arbitral awards, national laws, institutional rules, ethical codes and scholarly writing.”

However, the alleged lack of arbitral power to override the parties’ agreement is still subject to certain public policy considerations. When the arbitrators are faced with the question of applying the agreements made by the parties regarding the allocation or scope of the burden of proof, such decision should always consider the arbitral tribunal’s obligations. Specifically, it is important to balance the parties’ agreement with the arbitrators’ own responsibility to adopt fair and equitable procedures suitable to the circumstances of the arbitration, avoiding the risks of unenforceability, unnecessary delays or exaggerated costs. For example, an arbitral tribunal might decide to refuse to apply an agreement that modifies the burden and standard of proof rules in a way that is inconsistent with the mandatory applicable laws or prevents one of the parties to adequately present its case. Indeed, the arbitral tribunal has the duty of deciding the dispute based on a procedural framework that enables both sides to present their case with a real possibility to obtain a favorable judgment.

D. Arbitrators’ Authority to Modify Domestic Rules

One of the central issues of international commercial arbitration is the emphasis on the procedural discretion vested upon the arbitrators. This is confirmed by Article 19, section 2 of the UNCITRAL Model Law and several institutional arbitration rules that provide for a wide discretionary power of the arbitral tribunal to conduct the arbitration proceeding, including Article 27.4 of the UNCITRAL Rules, Article 25 of the ICC Rules, Article 9 of the IBA

110. Barraclough, supra note 34, at 215.
112. Id. at 338.
Rules on the Taking of Evidence, and Article 14.2 of the LCIA Rules, among others.\textsuperscript{113}

The ability of arbitral tribunals to change the rules on the burden of proof established by domestic laws (when they are not modified by the parties), shall depend on the character of the said norms. Indeed, it will depend on whether the norm is mandatory or dispositive under the applicable domestic law, as well as if they are characterized as substantive or procedural.

It has been sustained that if the burden of proof is considered a matter of procedural law, the arbitral tribunal is empowered to set the burden that considers appropriate. On the other hand, if the burden of proof rules are deemed substantive law, then the arbitrators are usually not going to be empowered to shift those burdens established by domestic laws. An author explains the aforementioned in the following terms:

\begin{quote}
Although the debate on the character of the burden and standard of proof in international arbitration may seem, in light of the foregoing, rather outdated, it is not. For that character may still have a bearing on the question of what burden and standard of proof are to be applied. If regarded as procedural law, failing’s the parties’ agreement, the tribunal would be empowered to set both the standard and burden of proof its own, subject to limitations, if any, by the procedural law of the arbitration. By contrast, the tribunal would lack such powers, should the burden and standard of proof be considered substantive law issues. In such circumstances, it would have to apply the burden and standard of proof as enshrined in the applicable substantive law.\textsuperscript{114}
\end{quote}

The allocation of the burden of proof will also surely present a choice of law inquiry. The tribunal will decide either to apply the law of the arbitral seat or the law governing the substantive issues. Ultimately, there is no clear answer. Some authors are of the view that

\begin{itemize}
\item \textsuperscript{113} Bhushan, \textit{supra} note 24, at 602.
\item \textsuperscript{114} Makarius, \textit{supra} note 2, at 59.
\end{itemize}
the burden of proof is intertwined with the substantive legal rules, while others consider some burden of proof rules the result of purely procedural matters. 115 This paper has suggested that the burden of proof rules are highly intertwined with substantive issues and therefore could be considered of the same juridical nature if there are no specific rules to supersede that discussion. It is important, however, that the arbitral tribunal allocates the burden of proof in light of the assessment of the applicable substantive law and procedures adopted in the arbitration. 116 In doing so, the arbitral tribunal is not tied by the laws of a given state. In fact, arbitrators do not need to apply the national laws of a specific jurisdiction, but are empowered to create specialized rules in light of “the particular substantive issues and procedures.” 117

VI. Conclusion

Generally, the parties of an international commercial arbitration have the power to change the burden of proof rules. This statement is supported by the principle of party autonomy, the juridical nature of arbitration, and the goals pursued by said institution. Indeed, the principle of party autonomy enables the parties of an arbitration proceeding to choose the procedural framework they wish to apply to the process of resolving the dispute, the governing law of the contract, the place where any potential dispute should be resolved, and of course, the burden of proof rules to which they would be subject. In turn, whatever theory regarding the juridical nature of international commercial arbitration one adheres to, it is undeniable that the agreement of the parties plays a central role in any procedure. Finally, the efficiency and flexibility that the principle of party autonomy provides to the system is considered as one of the main advantages of arbitration as a method of dispute resolution.

The parties’ ability to modify the burden of proof rules in the way they consider appropriate is not an absolute right. That freedom is

115. Gary B. Born, supra note 89, at 2316.
116. Id.
117. Id.
limited by the principle requiring that both sides must be treated fairly and equally, the mandatory rules applicable to the arbitration, considerations of public policy and good faith, and external interpretation issues. The parties’ agreement cannot go against public policy of a country because the award could be unenforceable on the grounds of Article V, section 2, part b of the New York Convention. Also, any agreement regarding the burden of proof by the parties must be made in good faith and in clear terms. If the parties structure the burden of proof rules making it impossible or unreasonably burdensome for one of them to adequately present their case with a real chance to obtain a favorable award, such an agreement is deemed to be inapplicable, null or void. The arbitral tribunal should not apply an unfair agreement because this might be basis for refusing the recognition and enforcement of the final award under the New York Convention.

The parties’ authority to modify the burden of proof rules is also limited by the mandatory rules applicable to a particular procedure, that is to say, those that apply irrespective of their choices. Therefore, notwithstanding the fact that distinguishing between a mandatory and a dispositive norm is not an easy task, classifying the burden of proof rules within one of those categories would affect the parties’ authority of altering it.

Classifying the burden of proof as either procedural or substantive matter affects the likelihood of the agreement modifying the burden being upheld by the arbitral tribunal. Indeed, if the burden of proof is a matter of procedural law, it is less likely that the arbitral tribunal would change the agreement adopted by the parties because the award could be unenforceable under Article V, section 1, part d of the New York Convention, which mandates respect for the procedure selected by the parties. If, however, the burden is considered a substantive norm, the arbitral tribunal should also apply the parties’ agreement and the arbitrators would have the power of overriding the agreement, but with less risk of the award being set aside under the commented norm.

The main reason to argue that the law applicable to the substance of the dispute should govern the burden of proof is because it guarantees the principle of party autonomy and protects the enforceability of the award. However, the general theory suggests
that the burden of proof rules are intertwined both with procedural and substantive issues. This is why we hold the view that specialized rules regarding the burden and standard of proof in international commercial arbitration should be adopted to supersede the referred discussion. Such a position not only helps the arbitrators in deciding the dispute, but also reduces the possibilities of the award being rendered unenforceable under the New York Convention.

There is a discussion regarding the role - whether active or passive - that arbitrators should play in a particular proceeding. In international commercial arbitration practice, if there is no agreement previously made by the parties, the arbitrators are deemed to hold broad powers to determine which side has the burden of proof, regardless of what the applicable law actually provides. Such great discretion to determine the allocation and scope of the burden of proof in an international arbitration proceeding is confirmed both by case law and the different international arbitration institutional rules.

However, it is understood that arbitral tribunals should follow the burden of proof rules agreed upon by the parties because arbitrators generally do not have the power to override those agreements. As explained, however, the arbitral tribunal should not blindly apply whatever procedural framework the parties might have agreed upon. Arbitrators should be cautious about applying a fair procedure, as the opposite might be used as a basis for challenging the award. Therefore, when the arbitral tribunal is faced with the issue of analyzing the agreements made by the parties regarding the allocation or scope of the burden of proof, its application should always consider the arbitral tribunal’s obligation to adopt procedures suitable to the arbitration, avoiding the risks of unenforceability, unnecessary delays, or exaggerated costs.

In the end, recognizing party autonomy while preserving the fundamental protections coming from domestic laws (mandatory rules) and international practice (fair and equal treatment, good faith, and others) is of the essence. Only in this manner can international commercial arbitration be accepted as an effective dispute resolution mechanism.