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**PROVING CORRUPTION ALLEGATIONS IN
INTERNATIONAL ARBITRATION**

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ABSTRACT

With the convergent of international anti-corruption conventions, corruption is increasingly condemned, prevented and adjudicated on both international and national levels. However, international arbitration is allegedly becoming a safe harbour which countenances and validates transnational contracts tainted by corruption. Despite the prevalence of corruption worldwide, corruption findings in international arbitral awards is questionably scarce. In addition, international arbitrators have adopted noticeably divergent approaches to the adjudication of corruption allegations. Subject to the particular evidentiary rules applied by each arbitral tribunal, same allegations supported by evidence of similar nature could lead to contradictory interpretation and conclusions in different arbitral awards. The rules of evidence with respect to corruption allegations therefore are considered as the most controversial topic in international arbitration.

Arbitrators who proactively fight against corruption permit the burden of proof to be reversed from an alleging party to an alleged party in order to increase the chance of corruption findings. On the other hand, arbitrators who are more conservative and cautious about the severity of corruption allegations and their consequences insist on a heightened standard of proof. Instead of applying the general standard of ‘balance of probabilities’, they specifically require corruption allegations must be substantiated ‘beyond reasonable doubt’ or at least with ‘clear and convincing’ evidence. Based on the reported cases, none of the aforesaid approaches is practicable and balanced enough to ensure a fair chance of substantiating corruption allegations in international arbitration.

Thus, this research paper aims to address the question of what are the appropriate rules of evidence with respect to corruption allegations in international arbitration. Considering that international arbitration, by nature, is subject to the party autonomy and the arbitral discretion, it is not the purpose of this paper to determine any rigid and universally accepted rules of evidence to handle corruption allegations. Alternatively, it is more crucial for international arbitrators to achieve a common understanding of and a consistent approach to the adjudication of corruption allegations in the context of international arbitration.

Ultimately, the applicable evidentiary rules should be able to maintain the appropriate equipoise between the pursuit of parties’ commercial interests and the integrity of truth seeking process. Regardless of whether international arbitrators consider themselves as the guarantor of the truth or the servant of the parties, they are always responsible for addressing and adjudicating corruption allegations appropriately. Therefore, the applicable evidentiary rules must enable international arbitrators and dispute parties to substantiate corruption allegations in a balanced, fair and practicable manner. It should be always kept in mind that corruption is intrinsically difficult to prove while international arbitration is devoid of power and resources to investigate, prosecute and pursue evidence. Thus, the persistence of the burden of proof on alleging parties, alongside the ‘balance of probabilities’ standard is an optimal solution to the existing dilemma in international arbitration. The aforesaid evidentiary rules are practicable but stringent enough to ensure that international arbitration is serving its commercial purposes in the compliance with international anti-corruption framework.

Word Count

The text of this paper (excluding abstract, list of abbreviations, footnotes and bibliography) comprised approximately 14,121 words.

Topics and Subjects

International arbitration – evidentiary rules – rules of evidence

Corruption allegations – burden of proof – standard of proof

LIST OF ABBREVIATIONS

FCPA	Foreign Corrupt Practices Act
IBA	International Bar Association
IBA Rule	IBA Rules on the Taking of Evidence in International Arbitration 2010
ICC	International Chamber of Commerce
ICC Rules	ICC Rules of Arbitration 2012
ICSID	International Centre for Settlement of Investment Disputes
New York Convention 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
OECD	Organisation for Economic Co-operation and Development
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997
UNCAC	United Nations Convention Against Corruption 2005
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules, as revised in 2010
UNCITRAL Module Law	UNCITRAL Module Law on International Commercial Arbitration 1985, with amendments as adopted in 2006

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I Introduction

A Research Question

This paper aims to address the question of what are the appropriate burden of proof and standard of proof in order to prove and adjudicate corruption allegations in international arbitration.

At the first glance, corruption which is usually of public nature appears extraneous to a private forum such as international arbitration. Counter-intuitively, corruption allegations in fact are raised and apposite to many international arbitral cases. Today, it is no longer unusual for an arbitral tribunal to hear a dispute where a party alleges the opposing party of bribing public officials overseas. For instance, a principal from country A enters into an intermediary contract with an intermediary in country B. According to the contract, the intermediary agrees to assist the principal in participating in country B's market. Consequently, the intermediary obtains a procurement contract with a State owned company on behalf of the principal. However the principal refused to make payments as committed under the intermediary contract. The intermediary therefore initiates the international arbitration. During the arbitral proceedings, the principal claims that the intermediary does not perform any work under the intermediary contract, except for bribing public officials in country B, in order to secure the procurement contract. Corrupt conducts, if proved, could render the underlying intermediary contract void and unenforceable. Therefore, by substantiating the corrupt conduct of the intermediary, the principal may be completely released from its financial liability to the intermediary.

Despite the frequency of corruption allegations, the number of arbitral awards which actually addressed and adjudicated the issue is questionably limited. Even when arbitrators unavoidably addressed corruption allegations, their approaches seemed ambiguous, inconsistent and to some extent, self-contradictory.¹

The rules of evidence, namely the burden and standard of proof, are arguably the most controversial issue in the contemporary international arbitration. The burden of proof was occasionally reversed from an alleging party to an alleged party to tackle the obstacles in proving corruption. However, such a reversal is being constantly challenged and questioned by most academics and arbitrators.² They argue that the burden of proof is absolute and cannot be shifted. A shift in burden of proof is therefore inconsistent with the principle of fair trial and the equality between the parties.

¹ Aloysius P Llamzon *Corruption in International Investment Arbitration* (Oxford University Press, Oxford, 2014) at [8.01].

² For instance, see Michael Hwang and Kevin Lim "Corruption in Arbitration — Law and Reality" (2012) 8(1) *Asian International Arbitration Journal* 1 at 19.

In addition, arbitrators consensually acknowledge that corruption is difficult to prove while international arbitration is inherently devoid of tools for investigating, prosecuting and proving corruption allegations. Nonetheless, many of them heightened the applicable standard of proof on the basis that corruption allegations and their consequences are too serious to lower the bar. Such predicament unavoidably leads to the current deadlock where corruption allegations are rarely found in international arbitration.³

B Scope of Research Paper

For the purpose of addressing the research question within the word limit, this paper is limited to the following aspects:

- (a) The paper only considers corruption allegations raised by any dispute party and involving the opposing party in relation to the underlying contract. It does not cover corruption allegations which may involve international arbitrators, witnesses or any other person or factor relating to the arbitral proceedings.
- (b) The discussion on the applicable rule of evidence is made in the context that arbitrators need to address corruption allegations which are raised by the parties in order to issue their arbitral awards. As a matter of fact, it is widely acknowledged that corruption related cases are arbitrable⁴ and arbitrators have the jurisdiction to arbitrate them.⁵
- (c) While this paper focuses on international commercial arbitration, it will concurrently consider other arbitral case law in international investment arbitration. Commercial arbitration is established on a contractual basis while investment arbitration is based on bilateral investment treaties. As investment arbitration is less confidential and private than commercial arbitration, a large number of investment arbitral awards have been published in full.⁶ In comparison, far less commercial arbitral awards are published and many of them are in redacted form. Therefore, the review of commercial arbitration case law is sometimes impeded by the lack of details regarding the tribunals' reasoning on the key issues.⁷ Furthermore, as a considerable number of arbitrators are active in

³ Cecily Rose "Questioning the Role of International Arbitration in the Fight Against Corruption" (2014) 31(2) *Journal of International Arbitration* 183 at 184.

⁴ Hwang and Lim, above n 2, at 63.

⁵ For instance, the Swiss Federal Tribunal, 2 September 1993, in *National Power Corp v Westinghouse*, ASA Bull (1994) 244 at 247 approved the jurisdiction of arbitral tribunal upon the bribery allegations.

⁶ Karl-Heinz Böckstiegel "Commercial and Investment Arbitration: How Different are They Today?" (2012) 28(4) *Arbitration International* 577 at 586.

⁷ For instance, ICC Case No 3916 (1984) *Journal Du Droit International* 930 (ICC Case No 3916) is an important precedent which demonstrated the tribunal's approach to the adjudication of corruption allegations based on circumstantial evidence. However, the published excerpt of this case does not provide the details of

both commercial and investment arbitration,⁸ preferred evidentiary rules in commercial arbitration would be likely considered and adopted for investment arbitration cases and vice versa. As the concern over the burden and standard of proof is similar and unsolved in both arbitral venues, it is optimal to maintain a broad reference resource to ensure the most comprehensive view on the rules of evidence.

- (d) This paper does not aim to justify whether international arbitrators have the responsibility to pursue, investigate *sua sponte* and/or adjudicate corruption insinuations which are not raised by a dispute party.

C Structure of Research Paper

To answer the research question, the final paper aims to address the following sub-questions:

- (a) What is corruption and the current anti-corruption efforts on international and national level?
- (b) Why and how does corruption become an increasing concern in international arbitration? How are international arbitrators approaching to corruption allegations in practice? Why are international arbitrators adopting such approaches?
- (c) What are the rules of evidence which international arbitrators are applying to corruption allegations? Why are these rules inappropriate and inefficient to adjudicate corruption allegations in the context of international arbitration?
- (d) What are the recommended rules of evidence to adjudicate corruption allegations appropriately in international arbitration?

The research paper is divided into six parts: Part I is to introduce the research thesis, the scope and structure of the paper; Part II highlights the seriousness and complication of corruption; Part III elaborates the practice in which arbitrators are handling corruption allegations and the reasons for such practice; Part IV analyses the evidentiary rules applicable to corruption allegations in international arbitration based on the reported arbitral awards; Part V proposes appropriate rules of evidence with respect to corruption allegations and Part VI is to present the conclusion of the research paper.

many major issues, including the available evidence, the parties who put forward the evidence and the evaluation of the evidence.

⁸ Böckstiegel, above n 6, at 582.

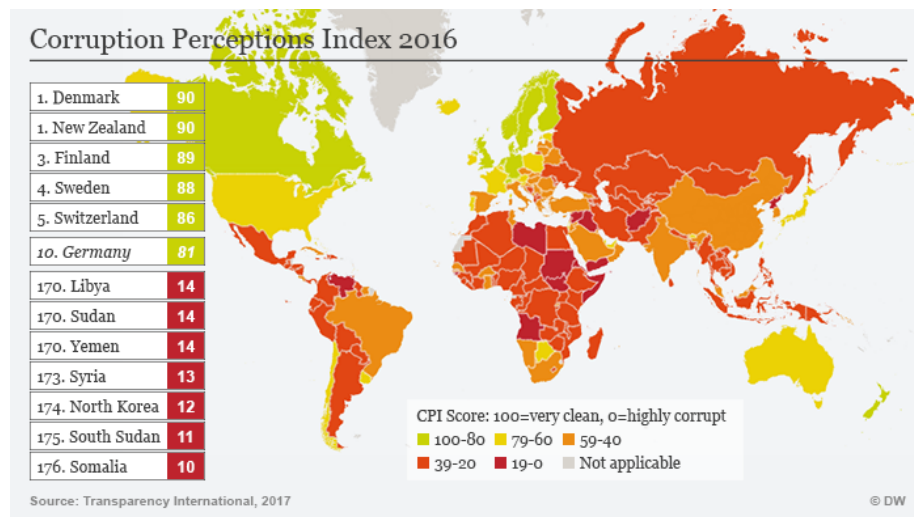
II Corruption As A Global Concern

This Part is to provide an overview of corruption from a global and national perspective. Corrupt conducts have been universally condemned and prevented. In view of the global anti-corruption trend, international arbitrators cannot be negligent and act as bystanders, especially when corruption allegations become more common and relevant to many arbitration cases. Their commitment to the corruption combat was demonstrated by the arbitral tribunal in *Himpurna v PLN*:⁹

The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. The arbitrators are well aware of the allegations that commitments by public sector entities have been made with respect to major projects in Indonesia without adequate heed to their economic contribution to public welfare, simply because they benefited a few influential people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.

A A Corrupt World

Corruption is widespread in the business world. The Corruption Perception Index in 2016 shows that almost two thirds of 176 countries worldwide scored less than 50 out of 100 points.¹⁰



⁹ *Himpurna California Energy v Perusahaan Listrik Negara (Award)* UNCITRAL (4 May 1999) Yearbook Commercial Arbitration XXV 13 at [118].

¹⁰ “Corruption Perception Index 2016” (25 January 2017) Transparency International <http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table>. The Corruption Perception Index of Transparency International is based on the scale from 0 as highly corrupted to 100 as very clean.

The World Bank's report in 2010 estimates that more than US\$ 1 trillion of the global economy is used to pay for bribes every year.¹¹ Within developing countries, approximately one quarter of the procurement contract costs is corrupted¹² and US\$ 40 billion are illegitimately appropriated by corrupt public officials.¹³ In the developed business environment such as the European Union, the corruption picture is also gloomy when 28 countries in the European Union pay more than €20 billion for corruption-related costs annually.¹⁴

To compensate for their corruption-related expenses, investors inevitably either inflate the price or detrimentally reduce the quality of their products or projects. The ultimate consequence of corruption is that the parties involved in corruption enrich illegitimately but tremendously at the costs of economic, political and social development. Meanwhile, the overwhelming majority of population suffers from deteriorating living conditions, perpetual poverty and increasing crimes.

Despite its catastrophic and corrosive impacts on the economy and public, corruption overseas are not always condemned and criminalised. There was a long period in the history where bribery of foreign public officials were widely tolerated and condoned as a normal business practice.¹⁵ For instance, companies in France and Germany were legally allowed to pay bribes to foreign public officials as a "courtesies" and such expenses were deductible for the tax purpose until the 1990s.¹⁶

B Anti-Corruption Efforts on the International and National Level

The cornerstone for the current global anti-corruption trend is the enactment of the Foreign Corrupt Practices Acts (FCPA) by the United States of America in 1977. FCPA primarily aims to prevent bribery of foreign public officials by punishing applicable entities who make undue payments to foreign public officials to obtain or retain business in the host countries. Since the promulgation of FCPA, corruption is increasingly condemned, strictly regulated and penalised by national law throughout the world.

FCPA inspired and incentivised the promulgation and development of international anti-corruption conventions afterwards. Due to the restrictions from bribing foreign

¹¹ "The Rationale for Fighting Corruption" (2014) Organisation for Economic Co-operation and Development <<https://www.oecd.org/cleangovbiz/49693613.pdf>> at 2.

¹² Llamzon, above n 1, at [1.10].

¹³ World Bank and United Nations Office on Drugs and Crimes *Stolen Asset Recovery (StAR) Initiatives: Challenges, Opportunities and Action Plan* (June 2007) at 1.

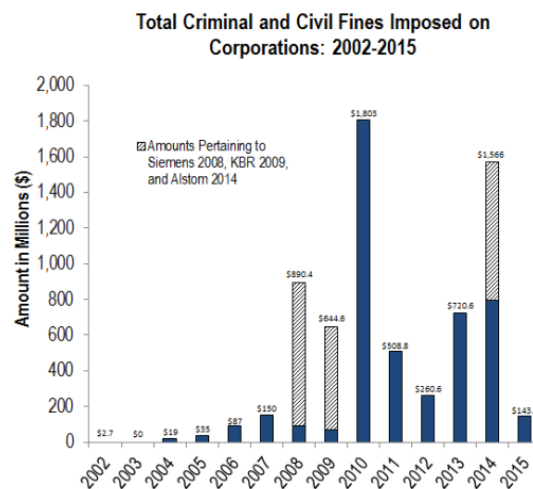
¹⁴ European Commission *Report from the Commission to the Council and the European Parliament – EU Anti-Corruption Report* (3 February 2014) at 3.

¹⁵ Llamzon, above n 1, at [1.15].

¹⁶ At [1.15].

public officials under FCPA, applicable entities realised that they no longer competed on an even play field with companies from other jurisdictions. Therefore, they urged for similar anti-corruption regulations worldwide.¹⁷ On the global scale, Organisation for Economic Co-operation and Development (OECD) passed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997 (OECD Convention) which criminalises the bribery of foreign public officials through national laws. On the basis of OECD Convention, European countries promulgated the Civil Law Convention on Corruption in 2003 governing the private corruption and the Criminal Law Convention on Corruption in 1999 covering the public corruption. More recently, United Nations promoted Convention against Corruption 2005 (UNCAC) which targets at both private and public corruption. By ratifying such international conventions, signatory countries have established and strengthen their legal regime to regulate and penalise corrupt conducts.

The investigation and prosecution of corruption violations in the criminal law sphere is stringent, evident and robust. Enforcement cases under FCPA are the quintessence in this regard. The Securities and Exchange Commission and the Department of Justice of the United States have proactively investigated and prosecuted many transnational corruption cases involving both United States and non-United States corporations and individuals. The top ten FCPA settlements comprise the total financial penalties of US\$ 4.65 billion. The most significant FCPA enforcement action is Siemens’ US\$ 800 million case in 2008.¹⁸



Source: Shearman & Sterling LLM *FCPA Digest – Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977* (January 2016) at 5.

¹⁷ Bernardo M Cremades and David J A Cairns “Corruption, International Policies and Duties of Arbitrators” (2003) 58(4) *Dispute Resolution Journal* 76 at 79.

¹⁸ See full FCPA Top Ten list at <http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html>.

To a certain extent, the dominance of German and French corporations in the FCPA Top Ten¹⁹ indicates the corollary between a country's tolerance for bribery of foreign public officials and the business behaviours adopted by its companies. While German and French companies populate the FCPA Top Ten list, Germany and France are in fact clean countries as they are ranked at the 10th and 23th respectively on the Corruption Perception Index in 2016.²⁰ Such a disparity between the local environment and the overseas business behaviours implies the importance to establish strong commitments and incentives for countries to combat corruption on both national and international level.

C Defined Concept of Corruption

The divergence in defining corruption and the complex nature of corrupt conducts contribute to the limited success in proving corruption allegations in international arbitration. Although there is a consensus on the principled approach to the corruption prevention and control, the definition, scope and specific handling of corruption under national laws diverge significantly. None of the international conventions such as OECD Convention or UNCAC provides any specific and conclusive guidance on the issues as they must be left to the discretion of the member states.²¹ As a result, a conduct may be legal in one jurisdiction but illegal in another jurisdiction. For instance, according to FCPA, facilitation payments²² are expressly permitted under certain circumstances. Meanwhile, the Bribery Act of United Kingdom completely prohibits payments of such nature and simply handles those payments as bribes.

As defined by Transparency International, corruption generally means the “abuse of entrusted power for private gain”.²³ It can be classified in various forms, subject to the seriousness, the methods, and the sectors where it happens.

- (a) With regard to the seriousness, the least serious but also the most common form of corruption is “petty corruption” or “administrative corruption”, which refers to the corrupt act of low and mid-level officials with small undue favours.²⁴ At the higher level is grand corruption which involves high level public officials which

¹⁹ Another German company, Daimler AG, was in the FCPA Top Ten until February 2016 when VimpelCom joined the list after its US\$ 397.6 million settlement.

²⁰ “Corruption Perception Index 2016” (25 January 2017) Transparency International <http://www.transparency.org/news/feature/corruption_perceptions_index_2016#table>.

²¹ Johanna Österlund “Revealing the Man behind the Curtain: Proving Corruption in International Commercial Arbitration” (LLM Thesis, Uppsala University, 2015) at 11.

²² A facilitation payment is a small payment made to a public official to expedite a service to which the payer is already entitled.

²³ “What is Corruption?” Transparency International <<http://www.transparency.org/what-is-corruption#define>>.

²⁴ United Nations *Handbook on Practical Anti-Corruption measures for Prosecutors and Investigators* (September 2004) at 23.

cause far-reaching impacts on the society.²⁵ The most severe corruption form is the political corruption which possibly distorts and manipulates the policies, rules and decision making process in a country.²⁶

In international arbitration, due to the transnational nature of the contracts, corruption usually involves foreign public officials at the high or top level in the foreign government. Part III below will illustrate the quintessence where corruption involving foreign public officials becomes central and decisive to the disputes between commercial parties in international arbitration.

- (b) With regard to sectors, corruption can be either public or private, subject to whether or not it involves public officials.

Most of the corruption allegations in international arbitration and to be considered in this paper are of public nature.

- (c) With regard to the methods, corruption mainly comprises bribery, embezzlement, trading in influence, illicit enrichment, nepotism and state capture. Corruption is also closely related to bid rigging, fraud and money-laundering.

Among the aforementioned corruption categories, bribery is the most prevalent. It is also the most common form of corruption allegations raised in international arbitration. As defined in Article 16 of UNCAC, bribery of foreign public officials means “the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business”.

III Dealing With Corruption Allegations In International Arbitration

Corruption allegations are relatively commonplace in international arbitration over the past decade.²⁷ Due to the confidentiality of international commercial arbitration proceedings, it is unlikely to obtain any conclusive aggregate of arbitral awards which have addressed corruption allegations. Nevertheless, there are at least fifty arbitral awards dealing with corruption allegations, in both investment and commercial arbitration.²⁸ In contrast to the demonstrative anti-corruption efforts on the international

²⁵ At 23.

²⁶ “What is Corruption?” Transparency International <<http://www.transparency.org/what-is-corruption#define>>.

²⁷ Rose , above n 3, at 183.

²⁸ Rose , above n 3, appendix from 230 to 264.

and national scale, dealing with corruption allegations in international arbitration appears contentious, uncertain and inconsequential.²⁹

Firstly, this Part provides a description of the common circumstances under which corruption becomes a subject matter in both commercial and investment arbitration. Secondly, it elaborates the arbitrators' current approaches to the adjudication of corruption allegations in practice. Finally, it underpins that despite the existing struggle to adjudicate corruption allegations, the demands for international arbitrators to accomplish such a duty are crucial and unavoidable.

A Quintessence of Corruption Related Cases in International Arbitration

1 *In international commercial arbitration*

Consultancy or intermediary contracts between principals and intermediaries are the most likely to trigger corruption allegations in international commercial arbitration.³⁰ The quintessential circumstances are as below:

- (a) An intermediary has procured a contract with a governmental agency for the benefit of a principal. However, the principal refuses to pay the commission fees as agreed in the consultancy contract. The intermediary brings the dispute to arbitral tribunal. The principal argues that the underlying consultancy contract is void and null on the basis that it is tainted by corruption.

In ICC Case No 9333, a French company (principal and defendant) entered into a consultancy agreement with a Moroccan nationality (intermediary and claimant) in January 1995.³¹ As a matter of fact, the intermediary's father was the mentor of Moroccan President. Through the assistance of the intermediary in accordance with the consultancy agreement, the principal obtained a 7 million French Francs contract with a State agency. Therefore, the principal agreed to pay the intermediary the commission of 1.9 million French Francs (after tax). An aggregate of 725,000 French Francs was paid to the intermediary via his company's account in Switzerland.

In July 1995, the principal was acquired by an American company. After the acquisition, the principal announced that all commission payments were to be paid only in the countries where the intermediaries were based and the services were

²⁹ Llamzon, above n 1, at [8.01].

³⁰ Hwang and Lim, above n 2, at 16.

³¹ Moroccan Agent v French Contractor (Award) ICC 9333 (1998) International Court of Arbitration Bulletin 10(2) 102 (ICC Case No 9333). See also A Timothy Martin "International Arbitration and Corruption: An Evolving Standard" (2002) 2 International Energy and Minerals Arbitration, Mineral Law Series at 51.

rendered. This restriction was to comply with the anti-corruption requirements under FCPA as the principal was headquartered in the United States and fell into the governing scope of FCPA.

As the result, the principal refused to pay the remainder of the commission to an overseas account as requested by the intermediary. With regard to the repatriation of the commission to overseas account, the intermediary explained that he needed to distribute the commission to some employees in his company who did not want to receive the payments within Morocco. However, the new manager of the principal interpreted his explanation as an acknowledgement of giving bribes to Moroccan public officials. For this reason, the principal withdrew the payment for the remaining commission. Thus, the intermediary brought the case to arbitral tribunal. During arbitral proceedings, the principal argued that the consultancy agreement was void and null as the real purpose of the consultancy agreement was to channel bribes to public officials.

- (b) On the other hand, the principal may initiate arbitration to request the intermediary to return the commission fees which it has paid.

In ICC Case No 5943, Northrop Corporation, an American company (principal and claimant) and Mr Chong Kyu Park, a Korean nationality (intermediary and defendant) entered into a consultancy agreement. Accordingly, Mr Park, who had significant influence on Korean government, agreed to assist the principal in selling fighter planes in South Korea.³² Under this consultancy contract, the principal only paid Mr Park several thousand. However, the principal subsequently entered into another contract with Asia Culture Travel Development Co, which was in fact controlled by Mr Park, with respect to the construction of a hotel and office complex. Under this contract, the principal advanced US\$ 6.25 million to a bank account hold by a friend of Mr Park in Hong Kong. Nevertheless, in practice, the principal did not even tried to apply for the prerequisite approval for its investment from Korean Ministry of Finance and the construction project never commenced. As a result, the principal initiated the arbitral proceedings to request reimbursement from Mr Park and his company.

2 *In international investment arbitration*

In addition to the aforementioned principal – intermediary relation, the State – investor relation is another common circumstance in investment arbitration where corruption allegations are made as a State defence to its liabilities for breach of investment

³² ICC 5943 (1996) 4 Journal Du Droit International 1014 (ICC Case No 5943). See also Martin, above n 31, at 25.

protection commitments.³³ Taking *World Duty Free v Kenya* for instance, after revoking the contract which it had awarded to the foreign investor, the host State released itself from all relevant liabilities by proving that the contract was procured by corruption.³⁴ *World Duty Free*, an Isle of Man company, was granted permission to build, maintain and operate duty free shops at Nairobi and Mombasa International Airports. Afterwards, due to political conflicts, Kenyan government expropriated the properties and withdrew all agreed contractual rights of *World Duty Free*. Thus, *World Duty Free* initiated the international arbitration on the basis of unlawful expropriation and breach of contract. However, Kenyan government claimed that the contract between Kenyan government and *World Duty Free* with respect to the duty free shops was void and null as it was procured by bribery of Kenyan public officials. Upon the substantiation of corruption suspicions, the arbitral tribunal uphold the argument made by Kenyan government and completely dismissed the claims of *World Duty Free*.³⁵

B Arbitrators' Approaches to the Adjudication of Corruption Allegations in Practice

Despite the frequency of facing corruption allegations, arbitrators have endeavoured to evade addressing the corruption matters as much as possible.³⁶ For instance, corruption allegations were found in only eight cases out of fifty three arbitral awards surveyed by Cecilia Rose.³⁷ Furthermore, most of such arbitral awards were issued more than a decade ago.³⁸ The most recent reported cases finding corruption conclusively is an investment arbitration case, *World Duty Free v Kenya*, in 2006.

The most significant reason for arbitrators' reluctance to address corruption allegations is the inherent challenge in proving corruption allegations during arbitral proceedings. Vastly different from the criminal law, international arbitration does not adopt any consensus or specific rule on the burden and standard of proof.³⁹ Being established or appointed in accordance with contractual arrangements between commercial parties, arbitral tribunals are substantially subject to the wide autonomy of the parties.⁴⁰ That is to say, the parties are entitled to determine every aspect of international arbitration,

³³ Tamar Meshel "The Use and Misuse of the Corruption Defence in International Investment Arbitration" (2013) 30(3) *International Arbitration* 267 at 268.

³⁴ *World Duty Free Company Ltd v Republic of Kenya (Award)* ICSID ARB/007, 4 October 2006.

³⁵ Andreas Kulick and Carsten Wendler "A Corrupt Way to Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption" (2010) 37(1) *Legal Issues of Economic Integration* 61 at 64.

³⁶ Aloysius Llamzon: *The Control of Corruption through International Investment Arbitration: Potential and Limitations*, at American Society of International Law Proceedings, 10 April 2008 <<https://www.questia.com/library/journal/1G1-210866519/international-law-and-the-fight-against-corruption>>.

³⁷ Rose, above n 3, at 197.

³⁸ At 197.

³⁹ Llamzon, above n 1, at [9.20].

⁴⁰ Abdulhay Sayed *Corruption in International Trade and Commercial Arbitration* (Kluwer Law International, New York, 2004) at 2.

including the governing laws, the appointment of arbitrators, the arbitration seat, the arbitral procedure, and the rules of evidence to be applied. According to Article 19(1) of UNCITRAL Model Law, “subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.” The arbitral tribunals can only apply the arbitral procedure which they may deem fit after the parties have failed to decide the aforesaid.⁴¹ Due to such nature, arbitrators can solely rely on the principles and propositions instead of any prescribed procedure or rigid evidentiary rule to evaluate evidence.⁴² Such ambiguity accounts for the fact that arbitrators constantly grapple but rarely succeed in establishing facts of corruption through arbitral proceedings.

In terms of burden of proof, international arbitrators express divergent opinions on who should bear the burden to substantiate a corruption allegation after it has been made and supported with prima facie evidence. Legally speaking, prima facie evidence is usually defined as “evidence which, unexplained or uncontradicted is sufficient to maintain the proposition affirmed”.⁴³ While some arbitrators permitted the burden of proof to be shifted from an alleging party to an alleged party in certain circumstances, other arbitrators and most commentators remain suspicious and concerned about such a radical approach.

In terms of standard of proof, arbitrators do not reach a consensus on whether they should apply a heightened or lower standard of proof to corruption allegations. Due to the severity of corruption allegations and their consequences, arbitrators in practice tend to apply a heightened standard of proof. However, it is phenomenally unlikely for any corruption allegation to be proved conclusively in accordance with such an absolute standard. As a matter of practice, any trace of corrupt conduct is profoundly concealed and disguised by all concerned parties. Thus, when one single party raises a corruption allegation, the evidence it provides to support its claim is usually fragmentary, inconclusive and imperfect.⁴⁴ Meanwhile, compared to State investigation and prosecution departments, international arbitrators are inherently devoid of the authority and resources to investigate corruption suspicions and compel the provision of evidence. Although a heightened standard of proof is a safe approach to sustaining corruption allegations conclusively, it contributes to the existing deadlock where corruption is rarely found in international arbitration.⁴⁵

⁴¹ Article 19(2) of UNCITRAL Model Law.

⁴² Llamzon, above n 1, at [9.20].

⁴³ Mojtaba Kazazi *Burden of Proof and Related Issues – A Study on Evidence before International Tribunals* (Kluwer Law International, the Netherlands, 1996) at 328.

⁴⁴ Llamzon, above n 1, at [9.03].

⁴⁵ Rose, above n 3, at 184.

The rules of evidence which are being applied in international arbitration will be discussed further in Part IV below.

C Demands for Arbitrators to Handle Corruption Allegations Appropriately

Despite the reluctance and struggle to deal with corruption allegations, it is unavoidable and unquestionable that international arbitrators are required and motivated to address the concerns appropriately.

The essential reason for international arbitrators' divergent approaches to corruption handling is driven from the classic question of whether they are the servant of the parties or the guarantor of the truth.⁴⁶ Subject to their own positions in the aforesaid debate, international arbitrators have demonstrated two mainstreams when dealing with corruption allegations.⁴⁷

When international arbitrators act as the guarantor of the truth, they proactively hear and adjudicate corruption allegations raised by any party. In this case, they uphold moral values which exist objectively and are considered as the cornerstone of all human decisions and conducts.⁴⁸ Most of those moral values are manifested and protected under the law.⁴⁹ However, in case the relevant law is unclear or insufficient, judges in national law or alternatively, arbitrators in international arbitration, would be able to surmount the loopholes in order to protect those moral values.⁵⁰ From this perspective, international arbitrators are responsible for ensuring that the contracts between the parties are consistent with the moral values and the relevant law.

On the other hand, when international arbitrators consider themselves as the servant of the parties, they tend to take a more passive role and avoid addressing corruption allegations as long as possible. From this perspective, international arbitration is considered as an instrument to facilitate transnational relations and protect the parties' interests.⁵¹ Thus, arbitrators' role is limited to the settlement of the disputes between the parties only.

Notwithstanding what are their positions in the aforementioned debate, international arbitrators always need to address corruption allegations which are made by dispute parties. As the guarantor of the truth, they adjudicate corruption suspicions to maintain and protect international public order. As the servant of the parties, they are responsible

⁴⁶ P Sieghart "Viewpoint" (1982) 48 Arbitration 133 at 135.

⁴⁷ Sayed, above n 40, at 9.

⁴⁸ At 9.

⁴⁹ At 10.

⁵⁰ At 11.

⁵¹ At 11.

for addressing the parties' concern, determining the validity of the underlying contract and ensuring the enforceability of their arbitral awards.

1 Duty of arbitrators to the public

With the convergence of international anti-corruption conventions, corrupt conducts certainly infringe international public order. Under international anti-corruption conventions, corruption is severely condemned as both immoral and unlawful.⁵² By ratifying and participating in those international conventions, all member states are responsible to ensure that corrupt conducts are prohibited and sanctioned under their national laws.

As a principled approach, the UNCAC requires the following main actions and cooperation from its member states:⁵³

- (a) The member states must cooperate with each other on the international scale to prevent and control corruption as corruption is, by nature, transnational and its impacts are contagious and destructive to the whole society and economy.
- (b) The member states must adopt comprehensive and multi-disciplinary approaches in order to establish and maintain an efficient anti-corruption regime.
- (c) All member states, including their governments and citizens, are responsible for the prevention and elimination of corruption.
- (d) It is essential to uphold the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and preserve the integrity and to foster an anti-corruption culture.

More specifically, in accordance with Article 16 of UNCAC, each member state is obliged to criminalise bribery violations, which are the most common corruption allegations in international arbitration.

When arbitrators act as the guarantor of the truth, they definitely would be willing and take the initiative in adjudicating any alleged corrupt conduct throughout arbitral proceedings.

When arbitrators act as the servant of the parties, the robustness of international public order remains apposite and decisive to the long-term interests of the parties. It is commonly claimed that international arbitration is a private dispute settlement forum which solely aims to serve the purposes and interests contemplated by the parties. From this perspective, international public order per se is extraneous to international

⁵² Martin, above n 31, at 5.

⁵³ Preamble of UNCAC.

arbitration. However, in the contemporary legal system, the aforesaid argument is no longer valid or widely advocated. Both international anti-corruption conventions and national laws consistently and firmly impose an obligation on their citizens, including international arbitrators and the parties themselves, to fight against corruption. As part of the society and the legal system, it is completely unjustifiable why and how international arbitrators should be immune from the aforesaid obligation and entitled to act against international public policy.

Although corruption inflicts the most devastating and far-reaching impacts on the population, it concurrently impairs international trading and distort the fair competition between investors.⁵⁴ Corrupt investors gain illegal but enormous benefits from the contracts which have been procured by corruption. On the other hand, investors who comply with the law lose the same contracts and at worst are eliminated from the market. Such illustration emphasises the fact that the protection of international public order and of economic interests are not competing targets. Instead, the better public order can be maintained, the more likely investors can compete on an even playfield and pursue their business goals.

The proponents of the proposition that arbitrators should act solely as the servant of the parties seem to view the protection of international public order separately as an excessive burden on international arbitrators. For this reason, it is necessary to reflect on the initial reasons for commercial parties to adopt and prefer international arbitration to national litigation. In practice, international arbitration has been far more favoured than national litigation for many reasons, such as language barrier, procedural disparity, unfamiliarity of national judges with the governing law and recognition and enforcement of court judgements in a foreign jurisdiction.⁵⁵ Especially, the most crucial cause for the dominance of international arbitration in transnational dispute settlement sphere is to prevent the impacts of any potential favouritism, nepotism and corruption in a host country. If international arbitration is manipulated to shelter and validate corruption of foreign public officials, commercial parties would be the first aggrieved by its adverse impacts. According to a survey from Transparency International, the percentage of people who interacted with the judiciary and paid bribes was markedly alarming.⁵⁶ Except for Europe and North America, approximately one in every four people paid bribes whenever working with judicial officials worldwide.⁵⁷

⁵⁴ Constantine Partasides “Proving Corruption in International Arbitration: A Balanced Standard for the Real World” (2010) 25(1) ICSID Review – Foreign Investment Law Journal 47 at 48.

⁵⁵ Inan Uluc “Corruption in International Arbitration” (JSD Dissertations, Pennsylvania State University, 2016) at 25.

⁵⁶ At 27. See also Transparency International *Global Corruption Report: Corruption in Judicial System XX* (May 2007) at 11.

⁵⁷ Transparency International *Global Corruption Report: Corruption in Judicial System XX* (May 2007) at 11.

Region	Percentage of people who contacted and paid bribes to the judiciary
Africa	21%
Latin America	18%
Newly Independent States	15%
South East Europe	9%
Asia – Pacific	15%
EU / Other Western European Countries	1%
North America	2%

Under the circumstance where the vast majority of jurisdictional litigation is bureaucratic, inadequate and unpredictable, international arbitration is the last resort for a fair and efficient settlement of transnational disputes. If international arbitrators also compromise with corruption and violations of international public order, they are destructing the balance and legality of international arbitration. The future international arbitration is neither more equitable nor reliable than jurisdictional litigation. Thus, it is the duty of international arbitration to preserve a fair and efficient venue to resolve transnational disputes by upholding public order.

The paradigm shift in international arbitration also reflects the increasing awareness and willingness of arbitrators to address corruption allegations. Historically, when a corruption allegation was first raised in international arbitration, the arbitrator decided not to adjudicate the issue. In the first arbitral award involving corruption allegation – ICC Case No 1110, Judge Gunnar Lagergren refused his jurisdiction on the basis that:⁵⁸

...there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.

... parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.

⁵⁸ ICC 1110 (1993) 10(3) *Arbitration International* 282 at [16] and [23].

After ICC Case No 1110, other arbitral tribunals however have adopted the opposite approach as they consistently proclaim their jurisdiction to hear corruption related disputes.⁵⁹ They widely support the doctrine of kompetenz – kompetenz which confirms arbitrators’ power to arbitrate any dispute concerning corruption.⁶⁰ Accordingly, the ICC Case No 6401 highlights that:⁶¹

It is well established that the Tribunal has jurisdiction to determine its own jurisdiction, a proposition that is not disputed by the parties. This basic principle is reflected in both the ICC Rules and Swiss law.

In addition, the power of arbitrators to hear and adjudicate corruption allegations is confirmed by important arbitral rules. For instance, Article 16.1 of UNCITRAL Model Law and Article 23.1 of UNCITRAL Arbitration Rules consistently stipulate that “the arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement”.

2 *Duty of arbitrators to the dispute parties*

While the duty of arbitrators to the public is arguably theoretical and idealistic, their duty to the parties is practical and unquestionable. As a dispute settlement forum chosen by the parties, arbitral tribunals are responsible to address corruption allegations which have been raised by any party during the proceedings.⁶²

Furthermore, the result of arbitrators’ adjudication of corruption allegations raised by any party may determine the substantial contents of arbitral awards. For instance, among twenty cases studied in investment arbitration, the evaluation and adjudication of corruption allegations is decisive to four arbitral awards.⁶³ Unlike the controversy surrounding the applicable rules of evidence, there is a global consensus about the legal consequences of contracts tainted by corruption. Accordingly, if a party can prove that a contract has been tainted by corruption, the contract would be declared void and unenforceable.⁶⁴ Taking *World Duty Free v Kenya* for example, after it became clear that World Duty Free had bribed the incumbent President of Kenya to obtain the business at issue, the arbitral tribunal declared that the contract between World Duty

⁵⁹ Martin, above n 31, at 3.

⁶⁰ Duncan Speller and Kenneth Beale “Arbitration and Bribery: Open Questions” (30 January 2012) Commercial Dispute Resolution <<https://www.cdr-news.com/categories/expert-views/arbitration-and-bribery-open-questions>>.

⁶¹ *Westinghouse International Projects Company, Westinghouse Electric SA, Westinghouse Electric Corporation, and Burns & Roe Enterprise, Inc v National Power Corporation, the Republic of the Philippines (Preliminary Award)* ICC 6401 (1991) Mealey’s International Arbitration Report 1992 7(1) Section B (ICC Case No 6401) at 17 and 18.

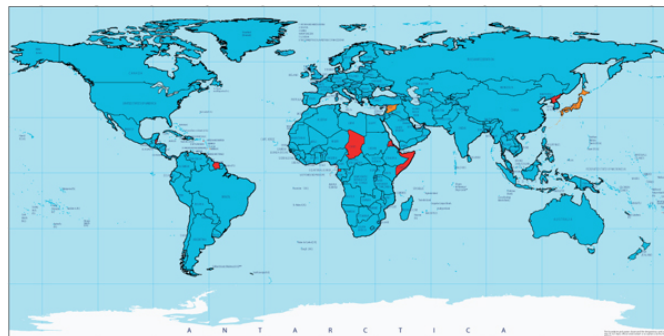
⁶² Llamzon, above n 1, at [9.04].

⁶³ At [9.04].

⁶⁴ Speller and Beale, above n 60.

Free and Kenyan government void and null on the basis of corruption. Consequently, the claim made by World Duty Free regarding Kenyan unlawful expropriation of its properties was completely dismissed. From this perspective, it can be seen that dealing with corruption allegation is not only a legal or theoretical responsibility for international arbitrators but also a matter of practice and necessity.

Most importantly, an appropriate evaluation and adjudication of corruption allegations would be able to ensure the recognition and enforceability of an arbitral award. As a servant of the parties, arbitrators have the obligation to ensure that their arbitral awards can be recognised and enforceable under the relevant national law. For instance, in accordance with Appendix IV, Article 41 of ICC Rules, arbitral tribunals are required to provide every effort to ensure that “subsequent award is enforceable at law.” Due to international arbitrators’ noticeable reluctance to address corruption allegations appropriately, there is an increasing concern that international arbitration may become a safe harbour for contracts which have been procured or tainted by corruption.⁶⁵ Accordingly, as arbitral awards are final, binding against the parties and enforceable similarly to court judgments, they may legalise and validate contracts which otherwise would have been illegal and sanctioned by national law. Nonetheless, pursuant to Article V.2 of New York Convention 1958, the recognition and enforcement of an arbitral award can be rejected by a country if such country deems the recognition and enforcement of the arbitral award in question contrary to its public policy. There is no doubt that an arbitral award which countenances corruption is in infringement of the public policy uphold by most countries around the world. As of the date hereof, 140 countries have ratified the UNCAC. Once a country ratifies an international convention on anti-corruption, harbouring corruption would be considered as a breach of its public policy.⁶⁶



Signatories: 140

Parties: 180

■ States Parties
■ Signatories
■ Countries that have not signed or ratified the UNCAC

Source: <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

⁶⁵ Vladimir Khvalei “Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption” (2013) 24 ICC International Court of Arbitration Bulletin 15 at 16.

⁶⁶ William Fox “Adjudicating Bribery and Corruption Issues in International Commercial Arbitration” (2009) 27(3) Journal of Energy and Natural Resources Law 487 at 500.

Hence, regardless of their attitude and positions on corruption issues, international arbitrators always have the responsibility and the need to address corruption allegations raised by dispute parties during arbitral proceedings. For this purpose, arbitrators need to be equipped with adequate evidentiary rules which can enable them to evaluate and adjudicate corruption allegations appropriately.

IV Existing Rules Of Evidence In International Arbitration

Rules of evidence, namely the burden and standard of proof, are decisive to the success in proving corruption during international arbitration.⁶⁷ Due to the complex and diverse nature of corruption, it is extremely unlikely to substantiate corruption allegations through arbitral proceedings conclusively. Therefore, whether or not international arbitrators find corruption mainly depends on whether the evidence presented by the parties satisfies the predetermined rules of evidence.⁶⁸

Traditionally, international arbitral tribunals applied the rules of evidence which were effective in the jurisdictions where they were seated.⁶⁹ However, whereas the party autonomy and the tribunal discretion is the nucleus of international arbitration, such tendency is apparently too constrained.⁷⁰ Today, international arbitration is no longer restricted to any predetermined evidentiary rule in any national law or legal system.⁷¹ They are entitled to decide on any rule of evidence which they may deem fit for the case at issue.

The discretion exercised by international arbitrators plays a central role in the determination of evidentiary rules during arbitral proceedings.⁷² Accordingly, the International Court of Justice has confirmed that “[t]he appraisal of the probative value⁷³ of documents and evidence appertained to the discretionary power of the arbitrator is not open to question”.⁷⁴ In acknowledgement of the arbitral discretion, international arbitration institutions therefore do not adopt any specific rule on the

⁶⁷ Österlund, above n 21, at 23.

⁶⁸ Francisco Blavi and Gozalo Vial “The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scale?” (2016) 39 *Hasting Int’l & Comp L Rev* 41 at 46.

⁶⁹ Sayed, above n 40, at 90.

⁷⁰ Jeffrey Waincymer *Procedure and Evidence in International Arbitration* (Kluwer Law International, the Netherlands, 2012) at 745 and William W Park “Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure” (2007) 23(3) *Arbitration International* 499 at 500.

⁷¹ Sayed, above n 40, at 90.

⁷² Abhinav Bhushan “Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line Rule?” (2014) 25 *Am Rev Int’l Arb* 601 at 2.

⁷³ See Sayed, above n 40, at 93: “Probative value is the tendency of evidence to establish the proposition that it is offered to prove.”

⁷⁴ Judgment of 18 November 1960, Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (*Honduras v Nicaragua*) [1960] ICJ REPORT 215 – 216.

burden and standard of proof. Alternatively, they generally provide arbitrators with a right and obligation to evaluate evidence according to the rules which they may deem appropriate. Article 27(4) of UNCITRAL Arbitration Rules and Article 9(1) of IBA Rules provides similarly that “the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence.” According to Article 25(1) of ICC Rules, “the arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means”. In other words, arbitrators can decide, at their discretion, the applicable rules of evidence on a case by case basis provided that such rules may ensure the procedural efficiency, fairness and equality between the parties.⁷⁵ When a corruption allegation is the subject matter of an ongoing dispute, arbitrators’ discretion becomes crucial to the outcomes of corruption findings and the arbitral awards. The advantage of such flexibility is that arbitrators can select the most apposite evidentiary rules on a case by case basis. Further, it solves the considerable controversy over whether the evidentiary rules in civil law or common law system should be applied in international arbitration.⁷⁶

Nonetheless, the arbitral discretion and absence of predetermined rules is the main reason why international arbitrators are grappling with corruption allegations in practice.⁷⁷ To deal with the indecisiveness and ambiguity in rules of evidence, some arbitral tribunals ended up making conclusion on corruption allegations without elaborating the applicable rules of evidence.⁷⁸ Such avoidance is not an appropriate solution to the adjudication of corruption allegations. In addition to remain autonomous and flexible, it is crucial for international arbitration, as a reliable international dispute settlement venue, to adopt comprehensive and systematic approaches. While universally determinate evidentiary rules are undesirable and infeasible, international arbitrators should at least achieve a common understanding and methodology to ensure that their interpretation and application of evidentiary rules is justifiable, consistent and practicable.⁷⁹

A Burden of Proof

Burden of proof dictates the party who is responsible for substantiating a claim.⁸⁰ The most essential and unanimous principle behind the burden of proof is that a party must prove the facts it relies on for its claim or defence (*actori incumbit probatio*).⁸¹ Article

⁷⁵ Sayed, above n 40, at 90.

⁷⁶ Francois Ruhlmann and Olivier Gutkes “The Absence of Specific Rules of Evidence in International Arbitrations: Desirable Remedies” (1995) 4 IBLJ 437 at 438.

⁷⁷ Llamzon, above n 1, at [1.18].

⁷⁸ Rose, above n 3, at 195.

⁷⁹ Sayed, above n 40, at 91.

⁸⁰ Llamzon, above n 1, at [9.15].

⁸¹ Article 24.1 of the UNCITRAL Arbitration Rules.

27(1) of UNICTRAL Arbitration Rules provides that “each party shall have the burden of proving the facts relied on to support his claim or defence”. In practice, this principle is adopted in most reported cases in international arbitration.⁸²

1 Arguments in favour of shift in burden of proof

Despite the straightforward principle, the application of burden of proof in international arbitration is problematic at times. In practice, most corruption related cases are phenomenally complex, obscure and involve intertwined and inconclusive claims, defences and counterclaims. Thus, it is extremely unlikely for one single party to provide conclusive evidence to sustain its claim. Following the principle, some arbitral tribunals were hesitant to determine the party responsible for providing further evidence and persuading the tribunals that the alleged fact is true (or untrue) in order to solve the dispute.⁸³ To break the impasse, they allowed the burden of proof to be shifted from an alleging party to an alleged party upon the presence of prima facie evidence. One of the most famous cases where a shift in burden of proof was authorised is ICC Case No 6497:⁸⁴

[4] The alleging party may bring some relevant evidence for its allegation, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter evidence, the arbitral tribunal may conclude that the facts alleged are proven (Art. 8 Swiss Civil Code). However, such change in the burden of the proof is only to be made in special circumstances and for very good reasons.

The foremost reason for giving effect to a shift in burden of proof is the party freedom and the tribunal discretion.⁸⁵ As a matter of principle, the parties may decide all aspects of arbitration, including the appointment of arbitrators, the seat of arbitration, the governing law and the applicable rules.⁸⁶ In the absence of parties’ contractual arrangement, arbitral tribunals are subsequently entitled to determine at their discretion the evidentiary rules to be applied in the arbitral proceedings.⁸⁷ From this perspective, there is nothing restricting arbitral tribunals from allowing the burden of proof to be shifted from an alleging party to an alleged party, if they deem such reversal appropriate and necessary.

⁸² Martin, above n 31, at 6.

⁸³ Blavi and Vial, above n 68, at 48.

⁸⁴ ICC 6497 (1999) Yearbook Commercial Arbitration XXIV 71 (ICC Case No 6497) at [4].

⁸⁵ Blavi and Vial, above n 68, at 51.

⁸⁶ At 51.

⁸⁷ At 51.

Furthermore, a shift in burden of proof arguably enhances the coherence of the arbitral proceedings and the likelihood of corruption findings.⁸⁸ The purpose of international arbitration, in general, and of evidentiary rules, in particular, is to improve the efficiency of dispute settlement while maintaining an appropriate equipoise with the truth seeking process.⁸⁹ Legally speaking, the evidentiary rules manifest the compromise between the truth seeking and the efficiency of legal proceedings.⁹⁰ By nature, they do not guarantee a definitive gateway to the truth but instead provide a benchmark against which arbitrators can evaluate the presented evidence and establish a factual account of events.⁹¹ As a matter of fact, corruption is intrinsically difficult to prove whereas international arbitrators always face a lack of sufficient resources to establish the facts of corruption conclusively. Therefore, a shift in burden of proof is believed to be an essential solution to such a dilemma.⁹² This proposition is based on the fact that an alleging party is unlikely to provide conclusive evidence to support its claim.⁹³ On the other hand, with the potential to access to additional evidence related to the claim, an alleging party should be responsible for providing counter evidence to prove the fact.⁹⁴ Taking intermediary contracts for example, a principal may allege that an intermediary receives an excessively high commission but does not provide any legitimate service rather than paying bribe to foreign public officials. In this case, once the burden of proof is shifted to the intermediary, it can prove its innocence easily by submitting counter evidence such as the proof of services rendered or the breakdown of the legitimate expenses it has spent during the performance of the intermediary contract.

Therefore, the burden of proof arguably can be reversed as long as the required provision of counter evidence is “possible” and “not too burdensome” to the requested party and “only under special circumstances” and “for very good reasons”.⁹⁵ Nevertheless, it is noteworthy that all of the aforementioned conditions are unclear and subject to interpretation of other arbitral tribunals in case they wish to apply them. Such ambiguity undoubtedly leaves the door open for further controversy.

2 *Arguments against shift in burden of proof*

Notwithstanding the aforesaid arguments, a shift in burden of proof is not widely supported in international arbitration. A long standing principle in law is that the burden

⁸⁸ At 55.

⁸⁹ Waincymer, above n 70, at 744.

⁹⁰ At 746.

⁹¹ At 746.

⁹² Österlund, above n 21, at 36.

⁹³ At 36.

⁹⁴ At 36.

⁹⁵ ICC Case No 6497, above n 84, at [4].

of proof is absolute and never shifts.⁹⁶ The arbitral tribunal in ICC Case No 7047 discussed the issue in detail.⁹⁷

[54] If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the *defendant* to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts *and* the burden of proof are therefore upon the defendant.

The most crucial argument against a shift in burden of proof is its likelihood to infringe the fair trial principle and the equality between the parties.⁹⁸ The historic rule on burden of proof requires that the burden of proof lies upon him who affirms, not upon him who denies (*ei qui affirmat non ei qui negat incumbit probatio*).⁹⁹ Such predetermined mechanism reasonably compels an alleging party to substantiate any alleged fact based on which its claim is made.¹⁰⁰ The same party would bear the subsequent risk if the allegation cannot be substantiated and the claim is dismissed.¹⁰¹ Furthermore, the clear-cut rule is crucial and practicable as it enables the parties to predict who bears the burden to prove an allegation and therefore be incentivised to provide the best evidence.¹⁰²

When the burden of proof is reversed upon the presence of inconclusive evidence which is commonly known as *prima facie* evidence, it means an alleged party is required to prove (or disprove) a fact based on which an alleging party is claiming its benefits. Such requirement is unreasonable and unfair, especially because the threshold imposed by the *prima facie* evidence is questionably low. If an arbitral tribunal insists on a shift in burden of proof in compliance with the fair trial and equality principles, it must raise the threshold for the required *prima facie* evidence. In the end, the debate is centred on the standard of proof which such *prima facie* evidence must satisfy before the burden of proof can be shifted to an alleged party.¹⁰³

⁹⁶ Waincymer, above n 70, at 763.

⁹⁷ *Westarcre v Jugoimport (Award)* ICC 7047 (1994) Yearbook Commercial Arbitration XXI, (1996) 79 at [54].

⁹⁸ Australian Law Reform Commission *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws (ALRC Interim Report 127)* (3 August 2015) at [11.5]. The principle in the criminal proceedings is that prosecutors must bear the burden of proof. It is argued that a shift in burden of proof is 'repugnant to ordinary notions of fairness'.

⁹⁹ Blavi and Vial, above n 68, at 46.

¹⁰⁰ Waincymer, above n 70, at 761 and Blavi and Vial, above n 68, at 43.

¹⁰¹ Waincymer, above n 70, at 761 and Blavi and Vial, above n 68, at 43.

¹⁰² Österlund, above n 21, at 27.

¹⁰³ Rose, above n 3, at 217.

Another significant concern about a facile reversal of burden of proof is its potential to incentivise reckless or manipulative corruption allegations. In *Thunderbird v Mexico*, Thunderbird paid US\$300,000 to its lawyers for obtaining a letter from a Mexican governmental agency which confirmed that there was no restriction to Thunderbird's gaming business under Mexican law.¹⁰⁴ Due to the aforesaid success fee, Mexico insinuated Thunderbird of corrupt conduct but never provided any evidence or legal argument for such allegation. Professor Thomas Wälde, in his separate opinion, expressed that while such immature insinuation was not upheld by in the arbitral award, it in fact hung "like a heavy dark cloud over the case" and affected the tribunal's assessment of the success fee in question.¹⁰⁵

B Standard of Proof

Standard of proof defines the satisfactory threshold of evidence in order to establish a fact or a case.¹⁰⁶ If such standard is not satisfied, it is concluded that the alleged fact is not established and consequently the party who is bearing the burden of proof would lose the case.¹⁰⁷ In *Rompetrol v Romania*, the distinction between burden of proof and standard of proof is elaborated as follow:¹⁰⁸

[178] The burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute whereas the standard of proof is relative.

As arbitrators come from different legal background, their approach and opinions to the applicable standard of proof diverge significantly.¹⁰⁹ The standard of proof in the civil law system is commonly referred to as 'inner conviction of the judge'.¹¹⁰ It means that national judges will assess whether the evidence presented is convincing up to their satisfaction. In comparison, the standard of proof for civil cases in the common law

¹⁰⁴ *International Thunderbird Gaming Corporation v the United Mexican States (Award)* NAFTA / UNCITRAL, 26 January 2006 at [54].

¹⁰⁵ Thomas Wälde "Separate Opinion in the Arbitration under Chapter XI of the NAFTA and the UNCITRAL Arbitration Rules: *Thunderbird v Mexico*" (December 2005) ITALaw <<http://www.italaw.com/sites/default/files/case-documents/ita0432.pdf>> at [111].

¹⁰⁶ Mortiz Brinkmann "The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure" (2004) 4 Unif L Rev 875 at 875.

¹⁰⁷ At 875.

¹⁰⁸ *Rompetrol Group NV v Romania (Award)* ICSID ARB/06/3, 6 March 2013 at [178].

¹⁰⁹ Michael J Bond "The Standard of Proof in International Commercial Arbitration" (2011) 77(3) Arbitration 304 at 305.

¹¹⁰ Florian Haugeneder and Christoph Liebscher "Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof" in Christian Klausegger, Peter Klein, et al (ed) *Austrian Arbitration Yearbook 2009* (C H Beck, Stampfli & Manz, 2009) 539 at 546 – 547.

system is described as ‘balance of probabilities’ or ‘preponderance of the evidence’.¹¹¹ According to this standard, national judges must be convinced that an allegation is more likely than not in order to establish the fact as alleged. Regardless of the standard to be applied, it is unavoidable that the evaluation of evidence comprises both objective factors and subjective viewpoints of the relevant judges. In a nutshell, the standards of proof with respect to civil cases in the civil law system and the common law system are not noticeably different.¹¹²

In addition, the standard of proof applicable to criminal offences in the common law system is ‘beyond reasonable doubt’.¹¹³ It means an allegation cannot be established as long as reasonable doubt remains. That is to say, a reasonable doubt is dismissed if a person establishes the fact based on a fair, comprehensive and prudent review of the presented evidence.¹¹⁴

In general, the ‘balance of probabilities’ standard is the most frequently applied in both international commercial and investment arbitration.¹¹⁵ However, when facing allegation of contra bonos mores such as corruption, international arbitrators tend to heighten the standard of proof.¹¹⁶ According to a survey on international arbitration case law, fourteen out of twenty five arbitral awards applied a high standard of proof.¹¹⁷ The heightened standard could be depicted differently by arbitral tribunals, such as ‘beyond reasonable doubt’,¹¹⁸ ‘clear and convincing’,¹¹⁹ and “irrefutable evidence”¹²⁰. In other cases, the arbitral tribunals either applied the normal weighing of evidence (which is commonly the ‘balance of probabilities’) or tactically did not specify what the applicable standard of proof was.

¹¹¹ At 546 – 547.

¹¹² Brinkmann, above n 106, at 891.

¹¹³ Haugeneder and Liebscher, above n 110, at 547.

¹¹⁴ Bond, above n 109, at 313.

¹¹⁵ Robert Pietrowski “Evidence in International Arbitration” (2006) 22(3) *Arbitration International* 373 at 409.

¹¹⁶ At 409.

¹¹⁷ Antonio Crivellaro “Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence” in Kristine Karsten and Andrew Berkeley *Arbitration: Money Laundering, Corruption and Fraud* (ICC Publishing SA, France, 2003)109 at 115.

¹¹⁸ For example, see *Oil Fields of Texas v Iran* (1986) 12 Yearbook Commercial Arbitration 292. The tribunals ruled that “*If reasonable doubts remain, such an allegation [of corruption] cannot be deemed to be established*”.

¹¹⁹ For example, see *Waguih Elie George Siag and Clorinda Vecchi v the Arab Republic of Egypt* (Award) ICSID ARB/05/15, 1 June 2009 at [326]. The tribunals applied that standard which was “... greater than the balance of probabilities but less than beyond reasonable doubt” or “clear and convincing evidence”.

¹²⁰ For example, see *African Holding Company of America Inc and Société Africaine de Construction au Congo SARL v the Democratic Republic of the Congo* (Award) ICSID ARB/05/21, 29 July 2008.

1 *Heightened standard of proof*

The heightened standard of proof is preferred when arbitral tribunals are concerned about the seriousness of corruption allegations and the possibility to invalidate the underlying contracts. It is commonly accepted that the more serious an allegation is, the more stringent the applicable standard of proof should be.¹²¹ According to this principle, the applicable standard of proof is frequently heightened up to ‘beyond reasonable doubt’ or requires ‘clear and convincing’ evidence. While there is no specific prescription for the ‘clear and convincing’ evidence, it is generally considered as the average of ‘balance of probabilities’ and ‘beyond reasonable doubt’ standards.¹²² To satisfy this requirement, the presented evidence must be more convincing than the ‘balance of probabilities’ standard but not necessarily ‘beyond reasonable doubt’. The arbitral tribunal in ICC Case No 6401 emphasised “clear and convincing evidence amounting to more than a mere preponderance and cannot be justified by mere speculation”.¹²³

The heightened standard of proof is strongly advocated especially when the burden of proof is shifted from an alleging party to an alleged party.¹²⁴ It prevents the alleging party from making baseless corruption allegations and unfairly passing the responsibility for persuading the arbitral tribunal to the alleged party.¹²⁵

In practice, the arbitral tribunal in ICC Case No 5622 took the most cautious approach by directly applying the ‘beyond reasonable doubt’ standard in criminal law:¹²⁶

In the present case, bribery has not been proved beyond doubt. It is true that it is possible to prove something through indirect evidence and that Article 8 of the Swiss Civil Code does not exclude indirect evidence. However, it is necessary that a sufficient ensemble of indirect evidence be collected to allow the judge to base his decision on something more than likely facts, i.e., facts which have not been proven. Thus, evidence of bribery has not been given and the indirect evidence is not sufficiently relevant.

As seen above, even when the arbitral tribunal accepted the admission of indirect evidence, the ensemble of the indirect evidence unsurprisingly failed to satisfy the stringent threshold set up by the ‘beyond reasonable doubt’ standard.

¹²¹ Martin Hunter “Modern Trends in the Presentation of Evidence in International Commercial Arbitration” (1992) 3(1) *American Review of International Arbitration* 204 at 211.

¹²² Bond, above n 109, at 313.

¹²³ ICC Case No 6401, above n 61, at [33] – [35].

¹²⁴ Martin, above n 31, at 7.

¹²⁵ At 7.

¹²⁶ *Hilmarton v Omnium de Traitement et Valorisation (Award)* ICC 5622 (1988) *Yearbook Commercial Arbitration* XIX 105 at [23].

Despite being less stringent than the aforementioned case, the arbitral tribunal in ICC Case No 6401 also applied a heightened standard of proof. The tribunal decided the applicable rules of evidence in consistency with the relevant rules in the national laws of the United States and the Philippines.¹²⁷ In general, the Philippines and the United States similarly require that “the party having the burden of persuasion must establish the facts on which it relies by a preponderance of evidence”.¹²⁸ However, both jurisdictions impose a higher standard of proof on corruption suspicions which are considered as fraud in civil cases. Accordingly, the tribunal ruled that:¹²⁹

However, in the Philippine and in the United States, fraud in civil cases ‘must be proved to exist by clear and convincing evidence amounting to more than mere preponderance and cannot be justified by a mere speculation. This is because fraud is never lightly to be assumed.

Thus the Tribunal will apply a ‘clear and convincing evidence’ standard to the Defendant’s claims of bribery.

However, the aforesaid equitation of corruption with fraud in the context of international arbitration is questionable.¹³⁰ Despite the similar deceitful and obscure nature, corruption is far more complex and challenging to prove than fraud in international arbitration.¹³¹ Only one side of a transaction would attempt to conceal its traces of fraudulent conducts. Meanwhile, as corruption usually concerns all parties related to a transaction, they would make every endeavour to conceal and camouflage their conducts. The evidence related to a corrupt conduct therefore is more intertwined and dispersed. Meanwhile, different from national criminal agencies, international arbitral tribunals do not have the same initiatives and authority to investigate corruption suspicions and compel the parties to provide evidence. Therefore, it is inappropriate to treat the adjudication of corruption allegations in international arbitration in the same manner as fraud in the national law.

Furthermore, the application of a heightened standard of proof is almost synonymous to corruption-free arbitral awards. Considering the nature of corruption and the inherent shortcomings of international arbitration, evidence presented during arbitral proceedings can rarely satisfy such an absolute standard. In other words, applying a heightened standard of proof to deal with corruption allegations in international

¹²⁷ ICC Case No 6401, above n 61, at [31].

¹²⁸ At [33].

¹²⁹ At [34].

¹³⁰ Rose, above n 3, at 197.

¹³¹ At 197.

arbitration is a self-contradictory approach. Such a conflicting position is evident in the argument made by the arbitral tribunal in *EDF v Romania*:¹³²

In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is a general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.

Regardless of inevitable difficulties in proving corruption allegations in international arbitration, the arbitral tribunal in *EDF v Romania* insistently raised the applicable threshold to ensure the task truly impossible. Apparently, the arbitral tribunal was somewhat troubled by the potential involvement of Romanian high-profile public officials and decided on the ‘clear and convincing’ evidence as a diplomatic compromise.¹³³ It is believed that some other arbitral tribunals have been unwilling to adjudicate corruption allegations which are made directly against a host State and its influential public officials.¹³⁴ For this reason, heightening the applicable standard of proof seems to be a safe choice when arbitral tribunals can take a firm stand against corruption without upsetting the host State. Nevertheless, if the heightened standard of proof is unanimously applied to handle corruption allegations, international arbitrators are essentially committed to refute all corruption allegations throughout arbitral proceedings. If adopting this approach, international arbitration would inevitably become a safe haven to validate and legalise transnational contracts tainted or procured by corruption.

2 *Moderate standard of proof*

By contrast, in order to accommodate the difficulties in proving corruption allegations, a few arbitral tribunals diverged from the tendency to heighten the standard of proof. Although they usually did not specify and elaborate the standard of proof in detail, the benchmark against which the evidence was evaluated indicated ‘the ‘balance of probabilities’ standard. This moderate standard of proof enables arbitrators to sufficiently rely on circumstantial evidence and draw adverse inferences.

In view of the reliance on prima facie evidence to reverse the burden of proof, the standard of proof applied in ICC Case No 6497 was not heightened.¹³⁵ After considering

¹³² *EDF (Services) Limited v Romania (Award)* ICSID ARB/05/13, 8 October 2009 at 221.

¹³³ T J Fox and S Wilske “Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence” (2013) 3 *Transnational Dispute Management* 489 at 498.

¹³⁴ At 498.

¹³⁵ ICC Case No 6497, above n 84, at [4].

the circumstantial evidence, the arbitral tribunal declared the underlying contract null and void for the reason that:¹³⁶

[30] There was a high degree of probability that the real object of Product Agreement Q was to channel bribes to officials in country X for this to be considered a case of bribery.

Similarly, the tribunal in ICC Case No 8891 applied a normal weighing of evidence and referred to circumstantial evidence to verify whether or not the party was likely to have the intention to conduct corruption.¹³⁷

The details of circumstantial evidence considered by the arbitral tribunal will be analysed in Part V below.

V *Recommended Rules Of Evidence In International Arbitration*

A No Shift in Burden of Proof

The burden of proof should not and need not to be reversed. As explained in Part IV above, a shift in burden of proof upon the mere presence of prima facie evidence is in the imminence of infringing the fair trial principle and the equality between the parties. As prima facie evidence per se is the lowest possible standard of proof,¹³⁸ an alleging party can pass the burden to persuade the arbitral tribunal to an alleged party in the most effortless and reckless manner. It becomes a duty of the alleged party to prove its innocence. If the alleged party fails to discharge the obligation up to the satisfaction of the arbitral tribunal, it faces the risk of losing the case as the burden of proof is sitting with the alleged party at the moment. Additionally, a facile reversal of burden of proof may stimulate dispute parties to make baseless and redundant corruption allegations as a strategy to delay and manipulate the arbitral proceedings. For the reasons above, the risk allocation mechanism implied by a reversed burden of proof is neither logical nor justifiable.

Notwithstanding the ongoing debate, a shift in burden of proof is in fact not as innovative or necessary as advocated. There are arguments that a reversed burden of proof is substantially similar to the concept of onus of proof.¹³⁹ Onus of proof is universally adopted concept which indicates the situation where a party to dispute is facing a preponderance of evidence against it.¹⁴⁰ If such party fails to provide sufficient

¹³⁶ At [30].

¹³⁷ ICC 8891 (2000) 4 Journal du droit international 1076 (ICC Case No 8891) at 1081.

¹³⁸ Rose, above n 3, at 218.

¹³⁹ Alexis Mourre “Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator” (2006) 22(1) Arbitration International 95 at 103 and Waincymer, above n 70, at 763.

¹⁴⁰ Waincymer, above n 70, at 773.

counter evidence to regain the equipoise of evidence, it may lose the case. In any circumstance, the burden of proof is always on the shoulder of the alleging party. In a nutshell, a reversed burden of proof and onus of proof operates on the same working framework. What causes a reversed burden of proof controversial and suspicious is the proposition that a minimal amount of prima facie evidence is sufficient to pass the burden of proof from an alleging party to an alleged party. In comparison, the onus of proof requires the alleging party to provide evidence to sustain its claims until the preponderance of the evidence is in its favour. Within such understanding, the applicable standard of proof is the only factor differentiating a shift in burden of proof from onus of proof.

In addition to onus of proof, the consequence of a reversed burden of proof is not significantly different from drawing adverse inferences in other circumstances. In the ordinary arbitral proceedings, after an alleging party has sustained its claim up to the applicable standard of proof, an alleged party has the right and the duty to provide counter evidence to avoid the risk of losing the case. Once the alleged party fails or refused to provide counter evidence without reasonable explanation, an arbitral tribunal may presume that the withholding of evidence aims to conceal the traces of illegal conduct and make a decision on the case against that party.¹⁴¹ Similarly, an arbitral tribunal may draw adverse reference against an alleged party who cannot provide counter evidence after the burden of proof has been shifted to it. Hwang and Lim argue that the prerequisite for arbitral tribunals to draw adverse inferences makes it different from a reversal of burden of proof.¹⁴² Under normal circumstances, arbitral tribunals draw adverse inferences against a party only if there are valid and reasonable reasons to interpret that party's withholding of information as an attempt to conceal its illegality traces.¹⁴³ However, in the case of reversed burden of proof, arbitral tribunals may draw adverse inferences against an alleged party who fails to provide counter evidence, regardless of whether such failure is deemed as suspicious or unreasonable.¹⁴⁴ Nevertheless, the aforesaid concepts are not strikingly different. If the prerequisite to reverse burden of proof is the same as the standard of proof applied in the cases of drawing adverse inferences, the process and the outcomes in practice would be identical.

In conclusion, there is a fine line among the concepts of reversed burden of proof, onus of proof and drawing adverse inferences. Thus, the proposed reversal of burden of proof should not be the centre of the debate on the evidentiary rules regarding corruption allegations in international arbitration. According to the explanations above, the

¹⁴¹ Fox and Wilsk, above n 133, at 501.

¹⁴² Hwang and Lim, above n 2, at 24.

¹⁴³ At 24.

¹⁴⁴ At 24.

question at issue is the standard of proof according to which an alleging party must substantiate its claim. For instance, the prerequisite to reverse burden of proof is that the alleging party must provide evidence to achieve the preponderance of evidence in its favour (ie ‘balance of probabilities’ standard). Subsequently, the alleged party needs to provide counter evidence to regain the balance of evidence to avoid the risk of losing the case. If the alleged party fails to do maintain such balance, it may lose the case because the preponderance of evidence is against it and/or the withholding of information is reasonably deemed suspicious. In this instance, the procedure after the reversal of burden of proof is practically a combination of onus of proof and drawing adverse inferences.

B Applying the ‘Balance of Probabilities’ Standard of Proof

International arbitrators have adopted various standards of proof to handle corruption allegations, including heightened (beyond reasonable doubt or clear and convincing evidence), lowered (mere presence of prima facie evidence) and moderate (balance of probabilities). Among them, the ‘balance of probabilities’ standard is the optimal approach to the adjudication of corruption allegations in a more balanced and practicable manner.

As analysed in Part IV above, it is a proven fact that the application of heightened standard of proof is impractical and unfit for corruption allegations in international arbitration. While all parties involved in corruption make concerted efforts to conceal and disguise their illegal conducts, arbitrators do not have sufficient tools at their disposal like State agencies to investigate, prosecute and compel the provision of evidence.¹⁴⁵ Therefore, arbitral tribunals can rarely establish a fact in accordance with such an absolute standard of proof. As a result, international arbitration would inevitably become a safe harbour for corruption tainted contracts. Meanwhile, arbitral tribunals need to adjudicate corruption allegations appropriately not only to protect international public order but also to serve the economic interests of transnational parties. A heightened standard of proof fails to assist international arbitration in achieving any of the aforesaid purposes. Therefore, the first and foremost requirement for an appropriate standard of proof is that it must be more practicable than the requirement for ‘clear and convincing’ evidence or ‘beyond reasonable doubt’.

Nonetheless, it does not necessarily indicate that a significantly low standard of proof is more favourable. If the standard of proof is unreasonably low, any corruption allegation can undesirably lead to corruption findings. The main reason for the considerable controversy about the shift in burden of proof is its promotion of such a low threshold. As soon as an alleging party presents some prima facie evidence to support its claim, an alleged party is required to provide counter evidence to prove its innocence. Even

¹⁴⁵ Martin, above n 31, at 8.

though the alleged party may successfully dismiss the immature allegation, the application of low standard of proof makes the arbitral proceedings lengthy and burdensome with redundant interaction between the alleged party and the alleging party.

Ultimately, the evidentiary rules aim to maintain the appropriate balance between the pursuit of commercial interests and the integrity of corruption findings in international arbitration. Neither the heightened nor the lowered standard of proof can achieve the aforesaid targets. In comparison, it is more practical and reasonable to maintain the general ‘balance of probabilities’ standard in corruption related arbitration cases.

First, the application of ‘balance of probabilities’ standard smoothly dismisses the need to reverse the burden of proof. Bearing the burden of proof, an alleging party is always responsible for proving its claims to be more likely than not. Once the alleging party satisfies the applicable standard of proof, the alleged party has to provide counter evidence to prevent the preponderance of evidence against it.¹⁴⁶ In case the parties cannot provide evidence to the satisfaction of the ‘balance of probabilities’ standard, the alleged party who is bearing the burden of proof will lose its claim.¹⁴⁷

Secondly, no matter how serious corruption allegations and their consequences are, the ‘balance of probabilities’ standard is the most apposite and appropriate to handle the civil claims. The paramount argument for heightening the standard of proof from the generally applied ‘balance of probabilities’ is based on the criminality of corruption.¹⁴⁸ Accordingly, as corrupt conducts are criminal offences and may lead to criminal sanctions, the threshold to establish the facts of corruption must be more stringent than other allegations.¹⁴⁹ However, corruption allegations in the context of international arbitration is always and only of civil liability nature. No arbitral tribunal can rule or enforce any criminal sanction on corrupt parties. The most likely consequence of a corruption finding is that the arbitral tribunal declares the underlying contract void and unenforceable. Thus, corruption allegations in international arbitration are not comparable to those in national law.

Furthermore, inherent difficulties in proving a serious allegation are always taken into account for the determination of the applicable standard of proof.¹⁵⁰ Even the International Criminal Court provides for exceptional circumstances under which the ‘beyond reasonable doubt’ standard in criminal law is not applied if the loss to victims

¹⁴⁶ Waincymer, above n 70, at 772.

¹⁴⁷ Österlund, above n 21, at 51.

¹⁴⁸ At 51.

¹⁴⁹ At 51.

¹⁵⁰ Partasides, above n 54, at 58.

is difficult to prove.¹⁵¹ Similar considerations are adopted by the United Nations Compensation Commission and the Claims Resolution Tribunal for Dormant Account in Switzerland.¹⁵² Constantine Partasides emphasised that many national courts, despite their full capacity to investigate, prosecute and adjudicate serious allegations, remain far more adaptable and practical than international arbitrators when dealing with serious allegations.¹⁵³ In particular, Lord Hoffmann in *Secretary of State for the Home Department v Rehman* confirmed that:¹⁵⁴

The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard.

Lord Hoffmann's further explanation also helped to debunk the confusing reaction of international arbitrators to heighten the standard of proof when facing serious allegations:¹⁵⁵

...something is inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

By analogy, when international arbitrators heighten the standard of proof to handle corruption allegations, they require that the alleged appearance of a lioness in Regent's Park must be proved 'beyond reasonable doubt'. Meanwhile, if the alleged creature is an Alsatian, international arbitrators would be satisfied if it can be proved to be 'more likely than not'. It is confusing and illogical why allegations of the same nature are required to be proved in accordance with different standards. In comparison, Lord Hoffmann's position is far more consistent and sensible. An alleging person needs to provide more evidence to convince his audience that the creature in question is a lioness instead of an Alsatian only because it is more likely to see an Alsatian than a lioness in a city. In other words, the expectation and confidence of his audience does not vary according to the alleged creature.

¹⁵¹ Partasides, above n 54, at 58 and International Criminal Court, Revised Draft Rules of Procedure and Evidence, PCNICC/2000/L.1/Rev.1/Add.1 (April 2000).

¹⁵² Partasides, above n 54, at 58.

¹⁵³ At 57.

¹⁵⁴ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2002] 1 All ER 122 at [140] – [141].

¹⁵⁵ At [140] – [141].

In conclusion, it is unjustifiable and unpractical for international arbitration to favour a more stringent and conservative standard of proof than national courts with respect to corruption allegations. While the national courts retain far more power and resources to investigate, prosecute and pursue evidence of corruption suspicions, many of them still apply the ‘balance of probabilities’ standard to handle serious allegations in civil cases. It is therefore advisable for international arbitrators to consistently apply the ‘balance of probabilities’ to evaluate and adjudicate corruption allegations. Such standard is not only practicable enough for corruption findings but also firm enough to prevent slippery slope towards baseless allegations by dispute parties.

C Considering Circumstantial Evidence

As a general rule in international arbitration, arbitrators can evaluate and decide at their discretion the admissibility, relevance, materiality and the weight of evidence. In particular, the admission of circumstantial evidence is allowed in all jurisdictions.¹⁵⁶ With the application of ‘balance of probabilities’, international arbitrators can draw more heavily on circumstantial evidence and adverse references to establish the facts.

Direct or primary evidence in international arbitration is usually documents or witness testimonies which can establish the fact on their own.¹⁵⁷ By contrast, indirect or circumstantial evidence per se is rarely sufficient to sustain a claim without the assistance of other legal tools. As defined by Judge Badawi Pash, indirect or circumstantial evidence means “facts, which while not supplying immediate proof of the charge, yet make the charge probable with the assistance of reasoning.”¹⁵⁸

Direct evidence is certainly the most favourable method to prove any allegation. However, it is extremely unlikely to substantiate corruption allegations based on direct evidence, especially in the context of international arbitration. Corruption, by nature, is usually not documented or witnessed by any unconcerned individual. In addition, as disputes in international arbitration comprise transnational parties, it is significantly complicated and challenging for any party to procure evidence of the other parties in their home countries.¹⁵⁹ *World Duty Free v Kenya* can illustrate how rarely and extraordinarily direct evidence can be submitted to substantiate corruption allegations in international arbitration. In this case, World Duty Free alleged Kenyan government of corruption and notoriously proved its allegation by direct evidence even when the alleged illegality involved itself. According to the witness statement submitted by Mr Nasir Ibrahim Ali, the Chief Executive Officer and shareholder of World Duty Free, Mr

¹⁵⁶ Waincymer, above n 70, at 793.

¹⁵⁷ Pietrowski, above n 115, at 380.

¹⁵⁸ Waincymer, above n 70, at 794 and *Corfu Channel Base, United Kingdom of Great Britain v People’s Republic of Albania (Merits)*, ICJ Reports (1949), 4, 59.

¹⁵⁹ Waincymer, above n 70, at 793.

Rashid Sajjad, who was his intermediary and had strong connection with the government, recommended him to make a “personal donation” of US\$ 2 million to the incumbent President Moi of Kenya to secure the business at issue.¹⁶⁰ Following such recommendation, Mr Ali and Mr Sajjad put US\$ 500,000 in a suitcase and left it in a corner of the meeting room where they met President Moi. At the end of the meeting, the suitcase was completely filled with fresh corn instead of money.¹⁶¹ Mr Ali asserted that he considered the personal donation as legitimate contract costs and consistent with Kenyan culture. For this reason, he properly recorded the payment into World Duty Free’s accounting books.¹⁶² Although World Duty Free’s counsel additionally argued that Mr Ali did not have the intention to bribe the President and genuinely believed the payment was lawful, such argument was not able to convince the arbitral tribunal. With its own testimony, World Duty Free inadvertently granted the victory to Kenyan government. Nevertheless, such presence of direct evidence is unlikely to re-appear in any future case as it was apparently a misguided strategy of World Duty Free during arbitral proceedings. Assuming that Kenya government had been the claimant to prove the corrupt conduct of World Duty Free, it would have been impossible for them to provide any direct evidence regarding the communication between Mr Ali and Mr Sajjad or the replacement of money with fresh corn in a private meeting between the ex-President and World Duty Free’s representatives.

Thus, circumstantial evidence may play a central role in the adjudication of corruption allegations in international arbitration. However, if the applicable standard of proof is met solely by circumstantial evidence, it would require a substantial amount of circumstantial evidence which directs towards the same fact.¹⁶³ As elaborated above, as some events are inherently unlikely than others, the prerequisite amount of circumstantial evidence to substantiate an allegation must be assessed and decided by arbitral tribunals on a case-by-case basis and in view of all other relevant factors. Furthermore, it is crucial for international arbitrators not to over generalise the implications of circumstantial evidence.¹⁶⁴ Similar circumstantial evidence may imply and lead to opposing conclusions when it is considered in the particular context of the relevant case. For instance, an excessively high commission per se is unlikely to sustain a corruption allegation. However, if the intermediary in addition fails to provide any proof of services rendered in practice and to justify the rapidity in which it secures procurement contract for the principal, the ensemble of the aforesaid circumstantial could sufficiently establish facts of corruption.

¹⁶⁰ *World Duty Free v Kenya*, above n 34, at [130].

¹⁶¹ At [130].

¹⁶² At [130].

¹⁶³ Österlund, above n 21, at 35.

¹⁶⁴ At 43.

The most common circumstantial evidence with respect to corruption allegations in intermediary contracts includes, among others, the following:

- (a) Commission fee is extraordinarily high and disproportional to the services rendered.

This can be considered as a starting point to establish facts of corruption based on circumstantial evidence. An excessively high commission fee has the substantial likelihood to lead to corruption findings. Nonetheless, it should be always noted that by nature, no circumstantial evidence is conclusive or determinative. Therefore, there is no universal threshold above which a high commission can immediately constitute facts of corruption. It is the duty of international arbitrators to justify the legitimacy of commission in view of other relevant indicators. The cases below illustrate how arbitral tribunal may have opposing positions on the acceptable level of commission fees.

In ICC Case No 8891,¹⁶⁵ the arbitral tribunal found that “it is rare that an agent receives a commission of more than 1% or 2%”.¹⁶⁶ Meanwhile, the consultant in this case received a commission fee of up to 18.5% of the price increase (approximately 700 million French Francs). Therefore, the arbitral tribunal considered the commission fee as indicia of corruption it was “excessively high, and necessarily indicated that the Consultants were expected to make payments to third parties”.¹⁶⁷

The tribunal in ICC Case No 6497¹⁶⁸ also drew the same conclusion from an extraordinarily high commission fee:¹⁶⁹

[17] ... The importance of the commission paid to Claimant in this case is indeed extraordinary. Even if Claimant alleges that, without their assistance, Respondent would have recovered nothing on those amounts, a

¹⁶⁵ This is a dispute between a consultant (claimant) and an exporter (defendant) arising from a consultancy agreement under which the consultant agreed to assist the principle in obtaining a price increase in a contract with a third party.¹⁶⁵ Before the consultancy agreement, the principal had executed a construction contract with the Ministry of Communication in a Middle Eastern country. Due to numerous problems, the project costs increased by approximately 700 million French Francs. However, the Ministry of Communication refused to increase the payments to the principal correspondingly. Therefore, the principal agreed to pay the consultant a commission fee of 18.5% of the price increase if it succeeded.

¹⁶⁶ Sayed, above n 40, at 141. See ICC Case No 8891, above n 137, at 1080.

¹⁶⁷ At 141.

¹⁶⁸ This is a dispute between a Liechtenstein consultant (claimant) and a German contractor (defendant). According to the basic consulting contract between the parties, the consultant agreed to assist the principal to obtain construction contracts in various countries, including one Middle Eastern country. Afterwards, the parties signed other specific contracts with respect to additional services and commission fees (up to 5.5%) for the consultant. The principle refused to make payments under one of those contracts on the basis that the real purpose of such contract was to bribe the public officials in the Middle Eastern countries.

¹⁶⁹ ICC Case No 6497, above n 84, at [17].

commission of 33.33% is extremely unusual. Claimant notes that the global amount of such compensation was ‘only’ representing a very small percent of the total contract value however, the services rendered here were not concerning the total value of the contract, but only the payment by the clients of two precise amounts and it is only logical that the compensation should be calculated on those amounts, as indeed is stipulated in Product Agreement Q.

However, the arbitral tribunal in ICC Case No 9333¹⁷⁰ considered a commission fee of around 30% as justifiable.¹⁷¹

All the elements mentioned by [the senior executive of the principal] show that it was particularly difficult for the defendant [the principal] to obtain the procurement contract, in a new field of activity, and even impossible without the intervention of the claimant [the intermediary]. Considering also the strategic nature of procurement contract, a commission that is higher than the normal is reasonable and justified. All seem to suggest that the defendant was ready – and bound – to pay the amount of 1.900.000 French Francs to claimant, to access a new market.

In summary, although the fee of nearly 30% of a procurement contract would appear, at first sight, excessive, it is justified in the particular circumstances of the present case. The defendant was to consider it, not in terms of percentage but rather as an absolute amount, like a necessary ‘investment’.

- (b) The nature and the manner in which the services are rendered are unexplained and suspicious.

The suspicious nature of the services, alongside with the high commission which is disproportionate to the service rendered, could be decisive to corruption findings.

In ICC Case No 8891, compared to the excessive commission, both the duration and the nature of the service were disproportionate and questionable. The initial duration of the consultant contract was only two and a half months.¹⁷² Afterwards, it was extended for another three months in total. In addition, the consultancy contract in fact terminated even before the principal achieved the price increase in the construction contract with the Ministry of Communication. Despite being alleged that it did not perform any service under the consultancy agreement, the

¹⁷⁰ See page 9 above for the summary of ICC Case No 9333.

¹⁷¹ Sayed, above n 40, at 143.

¹⁷² José Rosell and Harvey Prager “Illicit Commissions and International Arbitration: the Question of Proof” (1999) 15 *Arbitration International* 329 at 332.

consultant failed to provide any proof of the services to be rendered in practice. For these reasons, the arbitral tribunal concluded that:¹⁷³

As the Tribunal explained, it is to be expected that a Consultant's activities are documented by means of written memoranda and reports. Consequently, an agent's refusal to provide evidence of his activity constitutes *a fortiori* an indication of illicitness.

In ICC Case No 3916¹⁷⁴, the tribunal deemed the rapidity in which the consultant obtained the contracts with Iranian public agencies on behalf of the principal as one of the circumstantial evidence for its corruption findings.¹⁷⁵

- (c) The intermediaries fail to expound and justify the legitimacy of its organisational, managerial and operational structure and/or its relations with the relevant public officials.

If an intermediary withholds any crucial information of its internal organisational and managerial structure, its relationship with public officials or its beneficiaries, such withholding would be typically be deemed by arbitral tribunal as indicia of corruption.

In ICC Case No 3916, the consultant was in fact a public official who was potentially in charge of awarding the relevant contracts to the principal. In addition, while the consultant maintained another consulting firm, he refused to provide the arbitral tribunal with any detail of his firm structure or his intervention with Iranian authority in order to obtain the contracts.¹⁷⁶

In ICC Case No 8891, the arbitral tribunal was alarmed by the indication that the intermediary had a close friend working in the State agency in charge of awarding public procurement contracts.¹⁷⁷ This connection together with other circumstantial evidence completed the tribunals' reasonable interpretation of corruption.

The consultant in ICC 6497 also presented various suspicions in its identity and operations. First, it refused to provide details of its organisational structure. Additionally, during communication with the principal, the consultant referred to

¹⁷³ Sayed, above n 40, and Rosell and Prager, at 332.

¹⁷⁴ This is a dispute between an Iranian agent and a Greek principal who have entered into an intermediary contract. Accordingly the agent agreed to assist the Greek manufacturer to obtain purchase orders from Iranian administration. The commission fee was 2% of each purchase order.

¹⁷⁵ Matthias Scherrer "Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals" (2002) 5(2) International Arbitration Law Review 29 at 14.

¹⁷⁶ At 15.

¹⁷⁷ At 15.

some beneficiaries who were entitled to receive payments from them by nicknames. The tribunal concisely presented their view on this indicator as follow:¹⁷⁸

[8] This argument is not conclusive for deciding which was the real object of the agreements between the parties and if bribes were paid in fact. However, the refusal of the claimant to give more precisions weakens their own argumentation about the importance and the standing of their group.

- (d) The ubiquity of corruption in the host States renders it almost impossible to obtain public procurement contracts without committing corrupt conducts.

The reliable information of the corruption prevalence in a country can be collected from reports of international institutions such as ICC, Transparency International and OECD. In ICC Case No 3916, the tribunal expressed:¹⁷⁹

It is noteworthy that in the years when works by the Greek company were undergoing, corruption or at least influence peddling has been a constant practice. It was extremely difficult if not impossible to obtain contracts of public works without resorting to these means.

D Drawing Adverse Inferences

Drawing adverse inferences is an integral part of arbitrators' decision making process, especially when circumstantial evidence is taken into consideration. It enables arbitrators to make decisions based on circumstantial evidence in the absence or deficiency of direct evidence.¹⁸⁰ Similar to the admission of circumstantial evidence, the authority to draw adverse inferences is acknowledged in all jurisdictions.¹⁸¹ Particularly in international arbitration, Article 9(5) of IBA Rules provides that "if a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party".

In order to draw adverse inferences appropriately, arbitral tribunals need to ensure that:¹⁸²

¹⁷⁸ ICC Case No 6497, above n 84, at [8].

¹⁷⁹ ICC Case No 3916, above n 7, at 507 – 511.

¹⁸⁰ Pietrowski, above n 115, at 410.

¹⁸¹ Waincymer, above n 70, at 776.

¹⁸² Christoph Müller, Sébastien Besson and Antonio Rigozzi (eds) *New Developments in International Commercial Arbitration 2016* (Schulthess, Geneva / Zurich, 2016) at 27 – 28.

- (a) The party who requests the arbitral tribunal to draw adverse inferences has provided sufficient evidence to substantiate its allegations;
- (b) The party must have known beforehand of its obligation to provide the requested evidence in order for the arbitral tribunal not to draw adverse inferences against it;
- (c) The party whom the adverse inferences is drawn against fails to provide the requested evidence which is or can be reasonably interpreted to be accessible to that party; and
- (d) The adverse inference drawn by the arbitral tribunal is logical, relevant to and consistent with the proven facts and the withheld evidence.

The requirement (a) is addressed by the applicable standard of proof and the requirement (b) is a matter of arbitral procedure. The requirements (c) and (d) have been demonstrated in the reported arbitral awards where the tribunal actually drew adverse inferences.

In ICC Case No 8891, the circumstantial evidence comprises (i) the excessively high commission fee, (ii) the absence of proof of the services rendered in practice, (iii) the disproportion between the commission and the services and (iv) the unjustifiable relationship between the consultant and the public official in charge of awarding the relevant contracts. The consultant's withholding of the requested information was decisive the adverse inferences drawn by the arbitral tribunal. Accordingly, it was inferred that the consultancy contract was for the consultant to bribe the public officials in order to secure a price increase for the benefit of the principal. The consultancy contract therefore was declared void and null.

Similarly, the arbitral tribunal in ICC Case No 6497 drew adverse inferences as a result of the consultant's refusal to provide information without reasonable explanation. Notwithstanding the commission fee is strikingly high, the consultant refused to disclose or authorise independent auditors to inspect the bank records which enumerated the payments made to its subcontractors.¹⁸³ The arbitral tribunal inferred that the consultant's lack of cooperation was to conceal its corrupt conducts and therefore declared the relevant contract null and void.

The adverse inferences drawn by the tribunal in ICC Case No 3916 was based on the circumstantial evidence showing (i) the rapidity in which the consultant obtained the contracts, (ii) the consultant's unexplained identity and interaction with Iranian authority in charge of awarding the contracts, (iii) the ubiquity of corruption in Iran. As a result, the relevant contract was declared void and null by the tribunal.

¹⁸³ Rose, above n 3, at 202. ICC Case No 6497, above n 85, at [22] – [25]

VI *Conclusion*

The arbitral discretion and absence of predetermined rules of evidence substantially contribute to the current struggle against the adjudication of corruption allegations in international arbitration. To handle the consequential uncertainty and menace, international arbitrators have been presenting divergent opinions and approaches to the adjudication of corruption allegations. On one hand, some of them permitted a reversal of burden of proof in order to increase the chance of corruption findings in international arbitration. On the other hand, other arbitrators who are concerned with the serious nature and consequences of corruption allegations require any corruption allegations to be proved ‘beyond reasonable doubt’ or with ‘clear and convincing’ evidence. The current practice in international arbitration demonstrates that both of the aforesaid approaches fail to provide an adequate and efficient solution to corruption allegations. The reversed burden of proof sets is too lax and radical while the heightened standard of proof is too demanding and impracticable.

Due to the autonomy and discretion of international arbitration, it is neither desirable nor achievable to enforce any rigid rule of evidence with respect to the adjudication of corruption allegations. It is more important for international arbitrators to reach a common understanding and methodology in this regard. The ultimate purpose of international arbitration is to serve the commercial purposes and interests of dispute parties in compliance with international public policy. Thus, the applicable evidentiary rules to corruption allegations should be flexible enough to facilitate transnational dispute settlement but stringent enough to ensure the integrity of corruption findings.

The analysis above illustrates that the ‘balance of probabilities’ standard may address the aforesaid requirements satisfactorily. First of all, this standard is consistent with the long standing approach to civil cases of similar nature in both civil law and common law system. In addition, it dismisses the need to reverse the burden of proof whose application is too radical and controversial with the high likelihood to infringe fair trial and equality between dispute parties. Most importantly, the ‘balance of probabilities’ standard resolves the deadlock caused by the current trend to apply heightened standard of proof. Alternatively, it allows international arbitrators to draw heavily on circumstantial evidence and adverse inferences. As corruption is inherently complicated and difficult to prove, it should be substantiated by sufficient evidence which can prove that the alleged corrupt conduct is more likely than not to have happened in practice.

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