STANDARD OF PROOF AND APPLICABLE LAW IN CROSS-BORDER DISPUTES IN TURKEY AND GERMANY

Yabancılık unsurunun içereceği uyuşmazlıklar açısından Türk ve Alman hukukunda ispat ölçüsüne uygulanacak hukuk

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ABSTRACT

This paper analyses the term of standard of proof and then focuses on the discussion on applicable law to standard of proof in cross-border disputes, especially with regards to German and Turkish law.

Keywords: Standard of Proof, Applicable Law, Cross-border Disputes, Turkish Law, German Law.

ÖZET

Bu çalışmada ilk olarak ispat ölçüsü kavramı incelenmeye olup, daha sonra yabancılık unsurunun içereceği uyuşmazlıkların mahkemeler önünde giderilmesi sırasında bu ölçüye uygulanacak hukuk ne olması gerektiğini hususu, özellikle Türk ve Alman hukukları açısından ele alınmıştır.

Anahtar Kelimeler: İspat Ölçüsü, Uygulanacak Hukuk, Milletlerarası Uyuşmazlıklar, Türk Hukuku, Alman Hukuku.

Introduction

Party autonomy is of paramount importance in the sphere of private law. Thanks to it, parties can regulate their relationships as they wish without prejudice to mandatory provisions. If any dispute arises, they can either resolve it by themselves, without intervention of anyone, or bring the case before the courts due to the principle of disposition. This means that “masters of civil procedure” are parties and not the courts in civil proceedings.

Parties are also able to determine the beginning and end of the dispute resolution process. Therefore, the process always requires the application of parties and they are responsible to bring facts and evidences. Whilst it depends

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on them what to bring; the issues of how these facts and evidences would be brought to the court and how judges would deal with them are regulated by procedural rules. For instance, the deadline to bring evidence, and the examination of them by courts are regulated under Civil Procedure Codes.¹

The judge, who is in charge of resolving the dispute, assesses all the materials that have been brought by the parties. However, the problem here is that, the judge is often unfamiliar to the facts at the beginning, which would actually mean s/he has no idea about the dispute and what the truth is. Parties, thus, will try to convince the judge, and this process is called “proof procedure”. If one of the parties is successful in this process, then the fact that is brought by him/her, would be accepted as true and existent, otherwise would be ignored.

It should be noted, nevertheless, that under Turkish Law,² there are certain conclusive evidences on which judges have no discretion.³ In other words, if the fact is proved with a conclusive evidence, then the relevant fact is accepted as truth and can be basis for the judgement. A further, subjective persuasion of the judge is not required. That being the case, the general rule is, like German Law, judges are free while they examine and assess evidences and facts.⁴

Such discretion of judges for the examination of evidence leads to another problem: the need of criterion. To be more precise, in order to accept any fact as existent and to avoid arbitrariness, judges need a criterion. This may be clearly illustrated by the following example: A and B enter into a contract which requires that B must pay 1000 Euros to A. Later, A claims that B does not meet his/her obligations and brings an action against B. B replies and argues that the contract is valid and s/he has made the payment in line with that. It is clear that the aim of the proof procedure here is the payment issue. In other words, it has to be proved that whether B has made that payment or not. Parties should bring their evidences only for this fact. The problem, however, is that when and how the judge would decide on this. For the judge, any fact, which is claimed by one of the parties, can be true, probably true, probably not true and not true. In order to express these degrees, the term of “Standard of proof” (Beweismass-ispat ölçüsü) is used⁵. It is obvious that

² In contrast to Turkish Law, there is no conclusive evidence under German Law. Therefore, judges have discretionary power on any kind of evidence. In this regard, see Hans J Musielak/Max Stadler, Grundfragen des Beweisrechts, (1984), 63.
³ See HMK Art. 200.
⁴ See ZPO Art. 286 and HMK Art. 198.
⁵ Schack, IZVR, s. 292; Hk-ZPO/Saenger, Art. 286, para. 12; Musielak/Foerste, Art. 286,
if the judge thinks that the fact is *not true* or *probably not true*, it would be ignored in cost of the party who bears the burden of proof. Nevertheless, if the judge thinks that the fact, which is brought by one of the parties is *probably true*, either it can be accepted as existent or non-existent. Different legal systems have different approaches to this issue. This paper, therefore, analyzes the term of standard of proof and then focuses on the discussion on the law applicable law to standard of proof in cross-border disputes, especially with regards to German and Turkish Law.

§ I. The Term of Standard of Proof

A. General

The goal of the proof procedure is to establish the truth of alleged facts before the judge appointed for the resolution of the dispute. Parties use evidences to convince judges. According to ZPO Art. 286 and HMK Art. 198, judges have discretion to examine and to assess evidences. This discretion illustrates how judges will search the truth. The question of when and at which grade of persuasion, the fact would be accepted as existent, still needs to be answered.

The judges will decide according to their own convictions and the standard of proof shows the grade of this conviction, i.e. at which point the fact must be accepted as existent. This leads to different theories about the determination of the standard of proof.
B. Theories Regarding the Determination of Standard of Proof

1. Theory of the Subjective Standard of Proof

According to the followers of this theory, proof procedure is the process of the conviction about the existence of claimed facts, and thus, it depends on the personal knowledge of the judges. Therefore, determination of the possibility would not be objective; would rather be made in accordance with subjective and sensual criteria of the judges. This would mean that standard of proof is not an objective truth or objective possibility; rather it is only the persuasion of judges. In this context, therefore, the main concept is “truth/reality” (Wahrheit-Gerçeklik).

This theory is severely criticized. It is argued that they confuse the discretion of judges on examination and assessment of evidence with the standard of proof or they overvalue the discretion of judges on examination and assessment of evidence. Discretion to examine does not necessarily require arbitrariness, and in any case, judges must depend on objective elements while rendering a judgement. They must also pay due regard to ratio legis of the legislations and ordinary circumstances. In this context, persuasion is not the only the personal and arbitrary conviction of judges, rather any person at that position would be convinced in such a case. In addition, it is truism that there is no place in civil proceedings for the personal knowledge of judges. This is because judges are bound with the materials that are brought by the parties and it is probable that the judicial result at the end of the proceeding would be totally different from the actual situation.

2. Theory of the Objective Standard of Proof

This theory is emerged against the subjective theory. The followers of this theory contend that subjective, sensual and psychological value judgments of

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9 Hakan Albayrak, Medenî Usûl ve İcra İflas Hukukunda Yaklaşık İspat, (2013), 302; Christian Katzenmeier, Beweismassreduzierung und probabilistische Proportionalkaftung, ZZP 117 (2004) 187, 192. The term “persönliche Gewissheit” (personal knowledge) used here is also not true, because the knowledge and the doubt contradict with each other.

10 Greger, Wahrscheinlichkeit (n. 5), 69; Maasen, Beweismassprobleme (n. 6), 23.

11 Albayrak, s. 302; Başözen, s. 117; Maasen, s. 23. Maasen, Beweismassprobleme (n. 6), 23.

12 Greger, Wahrscheinlichkeit (n. 5), 81.

13 Maasen, Beweismassprobleme (n. 6), 30.


judges have to be excluded from the standard of proof in order to preclude arbitrariness, and judges must be bound with stable and objective criteria. Unlike the subjective theory, the “truth/reality” is not used here, since truth corresponds to the mathematical certainty which cannot be obtainable in a law suit. Rather “probability/possibility” (Wahrscheinlichkeit-Olasılık) is regarded as the subject of the discretion on examination and assessment of the evidence. Thus, when a certain grade of possibility is reached, independently from the conviction of the judges, the fact is to be accepted as existent. In this respect, German Imperial Court (Reichsgericht), in 1885, defined the “truth/reality” as the very high degree of probability, and also defined standard of proof as knowledge or probability at the border of certainty. Nevertheless, in the vast majority of cases, certainty, objective truth or knowledge cannot be achieved. In addition, the judge, who has to be convinced and must decide, is always a human being, and there is no objective tool to measure conviction of her/him. Thus, the subjective part of persuasion cannot be ignored.

3. Theory of Objectified Standard of Proof

This theory combines the pure subjective and objective theories and argues that judges must be convinced also about the probability. The starting point of this view is based on the argument that even though the parties try to convince judges for the reality, any proof procedure would in fact lead to some probability. Hence, persuasion of judges is based on probability. It is claimed that which degree of the probability would be accepted as truth is determined by the standard of proof. This theory do not entirely deny the subjective part of the examination and assessment of the evidence, it rather aims to eliminate the risks of arbitrary discretion by forcing judges to reach a certain degree of probability. It also rejects the personal knowledge of judges and the use of ratio legis of legislations and life experiences as objective elements.

18 Maasen, Beweismassprobleme (n. 6), 32.
19 Başözen, s. 119-120; Katzenmeier, ZZP 117 (n. 8) (2004) 187, 193; Greger, Wahrscheinlichkeit (n. 5), 88; Maasen, Beweismassprobleme (n. 6), 32
20 RGZ 15, 338, https://www.jurion.de/de/document/show/0:516859,0/
21 For other relevant court decisions see Maasen, Beweismassprobleme (n. 6), 32, fn. 65 and 74.
23 Katzenmeier, ZZP 117 (n. 8) (2004) 187, 194; Greger, Wahrscheinlichkeit (n. 5), 88; Muiselak, Beweislast im Zivilprozess (n. 21), 115.
25 Katzenmeier, ZZP 117 (n. 8) (2004) 187, 195; Leipold, Beweismass und Beweislast (n.7), 10-11; Huber, Beweismass (n. 23), 102. Atalay, s. 41
By doing so, it strikes a balance between subjective and objective theories.

4. Personal View

It seems that there is a subjective aspect of standard of proof, since it is accepted that judges have discretion to examine and assess evidences (ZPO Art. 286, HMK Art. 198). Nonetheless, this subjectivity should not mean arbitrariness. That is to say, a decision cannot be made without normative and reasonable grounds. It has to be shown with objective elements on why judges accepted that fact as existent or non-existent. It should be noted, however, that it would not be possible either for all cases to be decided with pure objective elements by virtue of the fact that “conviction” itself includes subjectivity. In certain cases, the degree of persuasion of people might be somewhat similar. In dubious cases, on the other hand, it continues to be subjective. This subjectivity, however, should not lead to an arbitrary decision without controllable criteria. Therefore, judges must take the general meaning and ratio legis of the legislation and general life experiences into consideration.

In conclusion, the theory of objectified standard of proof seems convincing. Here the terminology, either truth or probability would not affect the result and has no importance in practice because of the fact that the judgment of the court would not show the material truth, rather only the judicial truth. In addition, it appears that the truth is only another expression (mathematically 1/1) of the probability.

C. Degree of the Probability/Truth in order to accept any Fact as Existent

1. General

In the previous chapter the determination of the standard of proof, either subjective or objective persuasion of judges, and the terms truth and probability are examined. Another problem is that at which degree of the probability judges must be accepted as convinced. In other words, at which degree of the probability, subjectively conviction or objectively persuasion of

26 Greger, Wahrscheinlichkeit (n. 5), 16; Maasen, Beweismassprobleme (n. 6), 29.
27 Winfried Mummenhoff, Zum Beweismass im Berufskrankheitenrecht, ZZP 100 (1987) 129, 129.
28 Some authors argue that the subject of the persuasion is truth or probability, while some others claim that it is not about probability, rather subjective reality of the judge. However, the prevailing view is that it is truth, but truth itself is the high level of probability. Lüke/Wax/Prütting, MÜKo ZPO (n. 15), 1785-1786.
29 Olof Ekelöf, Beweiswürdigung, Beweislast und Beweis des ersten Anscheins”, ZZP 75 (1962) 289, 290.
the judge would be enough for them to accept related facts as existent. There claimed to be three different criteria for this in Civil law and Common law countries.

2. Beyond Reasonable Doubt (*Vollbeweis-Tam İspat*)

According to this criterion, judges must be completely persuaded in order to accept any fact as existent. Some authors define it as “a probability which close all doubts”, “a reality where there is any reasonable doubt”, or “probability on the border of certainty”. The prevailing definition of beyond reasonable doubt is expressed by the German Imperial Court (*Reichsgericht*) for the first time in its *Anastasia* Judgment: the knowledge that is required by practical life, which will not remove all doubts but at least silence them to a certain degree. Through this definition it is argued that both subjective and objective theories can be combined together. With the personal knowledge of the judge, subjectivity will be taken into consideration as the scale would always be within him/her. Such knowledge, however, would be considered objective, when it is used by an ideal judge or when the judge uses such knowledge, as obliged by the law, to the extent that is required by the needs of practical life.

3. Preponderance of Evidence (*Die überwiegende Wahrscheinlichkeit-Yaklaşık İspat*)

The main point of this view is as follows: since the truth is only of limited value (Grenzwert) during the examination and assessment of evidences, a degree of probability should always be allowed for. According to this standard, all doubts do not need to be eliminated. If the judge thinks that the possibility of the existence of facts is higher than the possibility of the non-existence, s/he must accept it as proved and existent, regardless of certain amount of doubt. Scholars supporting this standard contend that in this way, the risk of rendering wrong decisions would be distributed between parties

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30 Heinz Thomas/Hans Putzo, Zivilprozessordnung, (2009), 477; Lüke/Wax/Prüting, Müko ZPO (n. 15), 1787; Stein/Jonas/Leipold, Kommentar zur ZPO (n. 14), 166; Musielak/ Stadler, Grundfragen (n. 2), 74; Klaus Buciek, D., Beweislast und Anscheinsbeweis im internationalen Recht, (1984), 280.


32 Saenger, ZPO (n. 7), 717; Musielak/Boerste, Kommentar zur ZPO (n.7), 940; Lüke/Wax/ Prüting, Müko ZPO (n. 15), 1785; Leo Rosenberg/Karl H Schwab/Peter Gottwald, Zivilprozessrecht, (1993), 659; Stein/Jonas/Leipold, Kommentar zur ZPO (n. 14), 166; Musielak/ Stadler, Grundfragen (n. 2), 146.

33 Musielak/ Stadler, Grundfragen (n. 2), 74.

34 Gerhard Walker, Freie Beweiswürdigung, (1979), 173.

35 Leipold, Beweismass und Beweislast (n. 7), 7.
equally. They also claim that since certain knowledge cannot be reached, higher possibility is the most appropriate solution. In addition, it is asserted that incidentally correct decisions based on the burden of proof would be avoided. Lastly, by making it concrete with higher possibility, parties can be more satisfied than the pure conviction.

4. Flexible Standard of Proof (Die flexible Beweismass-Esnek İspat Ölçüsü)

This degree of standard is mainly claimed in German law. According to the proponents of this view, it is not necessary and appropriate to define the standard before the dispute and proceedings. Proof depends on the scale, which is always within the judges, even if it is attempted to be objectified. Thus, it is not appropriate to define a stable and abstract rule for the standard of proof. It is argued that it would be more practical if the standard of proof determined by taking the characteristics and alleged facts of the case in question, as well as the difficulty of proof and the requirements of substantive laws into consideration. Therefore, supporters of this view leave to discretion of the judge to decide on the necessary standard of proof, which would be preponderance of evidence or full proof. In any case, however, the judge has to consider that the existence of the facts is more probable than their non-existence.

36 It is also argued that the burden of proof is related to sharing the risk of doubt and standard of proof will determine that distribution. Richard Motsch, Vom rechtsgenügenden Beweis, (1983), 38 f.
38 Leipold, Beweismass und Beweislast (n. 7), 125; Huber, Beweismass (n. 23), 86-87; Maasen, Beweismassprobleme (n. 6), 55.
39 Huber, Beweismass (n. 23), 84.
41 Peter Gottwald, Das flexible Beweismass im englischen und deutschen Zivilprozess, in: FS für Dieter Henrich zum 70. Geburtstag, (2000), 173; Rosenberg/Schwab/Gottwald, Zivilprozessrecht (n. 31), 660; Hans J. Musielak, Gegenwartsprobleme der Beweislast, ZZP 100 (1987) 385, 408; Rommé, Der Anscheinsbeweis (n. 39), 90; Prütting accepts that for some exceptional cases, the flexible standard of proof will be applied. Lüke/Wax/Prütting, MüKo ZPO (n. 15), 1787.
42 The new theory developed and applied in some countries called “loss of a chance”. It is contended that, in order to avoid these “all or nothing” rule, especially for tort cases, the probability of the causation should be taken into account, which will provide a more efficient solution. For example see: Hans B. Schäfer/Klaus Ott, Lehrbuch der ökonomischen Analyse des Zivilrechts, (2012) 296 f.; Zaven T. Saroyan, The Current injustice of the Loss of Chance Doctrine: An Argument for a New Approach to Damages, Cumb. Law Rev. 33 (2002) 15 f., 17; David A. Fischer, Tort Recovery for Loss of a Chance, Wake Forest Law Rev. 36 (2001) 605 f.
5. Personal View

It is not explicitly regulated in German or Turkish Codes which degree of possibility is enough for acceptance of any fact as existent. Notwithstanding this, in some articles,\(^{43}\) it is explicitly expressed that preponderance of evidence is enough for the sake of those issues, and thus, the standard is reduced. Hence, it seems that the rule must be beyond reasonable doubt (\textit{Vollbeweis-Tam İspat}). Otherwise, the legislator would not provide the exceptional rules explicitly. Additionally, due to the rule of law, both claimants and defendants seek for a right decision, not a \textit{probably right} one.\(^{44}\) Finally, even if it is not possible to reach an absolute truth due to the human’s nature,\(^{45}\) the principle must be as possible as close to that aim. When there is a special rule for the matter in question, that preponderance of evidence would be enough and the judge will be bound with it. In other cases, s/he must expect the degree of the possibility in which all doubts are silent. In this context, even if preponderance of evidence or flexible standard of proof can be argued as \textit{lege feranda}, it will be against the normative rules of both German and Turkish Codes.\(^{46}\) Besides, the flexible standard of proof cannot be accepted, since it may lead to arbitrariness and prevent legal certainty and predictability.

\textbf{§ II. Applicable Law to the Standard of Proof Issues}

\textbf{A. General}

It is well-known that vigilantism is forbidden in modern law systems. Therefore, if parties cannot agree to resolve their disputes, they must apply to one of the ways which are allowed by the codes. In this sense, the most common method of dispute resolution is litigation. In litigation, judges will, in principle, settle the disputes by applying the substantive and procedural rules, which are in force in that state. However, as a result of globalization and the growth of commercial relations between states, the mere application of the law of the forum -\textit{lex fori}- would not be sufficient. Hence, in the vast majority of the cases, if the dispute has a relation with more than one country, the rules of conflict of laws, which are also part of substantive law, will decide on which

\(^{43}\) For example, ZPO Art. 294, HMK Art. 334, 390.
\(^{44}\) In constrast, Kegel claims that if preponderance of evidence is accepted, the judgment will be more probably correct and in any case this would be better and more just than making a decision according to burden of proof. Kegel, \textit{Die Verteilung der Beweislast} (n. 36), 335. However, rendering a decision according to burden of proof does not mean arbitrariness, rather there is a substantive ground. Thus the argument of “more just” does not appear to be plausible.
\(^{45}\) Walker, \textit{Freie Beweiswürdigung} (n. 33), 175.
law is to be applied. On the other hand, for procedural issues, it is almost universally accepted that the law of the forum -lex fori- will be applied with only few exceptions. This means that in order to apply the rules of the forum state directly, the issue has to be qualified as procedural through a process of qualification. In this regard, it is generally accepted that the issue of standard of proof belongs to procedural law, as the rules of standard of proof will not be applied outside proceedings and they regulate the proceedings and aim at reaching the most appropriate results in the end. Therefore, the qualification problem for the standard of proof will not be discussed here. Nevertheless, it is essential to put forward that nowadays applying the principle of lex fori for procedural issues is a matter of contention and it is claimed that the principle is not absolute. For each procedural rule, it has to be strictly investigated. In the following parts, thus, the issue of applicable law for the standard of proof will be discussed considering private international law justice. In the


50 Prütting, Gegenwartsprobleme (n. 6), 66.
first place, the problem will be put forward, and then it will be analyzed which law should be applied.

B. Definition of the Problem

As mentioned above, there are three possible degrees of standard: beyond reasonable doubt, preponderance of evidence and flexible standard of proof. Under Turkish and German Law, it is generally accepted\(^{51}\) that the general rule of standard of proof is beyond reasonable doubt, which means that not all doubts should be removed but at least they must be silent, as judges content themselves with the requirements of practical life. Nonetheless, this is not valid in all legal systems. In Common law systems, the preponderance of evidence (\textit{die überwiegende Wahrscheinlichkeit-yaklaşık ispat}) accepted in civil cases as the standard of proof.\(^{52}\) Likewise, Scandinavian states accept “\textit{överviktsprincip}” while French Law accept “\textit{intime conviction}” (\textit{intime Überzeugung}).\(^{53}\) Thus, when the dispute has a relation with these different legal systems, applicable law on standard of proof will affect the content of judgment of the courts. For example, if the American law will be applied to standard of proof, a German or a Turkish judge will decide according to preponderance of evidence and accept related fact as existent although it is only probable, and all doubts are not silent. However, when s/he applies German or Turkish Law, then the same fact will be accepted as non-existent, and final decision will be different. In this respect, the law applicable to standard of proof is of paramount importance.

3. Views about the Problem

For cross-border disputes, which law should be applied to standard of proof, especially when the applicable law is a foreign law, is often problematic. \textit{Coester-Waltjen} argues\(^{54}\) that the norms of the standard of proof exist in order to shorten the process of investigation of the truth. Even if, at first glance, it appears to be a procedural issue, the main aim of the proceeding is to detect substantial relationship, and thus the aim of the procedural law is

\(^{51}\) In German law, for the first time by \textit{Kegel}, and then by \textit{Maasen}, \textit{Musielak}, \textit{Burns}, and \textit{Motsch}, it is accepted that main rule for standard of proof must also be the rule for preponderance of evidence. Nevertheless, the majority of authors disagree with this view. \textit{Pekcanitez/Atalay/Özekes}, CPL (n. 5), 680; \textit{Inge Scherer}, Das Beweismass bei der Glaubhaftmachung, (1996); \textit{Kegel}, Die Verteilung der Beweislast (n. 36), 333 f.; \textit{Maasen}, Beweismassprobleme (n. 6), 153 f.; \textit{Rudolf Burns}, Beweiswert, ZZP 91 (1978) 64, 66; \textit{Musielak}, Beweislast im Zivilprozess, (n.21), 110 f.

\(^{52}\) \textit{Moritz Brinkmann}, Das Beweismass im Zivilprozess aus rechtsvergleichender Sicht, (2005), 27; \textit{Gottwald}, Das flexible Beweismass (n.40), 168; \textit{Maasen}, Beweismassprobleme (n. 6), 43-44.

\(^{53}\) \textit{Buciek}, Beweislast und Anscheinbeweis (n. 29), 281.

\(^{54}\) \textit{Coester-Waltjen}, Internationales Beweisrecht (n. 7), 277-280.
the realization of the substantive laws. Likewise, all exceptions for the general rule of standard of proof are based on the substantive law in both in Civil law and Common law states. The whole controversy on this rule stems from substantive law. In addition, the application of foreign law itself would not harm the international harmony of the judgments, rather judgments may be easily enforced as *ordre public* objection is eliminated in this way. Thus, the applicable law on the standard of proof should be *lex causae*.

*Buciek* also claims that in order to decide the applicable law, it must be firstly shown that the application of foreign standard of proof will not be more impractical than foreign substantive law. Thus, it will not be against the principle of judicial economy. The standard of proof, hence, will inevitably affect the content of the judgment. Additionally, in order to secure private international law justice, the expectations of parties have to be considered. Therefore, independent from the qualification of the standard of proof, there is a need of unique connection factors in conflict of laws' cases. In this regard, in order to provide predictability, the correct answer for the question of applicable law on standard of proof is *lex causae*.

In contrast, *Schack* claims that degree of the probability can neither be exactly measured nor valued, which results in a danger of equitability. Therefore, it may lead to problems with regards to the identification of the liable party. Indeed, allowing preponderance of evidence in international cases in Germany may lead to disorder in terms of investigation of foreign laws and facts, and this will cause a perception on the parties that the judge cannot detect the foreign law exactly. In addition to this, since the materials that are brought by defendants will not be explicit like the ones brought by the claimant, such a situation would be inappropriate for defendants. Thus, the application of preponderance of evidence would be against law and order (*Rechtsfrieden*). Further, decreasing the scale of standard of proof may in turn increase the number of admissible evidences. Therefore, *lex fori* should outweigh. Judges will have a lack of familiarity and experience to detect the foreign standard. In this sense, it would be meaningless to bind the judge with the foreign standard of proof. However, when the law of the forum is

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55 *Buciek*, Beweislast und Anscheinbeweis (n. 29), 282-285. See also *Geimer*, IZPR (n. 47), 814-815.

56 He claims that the rule of the degree of standard of proof is like a rule that determines the responsibility according to substantive law. In other words, if it is low, then the responsibility will be high or vice versa. *Buciek*, Beweislast und Anscheinbeweis (n. 29), 282.

57 *Schack*, IZVR (n. 7), 293-294. See also *Linke*, IZPR (n.7), 138-139; *Riezler*, IZPR (n. 47), 466-467.
applied, the parties may not be bothered with unnecessary obligations and this will serve the interest of the parties and private international law. Hence, proceedings would be more predictable and practical in such a circumstance.

Gottwald also argues that standard of proof cannot be separated from the position and conviction of the judges. Thus, lex fori should be applied to these issues. He further claims that different expressions in different norms will not create different results on merits owing to the fact that a psychologically persuasive judgment is the most important thing on these cases for an ordinary person. Hence, different regulations are only the “matter of words”.

4. Assessment of the Opinions and Personal View

Rules on standard of proof, as discussed above, indicate the degree of persuasion of judges in order to accept any fact in the proceeding as existent. Since legal systems adopt different approaches, applicable law to standard of proof in cross-border disputes has an important role. In order to determine the applicable law, it seems that the relationship between the discretion of judges to examine and assess evidences and the burden of proof should be analyzed. In addition, the aim of private international law and private international law justice should be taken into account.

According to German Code of Civil Procedure Article 286 and Turkish Code of Civil Procedure Article 198, judges have discretion to examine and assess evidences. This means that only judges are in position to make a decision on the credibility of an evidence. Standard of proof is related with the degree of this discretion. The rules of burden of proof, on the other hand, regulate the non liquet situation and allow judges to decide in spite of that. Thus, the rule of burden of proof is not required at this stage. If judges are not persuaded enough according to standard of proof, then s/he must search for the burden of proof and must accept the related fact as non-existent for the cost of the party who has that burden. It is generally accepted that discretion of judges to examine and assess the evidence belongs to law of procedure, and matters relating to the burden of proof belongs to substantive law. Under these

58 Gottwald, Das flexible Beweismass (n. 40), 175. See also Heinrich Nagel/Peter Gottwald, Internationales Zivilprozessrecht, (2013), 511-512.
59 Başözen, s. 114; Atalay, s. 39; Yıldırım, s. 72; Prütting, s. 59-60.
60 In this respect it is claimed that the burden of proof only distributes the risk of doubtful situation. Torstein Eckhoff, Tvilrsisikoen, (1943).
61 Schack, IZVR (n. 7), 285; Nagel/Gottwald, IZPR (n. 57), 514; Geimer, IZPR (n. 47), 816-817; Coester-Waltjen, Internationales Beweisrecht (n. 7), 283-284; Heldrich, Internationale Zuständigkeit (n. 47), 18; Riezler, IZPR (n. 47), 464; Hubert Niederländer, Materielles Recht und Verfahrensrecht im internationalen Privatrecht, RabelsZ 20 (1955) 1, 31, 33; Paul, H. Neuhaus, Internationales Zivilprozessrecht und internationales Privatrecht, RabelsZ 20
circumstances, the role and function of standard of proof against these two (examination of evidence and burden of proof) may help us to understand which law would be applicable to it. Additionally, the role of standard of proof must be analyzed in relation to private international law justice, which requires meeting legitimate expectations of parties and international harmony of judgments.62

There are diverging views on the role and function of standard of proof. One of the views is as follows:63

“By determining the standard of proof rules, lacunas in the norms are detected and filled. With the help of standard of proof, thus, the scope of any rule can be widened or narrowed. For example, if the standard of proof is lowered, then the application of the norm, which regulates compensation for tort cases, will be widened with the same ratio. Thus, the problem of standard of proof is also a problem of the right determination of the scope of the norm.”

By facilitating the proof of the present facts, therefore, the applicability of the abstract legal rules –either substantive or procedural rules- will be expanded.

Another view explains the function of the standard of proof, independent from the content of the rules, as shortening of investigation of the reality/truth.64 Furthermore, specification of areas, where the standard of proof is decreased, will also help to determine its function. In Turkish law, especially for interim injunctions, the rule for standard of proof accepted as a preponderance of evidence.65 In addition, Article 38/IV of the Code of Civil Procedure decreases the standard for the challenge of judges on the grounds of impartiality. Additionally, in order to provide legal assistance, Article 334/I requires only a low level of preponderance of evidence. The rationale behind decreasing the standard of proof for interim injunctions stems from their exceptional nature. To put it simply, judges, in these cases, should render his/her decision in a very short time. This corresponds with the function of standard of proof which aims at shortening the process of truth investigation.66

In Article 334/I, the aim is to facilitate legal assistance for people in order for

(1955) 201, 238; Nussbaum, DIPR (n. 47), 413.
Çelikel/Erdem, IPR (n. 48), 32-39.
Maasen, Beweismassprobleme (n. 6), 1; Rupert Schreiber, Theorie des Beweiswerts für Beweismittel im Zivilprozess, (1968), 13.
Coester-Waltjen, Internationales Beweisrecht (n. 7), 276-278.
However, shortening the time of truth investigation is valid here only for temporary decisions, not for permanent and final decisions of the courts.
them be easily part of it.\textsuperscript{67} This is in line with another function of standard of proof that expands or narrows the scope of the norms. In case of the challenge of judges, it is allowed to make a decision in spite of a doubt, since impartiality cannot be proved exactly (i.e. beyond all reasonable doubt) due to its nature. Thus, here the aim is similar to that of interim injunctions: to shorten the process of reality/truth investigation. Hence, both of the views discussed above which explain the function of standard of proof, appears to be acceptable for different legal norms.

Following the discussion on the scope and function of standard of proof, the role of private international law justice in determining the law applicable should also be analysed. This requires, in the first place, the examination of the relationship between the legitimate expectations of parties and standard of proof. Parties will prepare their evidence generally before the disputes arise. Therefore, standard of proof will affect them even at this stage. Since it is already illustrated that there is a close relation (widening and narrowing scope of rules) between substantive law and standard of proof, parties will adjust their action according to law that is applicable to the merits. In this sense, the view which supports the application of \textit{lex causae} to standard of proof issues appears to be convincing. This means that if a dispute, for example, arises out of a contract, contract status should also be applied to the standard of proof.

In terms of international harmony of judgments, there is no doubt that standard of proof will inevitably affect the judgments. For instance, when the judge comes to conclusion that “applicant is probably right”, the result depends on relevant rule: if the court must decide based on full proof, then, s/he must accept that fact as non-existent; however, if the preponderance of evidence is enough, then that fact would be accepted as existent.\textsuperscript{68} Hence, the function of standard of proof (widening and narrowing scope of rules) cannot be disregarded. It would affect the content of judgments in all cases. Therefore, independently from forum, if the law of the state which was also applicable to the merits applied to standard of proof, international harmony of the judgments will be provided.

In any case, the argument of Schack seems unconvincing. He argues that there will be difficulty in the investigation and application of the foreign law. Yet, the same is true for other substantive issues. In other words, even though

\textsuperscript{67} In the preamble of the Article this aspect of the rule is emphasized.
\textsuperscript{68} It does not seem to be just to agree with Gottwald, as he argues that it is practically unimportant due to psychological reasons. Das flexible Beweismass, (n. 40) 175. See also Nagel/Gottwald, IZPR (n. 57), 512.
detection of standard of proof and possible negative results are not more
different than substantive issues, the application of foreign substantive law
(lex causae) is not opposed in that context. The same argument should also
be rejected for practical grounds. For instance, regarding interim injunctions,
judges make a decision in a number of cases according to different standard
of proof. In this case, they will be more comfortable when applying foreign
standard of proof than applying substantive law, as they are more familiar with
such concept due to widespread use of interim injunctions in litigation. What is
more, it is not possible to agree with the argument supporting the application
of lex fori on the grounds that lex causae would create a risk of increasing
number of admissible evidences. Contrariwise, such a result will actually be
more appropriate for the legitimate expectations of the parties, since they
generally prepare admissible evidences before disputes arise. Gottwald’s
view which contends that standard of proof depends on the position and
persuasion of judges seems plausible. However, it should be accepted that
this will not prevent the application of foreign law. This is because different
standard of proof will not change the discretion of judges on examination and
assessment of evidence. It may only change the result whether related fact is
existent or non-existent. Consequently, application of lex causae to standard
of proof is more appropriate for the purposes of legitimate expectations of
parties and international harmony of judgments.

Conclusion

The analysis made in this paper regarding standard of proof, which shows
the degree of conviction of judges in order to accept alleged facts as existent
for present case, leads to the following conclusions:

1- In case of standard of proof, the truth will be reached through an
objectified evaluation of judges on the probability of existence or non-
existence of the related fact.

2- The applicable standard of proof in German and Turkish law is full proof
which means all doubts must be silent. This is because preponderance of
evidence is regulated exceptionally and explicitly in codes. In addition, due to
the rule of law, parties may only be satisfied with a literally right decision, not
a probably right one. The flexible standard of proof cannot be accepted, since
it may lead to arbitrariness and prevent legal certainty and predictability.

3- Lex causae should be applied to standard of proof issues both for
practical grounds and the sake of private international law justice.

♦♦♦♦
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