Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematization

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Arbitration is widely regarded as one of the most efficient mechanisms to solve complex commercial disputes. However, it has not yet been able to present sufficiently cohesive solutions for cases involving contracts obtained through corruption and, oftentimes, the current arbitrator's toolkit might not be enough to deal with such disputes without compromising the decision, risking its enforceability, and eventually unsettling the status quo of arbitration as an adequate mechanism for dealing with commercial disputes. To harmonize the current treatment of corruption allegations in arbitration and the broader societal fight against corruption, this article analyses the issues arising out of corruption allegations in arbitration and demonstrates how burden and standard of proof can be used as the missing link to seek such cohesiveness. Moreover, it analyses how the use of red flags – which can be obtained primarily from anti-corruption compliance practice – in arbitration is desirable. As a result, this article proposes a systemized framework for addressing allegations of corruption, in which a red flag of great gravity or the accumulation of red flags, in the absence of counterevidence or sufficient evidence to rule out the plausibility of the risk, authorizes arbitrators to apply negative inferences vis-à-vis the suspicion of corruption.

Keywords: corruption, bribery, standard of proof, burden of proof, red flags, adverse inferences, public policy, soft law, compliance, United Nations Convention Against Corruption, Civil Law Convention on Corruption

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1 INTRODUCTION

A company decides to do business in a new country. In order to obtain the right commercial contacts and navigate an overly bureaucratic local environment, the company retains the services of a well-connected consultant, whose main function is to procure business opportunities and to secure licenses to operate in the country. Five years later, these parties dispute the payment of the commissions and allegations that the agent used corruption to secure both business opportunities and licenses are made.

A local government decides to procure a new road and requests a tender. An international company wins the bid, builds the road and gets additional scope and payments during the execution of the works. The local government, now under a new administration, refuses to pay the last payments and requests full return of the price paid on the grounds that both the bid and the additional scope have been obtained due to illegal payments made to government officials of the previous administration.

Today, one can argue that arbitration has acquired the status of the most efficient mechanism and *locus* for the resolution of complex transnational disputes. However, occasionally, disputes involving contracts obtained through corruption are taken to arbitration due to, amongst other factors, a belief of protection from public exposure of spurious agreements. Arbitration, we argue, still has not been able to present sufficiently cohesive solutions for these cases.

As illustrated by the textbook examples above, the impacts of corruption are broad and far-reaching, affecting various spheres of life and undermining trust, a fundamental element in societies,[1] as well as the functioning of institutions.[2] The impacts of corrupt acts and practices also show the relevance of the discussion, with an estimated USD 1 trillion paid in bribes each year,[3] alongside some countries losing as much as 17% of their GDP (gross domestic product) to practices such as those.[4]

Currently, corruption issues are seen as part of the international (or transnational) public policy.[5] However, the content and consequences of these issues have

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1 Domitille Baizeau & Tessa Hayes, *The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte*, in *International Arbitration and the Rule of Law: Contribution and Conformity* (Andrea Menaker ed., Kluwer Law International B.V 2017).

2 Carlos F. Concepcion, *Combating Corruption and Fraud from an International Arbitration Perspective*, Disp. Resol. Int'l 23 (2017); Kathrin Betz, *Economic Crime in International Arbitration*, 35 ASA Bull. (Cambridge University Press Jun. 2017).

3 Emmanuel Gaillard, *La Corruption Saisie Par Les Arbitres Du Commerce International*, 2017 Revue de l'arbitrage (Jul. 2017); *The Impact of Corruption on International Commercial Contracts* (Michael Joachim Bonell & Olaf Meyer eds, 1st ed., Springer International Publishing 2015).

4 Joan E. Donoghue, *The Corruption Trump in Investment Arbitration*, 30 ICSID Rev. 756 (Oct. 2015).

5 Christoffer Coello Hedberg, *International Commercial Arbitration and Money Laundering: Problems that Arise and How They Should Be Resolved* (Uppsala University 2016); D. Srinivasan et al., *Effect of Bribery in International Commercial Arbitration*, Int'l J. Pub. L. & Pol'y (2014).

changed dramatically they were first mentioned back in the 1927 Geneva Convention.[6]

A set of both domestic and international initiatives set to tackle these issues, introduced in the mid-1990s, were particularly influential for such transformation,[7] transfiguring the fight against corruption (as Mark Pieth puts it) into a '*fashionable political goal*'.[8] With their introduction, a mostly consistent corpus of rules condemning these practices has unravelled, displaying a broad reprimand from the international community.[9]

A standing consensus was formed after the conclusion of multilateral instruments on the subject, such as the (United Nations Convention against Corruption) (UNCAC) and (Organization for Economic Co-operation and Development) (OECD) Conventions[10] and the introduction of section III under Chapter 3 of the (International Institute for the Unification of Private Law) (UNIDROIT) Principles of International Commercial Contracts.[11]

The evolution of the international legal framework against corruption also affected international arbitration. Starting with Judge Lagergren in (International Chamber of Commerce) (ICC) Case No. 1110,[12] corruption has been placed as a matter within the reach of the international public policy or transnational public policy.[13]

However, defining these broad concepts, what they entail, and how they are formed presents some challenges.[14] Olaf Meyer suggests that the international

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6 Gunther Horvath & Katherine Khan, *Addressing Corruption in Commercial Arbitration: How Do Arbitral Tribunals Evaluate and Adjudicate Contractual Relationships Tainted by Corruption? Section I: Studies, Articles, Commentaries*, 10 Rom. Arb. J. 72 (2016); Manuel Pereira Barrocas, *A Ordem Pública na Arbitragem*, 51 Revista de direito empresarial (Revista dos Tribunais 2014).

7 For a more comprehensive history of these reforms, *see* Bonell & Meyer, *supra* n. 3; Mark Pieth, *From Talk to Action: The OECD Experience*, in *Anti-corruption Policy: Can International Actors Play a Constructive Role?* (Paul Carrington & Susan Rose-Ackerman eds, Carolina Academic Press 2013); Carlos F. Concepción, *Combating Corruption and Fraud from an International Arbitration Perspective*, Arbitraje. Revista de arbitraje comercial y de inversiones, 369 (Iprolex 2016).

8 Pieth, *supra* n. 7, at 151.

9 Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35 Arb. Int'l 1 (Oxford Academic Mar. 2019).

10 Aloysius Llamzon et al., *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in *Legitimacy: Myths, Realities, Challenges*; Kathrin Betz, *Arbitration and Corruption: A Toolkit for Arbitrators*, J. Anti-Corruption L. 183 (2018).

11 Bonell & Meyer, *supra* n. 3.

12 Nassib G. Ziadé, *Chapter 7: Addressing Allegations and Findings of Corruption*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law* 114, 119 (Domitille Baizeau & Richard Kreindler eds, International Chamber of Commerce (ICC) 2015). However, even if the discussion was centred on jurisdictional issues, it is interesting to notice that Judge Lagergren expressly stated that '*corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations*'.

13 Gaillard, *supra* n. 9; Llamzon et al., *supra* n. 10.

14 André Chateaubriand Martins, *Os Diferentes Níveis de Ordem Pública Sob Uma Perspectiva Da Jurisprudência Brasileira Em Arbitragens Doméstica e Internacional*, 10 Revista Brasileira de Arbitragem 50 (Mar. 2013).

variant actually 'varies from state to state, depending on regional political, moral or religious views', whereas the transnational definition comprises 'a catalogue of truly international values, without (…) looking at the respective national laws'.[15]

Consequently, depending on criteria such as the seat of arbitration and where the awards will be enforced, there might be more than one public policy into play, which can include both the overarching transnational concept, but also international, regional, and domestic variants.[16] In their turn, each of those realms might have different working definitions for corruption, as well as distinct red flags for identifying it. Effectively, the 'vagueness of the definition', along with the absence of 'official standards', in practice, will leave most of the work for the arbitral tribunal.[17]

In the realm of commercial arbitration, for example, the concept of a public policy has gained additional contours, as a ruleset for determining some of the boundaries that set which awards can be deemed valid or enforceable.[18] Various sources have contributed to this, such as Article V(2)(b) of the New York Convention. Additionally, some legislations have recognized a public international policy, as illustrated by Article 1514 of the French new Code of Civil Procedure.[19]

There is also the question of how to deal with domestic rules with anticorruption provisions – the *lois de police*.[20] In any case, increasingly neither the parties nor the arbitrators can ignore these open, but determinable, concepts – at least without risking annulment.[21]

The core issue is that, although there is some interaction, arbitration practice is not perfectly aligned with the new demands: the influx has not been as cohesive and fast as the need for measures against corruption. In that sense, the lack of a

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15 *The Formation of a Transnational Ordre Public Against Corruption: Lessons for and from Arbitral Tribunals*, in *Anti-corruption Policy: Can International Actors Play a Constructive Role?* 229, 233 (Susan Rose-Ackerman & Paul D. Carrington eds, Carolina Academic Press 2013); Joachim Drude, *Fiat Iustitia, Ne Pereat Mundus: A Novel Approach to Corruption and Investment Arbitration*, 35 J. Int'l Arb. 665 (2018); Utku Cosar, *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanction*, in *Legitimacy: Myths, Realities, Challenges* 531 (Albert Jan Van den Berg ed. 2015).

16 Michael Nueber, *Chapter I: The Arbitration Agreement and Arbitrability, Corruption in International Commercial Arbitration – Selected Issues*, in *Austrian Yearbook on International Arbitration 2015* 3 (Christian Klausegger et al. eds 2015); Barrocas, *supra* n. 6.

17 Meyer, *supra* n. 15, at 232.

18 Gary Born, *Formation and Validity of International Arbitration Agreement*, in *International Arbitration: Cases and Materials* 1037 (3d ed., Wolters Kluwer 2022).

19 Barrocas, *supra* n. 6. Some jurisdictions have also been expanding what might fall within their control in terms of *international public policy*. *See* Jean-Yves Garaud, *L'office de l'arbitre En Arbitrage Commercial : Caractérisation de l'illicéité et Mise En Œuvre Des Sanctions*, 2019 Revue de l'Arbitrage 173 (2019).

20 Gaillard, *supra* n. 3; Nueber, *supra* n. 16.

21 Llamzon et al., *supra* n. 10; Barrocas, *supra* n. 6. Although it is quite a contentious issue whether the tribunal has a duty to inquire into corruption *sua sponte*. *See* Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality*, 8 Asian Int'l Arb. J. 1 (Sep. 2012); Nueber, *supra* n. 16; Deeksha Malik & Geetanjali Kamat, *Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication*, 5 Arb. Brief 22 (Jan. 2018).

uniform practice for dealing with allegations of that nature – which would be required to attain more predictability – continues to be the rule,[22] and even the proposed remedies, as mentioned, are uneven.[23]

These inconsistencies (and a broader disconnection) have been especially latent when the issue is the standard of proof required.[24] Tribunals have, overall, failed to create an adequate and consistent approach to solve the 'evidentiary impasse' in cases involving corruption, and, in general, have placed excessive burdens on the alleging party to prove their allegations.[25]

This can prove to be problematic for arbitration on a series of different fronts. As Rose-Ackerman suggests, both issues are internal (verified on a case-by-case basis, diminishing the enforceability of awards) and external (the perception of arbitration being a safe harbour for corruption).[26] Surpassing those limitations is important, both for arbitration and, more broadly, on a societal level, considering that corruption cannot be tackled by the government alone.[27] As a result, areas such as investment law, trade law, and commercial arbitration have a very important role in closing the enforcement gap.[28]

As seen above, the number of soft and hard law instruments against corruption has soared in the last decade. Nonetheless, as they are inadequate toolsets for arbitrators when dealing with corruption, they may not always help with the delivery of appropriate results, risking the enforceability of the award, or even jeopardizing arbitration's *status quo* as an adequate dispute resolution mechanism. Thus, the issue of how to deal with corruption in arbitration tends to gain even more importance.

In this context, the most relevant problem faced by arbitrators concerns the proof of corruption allegations: there is rarely direct evidence that a contract was

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22 Thomas Kendra & Anna Bonini, *Dealing With Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus?*, 31 J. Int'l Arb. 439 (Aug. 2014).

23 Susan Rose-Ackerman, *Introduction: The Role of International Actors in Fighting Corruption*, in *Anti-corruption Policy: Can International Actors Play a Constructive Role?* 3 (Susan Rose-Ackerman & Paul D. Carrington eds, Carolina Academic Press 2013).

24 Ana Gerdau de Borja Mercerau, *Caso Valeri Belokon v. Kyrgyz Republic : The Standard of Proof Applying to Corruption Allegations*, Revista De Arbitragem E Mediação (2018); R. Pereira Fleury & Q. Wang, *FCPA, UKBA, and International Arbitration: Dealing With Corruption in Latin America*, 13 TDM (Maris BV Jun. 2016); Meyer, *supra* n. 15; Ziadé, *supra* n. 12.

25 Cecily Rose, *Questioning the Role of International Arbitration in the Fight Against Corruption*, 31 J. Int'l Arb. 183 (Apr. 2014).

26 Rose-Ackerman, *supra* n. 23, at 27. In the same sense, *see* Concepcion, *supra* n. 2; Betz, *supra* n. 10; Vilmar Luz Graça Gonçalves & Daniel Becker, *Crime e Arbitragem: A Posição Do Tribunal Arbitral*, Revista dos Tribunais 23 (2019).

27 Laim Wren-Lewis, *Anticorruption Policy in Regulation and Procurement: The Role of International Actor*, in *Anti-corruption Policy: Can International Actors Play a Constructive Role?* 91 (Susan Rose-Ackerman & Paul D. Carrington eds, Carolina Academic Press 2013).

28 Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-corruption Policy*, in *Anti-corruption Policy: Can International Actors Play a Constructive Role?* 247 (Susan Rose-Ackerman & Paul D. Carrington eds, Carolina Academic Press 2013).

based on an illicit relationship, forcing parties and arbitrators to deal with circumstantial evidence and indirect evidence.

This article argues that anti-corruption compliance (and especially its sets of well-developed red flags) might provide important guidance in dealing with some of the more well-established and relevant elements in arbitration, namely the allocation of the burden of proof and the choice of the adequate standard of proof, *vis-à-vis* the subject matter in dispute.

This article also proposes to outline a theoretical framework capable of dealing coherently with the challenge of proof of corruption in arbitration. This system uses the literature of the compliance area – mainly that regarding red flags – to identify indirect evidence of corruption and, from there, make adverse inferences and dynamic evaluations of the suspicions of fraud.

The article is divided into seven parts, including this introduction. Section 2 briefly presents the main sources of allegations of corruption in arbitration. Section 3 reviews the difficulties of proving corruption in arbitration. Section 4 demonstrates how burden and standard of proof can be used to reconcile the differences that emerge from the current practices in arbitration and the fight against corruption. Section 5 introduces the legal grounds for the use of adverse inferences as a means of resolving disputes involving corruption in arbitration. Section 6 analyses the compliance literature regarding this type of indirect evidence and discusses limits and possibilities for the use of red flags in arbitration. Finally, section 7 concludes and proposes a simple test for systematization.

2 CORRUPTION AND COMMERCIAL ARBITRATION

There have long been discussions concerning the issues that arise when corruption and arbitration clash.[29] The list is long and varied, ranging from understanding what should be the consequences of a corrupt act to the underlying commercial or investment relationship, passing through what should be used to define corruption in arbitral cases, all the way to the broader debate about the role of arbitral tribunals and arbitration when there is at least suspicion that corrupt acts have been committed.

However, the conversation needs to be both broader and deeper. As Rose-Ackerman suggests, 'the international arbitration regime is the main international forum for resolving commercial disputes where corruption may be alleged', but, at

[29] Olivier Caprasse & Maxime Tecqmenne, *The Evidence of Corruption in Investment Arbitration*, 39 J. Int'l Arb. 519 (2022); Kendra & Bonini, *supra* n. 22; Hwang & Lim, *supra* n. 21; Malik & Kamat, *supra* n. 21; Andrea Menaker, *Chapter 5: Proving Corruption in International Arbitration*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 77 (Domitille Baizeau & Richard Kreindler eds 2015).

the same time, 'corruption – although recognized as an important issue – (…) remains a vexed and difficult problem for arbitrators'.[30]

Stigmatized views on corruption as a societal issue also contribute to difficulties in conducting these proceedings. Considering that *it takes two to tango*, allegations of corruption will often involve and impact both parties to an arbitration,[31] requiring adaptations to the usual toolset that is used. Therefore, the arbitral *milieu* frequently promotes policy discussions on what should be the role of courts and arbitrators when suspicions of corruption arise, and how this can contribute to the advancement of arbitration and the fight against corruption as a whole.

Commercial and investment law have relevant roles to play in the fight against corruption – including in identifying what are the applicable remedies – and will be a key part of determining how that aim is achieved.[32] The first step to do that (and to understand the dynamics of how corruption and arbitration can interact) is locating 'what crime is at stake'.[33]

In this context, the main interactions between corruption and arbitration can be classified in two main ways: (1) contracts that seek to cover up acts of corruption; and (2) contracts obtained through corruption. This division is useful as it allows for discussions regarding the effects of corruption on contracts submitted to arbitration, in a finalist and programmatic manner.[34]

2.1 Contracts providing for corruption

The first category consists of the so-called *bribery agreements* – contracts whose sole purpose is to confer an appearance of lawfulness to acts of corruption, justifying an (illicit) flow of money. Arbitration cases involving these contracts usually consist of an attempt by one of the parties to enforce an agreement that was not intended to be performed.

There is little doubt that contracts of this type are, as a rule, unenforceable, whether in arbitration or court, including by force of the principle of transnational law. Any differences in the treatment given to them in different jurisdictions are

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30 Rose-Ackerman, *supra* n. 23, at 25.

31 David Attanasio & Ana Duran, *What to Do About Corruption Allegations? – A Conference Report*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2019/04/22/what-to-do-about-corruption-allegations-a-conference-report/ (accessed 30 Dec. 2021); Baizeau & Hayes, *supra* n. 1.

32 Bonell & Meyer, *supra* n. 3.

33 Betz, *supra* n. 2.

34 *See* Gaillard, *supra* n. 3; Meyer, *supra* n. 15; Abdulhay Sayed, *Duplicity in Corruption and Arbitration: Dealing With the Evidentiary Gap*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 266 (Andrea Menaker ed., ICCA & Kluwer Law International 2017).

more related to how the unenforceability is declared: some consider these contracts as null and void *ab initio*, while others tend to declare them merely invalid.[35]

If the consequences in these agreements are clear, there are doubts surrounding the restitution of the benefits that might have been obtained – even though the idea that none of the parties may benefit from the unlawful act is uncontested.[36]

Here, responses range from a more traditional approach, which denies any remedies, to others that favour granting more discretion to the arbitrators to decide what is in the public interest. Nevertheless, doctrine agrees that there should be no overcompensation, and neither should any of the parties be able to take advantage of the illegality.[37] This is usually enshrined in domestic laws under the maxim *ex turpi causa non oritur actio*, which can be traced back to Roman Law.[38]

Both of these dimensions – consequences and remedies – have been subject to debate in the realm of commercial arbitration, alongside other relevant discussions such as what should be the burden of proof when a corruption allegation arises. Some of these developments merit examination in section 4, as they will be important for the argument in this article.

2.2 Contracts procured by corruption

If the consequences of this first category of contracts are relatively homogeneous, those of the second type – contracts that, although having lawful purposes, were obtained through corruption – create a more complex debate. This is because merely annulling a contract in effective execution may bring considerable losses to the public interest and *bona fide* third parties.[39]

Thus, the solutions adopted vary, and can be classified into at least three main categories: (1) to declare contracts null and void, regardless of the case; (2) to allow the contractor to decide between invalidating the contract or continuing its execution, without prejudice to the applicable remedies; and (3) to limit the possibility of invalidating the contract, in addition to the type of compensation that the contractor may claim.[40]

In general, the debate is still open in this respect. At the international level, for example, some instruments – such as the United Nations Convention Against

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35 *See* further: Bonell & Meyer, *supra* n. 3; Srinivasan et al., *supra* n. 5; Antonio Crivellaro, *Chapter 7. Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence*, in *Arbitration: Money Laundering, Corruption and Fraud* 109 (Kristine Karsten & Andrew Berkeley eds 2003).

36 *See* further: Bonell & Meyer, *supra* n. 3; Srinivasan et al., *supra* n. 5; Crivellaro, *supra* n. 35.

37 Gaillard, *supra* n. 9. A similar maxim is also frequently referred to in Civil Law: *Nemo auditur propriam turpitudinem allegans*.

38 Malik & Kamat, *supra* n. 21; Bonell & Meyer, *supra* n. 3.

39 Rose-Ackerman, *supra* n. 23; Meyer, *supra* n. 15.

40 Bonell & Meyer, *supra* n. 3.

Corruption and the Civil Law Convention on Corruption of the Council of Europe – suggest declaring contracts obtained through corruption to be null and void[41]; while others, such as the 2016 UNIDROIT Principles, give more room for choice to the contracting entity regarding the maintenance of the contract.[42] For now, the only identifiable trend in this respect is that arbitration seems to provide a flexible treatment, avoiding one size fits all solutions, which may even have counterproductive effects – as further demonstrated in section 4.[43]

The lack of a coherent framework has led some, especially in investment arbitration, to suggest that the use of corruption allegations is 'both a shield and a sword'.[44] Albeit identifying trends in arbitration is always difficult due to the limitations in publicly available awards and confidentiality issues, there seem to be fewer awards covering agreements in this situation.

It is safe to say that if there is more certainty in the consequences for contracts providing for corruption, the situation is much blurrier for agreements procured by corruption. As will be discussed in the next section, the aforementioned general trend that recognizes a broader context of the fight against corruption is particularly relevant and should inform how future cases handle corruption allegations.

3 PROVING CORRUPTION IN ARBITRATION

When it comes to the prosecution of corruption, any thoughts on the pros and cons of arbitral proceedings are, in the end, a trade-off analysis of costs and benefits across different settlement mechanisms. A disbalance in one of the variables – e.g., flaws in the prosecution of a fraudulent and corrupt act – may turn the audience's attention to alternative systems.

This section aims to build upon the view that, whilst arbitral proceedings must serve the parties' interest, they also need to address the societal demands for lawful, legitimate, and accountable conflict resolution systems. Out of the tension resulting from such a dual role, we aim at balancing the advantages of the arbitral jurisdiction and suggest a way forward based on the adjustment of burden and standard of proof in cases involving allegations of corruption.

Despite its many merits, some of the features that make arbitration so attractive for the resolution of complex claims may also make it difficult to satisfactorily address corruption. Part of that arises from a scenario of investigative apathy of the

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41 United Nations, *United Nations Convention Against Corruption* (2003); Council of Europe, *Civil Law Convention on Corruption* (1999).

42 UNIDROIT, *Principles of International Commercial Contracts* (2016).

43 Drude, *supra* n. 15.

44 Ayodeji Akindeire, *Corruption in Investor-State Arbitration: Balancing the Scale of Culpability*, 14 SSRN Elec. J. 4–6 (2019); *See* further: *International Centre for Settlement of Investment Disputes Case No. ARB/05/13 (2009).*

arbitrator described in some of the literature.[45] This is because, when faced with evidence of corruption, an arbitrator may often consider that he or she has no obligation to conduct investigations *sua sponte*; assess that the party alleging corruption has a duty to prove it sufficiently; or rely on a very rigid evidentiary standard. These three points are the subject of the discussions in this section.

3.1 Limitations for arbitration as a locus for prosecution of corruption

Several are the difficulties posed by viewing arbitration as the adequate locus to address the societal need to deter fraudulent and corrupt acts. These challenges are associated both with the nature of arbitration and the configuration of acts of corruption.

First, commentators list the arbitrators' capacity to delve into indicia of corruption *sua sponte propria*. The traditional view is that parties while exercising their free will, can circumscribe the substantive limits of the arbitral jurisdiction.[46] However, arbitrators 'shall make every effort to make sure that the award is enforceable at law',[47] and, in such capacity, disregarding corruption – a matter strongly refrained by the public policy of domestic jurisdictions – is deemed to be contrary to the transnational public policy[48] as set out in Article V(2)(b) from the New York Convention.[49] The eminently public nature of the arbitrator's function has also often been emphasized.[50] Disregarding these factors may unquestionably

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[45] Vladimir Khvalei, *Using Red Flags to Prevent Arbitration from Becoming a Safe Harbour for Contracts that Disguise Corruption*, 24/Special Supplement, ICC Int'l Ct. Arb. Bull. 15 (2013).

[46] Fabiane Verçosa & Guilherme Monegalha, *Como deve se comportar o árbitro diante de indícios e provas de corrupção? Algumas impressões* (*How Should Arbitrators Behave Before Facts and Evidences Towards Corruption? Some Highlights*) vol. 16, 159 (Revista dos Tribunais Oct. 2019).

[47] ICC Arbitration Rules (2017), Art. 42. *See* Baizeau & Hayes, *supra* n. 1.

[48] Betz, *supra* n. 10; Brody K. Greenwald & Jennifer A. Ivers, *Addressing Corruption Allegations in International Arbitration*, 2(3) Int'l Inv. L. & Arb. 1 (2018); Yoanna Schuch, *Tackling Corruption in International Arbitration – Key Issues and Challenges*, 8 Young Arb. Rev. 53 (2019).

[49] 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

[50] Khvalei, *supra* n. 45. *See* Deborah R. Hensler & Damira Khatam, *Re-inventing Arbitration: How Expanding the Scope of Arbitration Is Re-shaping Its Form and Blurring the Line Between Private and Public Adjudication Symposium: Re-inventing Arbitration*, 18 Nev. L.J. 381 (2017–2018); David L. Noll, *Response: Public Litigation, Private Arbitration Symposium: Re-inventing Arbitration*, 18 Nev. L.J. 477 (2017–2018); Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration*, 55 Int'l Org. 919 (Cambridge University Press 2001); Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 Int'l & Comp. L. Q. 371 (Cambridge University Press 2007).

damage the reputation of arbitration as a socially desirable conflict resolution mechanism.[51]

Since the evolution in the treatment of the matter since the 1990s,[52] corruption is now considered a problem of public policy – national and international (or transnational).[53] Public policy is an essentially open concept,[54] with varied definitions in each jurisdiction or even in the international scope, which means that its delimitation, in practice, is up to arbitrators and courts.[55] But ignoring it implies, increasingly, to risk the annulment[56] or unenforceability of the award, in direct violation of the duties of the arbitrator and with risks to the reliability of arbitration.[57]

Thus, presented with an allegation of corruption by one of the parties and in the absence of direct evidence, arbitrators are faced with a difficult problem as to the allocation of the burden of proof: requiring the facts to be proved by the party alleging corruption in the arbitration may imply in a true *probatio diabolica* resulting in inevitable cases of false negatives and the party benefiting from the act of corruption benefiting from the illicit itself. Furthermore, the adoption of a very rigid evidential standard may demand evidential efforts that go beyond a practical scope.

Although the situation highlighted above may give the impression that the best solution involves the inversion of the burden of proof and a legal system of presumptions of illicit, such a conclusion is hasty. This is because absolute reversal of the duty to prove the facts alleged in the case, as well as the adoption of an overly lenient standard of proof, may violate due process guarantees and lead to erratic results. Here, then, is the challenge

And it appears that arbitral tribunals have not yet incorporated a consistent approach to resolving this evidentiary impasse or are unclear as to the limits of their action *sua sponte*. More often than not, tribunals impose excessive evidentiary burdens on the party alleging corruption,[58] and even when they eventually

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51 As set out by Crivellaro, there are numerous cases in which arbitral tribunals have faced the issue of ex officio investigation and have not identified problems and assert jurisdiction: 'In three cases, the agreement was ex officio declared illegal and invalid, either because its purpose was illicit according to the law chosen by the parties to govern their agreement [ICC case 3913] or because it contravened international public policy [ICC case 3916] or because an award enforcing the contract would be contrary to the public policy of the country in which the award would be enforced [ICC case 4219]'. Crivellaro, *supra* n. 35, at 114.

52 Bonell & Meyer, *supra* n. 3.

53 On the consensus of treating corruption as a public policy subject, *see* Gaillard, *supra* n. 9; Llamzon et al., *supra* n. 10.

54 Martins, *supra* n. 14.

55 Meyer, *supra* n. 15.

56 Llamzon et al., *supra* n. 10; Barrocas, *supra* n. 6.

57 *See* Rose-Ackerman, *supra* n. 23; Gonçalves & Becker, *supra* n. 26.

58 Rose, *supra* n. 25.

adopt remedies, they do so without a great degree of uniformity.[59] Therefore, a discussion on the standard of proof adopted in the face of allegations of corruption in arbitration is essential – and even urgent.

Second, arbitration is a procedure strongly characterized by confidentiality. In fact, from the parties' standpoint, this is one of the key features that makes arbitration an interesting settlement mechanism. Nevertheless, confidentiality is not a guarantee and should not be sought to unduly conceal information pertaining to the public interest.[60] This explains why the International Bar Association (IBA) Rules of Ethics for International Arbitrators[61] set forth that confidential information shall be disclosed for the protection of the interests of an arbitrating party, or when the public interest requires so.[62]

Third, due process, the right to be heard, and the standards of equal treatment are toughened in arbitration.[63] This is partially a result of the fact that this proceeding competes with the judicial system and must seek legitimization by displaying thorough consideration of the parties' procedural rights. In such a context, allegations of corrupt acts must be treated with qualified caution.[64]

Fourth, when compared to the powers made available to domestic courts and criminal investigative authorities, the instructive powers of arbitrators are considerably limited. Such asymmetry has a direct impact, for example, on the tribunal's powers to obtain orders through more invasive measures.[65]

Finally, and more importantly, the nature of acts of corruption and fraud have a decisive role in determining the hurdles for their prosecution. As a rule, such acts aim to cover up unlawful practices in the guise of legal transactions through the use of obscure and hidden circumstances, leaving 'no scant traces behind'.[66] For instance, 'parties may hide the real purpose of the contract behind harmless contractual provisions',[67] or feign legitimate causes for an unlawful deal. As a result, proving the materiality of conduct through direct evidence is not a trivial

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59 Kendra & Bonini, *supra* n. 22.

60 Verçosa & Monegalha, *supra* n. 46.

61 Article 9: 'The deliberations of the arbitral tribunal, and the contents of the award itself remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators'.

62 *See Emmott v. Michael Wilson & Partners Ltd*, 2008 EWCA Civ 184 (Court of Appeal, Civil Division).

63 Baizeau & Hayes, *supra* n. 1; Verçosa & Monegalha, *supra* n. 46.

64 Gary Born, *International Commercial Arbitration* (2d ed., Kluwer Law International 2014).

65 Betz, *supra* n. 10; Mark Pieth & Kathrin Betz, *Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators* (Competence Centre Arbitration and Crime, University of Basel and Basel Institute on Governance 2019).

66 François Vincke, *Recent Anti-corruption Initiatives and Their Impact on Arbitration*, International Chamber of Commerce 5 (2013).

67 ICC Case No. 12,990, Bulletin. *See* Menaker, *supra* n. 29.

task. On top of that, due to its seriousness, an allegation of corruption usually requires a higher standard of proof, sometimes approaching the one used in criminal matters. Both elements coupled together constitute, in some cases, a paramount obstacle for a tribunal to determine the materiality of the illicit.[68]

These challenges may form a perfect storm to turn arbitration into the ideal place for corruption and money laundry. A party – or both parties – may approach a tribunal just as a way of securing the enforcement and validity of scant agreements.[69] At the end of the day, the harms to the integrity and reputation of arbitration are non-negligible and may mushroom a generalized bad perception of it.

In this sense, it is important to comprehend the barriers that arbitrators may face when dealing with corruption cases that intrinsically have social nature and public interest involved.

3.2 Societal demand, arbitration, and corrupt acts

Arbitration should not be used to shroud unlawful practices. Defending the contrary is a dead-end journey with serious consequences along the way, leaving arbitration untrusted, injured parties helpless, and corruptors unfettered.

A claim should not be regarded as unproved if the record is inconclusive due to the concealment of relevant evidence pertaining to the corrupt act.[70] This situation should be adjusted by allowing the use of adverse inference and a contextual interpretation of the other party's refusal to produce relevant evidence.[71]

Furthermore, a finding of corruption should not be halted merely by the difficulty in gathering direct evidence arising from the act. Due to the arbitral tribunal's limited investigative power and the nature of the illicit act, there may never be such evidence. Hence, tribunals should be allowed to use circumstantial evidence in order to make their probabilistic evaluation of the allegations brought before trial.[72]

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[68] Crivellaro, *supra* n. 35, at 7; Verçosa & Monegalha, *supra* n. 46.

[69] Menaker, *supra* n. 29.

[70] *ICC Case No. 6,401, Award of 1991*, in *Mealey's International Arbitration Report* (Wolters Kluwer International 1992). In this sense, remember that the IBA Rules on Taking the Evidence, Art. 9(5), sets forth that: 'if a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party'.

[71] This seems to be, actually, a well-established idea. Indeed 'a party cannot simply assert or deny a proposition and then rest his case upon a technical rule, throwing the burden of proof on the other party, without running a risk of adverse inference being drawn from his failure to produce evidence'. Durward Valdamir Sandifer, *Evidence Before International Tribunals* (University Press of Virginia Revised Edition 1975); Menaker, *supra* n. 29.

[72] If circumstantial evidence can be used to base a conclusion on corruption in a case, they can also be used in order to allow for adverse inferences and as an indicator that arbitrators should allow for further

The solution, as a result, is that arbitral tribunals should be able to calibrate the allocation of the burden of proving certain facts and the metrics of the standard of proof in cases dealing with corruption allegations.

In the pursuit of such an aim, compliance red flags and other circumstantial evidence can work well.[73] It is undeniable that the existence of red flags will progressively diminish the worry about the risk of false-positives and increase the risk of false-negatives. As decided in *Metal-Tech v. Republic of Uzbekistan*,[74] the idea is not to punish the party facing an allegation of corruption (which would constitute a violation of a fair trial), but rather to ensure the promotion of the rule of law that forbids granting assistance to a party that has engaged in a corrupt act.

It is important to stress that recognizing the relevance of circumstantial evidence for corruption cases does not mean the application of a lower standard of proof.[75] One should not mix the standard of proof with the probative value of circumstantial evidence.[76] Consequently, when dealing with circumstantial evidence and red flags, tribunals should determine if there are robust elements that fulfil the required standard of proof.[77]

Before addressing how red flags can be used by arbitrators in such cases, the next section focuses on the tools of burden and standard of proof.

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scrutiny on the case. Pieth & Betz, *supra* n. 65. This is the approach set out in ICC cases 8,891 and 12,990: 'regardless of the applicable standard of proof however, arbitral practice reflects that there is no requirement to produce direct evidence of corruption. If the evidence establishes that there are red flags of corruption in relation to payments that were made to a consultant or another third party, the tribunal may order the party that made or received those payments to establish that legitimate services were rendered in exchange for the payments. While this party does not have the burden of proving a negative fact, the tribunal may draw an adverse inference from its failure to produce evidence substantiating that legitimate services were provided in exchange for the payments'. *ICC Case No. 8,891, Award of 1998*, Journal du Droit International, vol. 4; *ICC Case No. 12,990, Award of 2005*, ICC Bulletin (Supplement), vol. 24, at 990.

73 Greenwald & Ivers, *supra* n. 48. *Also* in Menaker, *supra* n. 29; Pieth & Betz, *supra* n. 65.

74 *International Chamber of Commerce Case No. Case ARB/10/03 (2013).*

75 According to the ICC Guidelines on Agents, Intermediaries and Other Third Parties, in 2010: 'Although such "red flags" may not themselves constitute violations of the anti-bribery laws, they are warning signs that need to be taken seriously and investigated. The presence of one or more "red flags" does not necessarily mean that the transaction cannot go forward but it does suggest the need for a more in-depth inquiry and the implementation of appropriate compliance safeguards'. International Chamber of Commerce, *ICC Guidelines on Agents, Intermediaries and Other Third Parties* (2010).

76 Menaker, *supra* n. 29.

77 *Ibid.*; Greenwald & Ivers, *supra* n. 48. In ICC Case No. 13,515, the tribunal held that corruption must be established to 'a strong degree of certainty', but that 'such proof may be adduced by any means' *ICC Case No. 13,515, Award of 2006*, ICC Bulletin (Supplement), vol. 24. Also, these red flags are indicative of corruption, but are not conclusive evidence that a corrupt payment was made or offered. As also explained above, the party accused of corruption does not have (at least initially) the burden of proving that its activity or its agent's activity was lawful. Rather, the party alleging corruption bears the burden of persuading the tribunal of the truth of its allegation. *Ibid.*

4 BRIEF LINES ON BURDEN AND STANDARD OF PROOF IN ARBITRATION

Discussions involving burden and standard of proof are frequently determinative of the outcome of an arbitral proceeding.[78] Indeed, it is believed that 60% to 70% of all international commercial arbitration cases are decided on findings of facts rather than on issues of law.[79] Yet, both topics are seldom expressly articulated by arbitral tribunals or defined between parties in proceedings.[80] This may arise from the structure of the international commercial arbitration system, composed of a hybrid and delicate balance between different legal cultures. Or it may result from the fact that international tribunals often have a general discretion to determine the probative value of all evidence submitted by the parties.

One way or another, burden and standard of proof play an important role in setting the rules of the arbitration. Uncertainties as to the requisite burden and standard of proof are never desirable to the parties, and any grey areas regarding the parties' evidentiary responsibility may be amplified when the subjacent discussion concerns corruption.

Thus, having well-established rules on who bears the risk of not having a certain claim considered as proved (burden of proof) and the level of conviction that is required for an arbitrator to determine that a certain threshold of proof has been met (standard of proof) is crucial.[81] The definition of these concepts and the implications that their use in an arbitral procedure that deals with corruption are presented in this section.

4.1 Burden of proof

The notion of burden of proof regards – put simply – the allocation of the risk of not having a claim considered as proven. This allocation of risk – or rule of how

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78 Mateus Aimoré Carreteiro, *Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability*, 13 Revista Brasileira de Arbitragem (Apr. 2016).

79 Guilherme Rizzo Amaral, *Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart*, 35 J. Int'l Arb. (Feb. 2018); Francisco Blavi & Gonzalo Vial, *The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales*, 39 Hastings Int'l & Comp. L. Rev. 41 (Jan. 2016); *see* Susan D. Franck, *Precision and Legitimacy in International Arbitration: Empirical Insights from ICCA*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2014/09/10/precision-and-legitimacy-in-international-arbitration-empirical-insights-from-icca/ (accessed 4 Jan. 2022).

80 Franck, *supra* n. 79; R. Pietrowski, *Evidence in International Arbitration*, 22 Arb. Int'l 373 (Sep. 2006); Born, *supra* n. 64. In this sense: '[i]nternational arbitration conventions, national, arbitration laws, compromise, arbitration rules and even decisions of arbitral tribunals are almost uniformly silent on the subject of standard of proof'. Compare Born, *supra* n. 18.

81 Carreteiro, *supra* n. 78; Blavi & Vial, *supra* n. 79; Allan Redfern et al., *The Standards and Burden of Proof in International Arbitration*, 10 Arb. Int'l 317 (Oxford Academic Sep. 1994); *Phipson on Evidence* (Hodge M. Malek & M. N. Howard eds, 17th ed., Sweet & Maxwell, Thomson Reuters 2009).

to judge under uncertainty[82] – is a result of the fact that a judge and arbitrators must render a decision based on the elements brought before them. Albeit one may think that the decision-making process is strictly entitled to the ruling authority, it should be perceived as a shared responsibility between the former and the parties

In this sense, there is a general understanding[83] of the existence of a principle placing on each party the burden of proving the facts relied on to support his or her claim or defence[84] (*actori incumbit probatio*). This traditional rule may, however, be subject to at least three exceptions.

First, the parties can agree to allocate their burden of proof differently in their arbitral agreement.[85] This is a result of the parties' autonomy,[86] which structures the arbitral system and can address concerns as to the proof of certain circumstances which are, by their nature, hard to be proved by the claiming or defending party.

Whereas this may be an effective way of conforming the arbitral proceeding to the matter of fact underpinning the legal dispute, it is also true that an unrestricted capacity to privately allocate the burden of proof can be dysfunctional. That is because arbitral agreements, as a clear expression of long-term relationships (whose features presume recurrent interactions and long-term relations), give room to a lock-in effect between the parties, making it plausible that, if chances are given, a party may behave opportunistically for self-seeking gains.[87]

To avoid these abuses, some limitations to the parties' autonomy should take place. Therefore, it is argued that private allocation of the burden of proof should not (1) be unfair nor unequal, by deterring parties from being treated equally and having the opportunity to adequately present their case[88]; (2) derogate mandatory

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82 Karl-Heinz Böckstiegel, *Presenting Evidence in International Arbitration*, 16 ICSID Rev. 1 (Oxford Academic Mar. 2001); Carreteiro, *supra* n. 78.

83 Which, for its overspread application and common application, can be referenced as general principle of law. Carreteiro, *supra* n. 78; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1st ed., Cambridge University Press 2006).

84 Carreteiro, *supra* n. 78; Blavi & Vial, *supra* n. 79; Pietrowski, *supra* n. 80; Menaker, *supra* n. 29. *See Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, No. ARB/87/3 (ICSID 1990).

85 Redfern et al., *supra* n. 81; Carlos Alberto Carmona, *Arbitragem e Processo. Um Comentário à Lei Nº 9307/96* (3d ed., Atlas 2009).

86 *See* Blavi & Vial, *supra* n. 79. Indeed, 'party autonomy is the guarding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws but by international arbitration institutions and organizations. The legislative history of the Model Law shows that the principle was adopted without opposition' *Law and Practice of International Commercial Arbitration* 265 (Alan Redfern et al. eds, 4th ed., Sweet & Maxwell 2004).

87 *The Relational Constitution of Contract and the Limits of 'Economics'*, in *Contracts, Co-operation, and Competition: Studies in Economics, Management, and Law* (Simon Deakin et al. eds, Oxford University Press 1997).

88 Blavi & Vial, *supra* n. 79. *See* UNCITRAL Model Law Art. 18: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case'.

substantive and procedural rules[89]; and (3) harm public policy considerations and good faith.[90]

Second, legal provisions may specifically reverse traditional rules of burden of proof. Such reversal can occur by employing legal presumptions[91] or vulnerabilities. This is the case of particularly sensitive rights, such as employment and consumer matters.[92]

Third – and of special importance to corruption cases – the tribunal can allocate the burden of proof differently by making adverse inferences[93] from the parties' unjustified refusal to produce certain evidence after being expressly ordered to do so. This is the textbook example in which a document is not available to the claiming party, and the defending party unjustifiably refuses to collaborate with the proceeding by handing the document in. In functional terms, adverse inference helps the incapacitated party to discharge his/her burden of proof in the proceeding.[94]

4.2 Standard of proof

The standard of proof relates to the idea of how evidence submitted in the arbitral proceeding will be weighted by the arbitrator. Intuitively, it is clear that evidence pertaining to different factual allegations should be considered differently, and the

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89 Some authors, on the one hand, argue that the limits for such the derogation are set in public policy rules. On the other hand, others argue that such limits are set in the principle of legality and the legal reserve. The authors stand with the later considering that, unless otherwise disciplined, these rules are imperative. *See* I. Giuseppe Chiovenda, *Istituzioni Di Diritto Processuale Civile* (2d ed., Napoli: Eugenio Jovene 1935); Antonio do Passo Cabral, *Convenções Processuais* (JusPodivm 2017); George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 Am. Rev. Int'l Arb. (2007).

90 Blavi & Vial, *supra* n. 79. Also, Art. 5(2)(b) of the New York Convention provides that an arbitral decision may be considered unenforceable if it is against the public policy of the country where the recognition of the award is sought: '5.2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: … (b) The recognition or enforcement of the award would be contrary to the public policy of that country'.

91 For example, *iuris tantum or iuris et de iure*, in which the goal is to facilitate the production of evidence or by legal professionals that expressly reallocate the burden due to factual asymmetries in the legal, economic or technical plane. Dr Aristidis Tsatsos, *Burden of Proof in Investment Treaty Arbitration: Shifting?*, Humboldt Forum Recht 91 (2009).

92 Redfern et al., *supra* n. 81; Carreteiro, *supra* n. 78.

93 On the commentators on this topic *see* Amaral, *supra* n. 79; Born, *supra* n. 64.

94 'Even if one considers that "arbitrators would be disturbed at the thought of deeming the burden of proof discharged by an inference", the reality is that in appropriate circumstances arbitrators do employ adverse inferences to enable parties to discharge their burdens of proof in the absence of evidence otherwise sufficient to make their cases' Carreteiro, *supra* n. 78, at 102. In the same sense: 'when a party … has access to relevant evidence, the Tribunal is authorized to draw adverse inferences from the failure of that party to produce such evidence' Born, *supra* n. 64, at 2314. *See* Robert B. Von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9 J. Int'l Arb. 105 (1992); Greenwald & Ivers, *supra* n. 48. *See International Centre for Settlement of Investment Disputes Case No. ARB(AF)/99/1 (2002); European Court of Human Rights Case No. 91 (1978).*

way that the evidence will be analysed depends on several factors, one of them being the legal tradition (common or civil law systems). This section addresses common law approaches to the standard of proof, before investigating civil law institutes.

Common law resorts to at least two types of standard of proof, varying according to the degree of evidence required for a certain case. As will be further explored, their distinctive characteristics rest on the attempt of objectiveness and clear guidance for evaluating evidence, especially important for the numerous cases in which decisions are made by laypersons.

First, there is preponderance of evidence – also known as balance of probabilities[95] – which sets out that a proposition will be held if it appears to be truer rather than false.[96] Due to its greater zone of uncertainty about the fulfilling of the burden, the preponderance of evidence is ideal in cases where society sees a lower level of concern with the claim's outcome, in which case litigants share the risk of an error in the same degree.[97] Therefore, in disputes where the societal interest involved is of higher importance, such as in corruption cases, this might not be the most adequate measure.

To address matters such as these, common law has developed a second and stricter standard of proof: the *beyond reasonable doubt* standard. In general, this is the standard for criminal trials and more serious claims involving civil fraud and crimes.[98] In these cases, society chooses to exclude as nearly as possible the likelihood of an erroneous judgment against the party who does not face the burden of proof. Consequently, the allocation of the burden in cases demanding proof beyond reasonable should be reflective of the society's view on which side of the litigation it is better to allocate the chances of false-negative (on the claimant or defendant). This is not a straightforward assessment, but rather a conjunction of several contingencies and an evaluation of the more relevant right.[99]

On the other hand, civil law jurisdictions usually set out a different standard, based on the *sufficient inner conviction*[100] of the judges to rule the case (*l'intime*

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95 Born, *supra* n. 64.

96 Redfern et al., *supra* n. 86; Menaker, *supra* n. 29. This principle of assessing the evidence is commonly attributed to *Mille v. The Minister of Pensions*. *See Mille v. The Minister of Pensions* (House of Lords, 2 All ER 372, 1947).

97 Carreteiro, *supra* n. 78.

98 'A higher standard of proof may be applied in cases involving particularly sensitive allegations of wrongdoing such as conduct contra bonos mor … A higher standard of proof may also be applicable in cases involving allegations of bribery, fraud, corruption or extortion'. Pietrowski, *supra* n. 80, at 379–80.

99 Mark Schweizer, *The Civil Standard of Proof – What Is It, Actually?*, 20 Int'l J. Evid. & Proof 217 (Jul. 2016). A variation from the standard of beyond a reasonable doubt is the US clear and convincing evidence standard established in Barter v. Barter. *See* Carreteiro, *supra* n. 42.

100 Schweizer, *supra* n. 99.

conviction du juge).[101] This means that the judge must be reasonably convinced about the facts in question, in a judgment of logical probability.[102] This is essentially a negative rule, which excludes an *ex ante* legal valuation or hierarchy of each type of evidence[103] so that filling this '*empty space*' falls ultimately on the judge and the doctrine.[104] Indeed, cases are not generally judged by laypersons, who can and should exercise bounded discretion to evaluate evidence.[105]

In arbitration, it is argued that the arbitrator's scope of action, under its freedom of judgment, is to adopt all means to ensure that the relevant facts are made clear to the court – which consequently encourages arbitrators to place greater weight on their judicial responsibility rather than ignore indications of suspicious transactions.[106]

This may not even constitute a proper standard of evidence, as there is no prescription of how evidence should be valued, evidencing the importance of certainty about a fact rather than of establishing the actual truth.[107] Given its flexibility, the inner conviction can, on the one hand, appear to be a more suitable principle of law to weigh evidence on civil law cases, but, on the other hand, have shortcomings when the issue regards public interest. Despite these insuperable divergences, empirical studies show that the difference between the standard applied in common and civil law is 'more apparent than real'.[108]

Arbitral institutions – in general – prefer not to take a position in such controversies, nor to adopt a model of a standard of proof, for they desire to be commercially attractive for actors in different jurisdictions.[109] According to the 2006 UNCITRAL Model Law, the 'power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence'.[110] Similarly, the IBA Rules on the Taking of Evidence provide that 'the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence'.[111] The IBA Rules also permit an arbitral tribunal to exclude or limit the production of irrelevant, immaterial or

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101 Carreteiro, *supra* n. 78; Pietrowski, *supra* n. 80; Menaker, *supra* n. 29.
102 Carreteiro, *supra* n. 78.
103 Michele Taruffo, *Rethinking the Standards of Proof*, 51 Am. J. Comp. L. 659 (American Society of Comparative Law 2003).
104 *Ibid*., at 666.
105 Mirjan R. Damaška, *Evidence Law Adrift* (Yale University Press 1997).
106 Tobias Zuberbühler & Andreas Schregenberger, *Corruption in Arbitration: The Arbitrator's Duty to Investigate*, in *New Developments in International Commercial Arbitration 2016* 1 (Christoph Müller et al. eds, Schulthess 2016).
107 Piero Calamandrei, *Verità e Verosimiglianza Nel Processo Civile* (Giuffrè 1955); Carreteiro, *supra* n. 78.
108 Carreteiro, *supra* n. 78, at 104.
109 As pointed out by William W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice* 778 (2d ed., Oxford University Press 2012).
110 Article 19(2). In the same sense, the 2010 UNCITRAL Arbitration Rules, Art. 27(4).
111 Article 9(1).

unreasonably burdensome evidence,[112] or even to exclude evidence based on more general grounds such as privilege, confidentiality, political sensitivity or fairness and equality.

These rules consubstantiate the free evaluation of the evidence principle, with a texture that is open enough to adapt well to both civil and common law backgrounds. But this is far from meaning that arbitrators will not behave to obtain the closest possible truth. Arbitrators are cautious and will seek to produce every piece of evidence that will assist them in bringing the best decision for a case.[113]

Thus, one may conclude that the standard of proof to be employed in arbitration will depend on the matter of fact under analysis[114] and the choice ultimately depends on the arbitrators themselves, although there are arguments that, in corruption cases, the most appropriate evidential model is that of motivating free conviction.[115] In reality, the evidentiary standard is unlikely to make a considerable difference if the tribunal is convinced of the existence of acts of corruption,[116] as occurred in the Metal-Tech case.[117]

Regardless of the jurisdiction, however, the general rule regarding the burden of proof is that of the principle of *actori incumbit probatio*, i.e., the general principle of law[118] that each party must prove the facts that support its right or defence. In arbitrations involving contracts allegedly vitiated by corruption, therefore, proving the occurrence of the fraud or bribery would in principle be incumbent on the accusing party.

Even taking into account the civil nature of arbitration, the seriousness and consequences (including criminal consequences) of a corruption charge might suggest that stricter standards of proof should be employed in this case. However, as we have seen, corruption rarely leaves direct evidence, so the

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112 Articles 9(2)(a) with 8(2). *See* Born, *supra* n. 64.

113 *Mohamed Bin Hammam v. FIFA*, No. 2011/A/2625 (Court of Arbitration for Sport). 'The Panel is doing nothing more than concluding that the evidence is insufficient in that it does not permit the majority of the Panel to reach the standard of comfortable satisfaction in relation to the matters on which [Mr Bin Hammam] was charged'.

114 Born, *supra* n. 64.

115 Vladimir Khvalei, *Standards of Proof for Allegations of Corruption in International Arbitration*, in *Addressing Issues of Corruption in International Arbitration* 60 (Domitille Baizeau & Richard Kreindler eds, Wolters Kluwer International 2015).

116 Zuberbühler & Schregenberger, *supra* n. 106.

117 *International Chamber of Commerce Case No. Case ARB/10/03 (2013), supra* n. 74. According to Nappert: 'In light of this finding the tribunal found it unnecessary to embark upon the analysis of the claimant's violation of transitional public policy, and indeed the requisite burden of proving allegation of corruption, finding the red flags sufficiently compelling' *Raising Corruption as a Defence in Investment Arbitration*, in *Addressing Issues of Corruption in Commercial and Investment Arbitration* 175, 181 (Domitille Baizeau & Richard Kreindler eds, Wolters Kluwer International 2015).

118 Carreteiro, *supra* n. 78.

application of a criminal standard of proof ends up raising the bar too high and making proof of wrongdoing almost impossible.[119]

However, applying the standard of a conviction stemming from the civilian tradition, or even the standard of a balance of probabilities, is not a solution either, since there are no clear rules on how evidence should be evaluated; or even a robust dogmatic foundation to support the use of evidence of corruption more effectively and ambitiously. In order to contribute to such an undertaking, it is necessary to resort to other resources.

Actori incumbit probatio is not an absolute rule, and in the field of arbitration, it is subject to exceptions, such as the allocation of the burden of proof by express provision of the parties in the arbitration agreement[120] or as a result of the regulatory provision, as occurs with the legal presumptions.[121] Initiatives to reverse the burden of proof by arbitrators, however, are usually highly criticized by the literature and authorities. Indeed: (1) international courts do not have an inquisitorial system, nor a system that admits mere prima facie evidence to formulate judgment and await contrary production of burden; (2) the evidential burden – a rule of due process that does not admit constant changes in the course of a proceeding – should not be confused with the burden of producing certain evidence; (3) a reversal of the standard evidential burden deviates from the practice of international arbitral tribunals, besides being in contradiction with the legitimate interests of the parties at the time the arbitration was carried out.[122]

In order to avoid such problems, the arbitrator can deal with allegations of corruption through the use of *adverse inferences*[123]: faced with the unjustified refusal of a party to produce certain evidence – e.g., a document in its possession – and even after being expressly requested to do so, the judge (or arbitrator) may draw an adverse inference to its disadvantage, concluding that the other party has discharged its respective burden of proof.[124]

Although the derivation of an adverse inference has a certain bias of penalty, imposed on the party that has not complied with a determination of the judge,[125]

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[119] As in the *Philippines v. Westinghouse* case, discussed below.

[120] Redfern et al., *supra* n. 81; Carmona, *supra* n. 85.

[121] Tsatsos, *supra* n. 91.

[122] Zuberbühler & Schregenberger, *supra* n. 106.

[123] *See* Amaral, *supra* n. 79; Born, *supra* n. 64.

[124] 'When a party … has access to relevant evidence, the Tribunal is authorized to draw adverse inferences from the failure of that party to produce such evidence' Born, *supra* n. 64, at 2314. *See* Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, 22 Arb. Int'l 549 (Dec. 2006); Pierre-Yves Tschanz, *Advocacy in International Commercial Arbitration: Switzerland*, in *The Art of Advocacy in International Arbitration* 195 (R. Bishop & E. Kehoe eds, 2d ed., Juris Publishing 2010); Von Mehren, *supra* n. 94; Greenwald & Ivers, *supra* n. 48.

[125] This does not preclude other measures available to the arbitrator in such cases, such as an order for payment of procedural costs or arbitration costs, in addition to monetary sanctions. *See* Tschanz, *supra* n. 124; Amaral, *supra* n. 79.

this tool acquires special importance in civil cases involving allegations of corruption. This is because when the party alleging corruption has produced sufficient indirect evidence to suggest that an unlawful act has occurred, and when certain criteria of reasonableness are met, the court may require the defendant party to produce evidence that the transaction or contract is legitimate. If it fails to do so, then an inference can be drawn that that agreement is flawed. Thus, given the limited investigative powers available to an arbitral tribunal, adverse inferences allow the use of circumstantial evidence and the contextual interpretation of a party's refusal or inability to produce evidence, preventing inconclusive – but plausible – allegations of corruption from simply being dismissed as a technicality of the burden of proof.[126]

The use of adverse inferences, as mentioned, cannot be unrestricted, and should be covered by criteria of reasonableness and proportionality. The doctrine,[127] and in particular the Basel Institute on Governance,[128] which developed an important and simplified practical guide for the detection and treatment of allegations of corruption and money laundering in international arbitration, suggests the following criteria for a diligent use of adverse inferences:

(1) The party seeking the use of adverse inferences must produce robust evidence of the existence of corruption and must have produced in advance all available evidence to corroborate the evidence sought, or the tribunal must have identified sufficient evidence of corruption;

(2) The party from whom evidence is sought must have access to the evidence and be able to produce it;

(3) The party against whom the production of evidence is sought fails to give a convincing reason for not producing the evidence; and

(4) The inference to be drawn from such conduct must be reasonable, consistent with the facts, and have a logical relationship to the nature of the evidence that has not been produced.

This leaves the question as to which indirect evidence should be considered indicative of corruption and which may result in the use of adverse inferences by the court. This will be the subject of section 5.

Nonetheless, one may affirm that what is determinative to elect the standard of proof in arbitration is the substantive matter in dispute.[129] As mentioned before, civil matters require lesser burdens on the establishment of certainty, whereas allegations of fraud and corruption – claims of higher societal interest – require

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126 On the idea that a party cannot simply benefit from its refusal to produce certain evidence. *See* Sandifer, *supra* n. 71.

127 As in the *Sharpe test*, mentioned below.

128 Pieth & Betz, *supra* n. 65.

129 Born, *supra* n. 64.

more convincing evidence, even though not requiring clear-cut evidence.[130] However, we believe that this conclusion should be taken with a grain of salt.

As a general matter, we submit that tribunals should avoid adopting more strict criminal law standards to decide commercial/civil matters as they are not criminal law enforcers. In other words, arbitral tribunals do not apply criminal sanctions (such as imprisonment and criminal fines). They draw commercial/civil consequences from conducts that may also be defined under criminal law (e.g., the unenforceability of a contract procured by extortion/corruption). Even when criminal law is the only source to define certain conduct as illegal an arbitral tribunal applying such definition is not acting as a criminal law enforcer.

Therefore, the application of a standard of proof designed to confer protection to (mostly) individuals facing prison may not be the best standard for a commercial case. In national contexts, it is not unusual that different standards are used when there are parallel civil and criminal proceedings. It is also not usual (although not desirable) that somewhat conflicting decisions are rendered in such circumstances (e.g., a criminal acquittal by a criminal court and civil obligation to indemnify ordered by a civil court). Tribunals should not feel compelled to apply criminal standards of proof when deciding on commercial consequences of corruption.

4.3 Controlling the allocation of burden and standard of proof

As seen in the previous subsections, there is flexibility as to the establishment of the burden and the applicable standard of proof. However, besides the elements above that may help to determine the applicable rules (parties' autonomy, the law and adverse inference for the burden of proof, and the principle of free evaluation of the evidence), the consideration of the nature of the rules regarding burden and standard of proof (if procedural or substantive) also contributes to the same end.

This assessment is important, as it may aid arbitrators in determining (1) the application of the law of the place of the arbitration or the contract; (2) the substantive law governing the merits of the dispute; and (3) the applicable international standards.[131]

When both sets of rules are reputed to be procedural, they are seen more for their role in the allocation of responsibility and the degree of interest of the parties to produce the allegations brought to trial.[132] In this case, the tribunal's role

[130] Redfern et al., *supra* n. 86; Carreteiro, *supra* n. 78; Menaker, *supra* n. 29; Born, *supra* n. 18.
[131] Born, *supra* n. 64.
[132] Carreteiro, *supra* n. 78; Von Mehren, *supra* n. 94; Blavi & Vial, *supra* n. 79.

increases, as matters pertaining to the procedure will often be the responsibility of the arbitrators or will be found in an international standard.[133]

Conversely, by seeing the standard and burden of proof as a substantive matter, it shall mean that they are intertwined with the right to produce evidence and a matter of the parties' relationship.[134] Therefore, arbitrators have to respect the parties' choice of the law of the agreement, while not being bound to a particular system of procedural law.[135]

In any case, it may be that the non-observance of those rules may be immaterial to the validity of an arbitral decision.

The control of potential errors in the establishment of the burden of proof is difficult. *A priori*, errors in the application of law should not be subject to review by courts.[136] As a consequence, if the governing law determines a non-traditional allocation of the burden of proof and, for any reason, arbitrators do not observe such determination, a challenge to the arbitral award may be daunting. Nonetheless, a different scenario arises when arbitrators exercise their authority in a manner that is compatible with the traditional principles of law.[137]

As to the decision on the standard of evidence, even though the (International Centre for Settlement of Investment Disputes) (ICSID) Convention establishes that a bad decision on the allocation and measure of standard of proof has the potential of being a ground for non-recognition or annulment of arbitration by national courts,[138] this cause of action is hardly ever accepted because of two reasons: (1) a broad authority and discretion involved in the exercise of this prerogative by arbitrators; (2) courts are much more concerned with assuring the integrity and validity of the process to fulfil a watchdog function to protect the

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133 Born, *supra* n. 64.

134 Blavi & Vial, *supra* n. 79.

135 Carreteiro, *supra* n. 78. e.g., it has been established that if substantive, these are not applicable to the international tribunal: 'however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted' *William A. Parker (U.S.A.) v. United Mexican States*, No. IV R.I.A.A. 35, 39 (Award in US & Mexico General Claims Commission 1952).

136 Philippe Fouchard et al., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999).

137 William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647 (1988–1989).

138 Article 52(1). *See* Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* (2d ed., Cambridge University Press 2009).

interest of the parties in the establishment of a fair arbitral trial than they are with the review of factual and legal matters.[139]

This is why national laws usually provide quite narrow avenues to question arbitral decisions. It is well-established that there is a difference in divergence of appreciation of evidence and the departure of a fundamental rule of procedure or excess of authority (with the latter two allowing for the pursuit of annulment).[140]

Hence, as the main takeaways, three assertions can be made[141]:

(1) Unless otherwise agreed by the parties or determined by the law, the principle of *actori incumbit probatio* shall be applied[142];

(2) Adverse inferences to the issue for which the evidence is probative may be done to a party having possession or control of relevant evidence, but which then fails to produce it despite being ordered to do so; and

(3) Unless otherwise expressly established by the governing law of the arbitration, the facts shall be considered proven when the arbitral tribunal is convinced with sufficient certainty.

These heuristics will be important for the attempt of defining, in this article, a framework for (more systematically) proving corruption in arbitration.

5 AVOIDING THE AVOIDABLE: AN ADEQUATE EVIDENTIARY FRAMEWORK FOR ARBITRATION AND CORRUPTION

Arbitrators need to establish on which grounds an unlawful agreement will be deemed to result from a corrupt act. This is the reason why the two questions raised in the previous sections are important (who should bear the burden of proof and how this must be ascertained).

Albeit the traditional rule for allocation of the burden of proof is *actori incumbit probatio*,[143] some authors suggest that the tribunal should shift the burden of proof

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139 Carreteiro, *supra* n. 78.

140 *Ibid*. Which is also a cornerstone to the principle of non-interference in the arbitral proceeding Born, *supra* n. 64; Pietrowski, *supra* n. 80. In this sense, *see* Born, *supra* n. 64, at 2308–2309.: 'a recent Scottish decision concluded that Pit is for the arbitrator to decide questions as to the admissibility, relevance, materiality and weight of any evidence. Similarly, the Dutch Supreme Court has held that to the extent that the parties have not agreed otherwise, the arbitral tribunal is free in the application of the rules of evidence. Under this provision the arbitral tribunal in principle is not bound by the general provisions of the law of evidence in [the Dutch] Code of Civil Procedure that do apply to actions before the regular courts, which means that, with respect to, for example, the admissibility and assessment of evidence, the arbitrators are free to act and rule as they see fit'.

141 Carreteiro, *supra* n. 78.

142 Born, *supra* n. 64; Amaral, *supra* n. 79; Blavi & Vial, *supra* n. 79.

143 The ICC Case No. 7,047, e.g., highlights this view: '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 off acts and the burden of proof are therefore upon

between the parties once there has been established prima facie evidence of corruption.[144] This is to allow parties to produce countervailing evidence to discuss matters that are inherently hard to prove.[145] In such a context, the use of adverse inference, as mentioned, may instrumentalize this need.

However, as argued above, making adverse inferences from a party's behaviour in the proceeding shall be allowed only in exceptional circumstances,[146] provided that the alleging party has persuaded the tribunal of the truth and the inference sought is coherent and proportional to such allegations and evidence.

Concerning the standard of proof, tribunals are mostly silent on the matter, and, at a high level, there are not sufficient differences between common and civil law standards. The bottom line then is assessing the probability that is established in a case and how it can shore up a decision on the matter.[147]

A considerable number of ICC cases have pointed out the understanding that the conclusion of corruption in arbitration must be based on a very high probability[148] or a robust collection of indirect evidence beyond the probabilistic threshold of mere likely facts.[149] Unconvincing allegations of corruption should, in line with such case law, be completely overlooked.[150]

The *Westinghouse v. Philippines*[151] case outlines important insights into the outlines of too stringent requirements of the standard of proof. In this case, the US District Court for the District of New Jersey[152] overruled an arbitral decision using a standard stricter than the preponderance of evidence for the finding of corruption in local procurement contracts in the Philippines.[153] According to the court, this heavier burden was undue, as there was ample evidence to allow a reasonable jury to find corruption in the payments made to President Marcos.

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the defendant'. Albert Jan van den Berg, *ICC Case No. 5,622, Award of 1988*, in *Yearbook Commercial Arbitration* (Wolters Kluwer International 1994).

144 Born, *supra* n. 64; Pieth & Betz, *supra* n. 65; Betz, *supra* n. 10; Karen Mills & Karim Sani, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto* 15 (2002); Menaker, *supra* n. 29.

145 Menaker, *supra* n. 29; Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25 ICSID Rev. 47 (2010); Carolyn B. Lamm et al., *Fraud and Corruption in International Arbitration* 25 (2019); Mills & Sani, *supra* n. 144.

146 Menaker, *supra* n. 29.

147 Lamm et al., *supra* n. 145.

148 Albert Jan van den Berg, *ICC Case No. 4,145, Award of 1984*, in *Yearbook Commercial Arbitration* (Wolters Kluwer International 1987).

149 van den Berg, *supra* n. 143.

150 Albert Jan van den Berg, *ICC Case No. 6,497, Award of 1994*, in *Yearbook Commercial Arbitration* (Wolters Kluwer International 1999).

151 *ICC Case No. 6,401, Award of 1991*, *supra* n. 70.

152 *Republic of Philippines v. Westinghouse Elec. Corp.*, No. Civ. No. 88-5150 (District Court for the District of New Jersey 1992).

153 According to the arbitral tribunal: 'in the Philippines 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'. *ICC Case No. 6,401, Award of 1991, supra* n. 70.

Therefore, cases involving corruption should have an adequate and proportional standard of proof. Far from implying in a generalized standard, we argue for application on a case-by-case basis.

Those who argue contrary to this statement usually sustain three core motives. First, they say that a higher standard of proof discourages opportunistic parties to bring baseless allegations to the playing field. However, baseless allegation should be avoided in any situation – not to say that if a party can prove corruption based on a more likely than not standard, the argument will be far from baseless.[154]

Second, whereas they argue that findings of corruption result in more serious consequences when compared to other findings, this is not necessarily true. Also, the confidential nature of arbitral proceedings suffices to avoid undue bleeding from the convicted party, if that is a concern one should have.[155]

Finally, it is said that the finding of corruption in contracts is inherently unlikely, as there is a presumption that these agreements are valid and that high-ranking officials do not generally violate mandatory national laws. Nevertheless, as pointed out above, corruption occurs in every country and has become a widespread, systemic problem in many parts of the world. Further to that, the assumption of the legality of legal agreements should not be a reason to increase the standard of proof, but rather an element to assess the probability of the allegations being brought to trial.[156]

As mentioned, due to its very nature, corruption is extremely difficult to prove, and arbitral proceedings need a framework (or at least a specialized set of tools) that enable tribunals to deal more comprehensively with such allegations. Even though corruption is not an infrequent issue, there is usually a lack of direct evidence and straightforward admissions of guilt or wrongdoing in contracts submitted to arbitration – while they do happen – are few and far between.[157]

Thus far, tribunals have usually applied a purely based approach: first, the tribunal would determine abstractly which system of rules evidence it is to apply and then would use this system to deal with issues of burden of proof, standard of proof, as well as discovery, taking of witness evidence or applying inferences and presumptions.[158] However, this approach seems insufficient when dealing with

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154 Menaker, *supra* n. 29.

155 'For example, a finding that a state unlawfully expropriated an investor's investment or discriminated against an investor, thus violating its international obligations under a treaty or an investment agreement, may damage the state's diplomatic relations and its ability to attract foreign investment' *Ibid.*, at 90. Although it is important to notice that there is much disagreement as to whether arbitrators' have a duty to report potential acts of corruption to domestic authorities.

156 Menaker, *supra* n. 29.

157 Greenwald & Ivers, *supra* n. 48. The authors discuss a few of such cases: *World Duty Free v. Kenya; Azpetrol v. Azerbaijan; Metal-Tech v. Uzbekistan*.

158 Sayed, *supra* n. 34.

corruption. Corrupt intent is usually well hidden, and parties will usually have difficulty in proving that the other side incurred corruption. This may lead to conclusions which are contradicted by later findings in criminal proceedings, for instance.[159]

By establishing a clearer framework for dealing with corruption allegations arbitrators and tribunals would be much better equipped for rendering equitable decisions.[160]

We argue for a two-step framework: first shifting the burden of proof from one party to the other, when and if certain prima facie indicia are presented. If such party does not disprove these allegations, then, secondly, the tribunal should adapt the standard of proof to establish if corruption or fraud took place.

This approach has already been somehow suggested in *Metal-Tech v. Uzbekistan*[161] – although for different consequences.

Metal-Tech had entered into a molybdenum processing joint venture with two Uzbekistani government-owned companies, under the Israel-Uzbekistan Bilateral Investment Treaty. Later, the two government entities-initiated proceedings against Metal-Tech, claiming the distribution of dividends of their shares. Metal-Tech was ordered to do so but refused to comply, the two companies later filed bankruptcy proceedings against Metal-Tech, and then submitted a request for arbitration.[162]

Uzbekistan's main defence was that the investment contract had been obtained through corruption, by engaging three so-called consultants – who included the prime minister's brother and a former government official – in bribery and lobbying.[163] The tribunal found that the investment had indeed been established illegally and declined jurisdiction following its interpretation of the rules of the investment treaty.[164]

To reach this conclusion, the tribunal used six findings that qualified as red flags for corruption in the consultancy contracts. These were 'the amount of payments, the fact that there was no proof of service, the lack of qualification of the consultants, the sham consulting contracts, the lack of transparency of the payee and the connections of the consultants with public officials in charge of Metal-Tech's investment'.[165] The tribunal allowed Metal-Tech to prove the

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159 *Ibid.*

160 *See* Luis Maria Clouet, *Arbitrating Under the Table: The Effect of Allegations of Corruption in Relation to the Jurisdiction of the Arbitral Tribunal and the Enforcement of Foreign Arbitral Awards* 32.

161 Stefanie Schacherer, *International Investment Law and Sustainable Development*, in *Research Handbook on Foreign Direct Investment* 563 (Edward Elgar Publishing 2019).

162 *Ibid.*

163 Greenwald & Ivers, *supra* n. 48.

164 Schacherer, *supra* n. 161.

165 *Ibid.*, at 64.

legitimacy of the consultancy services, but it was unable to do so. Though Metal-Tech did not seem to be withholding evidence, the tribunal concluded that it had not been able to substantiate the services because none were rendered. By applying this 'red flag analysis', the tribunal concluded that there was sufficient – even if circumstantial – evidence of wrongdoing.

The proposed framework works similarly. In the first step, after corruption allegations have been brought against a party, the tribunal should determine if enough indicia of corruption have been shown. Such red flags may vary between industry sectors and from the type of contract, but common signs include, for instance, if a consultant employed by the party has close personal, familial or professional ties with a key government official or his other relatives; if there were requests for payments in cash or cash equivalents; if there was a refusal to provide reasonable information or contradiction with previously provided information; or if there were abnormally high commissions.[166] If the tribunal is satisfied with the number and strength of the red flags that were provided prima facie by the alleging party, it should then explicitly shift the burden of proof to the other party and request that it provide counterevidence – be it documentation, witness testimony, etc. – disproving the allegations.

The prima facie standard will also not be the ultimate standard of proof by which the tribunal would evaluate the allegations. This is the second step: once the tribunal concludes that the accused party has not managed to sufficiently dispel the allegations of corruption, it should then apply an – at least relatively – lower standard in its review of the corruption claim, such as the preponderance of evidence standard.[167]

Regarding the question of what standards should be applied in corruption cases, there seems to be a trend in arbitral practice to hold parties claiming corruption to higher standards, be it the 'clear and convincing evidence' standard or the 'beyond reasonable doubt' standard used in criminal proceedings.[168] In an illustrative survey of twenty-five arbitral awards published by the ICC in September 2003, only one was found to apply a 'low' standard of proof to establish the existence of corruption,[169] whereas in fourteen cases a 'high' standard of proof was applied. Justifications for this include that a higher standard would discourage baseless accusations, that a finding of corruption would result in serious consequences for the affected party, and that allegations of corruption are inherently

[166] Navex Global, *Bribery and Corruption Red Flags: How to Respond to Corruption Indicator* (2018).
[167] Rose, *supra* n. 25.
[168] Horvath & Khan, *supra* n. 6, at 216; Hwang & Lim, *supra* n. 21, at 6; Greenwald & Ivers, *supra* n. 48, at 26.
[169] Claus Werner Von Wobeser Hoepfner, *The Corruption Defense and Preserving the Rule of Law*, in *International Arbitration and the Rule of Law: Contribution and Conformity* 203 (Andrea Menaker ed. 2017).

improbable, because of the presumptions that contracts are valid and that officials will not violate regulations.[170]

However, applying a higher standard of proof seems counterproductive and, as seen above, parties need to be able to prove corruption in an arbitral proceeding. Though apparently in the minority, there are some cases in which tribunals have expressly declined to apply a high standard of proof.

Indeed, most scholars agree that a standard of proof applied in criminal proceedings has no place in arbitration tribunals since there are no criminal liabilities at stake. The possibility of a finding of corruption resulting in a criminal investigation is also limited because arbitral awards are not even made public. Even if they are, the investigating authorities may not review the case on that basis and will have to prove the allegation according to a standard of proof higher than prima facie evidence,[171] when taking the case for criminal or administrative enforcement.

The relative unlikeliness of a finding of corruption should also be balanced with the interests of fairness, which requires the tribunal to consider the intrinsic challenges faced by the parties in proving the claim of corruption,[172] thus giving them a realistic chance of actually proving these claims. Unfortunately, corruption findings are also not inherently unlikely[173] and are made even less so when the accusing party has successfully demonstrated a series of red flags.

Crucially, if tribunals were to rely on a lower standard of proof, this would enable them to 'draw more heavily on circumstantial evidence in reaching their factual findings' and 'play a more significant role in resolving disputes that concern corruption'.[174]

This leaves only the question as to which red flags should be used and how they may be applied as prima facie indicators of corruption. The next section will deal with these issues.

6 RED FLAGS AND COMPLIANCE

The use of adverse inferences may be one way to overcome practical challenges associated with proving corruption in arbitration. To this end, a system of evidence valuation must be well developed – and widespread. The existence of this type of evidence alleviates concerns about false positives of corruption and lends greater certainty to the tribunal's conclusions. However, without clear means, there are risks of allegations of arbitrator bias, and the undesirable perception that the arbitral

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170 Greenwald & Ivers, *supra* n. 48.
171 Hoepfner, *supra* n. 169; *ibid*.
172 Hwang & Lim, *supra* n. 21; Partasides, *supra* n. 145.
173 Menaker, *supra* n. 29, at 9.
174 Rose, *supra* n. 25.

tribunal has reversed the burden of proof by establishing a system of presumptions. Again, the challenge is not trivial.

In this sense, the compliance literature on red flags of corruption seems to be an adequate solution to confer the necessary theoretical density to this field.[175] And this is not an unprecedented approach: there are already published cases in which the existence of circumstantial red flags was considered by the court as sufficient to request that the accused party presented proof of the validity of the agreement.[176]

Again, the paradigmatic judgment of *Metal-Tech v. Uzbekistan*[177] can be cited. In it, the court considered that a list of indicators of corruption was already relatively consolidated in the international community. Based on this, it used factual elements to conclude that the contract under analysis was obtained through bribery.[178]

Furthermore, in ICC case No. 8891,[179] the court held that an intermediary agreement between the parties was void because of (1) the inability of the intermediary to prove the performance of the contracted service; (2) the excessively high remuneration; and (3) remuneration based on a percentage of the contract value.

That being said, the use of red flags is based on some important premises. First, is the difficulty of proving an act of corruption, especially because of its eminently secret nature. Secondly, even if secret, acts of corruption are operationally intricate and tend to leave traces and doubts along the way. In fact, in the face of banks monitoring suspicious transactions, companies adopting clearer and more consistent compliance standards, monitoring internal conduct, and financial intelligence agencies that (albeit imperfectly) monitor large international fund transfers, real engineering must be carried out to create a system of apparent legality for

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[175] *See* Zuberbühler & Schregenberger, *supra* n. 106; Lamm et al., *supra* n. 145; Mills & Sani, *supra* n. 144; Khvalei, *supra* n. 45; Martim Della Valle, *Arbitragem e Compliance: Primeiros Passos?*, 64 Revista de Arbitragem e Mediação 75 (2020).

[176] As examples, *see* ICC No 6,497, 8,891 and 12,990. *Also*, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1.

[177] 'For the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called "red flags". Several red flag lists exist, which, although worded differently, have essentially the same content. For instance, Lord Woolf, former Chief Justice of England and Wales, included on his list of "Key Red Flags" among other things (1) 'an Adviser has a lack of experience in the sector;' (2) 'non-residence of an Adviser in the country where the customer or the project is located;' (3) 'no significant business presence of the Adviser within the country; (4) "an Adviser requests 'urgent' payments or unusually high commissions;" (5) "an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;" (6) "an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision". As has been seen above in the section entitled "Key facts" and as will become further evident in the course of the analysis under Uzbek law, many of these red flags are present here'. *International Chamber of Commerce Case No. Case ARB/10/03 (2013), supra* n. 74.

[178] Betz, *supra* n. 2.

[179] *ICC Case No. 8,891, Award of 1998*, *supra* n. 72.

corruption money transfers. Such measures include, as seen, the creation of contract agency or consulting services or even cooperation contracts.[180] Finally, agreements involving corruption may inevitably lead to disputes, in which the agent demands the continuation of the bribe payment, or the contractor asks for the return of the amounts paid.

Some examples of these situations can include: (1) a contractor fails to pay contractor amounts for construction cost increases. Faced with losses, the contractor refuses to pay an '*agency fee*' to the agent who brokered the contract between the contractor and the contractor through bribery; (2) following a change of leadership in a government or company acting as owner of a project, the contractor decides to stop paying bribes to the intermediary engaged in securing contracts because of its personal relationships and influence with the previous leadership; and (3) a company, amid a compliance programme, identifies a suspicious situation of fee payments to an agent as a possible cover for bribery and stops making the payments.[181]

To establish the circumstances on factors that may be considered red flags, the arbitrators may, or rather must, avail themselves of a body of studies and literature developed in the realm of compliance, auditing, and accounting. This body, which counts on many empirical studies, in its turn gives origin to simplified instruments and lists of anti-corruption compliance prepared by specialized entities (such as ICC[182]), as well as by governmental bodies. At any rate, there is consensus that, even though there are small variations from one initiative to another, there is an important core of suspicious practices already consolidated in the literature.[183]

In these terms, some of the most highlighted indications to, for instance, identify contracts obtained through corruption include[184]: (1) execution of contracts with countries that are known for corruption cases (e.g., on Transparency International Corruption Perception Index), or in industries with a history of being subject to acts of corruption[185]; (2) refusal to accept anti-corruption commitments

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[180] Khvalei, *supra* n. 45.

[181] From *ibid*.

[182] Compare International Chamber of Commerce, *supra* n. 75; *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2d ed. 2020); Ministry of Justice, *The Bribery Act 2010 – Guidance* (2010).

[183] Baizeau & Hayes, *supra* n. 1.

[184] Compare World Bank Group, *Common Red Flags of Fraud and Corruption in Procurement*; *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, *supra* n. 182; Eva Anderson & Transparency International Defence and Security, *Six Red Flags: The Most Frequent Corruption Risks in Ukraine's Defence Procurement* (2018); World Bank & Central Anti-Corruption Bureau, *Fraud and Corruption Awareness Handbook: A Handbook for Civil Servants Involved in Public Procurement* (2013).

[185] In this regard, the listing of companies and individuals ineligible for World Bank contracting may be a relevant source of information, https://www.worldbank.org/en/projects-operations/procurement/debarred-firms (accessed 6 Jan. 2022).

by the contracting party or contractor; (3) high amounts of payments; (4) lack of transparency in accounting records; and (5) unusual payment mechanisms.[186]

Furthermore, lists of indicators applicable to certain segments or lines of business are frequently observed – the so-called sectoral red flags. A very frequent list involves evidence of illicit practices in public procurement processes.

In such cases, the World Bank[187] presents the following likely indicators: (1) existence of complaints from competitors about the competitive process; (2) contracts are often signed for amounts immediately below the contracting ceiling; (3) bids in tenders are given in an unusual manner and without following a specific pattern; (4) the lowest bidder is not selected for contracting; (5) presence of suspect bidders, who have established fictitious companies or act as cover companies for others in the bidding process; (6) contracts are repeatedly awarded to the same company; (7) after contracting, unjustified changes in scope and contract value are observed; and (8) services provided are below the volume expected or are of inferior quality to those contracted.

One segment that is frequently affected by acts of corruption is the defence industry. In an illustrative survey conducted by Transparency International[188] on incidents of corruption in public procurement associated with Ukraine's national defence, the entity raised six common red flags: (1) limitation of competition by awarding contracts to a single player, too short a bidding window, lower than expected number of participants; (2) intervention of public officials in the bidding process to unjustifiably favour a particular company; (3) corporate or other business relationships between the winning bidder and the contracting public entity; (4) an unqualified, inexperienced or hostile state supplier wins the contract; (5) contracting terms diverge significantly from those of the industry or market; (6) involvement of companies or individuals with a history of anti-competitive behaviour in the market.

For the construction sector – particularly problematic from the point of view of contracts obtained through corruption, it is possible to list some particular indicators[189]: (1) a large number of failures in-service tests and construction inspections or contradictory and unsatisfactory results in inspection reports; (2) technical failures at an early stage of construction; (3) inspectors or public agents

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[186] *Indicators of Corruption – Checklist|Legal Guidance|LexisNexis*, https://www.lexisnexis.co.uk/legal/guidance/indicators-of-corruption-checklist (accessed 6 Jan. 2022).

[187] World Bank Group, *supra* n. 184; World Bank & Central Anti-Corruption Bureau, *supra* n. 184; World Bank, *Most Common Red Flags of Fraud and Corruption in Procurement in Bank-Financed Projects*.

[188] Anderson & Transparency International Defence and Security, *supra* n. 184.

[189] Xiaomei Deng et al., *Analysis of Fraud Risk in Public Construction Projects in China*, 34 Pub. Money & Mgmt. 51 (Jan. 2014); Maarten de Jong et al., *Eliminating Corruption in Our Engineering/Construction Industry*, 9 Leadership Mgmt. Eng. 105 (Jul. 2009).

related to construction with living standards incompatible with their salaries[190]; (4) constant and disproportionate price increases.

Concerning specific indicators in contracts entered into intending to cover up acts of corruption, the ICC[191] defines red flags as 'circumstances that may indicate a party's propensity to make an illegal payment to officials and employees if public and private sectors', or more broadly as 'any fact that suggests commercial, financial, legal and ethical irregularities'. While many indications are not themselves violations of anti-corruption laws, they may be indications that need to be treated with care.[192] Further, if only one red flag is present or if it is taken alone, an arbitrator can potentially commit 'false positives'. However, when viewed together, and within context, a large number of unclear red flags may indicate a high likelihood of wrongdoing.[193]

The most common red flags listed by the compliance literature are[194]:

(1) A reference check indicates that the advisor/consultant has a poor background or reputation;

(2) The contract involves a country that has a history of corruption cases and scores high in corruption rankings;

(3) The payer for the prime contract is a state or public company;

(4) The advisor/consultant is suggested by a public entity to mediate the procurement of services;

(5) The object of the consulting/advisory contract is not tangible;

(6) The main contract involves a sector with a history of corruption, such as defence, mining, health or public works construction;

(7) The advisor/consultant rejects anti-corruption commitments, as well as any liability for acts of this nature;

(8) The effective beneficiaries of the firms providing advice/consultancy are unknown or are individuals close to the managers or employees with decision-making power over the main contract;

(9) The adviser/consultant does not have an actual office or does not have an office at the place designated for the performance of the obligations in the contract, with an opaque corporate structure and domicile;

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190 Deng et al., *supra* n. 189.

191 International Chamber of Commerce, *supra* n. 75, at 5.

192 Baizeau & Hayes, *supra* n. 1.

193 Rose, *supra* n. 25.

194 International Chamber of Commerce, *supra* n. 75; International Chamber of Commerce, *ICC Business Integrity Compendium*; *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, *supra* n. 182. The red flags are also listed in Khvalei, *supra* n. 115; Zuberbühler & Schregenberger, *supra* n. 106; Nappert, *supra* n. 117; Hwang & Lim, *supra* n. 21; Charles Kenny & Maria Musatova, *'Red Flags of Corruption' in World Bank Projects: An Analysis of Infrastructure Contracts* 27; Betz, *supra* n. 10.

(10) The adviser/consultant has only nominal directors, generally resides in tax haven territories or are lawyers;

(11) Due diligence investigations identify that the adviser/consultant owns a shell company or has a non-transparent corporate structure;

(12) The adviser/consultant does not have sufficient staff capable of performing contract obligations;

(13) The adviser/consultant requires that its identity, employees and directors are not disclosed;

(14) The contract value is high in absolute terms and in relation to the scope of the contract;

(15) The agent's remuneration is calculated as a percentage of the main contract value and the amount paid is disproportionately high compared to the work done by the agent;

(16) There is a little time-lapse between signing the contract with the intermediary and the date of obtaining the main contract;

(17) The contract must be paid into a bank account outside the agent's domicile;

(18) Amounts are due only after the main contract has been closed or has its initial payments made. Advisory/consultancy fees are fully contingent on success;

(19) There are no relevant records associated with the execution of the advisory/consulting contract; and

(20) Lack of transparency in information, with rudimentary accounting.

Nonetheless, building upon an interesting observation made by Khvalei that, in addition to the indications that may lead to the indication of corruption, there are also indications that help to relativize and, eventually, discard the red flags within the context of the analysis of the requirements of the adverse inferences.

For example, a company engaged in the performance of a correct activity should not have great difficulties gathering a context of information that may contribute to demonstrating the lawfulness of its activities and the existence of qualified personnel to perform the work defined in the agency or consulting agreement. This information includes (1) records of involvement of such personnel in the performance of the activities; (2) detailed reports indicating what work was performed, when and how; (3) information on similar projects developed and implemented at market prices; (4) confirmation by certified auditors that the fees paid by the agent were spent legitimately. However, eventually, proof of the absence of corruption cannot be produced instantly.

As indicated, red flag evidence can serve as a valuable tool for the arbitrator to identify corruption risks.[195] However specific they may appear, the arbitrators will,

[195] Betz, *supra* n. 10; Zuberbühler & Schregenberger, *supra* n. 106; Khvalei, *supra* n. 45.

as a result of the proceedings, have a variety of information that may, when analysed together, raise further questions. Khvalei[196] points out that arbitrators will necessarily have information about the parties to the main contract, the country and industry sector involved, the type of companies involved, whether or not there are commercial agents, the bank domicile, the nature of the work, the amount of remuneration, and the payment terms. The question that then arises is how to value and what to do about red flags.

To make this model even more systematic, we submit that the existence of at least one red flag of corruption is already sufficient for the court to start a more in-depth investigation. As said, it is the duty of the arbitrator to prevent such a serious matter from going unexamined.

In turn, during the proceeding, more evidence of the practice may emerge, especially through the contributions brought by the party questioning the corruption in the proceeding. In the face of new evidence, and if it is found that such evidence cannot be proved by the party claiming its right, it shall be incumbent upon the arbitrator to resort to adverse inferences, according to the rules set forth above. The respondent at this point who is not able to produce direct evidence for the imputation made, and does not present convincing reasons for such, will be subject to adverse inferences by the court (as pointed out above), always when they are reasonable and proportional to the evidence and to the fact intended to be proved.

At this point, we argue that two uncontested red flags would already be sufficient to make inferences about corruption. Or, still, the existence of only one particularly and contextually critical red flag could also be sufficient to suggest an adverse inference.

The relevance and importance of the red flags must always be assessed in light of the (non-corrupt) commercial practices used in the sector involved (e.g., the level of commissions and the work product of consultants vary according to the specific industry practices). Of course, extreme attention must be paid to sectors and places where corruption is widespread so as not to '*normalize*' or accept into context corrupt practices that are more or less accepted. The standards and practices must always be drawn from a corpus of '*clean transactions*', the best practices in terms of integrity in any given sector.

The degree of criticality varies according to the contract and context being examined. To assess such a context, an evaluation by the arbitrators will be necessary, and they should take the (good) business practices of the industry and the region as a standard. For instance, a contract remunerating the son of a minister responsible for the award of a major concession is enough to create significant

[196] Khvalei, *supra* n. 45.

suspicion as to the nature of the services, as serious, if not more so, than a payment made in a country other than the country in which the services were provided to a subsidiary of an existing and well-known company that prefers to carry out intercompany transactions for tax reasons.

Such evidence will be relativized if it proves to be unreasonable or if the party, despite failing to provide direct evidence, presents convincing evidence that its practice was lawful. If such evidence (1) has a direct bearing on the red flag of corruption; and (2) is relevant to the extent that it dispels doubts about corruption and makes the adverse inference disproportionate, then the adverse inference should be avoided.

It is believed that in this way a clearer system is created for (1) the ascertainment of acts of corruption in arbitral proceedings; and (2) valuation of indications of corruption as ignition points for the indication of investigations on corruption and, subsequently, the making of adverse inference to consider the fact proven (or not).

7 FINAL REMARKS

There are several difficulties in proving corruption in contracts submitted to arbitration. Often, the characteristics that make arbitration an efficient dispute resolution method also make it difficult to address acts of corruption. In sum, there is a disconnection between the current treatment of corruption allegations in arbitration and the broader societal fight against corruption. This needs to be reconciled as soon as possible, if arbitration is to maintain its status as the system of choice for resolving complex commercial disputes, as the lack of a coherent framework might impact the enforceability of awards and the overall standing of the arbitration itself. Then it is necessary to develop a theoretical framework capable of addressing the challenges posed by the complex nature of corruption.

Ignoring this, on the other hand, means taking the risk of having arbitration qualified as a haven for the validation of bribery and other malfeasance, most likely attracting much stricter state regulation. Using a system of adverse inferences based on a sufficient number of red flags allows the arbitrator to tackle this problem dynamically while fulfilling his duties to ensure the enforceability of the award and to ensure public policy.

In sum, we propose that allegations of corruption be dealt with under the following test: a red flag of great gravity (at the discretion of the arbitrators under good business practice in the industry) or the accumulation of any two red flags, in the absence of counterevidence or sufficient evidence to rule out the plausibility of the risk, authorizes the arbitrators to apply negative inferences concerning the facts justifying the suspicion of corruption.

Relevant sources of this issue, as well as the keys to resolving them, lie in the allocation of the burden of proof and choosing an adequate standard when dealing with corruption allegations or claims. In dealing with the burden, red flags should be used more widely to justify shifting it between the parties once prima facie evidence of corruption has been established, resorting to the adverse inferences framework to do so. As the burden has been shifted and once the tribunal concludes that the accused party has not managed to sufficiently dispel the allegations, a lower standard of review for the corruption claim – such as the preponderance of evidence – should be used.

Key red flags can be obtained from anti-corruption compliance literature and will usually be sector and activity-specific, being researched and applied on a case-by-case basis. The examination of how arbitration can curb corruption in some of these sectors is an interesting avenue for further research.

This system avoids possible nullity claims for violation of the due process of law or undue reversal of the burden of proof. The distribution of the burden remains the same and the party has, of course, the possibility of presenting counter-indications. To correctly and satisfactorily assess such indicia, the arbitrator must count on adequate knowledge of compliance. For such, it may even be advisable the assistance of compliance professionals, who are specialized in corruption prevention and are capable of identifying signs of illicitness.

In this regard, two notes that may be the object of future discussions and theorizations in this dogmatic field are still pertinent. The first one regards the potential particularities of certain jurisdictions concerning practices that may be taken as illicit by others. As much as there is relative consensus about customary international trade practices, one cannot rule out that domestic and relational cultural aspects directly impact the business environment and practices. This suggests that the arbitrator must be familiarized and advised about not only the compliance literature but also the uses and customs of the place where the contract is executed. Secondly, and still related to the first point, the sources for the formulation of red flags must be viewed with a certain critical perspective. If the evidence to be used diverges from what is usually established by international and governmental bodies, it is necessary to verify its suitability as a source for generating relevant procedural effects in arbitration. There is no doubt that arbitration has adequate means to deal with this type of issue, but, at the same time, it is essential to always keep it in perspective.

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