ICC
Dispute Resolution
Services

ICC COMMISSION DOCUMENT

Burden and standard of proof of corruption

Offprint from ICC Dispute Resolution Bulletin | ISSUE 2026-2

ICC Dispute Resolution Bulletin | 2026-2
Addressing Issues of Corruption in International Arbitration

E-journal of the International Chamber of Commerce (ICC)
Périodique numérique de la Chambre de commerce internationale

Acknowledgements
The ICC Commission on Arbitration and ADR Task Force "Addressing Issues of Corruption in International Arbitration" was co-chaired by **Sophie Nappert**, **José Ricardo Feris** and **Vladimir Khvalei**, under the leadership of **Carita Wallgren-Lindholm**, previous Chair of the ICC Commission on Arbitration and ADR and **Melanie van Leeuwen**, current Chair of the ICC Commission on Arbitration and ADR, **Patrick Leonard** and **Caline Mouawad**, Steering Committee Liaison Officers, and **Dr Hélène van Lith**, Steering Committee Officer and Commission Secretary. The Task Force has worked closely with the International Bar Association (IBA), including its arbitration and anti-corruption commissions, represented by Julie Bédard and Dietmar Prager, as well as with the ICC Business Integrity Commission, led by Viviane Schiavi.

Track coordinators

Red flags or other indicators of corruption
Xavier Andrade Cadena, Patrick Baeten, Lucinda A. Low, Abdulhay Sayed

National committee survey
Diana Bayzakova, Payel Chatterjee, Ana Gerdau De Borja Mercereau, Christine Lecuyer-Thieffry

The use of AI to assist in the identification, validation and assessment of red flags of corruption
Niuscha Bassiri, Polina Permyakova, Reinmar Wolff.
Experts: Battine Edwards, Henry Liu, Lilit Nagapetyan

Burden and standard of proof of corruption
Laurie Achtouk-Spivak, Arif Hyder Ali, Françoise Lefèvre, Cédric de Pouzilhac

Issues related to arbitrators
Clare Ambrose, Michael Hwang, Patricia Nacimiento.

Parallel Corruption Proceedings
Paola Aldrete Rivas, Elena Gutiérrez García De Cortázar, Susan Munro

Other Task Force members: The Task Force was launched on 5 November 2019, and its final membership comprised members from 58 jurisdictions: Diana Akikol, Folashade Alli, Koorosh H. Ameli, Ricardo Ampuero Llerena, Nicolas Angelet, Homayoon Arfazadeh, Andrea Bandini, Victoria Barth, Antje Baumann, Julie Bédard, Affef Ben Mansour, Sílvia Bueno De Miranda, Constantin Calavros, Michelangelo Cicogna, Massimo Coccia, Nadia Darwazeh, Sotiris Dempegiotis, Diana Droulers, Nils Eliasson, Alain Farhad, Marcelo Carlos H. Fernandez Flores, Cláudio Finkelstein, Jun (Gary) Gao, Brody K. Greenwald, Jacob Grierson, Renato Stephan Grion, Florian Haugeneder, Wulf Gordian Hauser, Emily Hay, Roberto Hernández García, Faith Hochberg, Mélida Hodgson, Junichi (Tim) Horakova, Lanlan Hu, Mahmood Hussain, Therese Isaksson, Talal H. Jaber, Sameer Jain, John Kadelburger, Hussein Khaddour, Christian Konrad, Philipp Kotlaba, Bartosz Kruzewski, Iohann Le Frapper, Pierrick Le Goff, Zhuo Jun Jennifer Lim, Aloysius (Louie) Llamzon, Esteban López, Eliseo Martínez, Hugh Meighen, Ian Meredith, Juan Felipe Merizalde Urdaneta, Catarina Monteiro Pires, Renato Nazzini, Piotr Nowaczyk, Babajide Ogundipe, Oluwaseyilayo Ojo, Julieta Ovalle Piedra, Marily Paralika, Olena Perepelynska, José María Pérez, Victor Radnaev, Peter Rižnik, Silvia Rodríguez Vasquez, Anita Schieffer, Daniel Schimmel, Thomas Stouten, Marc Thill, Filipe Vaz Pinto, Ana Vermal, Carlo Verona, María Vicien Milburn, Sophia Von Dewall, Stephan Wilske, Katia Yannaca-Small, Hua Hsin Yen, Jennifer Younan, Haixiao Hellen Zhang, Roland Ziadé, and Alberto Zuleta-Londoño.

Copyright © 2026
International Chamber of Commerce (ICC)

All rights reserved. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means except as permitted by law without the written permission of ICC. Authors should request the permission of ICC prior to any reproduction or subsequent publication of an article (electronic or print). Permission can be requested from ICC through **ipmanagement.drs@iccwbo.org**.

Tous droits réservés. Il est interdit de reproduire, de distribuer, de transmettre, de traduire ou d'adapter tout ou partie de cet ouvrage, sous quelque forme ou par quelque procédé que ce soit, en dehors des exceptions prévues par la loi, sans l'autorisation écrite de la Chambre de commerce internationale. Toute demande d'autorisation est à adresser à **ipmanagement@iccwbo.org**.

Disclaimer
Except where otherwise indicated, the views expressed and statements made herein are those of their authors and should not be construed as creating any duty, liability or obligation on the part of ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and their respective Secretariats.

Sauf indication contraire, les points de vue et les commentaires exprimés dans la présente publication sont ceux de leur(s) auteur(s) et ne sauraient créer aucun devoir, ni aucune responsabilité ou obligation à la charge de la Chambre de commerce internationale ou de ses organes, y compris la Cour internationale d'arbitrage, le Centre international d'ADR et leurs secrétariats respectifs.

Trademarks

ICC, the ICC logo, CCI, International Chamber of Commerce (including Spanish, French, Portuguese and Chinese translations), International Court of Arbitration and ICC International Court of Arbitration (including Spanish, French, German, Arabic and Portuguese translations) are all trademarks of the ICC, registered in several countries.

ICC, le logo ICC, CCI, International Chamber of Commerce (y compris des traductions en espagnol, français, portugais et chinois), International Court of Arbitration et ICC International Court of Arbitration (y compris des traductions en espagnol, français, allemand, arabe et portugais) sont des marques de la Chambre de commerce internationale et ont été enregistrées dans plusieurs pays.

ICC Publication No. @26BUL2
ISBN: 978-92-842-0773-2 ISSN: 2520-6052
publications@iccwbo.org

https://2go.iccwbo.org/

ICC Dispute Resolution Library
https://jusmundi.com/en/icc-dispute-resolution-library

Publication date | Date de parution
November 2026 | Novembre 2026

Contents

BURDEN AND STANDARD OF PROOF OF CORRUPTION

Introduction 4
1. Overview of trends 6
1.1 General 6
1.2 Burden of proof 7
1.3 Standard of proof 7
2. Applicable legal framework 8
2.1 Institutional arbitration rules 8
2.2 Applicable laws 9
2.2.1 Law governing the merits of the dispute (*lex causae*) 9
2.2.2 Law of the seat of the arbitration (*lex arbitri*) 9
2.2.3 The national law of the parties 10
2.3 General principles of law/transnational approach 10
2.4 Academic writings and doctrine 11
2.5 Soft law instruments 12
3. Burden of proof 12
3.1 Is the burden of proof substantive or procedural? 12
3.2 Who bears the burden of proof? 13
3.2.1 The default rule: *actori incumbit probatio* 13
3.3 The exceptions: burden-shifting and adverse inferences 16
3.3.1 Burden-shifting 16
3.3.2 Adverse inferences 18
3.4 Summary 19
4. Standard of proof 20
4.1 Is the standard of proof a substantive or procedural issue? 21
4.2 What standards have tribunals applied in assessing corruption allegations? 22
4.2.1 Common law derived standards 22
i) "Beyond reasonable doubt"
ii) "Clear and convincing evidence"
iii) "Balance of probabilities"
4.2.2 Civil law derived/subjective approach standards 27
i) "Inner conviction"
ii) "Reasonable certainty"
4.2.3 Weighing the evidence 28
4.3 Relationship between standards of proof and types of evidence 30
4.4 Summary 32

Burden and Standard of Proof of Corruption

Introduction

1. Critical to assessing whether an allegation of corruption in arbitration proceedings has been established, be it in contractual relations or the making and performance of a foreign investment, is the inquiry into and analysis of the burden and standard of proof, which is the subject matter of this document.

2. The question before the finder of fact – in the present context, the arbitral tribunal – is not to determine criminal guilt or innocence.[1] Rather, it is to assess whether, based on the evidence presented by the party alleging corruption and the party opposing that allegation,[2] the allegation has been proven. In this sense, the framework for analysing the burden of proof and the standard to which the corruption allegation must be proven is both objective and subjective. Its purpose is not to establish the objective truth, but rather to permit a structured and coherent analysis that enables a subjective assessment regarding the likelihood of the allegation based on the available evidence and how that evidence has been presented in the context of the case.

3. The burden of proof and the standard of proof are distinct concepts. In the words of the ICSID tribunal in *Rompetrol v Romania*:

> "[T]he burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute, whereas the standard of proof is relative."[3]

4. As reflected in relevant case law and reliable academic commentary, analysis of the burden and standard of proof in international arbitration is complicated by a variety of multi-layered and multi-dimensional factors, some of which are identified below:[4]

5. Corruption, graft, bribery, money laundering, fraud and similar economic crimes are, by their very nature, clandestine activities – where those involved make concerted efforts to hide their activities and cover their tracks, are untruthful, and engage in dishonesty – that render the proof of corruption allegations or their refutation harder than is the case with other types of claims and allegations.

6. While corruption allegations in international arbitration may implicate issues of criminal responsibility and sanction, arbitral tribunals do not have criminal law jurisdiction and are not part of the law enforcement or police authority of a State.[5] Unlike domestic legal systems, international arbitration lacks a uniform set of stringent rules on evidence. As such, arbitral tribunals have considerable flexibility in determining which evidence to admit, the weight it should carry, who bears the burden of proof, and what the appropriate standard of proof is.[6] Nevertheless, arbitrators must strike the right balance in allocating burdens of proof and determining standards of proof for corruption

---

1 The extent to which an arbitral tribunal can or should take into account parallel criminal investigations and parties potentially being prevented from defending themselves against corruption allegations as a result is addressed in the Supplementary Document on Parallel Corruption Proceedings.

2 The question of whether an arbitral tribunal can raise corruption allegations of its own motion is addressed in the ICC Commission Supplementary Document *Red Flags or Other Indicators of Corruption in International Arbitration*, at Section 4 "Role and responsibilities of the arbitral tribunal in relation to red flags".

3 The Rompetrol Group N.V v Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178; see also H. Tezuka, Corruption Issues in the Jurisdictional Phase of Investment Arbitrations - An Arbitrator's Checklist, in D. Baizeau, R. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, *Dossier XIII of the ICC Institute of World Business Law* (2015).

4 A. Llamzon, A.C. Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct", in A. Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series No. 18*, 451-530, 490 (2015); C. Brower, "Evidence Before International Tribunals: The Need for Some Standard Rules", 28(1) *Int'l Lawyer* 47-58, 49 (2018); A. Aynès, "La charge de la Preuve", 1 *Rev. Arb.* 3-14, 3 (2020).

5 K. Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration – On Applicable Criminal Law and Evidence* (Cambridge University Press, 2017), pp. 3-4: "In practice, when arbitral tribunals decide criminal law issues, difficult questions regarding the applicable law and evidence arise. Criminal law is mandatory and part of public law – it is not at the disposition of the parties – while in particular international arbitration is private and autonomous from states, consensual and based on party autonomy … The merger of proceedings that are essentially based on party autonomy with substantive criminal law that falls into the domain of the autonomy of states raises touchy issues".

6 Generally, international arbitral tribunals enjoy broad discretion in deciding issues pertaining to the admissibility and evaluation of evidence. For instance, Art. 26(1) of the 2026 ICC Arbitration Rules allows arbitral tribunals broad discretion to "establish the facts of the case by all appropriate means". ICC Secretariat Guide, para. 3-942: "Procedure for determining the facts. Article 25(1) gives the arbitral tribunal broad discretion to determine the fact-finding process. In practice, it will depend on the manner in which the case is conducted generally and will be strongly influenced by the parties" and individual arbitrators' "preferences". Art. 27(4) of the 2021 UNCITRAL Rules similarly provides that the "arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".

allegations. They must neither allow corruption to be used as an unsubstantiated ploy nor set the bar for proof so high that corrupt conduct is effectively insulated from scrutiny.[7]

7. The assessment of the burden and standard of proof in international arbitration is impacted by numerous factors, including the type of corruption underlying the allegation, where the alleged corrupt activities took place, the nationalities or places of residence of those allegedly involved in the corruption and the laws of these jurisdictions, the law of the seat of the arbitration (if there is one), and the substantive law of the contract (which may or not be specified).

8. There is no system of precedent (in the sense of *stare decisis*) in international arbitration, even though arbitrators may consult the decisions of other tribunals and support their analysis and conclusions on the basis thereof. The freedom and discretion that is a hallmark of arbitration and the lack of a system of precedent thus give rise to a wide variety of approaches by arbitrators in treating the burden and standard of proof where corruption is alleged.

9. The diversity of approaches is less evident in **investment arbitration** than in commercial arbitration. ICSID arbitration is delocalised in that there is no legal seat of the arbitration and the ICSID Convention specifically refers to "international law" as source of law that may have a controlling or gap-filling effect on the law chosen by the parties, or even in the absence of such a choice. The analysis of the allocation of the burden of proof and of the standard of proof in investment arbitration is thus not necessarily the same as in commercial arbitration.

10. The instruments of consent in investment arbitration (treaty, investment agreement, national legislation) are varied, and as such, the treatment of the burden and standard of proof needs to reflect the legal regimes that are relevant to or that result from the instrument of consent.

11. In **international commercial arbitration** (including construction arbitration), there is much greater variability regarding the applicable law and rules concerning the burden and standard of proof in corruption cases. Different legal systems diverge on whether these issues are treated as substantive or procedural, and on what evidentiary thresholds are appropriate. Common law systems typically regard rules on burden and standard of proof as procedural matters governed by the law of the forum or arbitral procedure, whereas civil law systems often view them as substantive aspects of the claim, to be governed by the law applicable to the merits. In other words, a common law lawyer might assume that burdens and standards are part of the arbitral procedure (and thus within the arbitral tribunal's discretion or *lex arbitri*), while a civil law lawyer may contend they are tied to the rights and obligations under the governing law of the contract or treaty. In practice, international arbitral doctrine and case law are not uniform on this classification, and tribunals may not explicitly engage in a conflict-of-laws analysis on this point, instead relying on a "good administration of justice" approach in the case at hand.

12. This document summarises the various approaches and perspectives – drawn from case law in investment arbitration (e.g. ICSID, PCA cases), international commercial arbitration (e.g. under ICC, LCIA, SIAC rules), national court decisions, international conventions, and scholarly commentary – regarding the burden and standard of proof in disputes where corruption is alleged, whether in support of a claim or in defending against one, or when corruption issues have been raised by the arbitral tribunal *ex officio*. It aims to provide guidance on how these issues may be addressed by examining which law governs these questions, who bears the burden of proving corruption, how tribunals should approach the standard (or level of evidence) of proof required, and how arbitral tribunals handle evidence (direct and circumstantial) in practice.

13. Certain topics that are relevant to the burden of proof and the bases on which it may shift are not addressed in this document, including the admissibility of evidence; rebuttable and irrebuttable presumptions; or how to treat the evidence of a witness who has invoked the right against self-incrimination, whether under the substantive law of the agreement, the laws of the host state, the law of the investor, the law of the seat of the arbitration, or the law of the witness's own country of residence or nationality. Nor does it address what law should apply insofar as the elements of the alleged crime are concerned.

14. **Section 1** provides an overview of current trends emerging from arbitral practice and best practice recommendations for addressing burden and standard of proof issues in corruption cases. **Section 2** examines the legal framework applied by arbitral tribunals when deciding which party bears the burden of proof and what standard of proof applies. **Section 3** analyses the burden of proof, addressing whether it is substantive or

7 An award tainted by proven corruption or one that ignores compelling evidence of corruption could be refused enforcement or be set aside by national courts. See e.g. the English High Court's decision in *Nigeria v P&ID*, demonstrating that courts will not hesitate to overturn an award that was obtained through or overlooks fraud and bribery. Nigeria v P&ID, Judgment [2023] EWHC 2638 (Comm). See e.g. A. Bunda, R, Pillai, United Kingdom: Nigeria v P&ID – Must the Court Safeguard the Rule of Law in Arbitrations?, *ICC Dispute Resolution Bulletin*, 2024-1.

procedural, who bears the burden of proof under the default rule *actori incumbit probatio onus probandi* (the person who makes a claim must prove it) principle, and relevant exceptions to that rule. **Section 4** examines the applicable standard of proof, determining whether it is a matter of substance or procedure, which standards are applied where corruption allegations are made, and whether a heightened standard should apply.

1. Overview of trends

15. To date, arbitral tribunals have dealt with the burden and standard of proof for corruption allegations in many ways, reflecting the fragmentation of the arbitration landscape and the reality that the legal and factual situation varies from case to case. However, tribunals are trending toward taking a pragmatic approach, which appropriately balances often competing considerations of fairness, due process, the evidentiary difficulties typically encountered in corruption cases, and the universally accepted policy imperatives of combatting corruption in transnational commerce and investment.

16. There is substantial agreement that the primary burden of persuasion for allegations of corruption lies with the party that makes those allegations, following the principle *actori incumbit probatio onus probandi*. In practical terms, this means that a claimant alleging that a contract is null *ab initio* or void due to the respondent's bribery, or a respondent asserting a corruption defence against a claim, must carry the burden to prove those corrupt acts. This baseline rule is firmly established across arbitral jurisprudence. Tribunals largely concur that the burden of persuasion remains fixed on the alleging party (it does not shift back and forth). However, some tribunals acknowledge that the burden of production (coming forward with evidence) can shift in the course of the proceedings if certain thresholds are met. For example, some arbitral tribunals consider that once a *prima facie* case of corruption is established, the other party may be expected to produce counter-evidence or risk an adverse inference. There is no consensus on the exact circumstances that justify such a shift. Rather, tribunals have exercised their judgment based on the facts of each case. Generally, the more one party controls the critical evidence, the more willing a tribunal might be to shift the production burden or draw inferences if that evidence is not provided.

17. The appropriate standard of proof for allegations of corruption is still subject to vigorous debate. While a number of tribunals have applied heightened standards of proof, others have applied an ordinary civil standard, and some tribunals have applied standards falling somewhere in between or not easily characterised as falling into any category. Tribunals that have grappled with the question of which standard to apply have traditionally balanced competing policy considerations:

- On the one hand, those selecting a heightened standard have been animated by concerns about the gravity of the allegation and the serious consequences likely to result therefrom;
- On the other hand, tribunals applying an ordinary civil standard have been animated by concerns that evidence of corruption is especially difficult to come by;
- Others have tried to balance these types of considerations with concerns of due process.

18. Based on a review of arbitral practice, as reflected in available case law, as well as reliable commentary, arbitrators and parties in arbitrations where corruption allegations are raised may consider the following recommendations.

1.1 General

19. Arbitrators should lay out their analysis regarding the applicable burden and standard of proof, or in support of their decision not to do so, with sufficient clarity. Best practice calls for tribunals to provide detailed reasoning when corruption is alleged, regardless of outcome. Because awards might face scrutiny at the enforcement or set-aside stages, it is important to maintain a clear record of how the arbitral tribunal handled (i) the allegations of corruption, including when it comes to burden and standard of proof, and (ii) evidence. Sufficiently didactic awards also contribute to developing consistent jurisprudence.

1.2 Burden of proof

20. Awards should reflect the arbitral tribunal's reasoning and the sources of law considered in determining allocation of the burden of proof;

21. In keeping with the majority view, absent a clear indication to the contrary in the law(s) that the arbitral tribunal considers applicable to deciding an issue of corruption, arbitral tribunals may safely consider that the allocation of the burden of proof is a matter of procedure. Arbitral tribunals may also safely rely on the general principle of law *actori incumbit probatio* and consider that it consists of two basic elements:
    - the burden of persuasion (which may never shift); and
    - the burden of production (which may shift in certain circumstances).

22. In corruption cases, arbitral tribunals may decide to shift the burden of production to the party opposing the allegation of corruption once a *prima facie* case (i.e. one where sufficient evidence has been adduced to establish that corruption has occurred in the absence of any countervailing evidence) has been made by the party making the allegation. Tribunals should elaborate in their award what specific evidence or collection of evidence and circumstances led to shifting the burden of production.

23. Similarly, in corruption cases, tribunals may rely on adverse inferences in their overall consideration of whether a party has satisfied its burden of proof; however, this should be done with caution. Where adverse inferences are relied upon, the arbitral tribunal's analysis should be spelt out such that it is clear what inference has been made and with what evidentiary effect.

24. While there is considerable overlap between investment arbitration and commercial arbitration insofar as the allocation of the burden of proof is concerned, investment arbitration tribunals seized with deciding corruption allegations should delineate with greater precision the public policy considerations that they have considered important in allocating the burden of proof and any shifting thereof.

1.3 Standard of proof

25. In determining the appropriate standard of proof by which an alleging party must prove corruption, arbitral tribunals may consider whether to apply a strict conflict-of-law approach (by first characterising whether they consider the standard of proof to be a procedural or substantive issue and determining the law applicable to the issue) or to apply a particular standard of proof directly. While approaches vary greatly, there is a growing trend of awards that are guided by the need to balance the transnational goal of combating corruption with considerations of fairness, due process, and equality of arms, where serious allegations are being made, in deciding the issue and reviewing the evidence more generally.

26. Given the various legal traditions at play and the lack of consensus on the various approaches, no transnational standard appears to have emerged as of yet (particularly in commercial arbitration), although some may consider this would be the most desirable way forward. Proponents of this position suggest that the transnational standard would or should be no higher than the common standard applied in civil and commercial cases – that of "balance of probabilities" or its equivalent in other legal traditions.[8] Resorting to such a standard should not, in any event, prevent arbitrators from weighing the particular evidence put forward against the seriousness of the allegation while fostering the overall policy goal of combatting corruption. Arbitration is best served however by a rigorous analysis of the legal landscape and the evidence being proffered in an effort to provide the necessary level of motivation for awards in consideration of a fair administration of justice. At all times, and while this goes beyond the strict scope of this Supplementary Document, arbitrators should be mindful to engage in a thorough review of the evidence adduced by the parties in propounding and defending against an allegation of corruption.

27. In analysing the evidence presented, arbitrators may wish to include in their award a discussion of what evidence they considered to constitute direct or circumstantial proof of corruption, why the evidence falls into one or the other category, and how this categorisation influenced their findings in weighing the allegations made as well as how their review of the evidence interplayed with the approach to the standard of proof they decided to endorse.

8 It is argued that this standard has several advantages, namely: (i) it aims for a fairly balanced standard, as explained below (see Section 4.2.1(iii) below); (ii) it corresponds in many common law countries to the standard applied in arbitration to allegations other than corruption; and (iii) it is a standard which, compared to other commonly applied standards, will not have the overall effect of raising the standard of proof required and therefore, from this point of view, corresponds to the objectives of the international fight against corruption.

2. Applicable legal framework

28. When addressing questions relating to the burden and standard of proof of evidence of corruption, arbitral tribunals have taken various approaches, ranging from setting out in detail the applicable legal framework that guided or directed the arbitral tribunal in addressing which party bears the burden of proof and what is the applicable standard of proof, to providing no explanation as to which approach was taken or which particular set of rules applied to identify the applicable standard of proof and who bears the burden of proof. The latter approach, quite likely reflecting the specific exigencies of the case, is not recommended, and even tribunals deciding to exercise their discretion are best served by explaining the motives for the approach chosen.

29. The application of, reference to, or taking into consideration of a particular set of rules may vary depending on whether the arbitral tribunal considers that the burden or standard of proof is a matter of substance or procedure (either as part of a conflict-of-law analysis or by way of a "direct choice" approach).[9]

30. Arbitral tribunals apply or look for guidance from a variety of sources of law, rules and authorities in their decision-making process. Each of these, in varying degrees, can potentially influence the arbitral tribunal's approach. They include institutional arbitration rules (**2.1**); applicable laws (**2.2**), in particular the law governing the merits (*lex causae*), the law of the seat of the arbitration (*lex arbitri*) and the law of the nationality of the parties; (**2.3**) general principles of law (the transnational approach); (**2.4**) academic writings and doctrine; and (**2.5**) relevant "soft law" instruments.

2.1 Institutional arbitration rules

31. A natural starting point for arbitrators in considering the burden and standard of proof is to refer to the instrument of the parties' consent to arbitrate, and more specifically, any reference therein to the agreed or applicable institutional arbitration rules. These institutional rules apply upon agreement by the parties, unless the *lex arbitri*, the law of the seat, or any other applicable law includes mandatory provisions from which the parties may not derogate.

32. While most institutional rules implicitly accept that each party must present evidence in support of its case, this is not to be equated with the question of which party bears the burden of proof or even which specific standard of proof should be applied to the evidence presented.[10] Most institutional rules, with certain notable exceptions,[11] do not explicitly specify which party has the burden of proof, but instead grant tribunals broad discretion on evidentiary matters, thereby allowing them the liberty to decide how to allocate the burden of proof.[12]

33. Likewise, institutional arbitration rules do not address the standard of proof, instead providing arbitral tribunals with considerable discretion to determine matters of evidence. For example, Art. 26(1) of the ICC Arbitration Rules merely provides for the possibility that the arbitral tribunal "establish the facts of the case by all appropriate means", thereby giving full discretion to the arbitrators as to the approach to take in evidentiary matters, including identifying the appropriate standard of proof. Some institutional rules have incorporated broad terminology to deal with the issue of evidence. These rules require the arbitral tribunal to assess the "materiality" and "weight" of the evidence, which suggests a duty on the part of arbitral tribunals to assess the standard of proof. However, these rules do not go so far as to determine the actual standard to be applied, which is to be determined in the arbitral tribunal's discretion.

---

9 While the question of whether the burden of proof is substantive or procedural insofar as a particular claim is concerned will not change, that determination could significantly impact which party bears the burden.

10 H.A. Ali, J. Wessel, A. de Gramont, R. Mellske, *The International Arbitration Rulebook: A Guide to Arbitral Regimes* (Kluwer Law International, 2019), para. 6.01 at 369 and n. 1.

11 See e.g. UNCITRAL 2021 Arbitration Rules, Art. 27(1): "Each party shall have the burden of proving the facts relied on to support its claim or defence"; ICSID Arbitration Rules (2022), Rule 36(2) "[e]ach party has the burden of proving the facts relied on to support its claim or defence"; HKIAC Arbitration Rules (2024), Art. 22(1): "Each party shall have the burden of proving the facts relied on to support its claim or defence."

12 H.A. Ali, J. Wessel, A. de Gramont, R. Mellske, supra note 10, para. 6.01 n. 2 at 369; H. Tezuka, supra note 3; C. Albanesi, E. Jolivet, Dealing with Corruption in Arbitration: A Review of ICC Experience, *ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration*. See e.g. ICC 2026 Arbitration Rules, Art. 26(1); UNCITRAL Arb. Rules, Art. 27; LCIA 2020 Arbitration Rules, Art. 22; SIAC 2025 Rules, Art. 32.3. This is also the case of the 2006 ICSID Arbitration Rules, which led the tribunal in Tethyan Copper Company Pty Limited v Islamic Pakistan to conclude that the ICSID Convention and the ICSID Arbitration Rules "provide the Tribunal with considerable discretion to determine matters of evidence", ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 Nov 2017, para. 285.

2.2 Applicable laws

34. Some arbitral tribunals take the approach that the burden and standard of proof are to be found through the applicable national law by applying, referring to, or considering the applicable law. Among the applicable laws considered are the law governing the merits of the dispute (*lex causae*) (**2.2.1**); the law of the seat of arbitration (*lex arbitri*) (**2.2.2**); and/or the national law of the parties (**2.2.3**).

2.2.1 Law governing the merits of the dispute (*lex causae*)

35. Arbitral tribunals have often looked to the *lex causae*, the law governing the merits or substance of the dispute[13] on matters of burden (at least on potential burden-shifting) and standard of proof. When arbitral tribunals have relied on the law governing the merits of the dispute, they have often reasoned that the law governing a substantive claim should also govern the standard by which a party must prove that claim; that is, the amount and strength of the evidence necessary to prove that claim.

36. For example, in *Metal-Tech Ltd. v Uzbekistan* (ICSID), the arbitral tribunal reasoned that:

> "Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*".[14]

The arbitral tribunal found that the *lex causae* – in that case, the BIT – being silent on the matter granted the arbitral tribunal "relative freedom in determining the standard necessary to sustain a determination of corruption". In ICC Case 4145, a contract-based dispute, in considering allegations of bribery, the tribunal applied "general principles of interpretation" recognised in Swiss law, which was referred to in the underlying agreement as the applicable law, to determine that "a fact can be considered as proven even by the way of circumstantial evidence". [15]

37. Importantly, tribunals have generally not looked to criminal law standards of the *lex causae* in determining the burden or standard of proof.[16] Nor have they considered themselves bound by national procedural rules of evidence, even in cases of investor wrongdoing arising from breaches of the host State's law.

2.2.2 Law of the seat of the arbitration (*lex arbitri*)

38. The law of the seat of the arbitration,[17] to which some tribunals refer particularly on matters of burden of proof, may contain default rules on burden of proof, or may explicitly grant arbitrators discretion as to which standard to apply, if any. For instance, in *Jan Oostergetel v Slovakia*, the arbitral tribunal reasoned that the general principle on allocation of burden of proof (*actori incumbit probatio*) was a procedural matter governed by the *lex arbitri*, the law of the seat of the arbitration and confirmed that the general principle was part of procedural *ordre public* under Swiss international arbitration law.[18]

39. However, and more commonly, the arbitration law of the seat of the arbitration is silent on burden allocation and the standard of proof. The absence of a specific rule in the *lex arbitri* often leads to the arbitral tribunal's discretion to apply general principles of law or the *lex causae* as it finds appropriate.

40. That being said, particularly on the standard of proof matters, arbitrators should be mindful of the law of the seat or, at a minimum, the approach of courts at the seat when it comes to allegations of corruption, even where the *lex causae* may take a different approach. Indeed, because courts at the seat may engage in a full evidentiary review on public policy grounds, it is important for arbitral tribunals to consider the practice of the courts at the seat of the arbitration and their

---

13 This document does not touch upon the circumstances when mandatory provisions of a specific applicable law prevail over the law chosen by the parties but the issue has previously arisen in case law. ICC Case 12472, Final Award, 24 *ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration*. In this case, although the contract expressly provided for a choice of law for French law to govern the contract, the respondent contended that the law of the country of performance of the contract should apply instead. The tribunal rejected this argument, holding instead that the dispute could be decided independently of the law of the country of performance of the contract.

14 Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 238.

15 ICC Case 4145, referred to in A. Crivellaro, Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence, in *Arbitration - Money Laundering, Corruption and Fraud - Dossier XIII of the ICC Institute of World Business Law (2003)*.

16 *Fraport AG Frankfurt Airport Servs.* Worldwide v Republic of the Philippines (I), ICSID Case No. ARB/03/25, Award, 16 Aug. 2007, para. 39. E. Teynier, "L'office de l'arbitre d'investissement: le cas particulier de l'investissement illicite", *Rev. Arb.*, pp. 117-172, 162, n. 123 (2019); A. Llamzon, A.C. Sinclair, supra note 4.

17 In this context, the distinction made or to be made between arbitration law and procedural law at the law of the seat is not addressed.

18 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, *Ad Hoc* UNCITRAL, Final Award, 23 April 2012, paras 146-147. See also, in a case that did not involve corruption allegations, *Petrobart Ltd. v The Kyrgyz Republic*, UNCITRAL, Award, 13 Feb. 2003, pp. 39, 45. In this Energy Charter Treaty case under SCC Rules, the tribunal found that evidentiary matters (including burden) were procedural and thus governed by the *lex arbitri* (Swedish arbitration law in that case).

use of the public policy exception, irrespective of the standard of proof applicable under the *lex causae*. The *Wells v Bariven* case serves as an example of this approach. In that case, the Dutch Court of Appeal, even after having recognised the arbitral tribunal's discretion on evidentiary matters, considered that the serious allegations of corruption warranted an independent evidentiary assessment by the Court of Appeal, finding that:

> "In so far as the arbitral tribunal meant by 'clear and convincing evidence' that corruption could only be assumed on the basis of direct evidence … the arbitral tribunal applied too strict a standard, in the opinion of the Court of Appeal".[19]

41. While in that case, Dutch law was also applicable to the merits, there are examples in French annulment cases where courts conduct a *de novo* review of matters of international public policy, such as corruption, even when the applicable law to the merits was not French law.[20]

2.2.3 The national law of the parties

42. Certain tribunals have considered the national law of the parties, which may be, but is not necessarily, the same as the substantive law otherwise applicable to the dispute or that is applicable to the agreement to arbitrate, in determining the standard of proof. This is the case specifically in investment arbitrations where the applicable treaty may include a "*renvoi*" to domestic laws of the host State in determining the legality of the investment at issue.

43. Some authors have suggested examining the standard of proof according to the national law of the host State in the context of investment arbitration, where the legality clause in the applicable treaty may be in issue.[21] This approach was adopted in *Kim v Uzbekistan*,[22] where the allegation itself concerned a violation of the host State's law. In *Westinghouse v Philippines and NPC*, an ICC contract-based arbitration, the arbitral tribunal determined the standard of proof (i.e. preponderance of evidence) by electing to apply the standards found in both US and Philippine law.[23]

2.3 General principles of law/ transnational approach

44. General principles of law (as part of international law per Art. 38 of the Statute of the International Court of Justice) have, in a number of cases, guided tribunals' consideration of the burden or standard of proof, especially in investment arbitrations where the BIT and international law generally are considered as the *lex causae*.

45. It is well-recognised by international courts that "the party who alleges a fact must prove it".[24] Indeed, the ICSID tribunal in *BSGR v Guinea* held that "[t]he International Court of Justice and arbitral tribunals acting under the ICSID Convention have regarded [the *actori incumbit probatio* rule] as a general principle of law", and applied this principle to the corruption allegations that were before it.[25] A long list of investment cases have affirmed this principle, including *Wena Hotels v Egypt*,[26] *Metal-Tech v Uzbekistan*,[27] *Unión Fenosa Gas v Egypt*,[28] *Karkey v Pakistan*,[29]

---

19 Wells Ultimate Serv LLC v Bariven S.A., Hague Court of Appeals, 22 Oct. 2019, para. 5.12 (free translation).

20 *Groupement Santullo Sericom Gabon v Gabonese Republic*, ICC Case. 21403, Paris Court of Appeal, Department 5 - Chamber 16, 20/03242, 5 Apr. 2022; Santullo Sericom v Gabon, Partial Award, 21 March 2018 and Final award published; Sorelec v State of Libya, Judgment of the French Court of Cassation (First Civil Chamber) 20-22.118, 7 Sep. 2022.

21 E. Teynier, "L'office de l'arbitre d'investissement: le cas particulier de l'investissement illicite", 1 *Rev. Arb.* (2019), pp. 117-172, 161:"[I]t has been proposed that the standard of proof varies according to the source prohibiting the illegality of the investment. If it is a question of the legality clause and the obligation of conformity with the laws of the host State, then the tribunal should examine the constituent elements of the offense in accordance with national law, and the standard of evidence required would be one of these elements".

22 *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 545.

23 These national laws were found to be applicable because of the nationality of the parties and a contract was meant to be performed in Philippines. See *Westinghouse Projects Co. et al. v National Power Corp., Republic of the Philippines*, Preliminary Award, 10 Dec. 1991, reprinted in 7 *Mealey's Int'l Arb. Rep.*, No. 1, section B, at p. 31 (Jan. 1992).

24 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Judgment - Jurisdiction of the Court and Admissibility of the Application, 26 Nov. 1984, para. 101; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*), Judgment, 26 Feb. 2007, para. 204; Pulp Mills on the River Uruguay (*Argentina v Uruguay*), Judgment, 20 April 2010, para. 162.

25 BSG Resources v Guinea (I), ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 489.

26 *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, paras 77, 117.

27 *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 237.

28 *Unión Fenosa Gas v Egypt,* CRCICA Case No. 899/2013, Award, 7 Jan. 2020.

29 *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017, para. 495.

Niko Resources v Bangladesh,[30] *EDF (Services) v Romania*,[31] *Tokios Tokelės v Ukraine*,[32] *AAPL v Sri Lanka*,[33] *Bayindir v Pakistan*,[34] among others. Each of those tribunals, facing corruption or illegality allegations, applied the general international principle: the party alleging corruption (often the State as a defence, or sometimes the investor as a claim of treaty breach by extortion) must prove it.

46. Investment tribunals, including *BSG Resources v Guinea (I)*, have also explicitly looked to "international law and to the practice of international tribunals" to decide the standard of proof for corruption allegations,[35] and often refer to arbitral jurisprudence to reach their decision on the applicable standard of proof.[36] Some authors likewise argue that evidentiary methods (such as the red flag methodology in assessing the type of evidence put forward) have emerged as transnational principles.[37]

47. Commercial arbitral tribunals in international cases may also be guided, as appropriate, by the evidentiary standards and/or methodology that authors and investment tribunals alike consider emerging as general principles of law forming part of international law or the general body of transnational principles.

48. Importantly, even though international law does not contain binding rules of evidence in arbitration, arbitral tribunals cite international instruments to support approaches on the burden and sometimes on the standard of proof. Some arbitral tribunals have even suggested that international anti-corruption conventions (e.g. the UN Convention Against Corruption or the OECD Anti-Bribery Convention) have helped form international public policy or principles relevant to proving corruption.[38] While the conventions do not prescribe the burden or standard of proof in arbitration, references to them underscore the gravity of corruption issues and support tribunals' inclination to ensure corruption is not left unexamined.

2.4 Academic writings and doctrine

49. Several tribunals have looked to learned writings to navigate burden and standard of proof questions, especially where the case law is divided.[39] Academic commentaries often compare national standards or propose best practices. In essence, when jurisprudence is scarce or split, a well-reasoned piece of scholarship can be informative and potentially fill the gap. If parties present renowned authorities opining on the burden of proof, tribunals may find those persuasive.[40] Similarly, in some cases, tribunals have relied on legal doctrine in order to determine the applicable standard of proof.[41] In *Unglaube v Costa Rica*, the arbitral tribunal noted that the practice in international arbitration does not indicate a leaning towards a definite standard of proof and thus considered that it is left to the discretion of arbitral tribunals to decide whether to rely on legal commentary.[42]

---

30 *Niko Resources (Bangladesh) Ltd. v Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim of 25 Feb. 2019, para. 784.

31 *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 232.

32 *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 121.

33 *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 56.

34 *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, para. 140.

35 *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 492.

36 *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221; *Ampal-American Israel Corp. and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 Feb. 2016, para. 305; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017, para. 492; *Lao Holdings N.V v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award, 6 Aug. 2019, para. 110, n. 43; *BSG Resources Ltd. (in administration) and others v Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 492.

37 See E. Gaillard, "The Emergence of Transnational Responses to Corruption in International Arbitration", 35(1) *Arb. Int'l* (2019), pp. 9-10.

38 *Sanum Inv Ltd. v Lao People's Democratic Republic*, PCA Case No. 2013-13, Award, 6 Aug. 2019, para. 103.

39 While academic writings can crystallise general principles or compile comparative solutions, which arbitral tribunals might adopt, they must be considered with caution and their reliability should be assessed.

40 *Tethyan Copper Co. Pty Ltd. v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 Nov. 2017, para. 314; See e.g. C. Partasides, "Proving Corruption in International Arbitration: A Balanced Standard for the Real World", 25(1) *ICSID Review* 47 (2010).

41 Tethyan Copper Co. Pty Ltd. v Islamic Republic of Pakistan, supra note 40, paras 295, 300-303; *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Co. Ltd. and Bangladesh Oil Gas and Mineral Corp.*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 Feb. 2019, para. 806; *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221.

42 *Marion Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, para. 34.

2.5 Soft law instruments

50. Arbitral tribunals also rely upon two soft law instruments when deciding evidentiary matters generally:

- the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"); and
- to a lesser extent, the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules").

These instruments may apply with binding force if so agreed by the parties, or serve as a source of guidance for the arbitral tribunal, either as a result of party agreement or the arbitral tribunal's discretionary authority.

51. The IBA Rules do not contain provisions directly addressing the allocation of the burden of proof, although they do contain guidance on the availability of adverse inferences, which can have a bearing on the burden and standard of proof.[43]

52. The Prague Rules contain more express guidance on the burden of proof in that they provide that "[a] party bears the burden of proof with respect to the legal position on which it relies".[44] Neither instrument contains specific provisions pertinent to the burden of proof where corruption is alleged.

53. At least one arbitral tribunal has also referred to the Basel Institute Toolkit for Arbitrators on Corruption and Money Laundering in International Arbitration.[45] The Basel Institute Toolkit does not directly allocate the burden of proof, but provides that if there are indicators of corruption, the arbitrators should consider asking the party that denies the corruption allegations to produce supporting evidence to prove the opposite (i.e. that an allegedly corrupt transaction was legitimate and part of a normal business transaction).[46] It provides different options regarding the standard of proof, allowing the arbitrator to resort to the balance of probabilities or preponderance of evidence standard, to the clear and convincing evidence standard, or to rely on their inner conviction.[47]

3. Burden of proof

54. This Section 3 analyses whether the burden of proof should be characterised as substantive or procedural (**3.1**), who bears the burden of proof under the default rule *actori incumbit probatio* (**3.2**), and the exceptions to that rule through burden-shifting and adverse inferences (**3.3**). This section also provides a general summary of the burden of proof in corruption cases (**3.4**).

3.1 Is the burden of proof substantive or procedural?

55. The cases reviewed reflect significant attention by tribunals to the question of whether the allocation of the burden of proof is governed by the procedural law of the arbitration (e.g. deriving from the *lex arbitri* or from institutional arbitral rules) or by the substantive law applicable to the merits.[48] This classification affects which law or rules a tribunal will apply when determining who bears the burden, and is a step in the analysis that arbitral tribunals must consider irrespective of whether corruption is alleged.

56. The determination of whether the burden of proof is procedural or substantive can directly impact the outcome: if considered procedural, the *lex arbitri* (the law of the seat of the arbitration) or the procedural law agreed by the parties would typically govern; if considered substantive, the *lex causae* (the governing law of the contract or treaty) would supply the rules.[49] In international arbitration, the line is not always clear-cut.[50] Many tribunals, rather than explicitly choosing one law or identifying the applicable law through a conflict of laws analysis, simply apply general principles of law on burden of proof, leaving the precise legal basis opaque.

---

43 IBA Rules on Taking of Evidence in International Arbitration (2020), Art. 9(6), 9(7). See also Section 3.3.2 below on "Adverse inferences".

44 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018), Art. 7(1).

45 *UAB Vilniaus Energija and Veolia Environnement S.A. v SP AB Vilniaus Šilumos Tinklai and Vilnius City Municipality*, SCC Case No. 2016/183, Final Award, 30 Nov. 2023, paras 325-327; M. Pieth, K. Betz, Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators (Basel Institute on Governance, 2019).

46 M. Pieth, K. Betz, supra note 45, p. 13, at Step 5 "Burden and standard of proof, circumstantial evidence and red flags".

47 Id. Tool 5.2 "Options regarding the standard of proof".

48 In common law systems, the burden of proof is generally considered a procedural matter. In contrast, in civil law systems, the burden of proof may be considered a matter of substantive law in that it is codified (see e.g. French Civil Code, Art. 1353; Swiss Civil Code, Art.8; Italian Civil Code, Art. 2697).

49 G. Born, *International Commercial Arbitration*, para. 15.09 (3rd ed., 2021).

50 This lack of clarity may be attributed to the manner in which different legal traditions approach this question. In many common law jurisdictions, the allocation of the burden of proof is traditionally seen as a procedural matter; for example, U.S. federal courts, applying the "Erie Doctrine", have sometimes treated the burden of proof as substantive if it is "outcome determinative", but generally the default in private law disputes is that the forum's own rules of evidence and burden apply. In contrast, civil law systems may enshrine burden-of-proof rules in their civil codes or jurisprudence as part of the rights in the case – suggesting a substantive character.

57. It would appear that the most common and general approach taken in investment arbitration has been that of treating the burden of proof as a procedural issue,[51] with many investment arbitration tribunals applying the procedural law chosen by the parties to determine the burden of proof, rather than the law applicable to the merits.[52]

58. Various commentators have posited that the general principle cannot be viewed as immutable and that due regard must be given to the applicable law governing the substance and/or merits of the claim in relation to the allocation of the burden of proof.[53] They argue that, since both the burden and standard of proof impact the claim, they should be considered as substantive issues for the sake of predictability and foreseeability.[54] At least one notable commentator has argued for an approach that is even more nuanced, suggesting that the tribunal:

> "should allocate the burden of proof in light of its assessment of the applicable substantive law and procedures adopted in the arbitration … the tribunal need not apply the burden of proof rules of any specific jurisdiction, but can instead fashion specialized rules in light of the particular substantive issues and procedures at issue in a specific instance".[55]

59. An illustration of this more nuanced approach is found in *Jan Oostergetel v Slovakia*, where the arbitral tribunal treated the basic principle of *actori incumbit probatio* as procedural (governed by the law of the seat, Switzerland), but considered that specific rules on presumptions or shifting burdens in cases of corruption belonged to the *lex causae* (the law applicable to the merits/substance of the case). The arbitral tribunal stated:

> "While the general principle *actori incumbit probatio* pertains to procedure, governed here by Swiss international arbitration law as the law of the seat, the rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*."[56]

3.2 Who bears the burden of proof?

3.2.1 The default rule: *actori incumbit probatio*

60. It is widely agreed – across international courts and arbitral tribunals – that the burden of proving an allegation rests upon the party who asserts it.[57] This is the meaning of the Latin maxim *actori incumbit probatio* onus probandi. It has been recognised as a general principle of law in international adjudication. Recently, for example, the arbitral tribunal in *DTEK v Russia* reiterated that:

> "International investment tribunals routinely apply the principle of '*actori incumbit probatio*', a doctrine which allocates the burden of proof to the party bringing a claim. This is a general principle of law and has been applied consistently by arbitral tribunals as well as by the ICJ. Thus, in principle, the party which alleges a fact bears the burden of proving it."[58]

---

51 N. O'Malley, *Rules of Evidence in International Arbitration* (Informa Law from Routledge, 2nd ed., 2019), p. 215.

52 *PJSC DTEK Krymenergo v Russian Federation*, PCA Case No. 2018-41, Award, 1 Nov. 2023, para. 566; *Carlos Sastre and others v United Mexican States*, ICSID Case No. UNCT/20/2, Award on Jurisdiction, 21 Nov. 2022, para. 143; *Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 236.

53 N. O'Malley, supra note 51; J. Waincymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012), p. 765; R. Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) (n. 51); A. Briggs, *The Conflict of Laws* (Clarendon Press, 2nd ed., 2008) 234; R. Graveson (Sweet & Maxwell, 7th ed., 1974), p. 602; *Cheshire, North & Fawcett Private International Law* (Oxford University Press, 14th ed., 2008), p. 89.

54 A. Reiner, "Burden and General Standards", 10 *Arb. Int'l, pp.* 328, 331 (1994); E. Verges, "El derecho francis de la prueba civil", *Actualidad Juridica Universidad del Desarrollo* (2013), p. 81; A. Bhushan, "Standard and Burden of Proof in International Commercial Arbitration: Is There a Bright Line Rule?", 25 *Am. Rev of Int'l Arb.* (2014), pp. 601, 604.

55 G. Born, *International Commercial Arbitration* (3rd ed. 2021), para. 15.09.

56 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, *Ad Hoc* Arbitration, UNCITRAL, Final Award, 23 Apr. 2012, para. 147; see also *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 238.

57 K. Duggal, W. Cai, *Principles of Evidence in Public International Law as Applied by Investor-State Tribunals: Burden and Standards of Proof* (Brill, 2018), p. 14 et seq.; *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 237; *Riahi v Iran*, IUSCT Case No. 600-485-1 Concurring and Dissenting Opinion of J. Brower in Award, 27 Feb. 2003, 37 Iran–US CTR 158 (2003), para. 18; *Antoine Biloune v Ghana Inv Ctr*, Award on Jurisdiction & Liability, 27 Oct. 1989, XIX *Y.B. Comm. Arb.* (1994), pp. 11, 20.

58 *PJSC DTEK Krymenergo v Russian Federation,* PCA Case No. 2018-41, Award, 1 Nov. 2023, para. 566. The International Court of Justice's approach to the burden of proof closely reflects the practical realities of how the burden is applied. In the *Ahmadou Sadio Diallo* case, the Court observed that "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case". *Ahmadou Sadio Diallo* (*Rep. Guinea v Dem. Rep. Congo*) Merits, Judgment (30 Nov. 2010), 2010 *ICJ Rep.* 639, para. 54. In other words, even while the overall burden framework stands, certain specific issues might have their own burdens. In corruption scenarios, this could mean, for example, if a State raises a jurisdictional objection based on corruption, the State may bear the burden on that objection, whereas the investor bears the burden on the merits of its claims. The ICJ's point is that one size may not fit all – tribunals might allocate burdens issue-by-issue. Still, in arbitration practice, tribunals mostly stick to *actori incumbit probatio* and handle nuance through tools like presumptions or adverse inferences rather than flipping the burden completely.

61. The general principle is also reflected in the Latin maxim *ei qui affirmat non ei qui negat incumbit probatio* – the burden lies on the one who affirms, not the one who denies.[59] In corruption disputes, the party "affirming" the occurrence of corruption typically carries the burden, as opposed to the party simply denying it.[60] Nearly all arbitral tribunals confronting corruption claims have applied this default approach, either explicitly or implicitly. Leading commentators and institutional guides also endorse *actori incumbit probatio* as the starting point for any issue of proof in arbitration.[61] Case law from both the commercial and investment arbitration spheres illustrates the foregoing.

62. **In commercial arbitration**, although awards are often confidential, published snippets and court decisions indicate application of the same default principle. For example, the arbitrators in ICC Cases 6497, 7047, 8240, 9887, 12355, 12472, 13384, as well as in the *ad hoc* case *Wells Ultimate Service v Bariven* (excerpted in a Hague Court of Appeal judgment)[62] all followed the rule that the party asserting contract illegality (due to corruption) had to prove it.

63. The major institutional rules (e.g. ICC, LCIA, SIAC, ICDR) do not usually spell out "who bears the burden" in as many words, but they do empower arbitrators to manage evidence and determine how evidence is evaluated. The UNCITRAL Rules, which are also frequently applied in commercial arbitration, are more didactic in that they spell out the default rule according to which:

> "Each party shall have the burden of proving the facts relied on to support its claim or defence".[63]

64. In practice, arbitral tribunals in commercial cases almost invariably adhere to the default rule. For example, the ICC Cases mentioned above all placed the burden on the alleging party to prove that bribery occurred. Likewise, in an LCIA arbitration between Vale and BSG Resources, the arbitral tribunal confirmed that the claimant (Vale), which accused its business partner of obtaining mining rights through bribery, had to prove those allegations, which it successfully did, as evidenced by the arbitral tribunal's findings of corruption in that case. Another well-known case is the award in ICC Case 1110 of 1963. In that case, although the sole arbitrator ultimately refused to hear the case due to both parties' involvement in corruption, he arrived at that decision only after considering the evidence of the alleged bribes; the burden was effectively placed on the party invoking the corrupt contract to prove the illicit arrangement.

65. **In investment arbitration** – such as cases under the ICSID Convention or *ad hoc* arbitrations under UNCITRAL or PCA auspices – the burden of proof is generally allocated in line with the *actori incumbit probatio* principle. Neither the ICSID Convention nor prior ICSID Arbitration Rules explicitly address the burden of proof, leaving it to tribunals' discretion, often applying the general principles of international law.[64] Tribunals have consistently done so, referring to international practice and often analogising to judicial standards under the applicable laws. The revised ICSID Arbitration Rules (effective 2022) now codify the traditional and majority approach by stating that:

> "Each party has the burden of proving the facts relied on to support its claim or defence".[65]

This language mirrors Art. 24(1) of the 1976 UNCITRAL Arbitration Rules and Art. 27(1) of the 2010 UNCITRAL Rules, which similarly provide that each party must prove the facts it relies upon. Thus, in investment arbitration cases, the claimant must prove all elements of its claim (jurisdiction, liability, and damages), while the respondent state must prove any jurisdictional objections or affirmative defences like corruption.[66]

---

59 C. Brower, supra note 4.

60 Importantly, the claimant or proponent is not just the party who started the case, but whichever party alleges a particular fact. An arbitral tribunal in *Asian Agricultural Products v Sri Lanka* clarified that the *actori incumbit probatio* principle means "the term actor … is not to be taken to mean the [formal] plaintiff from the procedural standpoint, but the real claimant in view of the issues involved … the burden of proof rests upon the party alleging the fact". *Asian Agricultural Products v Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 56. Thus, if a respondent asserts a corruption defence (i.e. alleges the claimant engaged in corruption), the respondent bears the burden to prove that corruption. Conversely, if a claimant alleges corruption by the respondent (e.g. that a state official solicited a bribe), then the claimant must prove those allegations.

61 See A. Llamzon, A.C. Sinclair, supra note 4; C. Kotuby, L. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press, 2017), p. 157.

62 *Wells Ultimate Serv LLC v Bariven S.A.*, Hague Court of Appeals, 22 Oct. 2019.

63 UNCITRAL Arbitration Rules (2021), Art. 27(1).

64 BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sarl v Republic of Guinea, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 489; PJSC DTEK Krymenergo v Russian Federation, PCA Case No. 2018-41, Award, 1 Nov. 2023, para. 566.

65 ICSID Arbitration Rules, Rule 36.

66 MOL Hungarian Oil and Gas Company PLC v Republic of Croatia, ICSID Case No. ARB/13/32, Award, 5 July 2022, para. 504.

66. Investment arbitration tribunals must also consider the language of the treaty[67] or investment law underlying the investor's claim. Thus, if either instrument requires the investment to be made "in accordance with law", some arbitral tribunals treat the lawfulness of an investment as part of the claimant's case (jurisdiction or merits) – meaning the investor might need to prove it complied with local law.[68] Other arbitral tribunals, however, treat illegality as an affirmative defence for the State to prove.[69] The approaches can differ case by case.

67. A non-exhaustive list of investment arbitration cases that have applied the *actori incumbit probatio* principle in corruption contexts includes: *Wena Hotels v Egypt*,[70] *Metal-Tech v Uzbekistan*,[71] *Unión Fenosa v Egypt*,[72] *Karkey v Pakistan*,[73] *Niko v Bapex & Petrobangla*,[74] *Oostergetel v Slovakia*,[75] *EDF v Romania*,[76] *Liman Caspian v Kazakhstan*,[77] *Hamester v Ghana*,[78] *Fraport v Philippines (II)*,[79] *Stans Energy and Kutisay Mining v Kyrgyzstan (II)*,[80] *CME v Czech Republic*,[81] *Noble Ventures Inc. v Romania*,[82] *Tokios Tokeles v Ukraine*,[83] *Bayindir v Pakistan*,[84] *Tza Yup Shum v Peru*,[85] and *BSGR v Guinea*.[86] Despite the variety of factual circumstances, these tribunals all placed the burden of proving corruption or fraud on the alleging party (often the State alleging investor corruption, or sometimes the investor alleging state corruption).[87]

68. Generally, in various forms of international adjudication, not just international arbitration, the burden of proof lies with the party seeking to establish a factual or legal proposition.[88] In arbitration, this principle applies throughout the proceeding: whenever a party makes a claim or counterclaim, or alleges a fact in defence, it must support it with evidence.[89] In practical terms, the burden of proof encompasses two aspects:

    i) the burden of going forward (also known as the burden of production or duty of producing); and

    ii) the burden of persuasion (or the risk of non-persuasion if proof is insufficient).

---

67 Certain treaties allocate the burden of proof on particular issues. See, e.g. Sweden-Ukraine BIT (1995), Art. 1(3)(c) ("Where there is doubt as to whether an investor of either Contracting Party exercises effective control of a legal person in a third country, an investor claiming such control has the burden of proof that such control exists."); CPTPP, Art. 9.23(7) ("For greater certainty, if an investor of a Party submits a claim under this Section, including a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), the investor has the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration.").

68 *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya*, ICSID Case No. ARB/15/29, Final Award, 22 Oct. 2018, para. 250.

69 *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 Sep. 2012, para. 259; Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 229.

70 *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 Dec. 2000, para. 117.

71 *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 237.

72 *Unión Fenosa Gas, S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 Aug. 2018, para. 7.113.

73 *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017, para. 497.

74 *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Co. Ltd. and Bangladesh Oil Gas and Mineral Corp.*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 Feb. 2019, para. 784.

75 *Jan Oostergetel and Theodora Laurentius v Slovak Republic, Ad Hoc* Arbitration, UNCITRAL, Final Award, 23 April 2012, para. 148.

76 *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 232.

77 *Liman Caspian Oil BV and NCL Dutch Inv BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paras 193, 423.

78 *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award 18 June 2010, para. 132.

79 *Fraport AG Frankfurt Airport Servs. Worldwide v Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014, paras 297-299.

80 *Stans Energy Corp. and Kutisay Mining LLC v Kyrgyz Republic (II)*, PCA Case No. 2015-32, Award, 20 Aug. 2019, para. 475.

81 *CME Czech Republic BV (Netherlands) v Czech Republic*, UNCITRAL, Partial Award, 13 Sep. 2001, para. 285.

82 *Noble Ventures Inc v Romania*, ICSID Case No. ARB/01/11, Award, 12 Oct. 2005, para. 100.

83 *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, para. 121.

84 *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug. 2009, para. 140.

85 *Señor Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 151.

86 *BSG Resources Ltd. (in administration) and others v Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 489.

87 This principle may seem straightforward, but it can become complicated in multi-stage disputes. Notably, the burden of production (going forward with evidence) can shift over the course of a proceeding, even if the burden of persuasion remains with the alleging party. For instance, once the alleging party makes a *prima facie* showing of corruption, the burden of producing a rebuttal may practically shift to the opponent (this is addressed under the exceptions below). However, if at the end of the day the evidence is in equipoise, the party with the burden of persuasion (the alleger) loses.

88 The Temple of Preah Vihear (*Cambodia v Thailand*), Merits [1962] ICJ Rep 6, Judgment pp. 15-16; Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v USA*), (Jurisdiction and Admissibility, Judgment) [1984] *ICJ Rep* 392, para. 101; *Salini Construttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 Jan. 2006, para. 72; *Asian Agricultural Products Ltd v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 56; See G. Sourgens, K. Duggal, I.A. Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2008).

89 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, Cambridge University Press, 2006), 129.

The burden of going forward defines *when* evidence should be presented, i.e. who should be first to submit evidence.[90] This standard is sometimes also understood as the burden of evidence or the production burden. The party which has the legal burden of proof thus bears the risk of dismissal of its claim or its allegation for the non-production of evidence in support of the proposition it is seeking to establish.[91] Generally, this burden of going forward is on the party asserting a proposition, claim or affirmative defence – at least in the first instance.[92] The burden of persuasion is slightly different. It refers to which party is responsible for convincing the finder of fact or decision maker of the truth of its claim or allegation.

69. All other evidentiary techniques (e.g. shifting burdens of production, drawing inferences, discussed below) operate within the above overarching framework.

3.3 The exceptions: burden-shifting and adverse inferences

70. While the burden of proving corruption starts (and may remain) with the alleging party, arbitral practice shows that arbitral tribunals have identified certain circumstances where the strict application of *actori incumbit probatio* may be relaxed or applied in a more nuanced fashion. Two related mechanisms often apply in this regard: burden-shifting (**3.3.1**) and adverse inferences (**3.3.2**). Both mechanisms aim to address the reality that direct evidence of corruption is hard to come by and is often in the exclusive control of the opposing party (e.g. secret bribes known only to the bribe-giver and taker, or documents held by the accused party). However, there is a material difference in how these two exceptions to the general principle of *actori incumbit probatio* work:

    i) *Burden-shifting* actively puts the burden on the other side to disprove the claim, unless only the burden to produce evidence is shifted.

    ii) In employing the tool of *adverse inferences*, tribunals consider the non-production of certain pieces of information or evidence by the other side as a form of proof in itself.

Thus, it is the inactivity of the other side which allows the arbitral tribunal to establish the claim even if the party making the allegation is unable to produce sufficient proof to prove it. Nevertheless, both tools are not without controversy, and the manner in which they have been applied by tribunals in corruption cases does not reveal a consistency of practice.

3.3.1 Burden-shifting

71. In principle, the burden of proof does not shift in international arbitration, whether commercial or investment arbitration, even where corruption is alleged. The risk of persuasion or non-persuasion stays on the alleging party. However, tribunals and commentators have noted that if one party produces *prima facie* evidence of corruption (or if certain presumptions apply), then the burden of production may be shifted to the other party to rebut that evidence or presumption.[93] In other words, once an initial threshold of evidence is met indicating corruption, the onus may fall on the opponent to disprove or counter the inference of corruption with proof that it adduces.

72. Such burden-shifting can arise out of the applicable law or from a tribunal's discretion to assess evidence. A tribunal applying such legal rules or in the exercise of its discretion could find that the burden shifts to the party opposing the allegation to provide an explanation. Even without a formal legal basis, tribunals have reasoned in terms of fairness: given that corruption is typically covert, once the alleging party has shown sufficient "red flags" or indicia, it is reasonable to expect the accused party – who usually has better knowledge of its own conduct – to come forward with evidence of innocence.[94] Burden shifting has also been expressed

90 F. Blavi, G. Vial, "The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales", 39 *Hastings Int'l & Comp. L. Rev* 41, 49-50 (2016).

91 F. James Jr., "Burden of Proof", 47 *Virginia Law Review*, 51 (1961), p. 55.

92 R.B. von Mehren, "Burden of Proof in International Arbitration" in A. Jan van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series, Vol. 7* Issue, 123-130, at p. 124 (Kluwer Law International, 1996).

93 K. Duggal, W. Cai, supra note 57 at 16, n. 103 (citing *Marion Unglaube v Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, para. 33). See also A. Aynès, La charge de la Preuve, 1 *Rev. Arb.* 3-14, para. 3 (2020); See *International Ore & Fertilizer Corp. v Rati Chemical Co. Ltd*, Award No. 351-486-3, 25 Feb. 1988) (dissenting opinion of J. Brower), 18 Iran-US Cl. Trib. Rep. 102, n. 2; *Waste Management v United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2001, 40 ILM 70 (2001), n. 8 (dissenting opinion of K. Highet distinguishing *onus probandi* from *onus proponendi*); *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 Aug. 2014, paras 8.6-8.10; *Eli Lilly and Company v Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, para. 109; *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 March 2019, para. 215; See also M.W. Friedman, G. Recena Costa, "Evidence in International Investment Arbitration", in J. Chaisse, L. Choukroune and S. Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer, 2021), 1339.

94 K. Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto", *International Commercial Arbitration: Important Contemporary Questions*, *ICCA Congress Series No. 11*, (Kluwer, 2003), p. 295; see also C.B. Lamm, H.T. Pham and R. Moloo, "Fraud and Corruption and International Arbitration", in M.A. Fernandez-Ballesteros and D. Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley grupo Wolters Kluwer, 2010), 699

as a function of a certain quantum of evidence giving rise to a presumption that suffices to shift the burden. If a party:

> "adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".[95]

73. There is no generally accepted standard of what constitutes *prima facie* evidence. As explained by commentators:

> "'*Prima facie evidence*' is evidence that does not offer conclusive proof, but establishes that a belief in the truth of a statement would be reasonable. It can be rebutted by evidence to the contrary. If such rebuttal evidence could easily be produced, but is not, a tribunal may draw reasonable (possibly adverse) inferences from the non-production".[96]

Tribunals have recognised that:

> "In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e. *prima facie* evidence".[97]

74. Where there is a reasonable indication of corruption, it has been suggested that the burden of proof should be reversed:

> "to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met … [b]ecause of the near impossibility to 'prove' corruption'".[98]

In one instance, the arbitral tribunal did effectively place the burden of proving the existence (and legality) of an activity on the party denying allegations of corruption.[99] However, this approach remains controversial[100] and has been criticised as not being compatible with due process.[101]

75. The majority view is that a reversal of the burden of proof is improper, arguing that the shifting of the burden of proof is not a derogation from or exception to the general principle that the party making the allegation of corruption bears the burden of proving it.[102] Instead, as the arbitral tribunal in *Fraport v Philippines* noted,[103] it is a natural consequence of the fact that *prima facie* evidence of corruption has been established by the party making the allegation, such that, in the absence of any evidence to the contrary, the arbitral tribunal may be in a position to arrive at a conclusion on the proof of the corruption allegation. It is for this reason alone that it would fall on the other party to provide evidence of the absence of corruption in such a circumstance. The overall burden of proof always remains with the party making the allegation. Shifting the burden back to the alleging party (i.e. the party that bears the *onus probandi*) requires "sufficient evidence to rebut the presumption" that results from shifting the burden of proof on the basis of *prima facie* evidence.[104]

76. Whether the standard of "sufficient evidence to rebut the presumption" has been met "depends on the evidence presented by both parties".[105] The standard for rebuttal cannot be satisfied only by the evidence of the party which bears the burden of proof, "but on the overall assessment of the accumulated evidence put forward by one or more parties, for the proposition or against it".[106]

---

95 *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec. 2002, 42 ILM 625, 662 (2003) (quoting WTO Appellate Body, United States – Measures affecting Import of Woven Wool Shirts and Blouses from India, adopted 23 May 1997, WT/DS33/AB/R, at 14).

96 K. Betz, supra note 5, at n. 380 (citing B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 327 et seq. (1987)). See also T. Zuberbühler, A. Schregenberger, "Corruption in Arbitration: The Arbitrator's Duty to Investigate", in C. Müller, S. Besson, A. Rigozzi (eds.), *New Developments in International Commercial Arbitration* 1, 26-27 (Schulthess Juristische Medien AG, 2016).

97 *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 56; see also "[a] '*prima facie case*' is a case sufficient to call for an answer". *International Ore & Fertilizer Corp. v Rati Chemical Co. Ltd*, Award No. 351-486-3, 25 Feb. 1988) (dissenting opinion of J. Brower), 18 Iran-US Cl. Trib. Rep. 102, n. 2 (citation and other internal quotations omitted).

98 K. Mills, supra note 94, p. 295.

99 ICC Case 12990, Final Award. Extract published in ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration and referred to in Proving Corruption in International Arbitration Who Has the Burden and How Can it Be Met?, in D. Baizeau, R. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, *Dossier XIII of the ICC Institute of World Business Law* (2015).

100 A. Mourre, "Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator", 22(1) *Arb. Int'l J.* 95, 102 (2006).

101 *Waguih Elie George Siag and Clorinda Vecchi v Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 317.

102 A. Mourre, supra note 100, p. 103. See also C. Partasides, supra note 40, para. 28.

103 *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014, para. 299.

104 Id.

105 M. Hwang, C. Chern, "Standards of Proof and Requirements for Evidence in Special Situations", *The Guide to Evidence in International Arbitration* (*GAR*, 2021), p. 107.

106 *The Rompetrol Group N.V v Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178.

77. As the arbitral tribunal in *Tethyan Copper v Pakistan* noted, a burden to adduce evidence in response to an allegation of corruption supported by *prima facie* evidence may be discharged without shifting the overall burden of proof or binding the arbitral tribunal to a particular conclusion.[107] The arbitral tribunal in ICC Case 6497 found that any "change in burden of proof" is limited to special circumstances:

> "As the Respondent neither gave the names of the bribe recipients nor called Mr B as a witness, the Tribunal eventually did not shift the burden of proof to the Claimant by asking it to provide details on its costs for the ten-year period of the consultancy and product agreements".[108]

78. Another variation consists of arbitral tribunals applying the default rule but with flexibility in how it is enforced. An illustrative case is *Spentex v Uzbekistan*. Reports indicate that the arbitral tribunal started with the established principle that each party must prove the facts it relies on, but then considered how each party had cooperated with the fact-finding process.[109] This approach keeps the burden formally on the alleging party but mitigates it if the other party's non-cooperation is the reason evidence is scarce.

79. In *Rompetrol v Romania*, the arbitral tribunal reasoned that the burden of proof is absolute and does not shift from one party to the other (and perhaps back again to the original party), noting that:

> "arguments of that kind confuse, unhelpfully, the separate questions of who has to prove a particular assertion and whether that assertion has in fact been proved on the evidence".[110]

The arbitral tribunal went on to note that the burden cannot be shifted to the respondent to the extent that it becomes a "burden of (dis)proof".[111]

80. Other arbitral tribunals may distinguish between the onus probandi (the burden of persuasion), which always rests on the party alleging a fact, and the burden of production (i.e. the burden of producing evidence in support of a particular provision), which may shift. Per the onus probandi, the party that asserts a fact always bears the burden of proving it.[112] As per this approach, the burden of proof is a burden to persuade and not necessarily to produce evidence.[113] In other words, it is the burden of production which shifts from party to party depending upon the exigencies of the case. Arbitral tribunals adopting this approach have considered that this legal burden of proof consistently remains with the party making the claim and throughout the proceedings because otherwise it would be difficult for the allegedly fraudulent or corrupt party to defend itself, thus violating due process standards.[114]

3.3.2 Adverse inferences

81. Closely related to burden-shifting is the use of adverse inferences. In corruption matters, adverse inferences are particularly apt.[115] The nature of corruption is such that the party involved in wrongdoing will hide or destroy evidence, or refuse disclosure, claiming confidentiality. An adverse inference is drawn when a party with control of presumably relevant evidence fails to produce it despite an order from the arbitral tribunal. In such circumstances, the arbitral tribunal may infer that the evidence would likely have been unfavourable to that party's case.[116] This tool can alleviate the alleging party's burden when the other side is obstructive or simply holds all the evidence.

---

107 Tethyan Copper Co. Pty Ltd. v Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 Nov. 2017, para. 318.

108 K. Betz, supra note 5, p. 137 (citing ICC Case 6497, Award (1994), paras 3-4, *Collection of ICC Arb. Awards Vol. IV 1996-2000* (Wolters Kluwer/ICC, 2003)).

109 V. Djanic, In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process: Are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims under Dutch BIT, *IA Rep.* 22 June 2017.

110 The Rompetrol Group N.V v Romania, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178. See also J.K. Sharpe, Drawing Adverse Inferences from the Non-production of Evidence, 22 *Arb. Int'l* 549, 552 (2006); K. Betz, supra note 5, p. 208.

111 *Rompetrol*, supra, at para. 179.

112 See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 334 (1987); J. K. Sharpe, Drawing "Adverse Inferences from the Non-production of Evidence", 22 *Arb. Int'l* 549, 552-553 (2006); K. Betz, supra note 5, pp. 52-53, and p. 186 (quoting *X v Y*, *Ad Hoc* Arbitration, Second Partial Award, May 16, 2006 (unpublished), 168); T*ethyan Copper Co. Pty Ltd. v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 Nov. 2017, para. 318; S. Greenberg and F. Lautenschlager argue that in some instances, the burden of proof indeed shifts to the party that refuses to produce the requested documents, see Adverse Inferences in International Arbitral Practice, in S. Kröll et al. (eds), *Liber Amicorum Eric Bergsten, International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (2011) 179, 182, and also published in the *ICC Dispute Resolution Bulletin* (2011), Vol. 22(2).

113 H. Malek, J. Auburn, R. Bagshaw, *Phipson on Evidence* (Sweet & Maxwell, 17th ed., 2009) para. 6-02; C. Tapper, *Cross and Tapper on Evidence* (Oxford University Press, 12th ed. 2010) 121; A. Mourre, supra note 100, p. 103.

114 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras 316-317; *Apotex Holdings Inc. and Apotex Inc. v United States of America*, NAFTA/ICSID Case No. ARB(AF)/12/1, Award, 25 Aug. 2014, Part VIII, para. 8.8; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014, para. 299.

115 C.B. Lamm et al., supra note 94, pp. 699, 706.

116 K. Betz, supra note 5, p. 209, quoting V. Van Houtte, Adverse Inferences in International Arbitration, p. 195, in T. Giovannini, A. Mourre (eds), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies – Dossier VI of the ICC Institute of World Business Law (2009).*

82. Art. 9(5) of the IBA Rules explicitly allows arbitral tribunals to infer that undisclosed evidence would be adverse to the party that refuses to produce it (after a proper request and order to produce). Many arbitral tribunals – even outside the IBA framework – acknowledge this inherent power. As stated by the American-Mexican General Claims Commission in the *Parker* case:

> "[W]here evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the [respondent], the failure to produce it, unexplained, may be taken into account by the [tribunal] in reaching a decision".[117]

The Hague Convention of 1907, for example, provides that international tribunals can:

> "[R]equire from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the Tribunal takes note of it".

More recently, in *Niko Resources*, the arbitral tribunal opined that:

> "Tribunals may draw adverse inferences if it appears to them that the documents so produced by the Claimant are incomplete and without convincing explanations for missing documents."[118]

ICC Case 8891 provides an example where:

> "By deducing corruption in part from the consultant's failure to produce evidence of its activities, the Tribunal drew an adverse inference based on the silence of one of the parties."[119]

83. Adverse inferences, however, are employed cautiously in international arbitration. They are a tool to be used when a party's non-cooperation with evidentiary requests leaves the arbitral tribunal little choice but to infer the worst; they ensure that a party cannot defeat a corruption claim simply by hiding evidence it was obliged to reveal. Before relying on them, arbitral tribunals have taken into account factors such as a party's difficulty in submitting additional evidence and the opposing party's failure to adduce contrary evidence in deciding a disputed factual issue;[120] whether the missing or non-produced evidence is consistent with other evidence on record;[121] the significance of the missing evidence; [122] and whether the party against which the inference is to be drawn was given an adequate opportunity to produce the evidence.[123]

3.4 Summary

84. In summary, while arbitrators do have a broad toolbox and may consider multiple sources of law, the general trend evinced in both commercial and investment arbitration reflects arbitral tribunals' reliance on the general international approach: the party alleging corruption bears the burden (*actori incumbit probatio*), unless and until some other rule or the circumstances warrant shifting it. The applicable law (procedural substantive) rarely changes that baseline, although in specific scenarios, the applicable law or the exception of public policy may introduce presumptions or derogations that affect how the burden is applied.

85. Most international tribunals lean toward treating the burden of proof as a procedural issue within their arbitral discretion or under the arbitral procedural law, which allows flexibility. However, arbitral tribunals remain mindful of the legal consequences on the merits – especially in corruption cases, where the applicable substantive law (national laws or international law) might contain relevant principles (e.g. a legality requirement in an investment treaty, or a presumption under national anti-corruption statutes) that cannot be ignored. As a result, arbitral tribunals often merge these perspectives: they start with the general principle of *actori incumbit probatio* (procedural default) but will consider substantive law rules or policies (e.g. transnational public policy against corruption) to adjust the burden in exceptional circumstances.

---

117 *Parker (U.S.A.) v United Mexican States*, Decision, 31 March 1926, para. 7.

118 *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Co. Ltd. and Bangladesh Oil Gas and Mineral Corp.*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 Feb. 2019, para. 219.

119 ICC Case 8891, *Journal de Droit International*, 2000, No. 4, p. 1076.

120 *Zhinvali Development Ltd. v Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 Jan. 2003, para. 311.

121 *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec. 2002, para. 180.

122 *Flemingo DutyFree Shop Private Limited v Republic of Poland*, PCA Case No. 2014-11, Award, 12 Aug. 2016, para. 932.

123 *Latam Hydro LLC and CH Mamacocha S.R.L. v Republic of Peru*, ICSID Case No. ARB/19/28, Final Award, 20 Dec. 2023, paras 249-251; *Sevilla Beheer B.V and others v Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 Feb. 2022, para. 550.

86. While the burden of persuasion remains on the alleging party, arbitral tribunals have demonstrated flexible strategies to deal with the evidentiary challenges of corruption. If sufficient (but not necessarily conclusive) evidence is presented pointing towards the presence of corruption (establishing a *prima facie* case), the other party is expected to come forward with contrary evidence. If it does not satisfy its burden of production, the arbitral tribunal may decide to treat the corruption allegation as effectively proven; that is, reach a finding that the alleging party has satisfied its burden of persuasion. If a party refuses to produce relevant evidence in its control without valid justification, the arbitral tribunal can, if the applicable legal framework so allows, infer depending on the rest of the record and the specific circumstances of the case, that the evidence would confirm the corruption allegation (adverse inference), thereby relieving the alleging party from needing that "smoking gun". Arbitral tribunals, however, should ensure that due process is respected in drawing any adverse inference.

4. Standard of proof

87. While the burden of proof addresses "who must prove what", the standard of proof addresses "how much proof is needed" for an arbitral tribunal to be satisfied that an allegation has been substantiated; it deals with the sufficiency of the evidence provided by the party on whom the burden of proof lies.[124] The standard of proof defines the threshold of evidence necessary to succeed in establishing an assertion.[125] It refers to the degree of evidence and level of certainty necessary to establish a disputed fact.[126] The *Gavrilovic v Croatia* tribunal's description of the standard of proof is informative and reflects a widely accepted formulation of the concept in both commercial and investment arbitration, including its relevance to and interrelationship with the burden of proof. The arbitral tribunal described the standard of proof as:

> "[The] level of evidence that would be sufficient to prove an assertion and would result in shifting the burden of proof to the other party".[127]

88. Two points of general application emerge from the case law and other sources reviewed. *First*, despite the importance of the standard of proof and its potentially outcome-determinative consequences, neither treaties nor arbitration legislation nor institutional arbitral rules directly address the standard of proof. Instead, the legal position surrounding the standard of proof has mainly developed from arbitral practice. As a result, different standards have been applied by arbitral tribunals, and there does not appear to be a transnational standard of proof that is applied in international arbitration, as there is significant divergence between the standards of proof in national laws and various legal traditions and approaches when it comes to weighing evidence. This observation applies equally whether corruption or fraud is alleged or not. *Second*, there appears to be no clear practice on the part of arbitral tribunals of referring to conflict of laws rules to determine the standard of proof or the source of law determining its application.[128]

89. This Section addresses the following key issues relevant to the standard of proof in international arbitration: (**4.1**) whether the standard of proof is a matter of substance or procedure; (**4.2**) which standards (if any) are applied in arbitrations where corruption or fraud has been alleged; (**4.3**) the concepts of direct and circumstantial evidence; and (**4.4**) a general summary of the standard of proof in corruption allegations.

---

124 A. Akindeire, "Corruption in Investor-State Arbitration: Balancing the Scale of Culpability", in J. Chaisse, L. Choukroune, S. Jusoh (eds), *Handbook of International Investment Law and Policy*, p. 872 (Springer, 2021); G. Sourgens, K. Duggal, I.A. Laird, supra note 88; *Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 Apr. 2020, para. 15.

125 A. Llamzon, A.C. Sinclair, supra note 4.

126 J. El Ahdab et al., "Approaches to Evidence Across Legal Cultures", in A.C. Klasener et al., (eds), *The Guide to Evidence in International Arbitration* (Global Arbitration Review, 2021).

127 Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia, ICSID Case No. ARB/12/39, Award, 26 July 2018, para. 233; see also, *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 Nov. 2010, para. 238.

128 In *Continental Casualty v Argentina*, for example, the tribunal held that "there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it". *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 Sep. 2011, para. 135.

4.1 Is the standard of proof a substantive or procedural issue?

90. Certain arbitral tribunals have inquired, as a threshold matter, whether the standard of proof is governed by the procedural rules of the arbitration (under the procedural laws of the *lex arbitri* or institutional arbitral rules) or by the substantive law governing the contract or treaty underlying the dispute. The inquiry is not a mere matter of formalism, given that the standard of proof applied (either a question of substance or procedure) and how it is applied (a question of evidence and procedure) can be outcome determinative. Nevertheless, a review of the case law showed no consistency of practice amongst tribunals in the application of this analytical step.

91. As with the burden of proof, there are divergent approaches to the question of whether the standard of proof is considered a procedural[129] or substantive[130] issue. In no small measure, this is attributable to the practice that common law legal systems tend to treat the standard of proof issue as procedural,[131] with defined categories (e.g. "balance of probabilities" or "clear and convincing" for civil matters, or "beyond reasonable doubt" for criminal matters), whereas civil law systems[132] tend to treat it as substantive or as a matter intrinsically linked to how a right or its absence is proved.[133] In a third approach, tribunals have chosen not to identify a specific applicable law from which to draw the standard, or to consider whether the standard derives from substantive or procedural law, but instead have relied upon their inherent discretion in evidentiary matters, general principle of fairness and good administration of justice.[134] The range of practice reflects the diversity of factors that find their confluence in international arbitration generally, and in particular in cases involving corruption: the different legal traditions of the arbitrators, the procedural and substantive laws at the seat of the arbitration (*lex arbitri*), the substantive law of the parties' nationalities, the substantive law governing the contract, other substantive laws of jurisdictions implicated or impacted by the corrupt activities, amongst others. This array of factors, all of which appear in various combinations and permutations in international arbitration, explains why there is no clear answer to the question whether the standard of proof is substantive or procedural, and, as important, whether arbitrators need to analyse and resolve the distinction.

92. Ultimately, in light of (or perhaps despite) the wide divergence in arbitral practice, the standard of proof in international arbitration may be viewed as part of the arbitral tribunal's general power to weigh evidence, which is generally viewed as a matter of procedure, even if conceptually the standard of proof may be seen as substantive. While civil and common law views differ academically (and might influence how arbitrators think about the problem), in practice, arbitral tribunals have demonstrated a relatively liberal attitude towards choosing or adjusting the standard of proof to fit the case, without feeling bound by any one national system's rule(s). Viewed from this perspective of decision-making pragmatism – largely the consequence of the fact that international arbitral procedure reflects a blend of procedural and proof gathering and evaluation practices – the standard of proof in international arbitration can be viewed as both substantive and procedural. As such, arbitrators should give equal emphasis to the setting of a degree of probability required for an allegation of corruption to be proved (arguably more of a substantive inquiry), and the strength or quality of the evidence that is adduced by the parties and their analysis and advocacy on the basis of that evidence with reference to the particular allegation (arguably more of a matter of procedure).

---

129 *Petrobart Ltd. v The Kyrgyz Republic*, UNCITRAL, Award, 13 Feb. 2003, paras 39, 45; B. Berger, F. Kellerhans, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* (Bern, Stämpfli Verlag 2006), p. 438 at 1238.

130 *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, UNCITRAL, Award, 23 Apr. 2012, para. 147; *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 238; F. Blavi, G. Vial, supra note 90, pp. 41, 47.

131 This classification stems from the role of the standard of proof in guiding the judicial process, particularly in the evaluation of evidence and the determination of facts during legal proceedings. As a procedural mechanism, the standard of proof dictates how evidence is assessed and weighed during a trial. It ensures that the adjudication process adheres to established thresholds of certainty before reaching a verdict. From a policy perspective, treating the standard of proof as procedural is said to promote uniformity and predictability in legal processes within a jurisdiction, as it applies uniformly across various cases, irrespective of the underlying substantive issues.

132 Civil law systems are characterised by comprehensive legal codes that encompass both substantive and procedural aspects. Within these codifications, the standard of proof is often delineated alongside substantive provisions, reflecting its role in defining the thresholds for establishing legal claims and defences. Civil law traditions emphasise the importance of material truth and the accurate determination of facts to uphold justice. Treating the standard of proof as a substantive element aligns with this emphasis, ensuring that the requisite level of certainty is achieved before legal rights and obligations are adjudicated.

133 M. Hwang, C. Chern, supra note 105, citing J. Waincymer, supra note 53, p. 766. See also A. Menaker, Proving Corruption in International Arbitration, in D. Baizeau, R. Kreindler (eds), *Dossier XIII of the ICC Institute of World Business Law* (2015), pp. 77-102. In *BSG Resources v Guinea*, the tribunal helpfully surveyed the relevant investment arbitral cases on the standard of proof, which confirmed the split has broadly been between tribunals applying the common law and civil law standards of proof. *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sarl v Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 493.

134 *PJSC DTEK Krymenergo v Russian Federation*, PCA Case No. 2018-41, Award, 1 Nov. 2023, para. 569; *Antonio del Valle Ruiz et al. v Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, para. 495.

4.2 What standards have tribunals applied in assessing corruption allegations?

93. In international arbitration, the case law shows that arbitral tribunals have adopted various approaches with respect to the standard of proof applicable to corruption allegations, with tribunals differing in particular on whether a heightened standard of proof is required. This variance is a reflection of the multi-faceted nature of international arbitrations discussed above and the manner in which arbitrators reflecting different legal traditions and swayed by different policy considerations have sought to achieve an appropriate balance.

94. When it comes to legal traditions, it is notable that civil law-influenced systems tend to require a certain degree of persuasion based on the "inner conviction" (Roman law-influenced systems: "*intime conviction*", "*íntima convicción*"; German law-influenced systems "*freie Beweiswürdigung"*) of the decision maker. Common law-based jurisdictions require a balance of probabilities or preponderance of evidence, or clear and convincing evidence; proof beyond reasonable doubt is required in criminal matters.[135] In civil law jurisdictions, the concept of formal "standards of proof" is less rigidly delineated. Civil law judges, rather than applying a named standard, weigh all evidence freely and ask themselves whether they are convinced. The judge must be firmly convinced to rule in favour of the party bearing the burden of proof. In practice, this often approximates a balance of probabilities or higher threshold, but civil lawyers do not usually quantify it – it is a subjective judicial certainty. An approach more similar to the continental approach than the Anglo-Saxon influenced common law can be found in other jurisdictions: China (credible and sufficient)[136] and Japan (high probability or high degree of probability);[137] Saudi Arabia (a *Shari'a* law influenced standard akin to balance of the probabilities);[138] and other Middle Eastern jurisdictions (balance of probabilities).[139]

95. As to other considerations, policy (or even analytical) rationale for a high standard in corruption or fraud cases may be summarised as follows:

    i) A finding of corruption can have severe consequences (contract nullity, criminal referrals, reputational damage) for the accused party;

    ii) Accusing a party of corruption is akin to accusing them of a crime (even if in a civil context), so there is an instinct to require proof commensurate with a criminal allegation; and

    iii) Because there is in principle no right of appeal in arbitration, an erroneous determination of corruption by a tribunal cannot be tested or re-examined.

    There is, however, an equally compelling counter-rationale: corruption is by nature covert, and there is rarely a "smoking gun" type of evidence. Therefore, requiring too high a standard (like near certainty) could make it virtually impossible to establish corruption, even where it likely occurred. This concern has driven a trend in more recent years toward a pragmatic or flexible approach on the standard of proof for corruption.[140]

96. The remainder of this Section provides an overview of the standards that arbitral tribunals typically refer to, including common-law derived standards (**4.2.1**) ranging from "beyond reasonable doubt" (i) and "clear and convincing evidence" (ii) to "balance of probabilities" (iii); civil law derived (or more subjective) standards (**4.2.2**) such as "inner conviction"; (i) and "reasonable certainty" (ii). The final sub-section presents the recent more flexible approach taken by tribunals in relation to the standard of proof (**4.2.3**).

4.2.1 Common law derived standards

i) "Beyond reasonable doubt"

97. This standard provides for a heightened standard of proof similar to the standards applied in criminal law cases in common law jurisdictions. It calls for near certainty of the truth of the matter alleged in that it requires that no other reasonable explanation can be derived from the evidence except that the claim or allegation is true. In contrast to the preponderance standard, which allocates the risk of error equally, the "proof beyond a reasonable doubt" standard allocates the risk of error in favour of the accused.[141]

98. The proof beyond reasonable doubt standard has been applied by various arbitral tribunals. In the *Hilmarton* award (eventually set aside by the Court of Appeal of Paris), the arbitral tribunal demanded proof "beyond doubt" even if proof could be adduced by way of

135 R. Trittman, M. Mekat, "Standard of Proof in International Commercial Arbitration", 2 *b-arbitra* 356 (2014). E. Eveleigh, "General Standards of Proof in Litigation and Arbitration Generally", 10(3) *Arb. Int'l J.* 317, 335 (1994); G. Born, *International Commercial Arbitration* (2014), 2313.

136 Criminal procedural law (2013), Art. 53.

137 Japan Supreme Court, 24 Oct. 1975.

138 Saudi Law of Evidence (2021), Art. 4.

139 UAE Law of Evidence in Civil and Commercial Transactions (2022), Art. 1(2).

140 C. Partasides, supra note 39, pp. 47, 57.

141 *Addington v Texas*, 441 U.S. (1979), paras 418, 423-424.

indirect evidence.[142] A number of arbitral tribunals have expressed in the past that if a reasonable doubt remains, an allegation of bribery cannot be deemed to be established.[143] In *AHCA v Congo*, the arbitral tribunal applied the same standard, considering that serious allegations required irrefutable evidence akin to that required in criminal proceedings.[144] Commercial arbitration tribunals have also applied these standards based on the applicable national law.[145]

99. This approach, however, is not generally reflected in arbitral practice, even where corruption or other economic crimes are alleged, because arbitration typically addresses issues that are civil or commercial in nature (i.e. the consequences of the crime if proven to have occurred) rather than criminal guilt and can make it difficult for any accusation of corruption to reach the required threshold. In fact, commentators note that early arbitrations sometimes seemed to require proof "beyond any doubt" for allegations like corruption, but this "erroneous" attitude has since been abandoned.[146] In line with this trend, some arbitral tribunals have specifically denied the application of this heightened or more demanding criminal law influenced standard of proof.[147]

ii) "Clear and convincing evidence"

100. Clear and convincing evidence is evidence which makes the existence of a fact highly probable or much more probable than its falsity.[148] The clear and convincing standard, which often applies in civil proceedings in common law jurisdictions where fraud (or similar malfeasance) is alleged, is less demanding than "proof beyond a reasonable doubt" but more demanding than balance of probabilities.[149] It requires that the truth of the allegations be highly probable or reasonably certain in light of the evidence. In practice, this means the evidence must be strong, cogent, and leave the arbitral tribunal with a firm belief that the claim is true. Under this standard, "clear" means the evidence is reasonably unmistakable or unambiguous, and "convincing" means it is compelling and credible. If an arbitral tribunal says a party must meet this standard, the party needs to present substantially more proof than a mere preponderance – often a combination of direct evidence and strong corroboration – to prevail.

101. While arbitral tribunals have been divided on whether a heightened standard of proof should apply to allegations of corruption or other particularly serious allegations carrying quasi-criminal connotations, a substantial number of arbitral tribunals, in both commercial and investment arbitrations, have endorsed this heightened standard[150] by either applying the standard of clear and convincing evidence or at least requiring that the case be clearly made out.[151] The reasoning is that such accusations, if proven, can nullify contracts or investments and tarnish reputations, so requiring more persuasive proof helps avoid wrongful findings of misconduct.

---

142 *Hilmarton Ltd v Omnium de Traitement et de Valorisation S.A.*, ICC Case 5622, Final Award (1994), Extract published in the *ICC Int. Court Arb. Bull.* Vol. 8 No. 1: and in the *Collection of ICC Arbitral Awards 1991-1995 Vol. III* (1997), p. 220 (Wolters Kluwer/ICC); 19 *ICCA Y.B. Com. Arb.* 105-123.

143 *Oil Field of Texas, Inc. v Gov't of Islamic Republic of Iran et al.*, Award No. 258-43-1, 8 Oct. 1986, para. 25, 12 Iran-U.S. Cl. Trib. Rep. 308, 315 (1986).

144 *African Holding Co. of Am., Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award, 29 July 2008, para. 52.

145 *GBC Oil Company, Ltd. v The Ministry of Infrastructure and Energy (Republic of Albania) and the National Agency of Natural Resources (Republic of Albania)*, ICC Case 22676, Final Award, 6 July 2020, para. 425; Final award published under the IBA x Jus Mundi Exclusive Partnership for Commercial Arbitration and ICC has not contributed to its publication.

146 J. Fernandez-Armesto, The Effects of a Positive Finding of Corruption, p. 167, para. 11 (2015): "A recurring problem is the standard of proof. Historically, tribunals required a high standard of proof – beyond any doubt. In recent times this (erroneous) attitude seems to have been abandoned, tribunals being satisfied with the adequacy of indirect or circumstantial evidence and prepared to use adverse inferences to sanction reticent or obstructive behaviour of one of the parties – plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by denying the allegation. Where an inference is a reasonable conclusion to draw from the known facts, tribunals should be willing to draw such inference to prove allegations of bribery, as they would any other allegation".

147 *Flughafen Zürich A.G. y Gestión e Ingeniería IDC S.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 Nov. 2014, paras 150, 154; *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sarl v Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 493.

148 *Joseph Laura and Anthony Sichenzio, suing both individually and derivatively on behalf of Pristec America, Inc. (Nevada), Pristec America, Inc. (New Jersey) and Innovative Crude Technologies, Inc. v Pristec AG*, ICDR Case No. 01-18-0001-9729, Final Award, 10 June 2019, para. 221.

149 *Addington v Texas*, 441 U.S. (1979), para. 428.

150 A. Mourre, supra note 100, p. 101; *Himpurna California Energy Ltd. v (Persero) Perusahaan Listruik Negara*, Final Award, 4 May 1999, 25 *ICCA Y.B. Com. Arb.* 11-108, 42 (2000); *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221.

151 *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on the Objections to Jurisdiction and Admissibility of 29 July 2008, para. 52; *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 326; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 131; *TSA Spectrum de Argentina S.A. v Argentine Republic*, ICSID Case No. ARB/05/5, Award, 9 Dec. 2008, para. 172; *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014, para. 477; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 Aug. 2017, para. 492; *Penwell Business Ltd. (by MegaCom) v Kyrgyz Republic*, PCA Case No. 2017-31, Award, 8 Oct. 2021, para. 333; *Sanum Invs. v Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award, 6 Aug. 2019, para. 108; *Lao Holdings N.V v Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award, 6 Aug. 2019, para. 110.

102. In *Westinghouse and Burns & Roe (USA) v National Power Corporation and the Republic of Philippines*, in deciding an allegation of corruption, the arbitral tribunal held that pursuant to the laws of the Philippines and the USA, fraud must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance of evidence and cannot be justified by mere speculation because fraud can never be taken lightly.[152] Notably, this was a decision taken based on the standards under the applicable law.

103. The US-Iran Claims Tribunal has consistently adopted the clear and convincing standard. In *Oil Field of Texas v Iran*, the arbitral tribunal reasoned that allegations of corruption are serious and thus require a higher standard of proof.[153] Similarly, in Dadras v Iran, the arbitral tribunal held that the minimum quantum of evidence required for it to be satisfied could be described as clear and convincing evidence.[154]

104. In *Fraport v Philippines*, the arbitral tribunal acknowledged that in corruption cases, it could be difficult to provide direct evidence, and the arbitral tribunal could rely on circumstantial evidence. However, in view of the consequences of corruption on the investor's ability to claim BIT protection, the arbitral tribunal noted that:

> "evidence must be clear and convincing so as to reasonably make-believe that the facts, as alleged, have occurred".[155]

105. In *EDF v Romania*, the arbitral tribunal fully recognised that it is "notoriously difficult" to prove corruption because there is typically "little or no physical evidence", but nevertheless required "clear and convincing evidence".[156] In this case, it was the foreign investor who alleged corruption on the part of Romania, arguing that the breach of the treaty between the United Kingdom and Romania was caused by the investor's refusal to comply with bribes solicited by Romanian government officials. The arbitral tribunal found that:

> "The seriousness of the accusation of corruption … demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption."[157]

Ultimately, the claimant was unable to meet this standard of proof because the decisive witness's testimony "was contradicted by … the person who, according to [the claimant], had solicited the bribe".[158]

106. In *Siag v Egypt*, the majority adopted the "clear and convincing" standard, explaining that:

> "It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof. The same is the case in international legal proceedings, as can be seen in the cases cited by Claimants, among them the Award of the ICSID Tribunal in Wena Hotels … The Tribunal accepts that the applicable standard of proof is greater than the balance of probabilities but less than beyond a reasonable doubt".

According to the arbitral tribunal, the "heavy" standard of "clear and convincing evidence" was therefore located somewhere between the "preponderance of evidence"/"balance of probabilities" standard for civil cases and the "beyond reasonable doubt" standard for criminal cases.[159]

107. In *MOL v Croatia*, the arbitral tribunal likewise applied a heightened standard to allegations of corruption, concluding that there was "no doubt" that an "appreciably higher standard than a mere balance of probabilities" would have to be adopted in respect of the corruption allegation.[160] The arbitral tribunal observed

---

152 ICC Case 6401, Award, 19 Dec. 1991, *Mealey's International Arbitration Report*, 7:1 (1992), and referred to in Proving Corruption in International Arbitration Who Has the Burden and How Can it Be Met?, in D. Baizeau, R. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, *Dossier XIII of the ICC Institute of World Business Law* (2015) and in C. Albanesi, E. Jolivet, Dealing with Corruption in Arbitration: A Review of ICC Experience, *ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration* also reprinted in 7(1) *Mealy's Int'l Arb. Rep.* 31, 34 (1992). See also *Himpurna California Energy Ltd. v (Persero) Perusahaan Listruik Negara*, Final Award, 4 May 1999, 25 *ICCA Y.B. Com. Arb.* 11-108, 42 (2000); *EDF Servs. Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221. See also cases reported by M. Scherer in M. Scherer, "Circumstantial Evidence in Corruption Cases Before International Arbitration Tribunals", 5(2) *Int'l Arb. L. Rev* 29, 37-40 (2002).

153 *Oil Field of Texas, Inc. v Gov't of Islamic Republic of Iran et al.*, Award No. 258-43-1, 8 Oct. 1986, para. 25, 12 Iran-U.S. Cl. Trib. Rep. 308, 315 (1986).

154 *Dadras Intl, et al v Islamic Republic of Iran, et al.*, Award No. 567-213/215-3, 27 Nov. 1995, 31 Iran-U.S. Cl. Trib. Rep. 127, 162 (1995).

155 *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 Dec. 2014 [CA 200], 479.

156 *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, para. 221.

157 Id.

158 Id. para. 231.

159 Id. para. 325.

160 *MOL Hungarian Oil and Gas Company PLC v Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022, paras. 506-509; see also *Republic of Croatia v MOL Hungarian Oil and Gas Plc*, PCA Case No. 2014-15, Award, 23 Dec. 2016.

that "other tribunals have adopted a similar approach in comparable circumstances", and noted a "wide-ranging unanimity of approach" on this issue.[161] The arbitral tribunal elaborated:

> "It is not, in the eyes of the Tribunal, a matter of deciding that an act of bribery was likely, or even very likely, to have taken place. It is a matter of being able to arrive at a conclusion that the alleged act of bribery *did* take place, that it *did* involve those accused of it, and that it *did* lead to the consequences alleged to have followed from it".[162]

The arbitral tribunal did not use the term "clear and convincing evidence" to describe this approach despite making clear that it was applying an "appreciably higher" standard than balance of probabilities.

108. In Carlos Sastre v Mexico, the parties themselves agreed that for ordinary claims, the standard of proof would be "balance of probabilities", but for issues of corruption or illegality, there should be a heightened standard of "clear and convincing evidence".[163]

109. In ICC Case 6497, the arbitral tribunal required the respondent to prove bribery "conclusively", or with a "high degree of probability", a standard that appears to be roughly the same as "clear and convincing evidence".[164]

110. In a similar vein, in ICC Case 13914, the arbitral tribunal considered that "clear and convincing evidence" was required for allegations of corruption, but considered this standard to be met by a body of circumstantial evidence constituting "red flags" of corruption.

iii) "Balance of probabilities"

111. The balance of probabilities standard is relatively moderate: it does not require absolute certainty, only that the claimant's version of events appears more probable than the respondent's. Because it serves as the baseline in many legal systems for civil liability, it promotes a fair equilibrium – neither too easy nor too hard – for a party to meet its burden of proof. This standard requires a showing that the factual allegation is "more likely than not true".[165] In common law jurisdictions, the standard of proof is generally considered satisfied in civil domestic court proceedings if a particular fact is true on a preponderance of evidence or a balance of probabilities. The judge does not have to be convinced of the truth of a certain fact but can be satisfied on a balance of probabilities that it is indeed the truth.[166] Similarly, arbitrators accept factual allegations advanced by the parties if the disputed fact was more likely than not to have occurred.

112. Various international arbitral tribunals have applied this standard, including in cases where fraud or corruption was alleged.[167] Some consider this standard as the one that should emerge as the transnational standard of proof (see above, Section 2.3), although it is difficult to say that it has already emerged to date, and the case law, particularly in investment arbitration, shows that irrespective of the standard applied, tribunals tend to weigh with particular care the evidence put forward against the seriousness of the allegation having in mind the requirement of the fair administration of justice and the important policy goals underlying the fight against corruption.

---

161 Id. para. 508, citing *Vladislav Kim, et al. v Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction of 8 March 2017, para. 589; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 10 Dec. 2014, para. 479; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, para. 422; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct. 2009, paras 221, 232; *Oostergetel v Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, para. 303; and ICC Case 14878, Final Award, 2008, para. 5. (Extract published in ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration and referred to in Proving Corruption in International Arbitration Who Has the Burden and How Can it Be Met?, in D. Baizeau, R. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, *Dossier XIII of the ICC Institute of World Business Law* (2015).

162 *MOL Hungarian Oil and Gas Company PLC v Republic of Croatia*, supra note 160, para. 508 (emphasis in original).

163 *Carlos Sastre and others v United Mexican States*, ICSID Case No. UNCT/20/2, Award, 21 Nov. 2022, para. 145.

164 ICC Case 6497, Award (1994), paras 3-4, *Collection of ICC Arb. Awards Vol. IV 1996-2000* (Wolters Kluwer/ICC, 2003).

165 See e.g. G. Born, "On Burden and Standard of Proof", in M. Kinnear et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (2016), pp. 43, 50; D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), p. 561; M. Hunter, "The Procedural Powers of Arbitrators Under the English 1996 Act", 13 *Arb. Int'l*, pp. 345, 352 (1997); A. Reiner, "Burden and General Standards", 10 *Arb. Int'l* 3 (1994); A. Redfern, M. Hunter, *Law and Practice of International Commercial Arbitration*, pp. 6-66, 314 (Sweet & Maxwell, 3rd ed. 1999).

166 K. Clermont, E. Sherwin, "A Comparative View of Standards of Proof", 50 *Am. J. Comp. L.* 243 (2022).

167 *Cortec Mining Kenya Limited and Ors. v Kenya*, ICSID Case No. ARB/15/29, Award, 22 Oct. 2018, para. 308.

113. This test was applied in *Glencore International v Colombia*, where the arbitral tribunal saw no reason to depart from the traditional standard of preponderance of evidence in an alleged case of corruption.[168] In *Unión Fenosa Gas v Egypt*, the arbitral tribunal also considered that the standard of proof remained "the balance of probabilities".[169] In *Tokios Tokeles v Ukraine*, the arbitral tribunal stated that a party advancing a claim "must show that its assertions is more likely than not to be true".[170] The *Kardassopoulos v Georgia* tribunal followed this approach and noted that:

> "the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the parties any burden of proof beyond a balance of probabilities".[171]

114. However, a more nuanced version of the test has been applied by several tribunals. For example, in *Libananco v Turkey*, the arbitral tribunal expressly refuted the idea that a heightened proof of standard for allegations of fraud would be required.[172] The arbitral tribunal cited Judge Higgins's Oil Platforms observation[173] with approval and then endorsed the English-law position:

> "[T]he Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that 'the graver the charge, the more confidence there must be in the evidence relied on' …, this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged."[174]

115. The *Rompetrol* tribunal adopted a similar holding,[175] accepting that a higher standard applied to bribery and fraud allegations, but only when the respondent impugns the claimant's conduct and not vice versa. The arbitral tribunal rejected the adoption of a formal, heightened standard of proof:

> "[The] Tribunal should [not] regard itself as bound in advance to expect or to require specific levels of proof or of rebuttal in respect of particular factual allegations advanced by the Claimant in this arbitration."[176]

The arbitral tribunal then stated that it would nevertheless demand more proof regarding certain types of allegations:

> "[T]here may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence – as opposed to pure probabilities or circumstantial inferences. But the particular circumstances would be determinative, and in the Tribunal's view defy codification."[177]

116. A nuanced version of the balance of probabilities test was also applied in the ICC award in *Alfa Duty Free Holdings*.[178] The tribunal applied the balance of probabilities. The tribunal ruled, however, that based on the *lex causae* and the law of the seat, which was the same, establishing quasi criminal conduct required

---

168 *Glencore Int'l A.G. and C.I. Prodeco S.A. v Republic of Colombia (I)*, ICSID Case No. ARB/16/6, Award, 27 Aug. 2019, para. 669.

169 *Unión Fenosa Gas, S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 Aug. 2018, para. 7.52; *Churchill Mining and Planet Mining Pty Ltd. v Republic of Indonesia*, ICSID Case Nos. ARB/12/40 and ARB/12/14, Award, 6 Dec. 2016, para. 244.

170 *Tokios Tokeles v Ukraine* (ICSID Case No. ARB/02/18), Award, 26 July 2007, para. 124.

171 *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID Cases Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, para. 229.

172 *Libananco Holdings Co. Ltd. v Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 Sep. 2011, para. 125.

173 *Oil Platforms (Islamic Republic of Iran v United States of America)*, Separate Opinion of Judge Higgins, 6 Nov. 2003, *ICJ Rep.* 2003, p. 234.

174 Id.; see also Lord Hoffmann's statement in *Secretary of State For the Home Department v Rehman* [2001] UKHL 47 (HL): "I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained … some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not".

175 *The Rompetrol Group N.V v Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 178.

176 Id. para. 182.

177 Id.

178 *Alfa Duty Free Holdings, SARL v Gebr. Heinemann SE & Co. KG and Gebr. Heinemann Russia Holding Verwaltungs GmbH*, ICC Case 23656, Final Award, 19 Nov. 2021. Final award published under the IBA x Jus Mundi Exclusive Partnership for Commercial Arbitration and ICC has not contributed to its publication.

"evidence of greater and heavier weight than that required in standard civil trials".[179] The tribunal further ruled that:

> "[A]n arbitral tribunal should not focus on each piece of evidence in isolation, but should consider the evidence as a whole. An arbitral tribunal should consider the accumulation and amount of circumstantial evidence, its strength, and whether the pieces of circumstantial evidence are sufficiently detailed and integrated with one another to satisfy the arbitral tribunal as to the tilting of probability".[180]

The tribunal found that the accumulation of compelling evidence, including circumstantial evidence obtained with the assistance of the court at the seat of arbitration, satisfied that heightened standard of proof. This case illustrates how tribunals can endorse a heightened standard of proof and, at the same time, adopt a flexible approach based on circumstantial evidence and red flags. Commercial arbitral tribunals employing the balance of probabilities as the standard of proof also include ICC Cases 12732, 22467, 25194, LCIA Case No. 142683, and ICDR Case No. 50-180-T-444-08.

Of note, the "Sanctions Proceedings and Settlements in Bank Finance Projects" issued on 30 November 2023 apply the same standard.

> "(i) Standard of Proof. The Sanctions Board shall determine whether the evidence presented by INT, as contested by the Respondent, supports the conclusion that it is more likely than not that the Respondent engaged in a Sanctionable Practice. 'More likely than not' means that, upon consideration of all the relevant evidence, a preponderance of the evidence supports a finding that the Respondent engaged in a Sanctionable Practice."[181]

4.2.2 Civil law derived/subjective approach standards

i) "Inner conviction"

117. Under this approach, an arbitrator will decide an issue based on his or her personal, inner conviction on the basis of the evidence produced. In other words, the arbitrator must be personally satisfied with the evidence in order to resolve any issue.[182]

118. This is typically the standard of proof required in civil law countries,[183] but it also finds place in international arbitration.[184] A civil law judge has to be convinced (in Germany)[185] or fully convinced (in Austria) in order to regard a fact as established. This standard does not equate to irrefutable certainty, but the judge must be persuaded to a degree that silences doubts, even if it does not eliminate them totally.

119. The French concept of "*intime conviction*" is similar to this, albeit not technically a standard of proof, but an expression referring to the sovereign power of judges to decide a dispute, which is a more subjective approach than the common law approach. In ICC Case 7047, for example, the arbitral tribunal explained that it:

> "must be convinced that there is indeed a case of bribery [and that a] mere 'suspicion' … is entirely insufficient to form such a conviction".

120. Some authors consider that this civil law standard of "inner conviction" is similar to common law standard of "balance of probabilities" as in both the arbitrators have to "evaluate the evidence produced and be convinced that the evidence is more likely than not true".[186] A similar position was also taken by the arbitral tribunal in *Churchill Mining v Indonesia*, which considered that the "inner conviction" standard was the "civil law counterpart" of the "common law standard of the balance of probabilities".[187] Although the civil-law notion of inner conviction and the common-law standard of balance of probabilities originate from different legal traditions, they often converge in practice, particularly in international arbitration. In both frameworks, arbitrators

179 Id. at pp. 357-358.

180 Id. at p. 362.

181 Art. 8.02.(b)(i), The Sanctions proceedings and Settlements in Bank Finance Projects (IBRD and IDA Sanctions Documents, 30 Nov. 2023) set out the procedures to be followed in the administrative process by which the World Bank determines whether or not to sanction parties alleged to have engaged in a sanctionable practice in connection with a Bank Financed Project.

182 G. Sourgens, K. Duggal, I.A. Laird, supra note 88.

183 G. Von Mehren, C. Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide", 20(3) *J. Int. Arb.* 285, 290 (2003).

184 R. Pietrowski, "Evidence in International Arbitration", 22 *Arb. Int'l* 373 (2006).

185 K. Clermont, E. Sherwin, "A Comparative View of Standards of Proof", 50 *Am. J. Comp. L.* 243, 254 et seq. (2022); S. Elsing, "Procedural Efficiency in International Arbitration: Choosing the Best of Both Legal Worlds", *SchiedsVS*, 114, 120 et seq. (2011).

186 G. Sourgens, K. Duggal, I.A. Laird, supra note 88; J. Waincymer, supra note 53, p. 767; A. Riddell, B. Plant, "Evidence Before the International Court of Justice", *BIICL?* 2011, p. 125,; J.D.M. Lew, Document Disclosure, Evidentiary Value of Documents and Burden of Evidence, p. 22, and V. Van Houtte, supra note 116; A.T Martin, "International Arbitration and Corruption: An Evolving Standard", 1(2) *Transnational Dispute Mgmt* 7 (2004).

187 *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case Nos ARB/12/14 and ARB/12/40, Award, 6 Dec. 2016, para. 244.

are required to assess the evidence as a whole and to decide in favour of the factual account they find more convincing than the competing version. In that practical sense, both approaches lead the decision-maker to determine whether a factual proposition is more likely than not to be true. That said, the two notions are not doctrinally equivalent. The balance of probabilities is an expressly articulated evidentiary threshold grounded in probabilistic reasoning, whereas inner conviction refers to the subjective decision-maker's state of persuasion and resists numerical formulation. Accordingly, while the outcomes reached under the two standards may often align, they rest on distinct conceptual foundations that should not be conflated.

ii) "Reasonable certainty"

121. Some arbitral tribunals have applied the "reasonable certainty" standard, "which appears close to *intime conviction*",[188] and in both cases, the focus is on the arbitrator's level of persuasion, conviction, and certainty. While these tribunals do require sufficient level of proof to be convinced, persuaded, satisfied of the allegation, they remain flexible in resorting to circumstantial evidence along with inferences where called for, in order to account for the evidentiary difficulties being faced by parties alleging corruption.

122. In *BSG Resources v Guinea (I)*, the arbitral tribunal resorted to "*intime conviction* or reasonable certainty" and stated it would "only make a finding of corruption if, on the basis of the record, it is reasonably certain that acts of corruption have been committed".[189] Similarly, in *Metal-Tech v Uzbekistan*, where Uzbekistan alleged that Metal-Tech was involved in bribery, the arbitral tribunal stated that it would decide the corruption allegations under a "reasonable certainty" standard of proof:

> "[T]he tribunal will determine on the basis of the evidence before it whether corruption has been established with reasonable certainty. In this context, it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence."[190]

123. The *Croatia v MOL* tribunal likewise applied a "reasonable certainty" standard to the respondent's corruption allegation, after considering a number of standards and the policy considerations underlying them, and observing that "no consensus has as yet emerged as to how to reconcile these conceptual approaches in theory".[191]

124. There have been some varying descriptions of how the "reasonable certainty" standard compares to the "balance of probabilities" standard, but the "reasonable certainty" standard appears to be, if not lower than, certainly takes a more subjective approach to evidence than the "clear and convincing" standard.[192]

4.2.3 Weighing the evidence

125. No transnational standard having yet emerged and taking stock of the lack of consensus on the various standards, the seriousness of the allegations and the evidentiary difficulties for the party alleging corruption, some tribunals have endorsed a more flexible approach to the issue of standard of proof. This includes tribunals focusing on the careful review of the evidence that has been presented by the parties, rather than on deciding which standard to apply and tribunals weighing the evidence in light of more than one standard of proof.[193]

---

188 *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 493. *Tethyan Copper Co. Pty Ltd. v Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 Nov. 2017, para. 304.

189 *BSG Resources v Guinea (I)*, supra note 188, at para. 494.

190 Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 Oct. 2013, para. 243 (citing Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Jurisdiction and Admissibility, Judgment (Nov. 26), 1984 *ICJ Rep.* 392, para. 101).

191 *Republic of Croatia v MOL Hungarian Oil and Gas Plc*, PCA Case No. 2014-15, Award, 23 Dec. 2016, paras 125, 118; 106-128.

192 In the *BSGR v Guinea* case, the arbitral tribunal observed that while there is no consistent case law on the applicable international standard, the case law can largely be divided into two groups. The first, which encompasses decisions that "resort to the common law standard of clear and convincing evidence", applies a heightened standard of proof to corruption issues as compared to others, on the basis of the gravity of a corruption allegation. The second group applies the same standard of proof as other matters to allegations of corruption, including the "the common law standards of balance of probabilities or preponderance of evidence or the civil law standard of *intime conviction* du juge" *BSG Resources Limited (in Administration), BSG Resources (Guinea) Limited, BSG Resources (Guinea) Sarl v Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022, para. 493. It should be noted however that in *Getma International v Guinea*, the tribunal found that "it shall verify below whether the evidence submitted by the Respondent is clear and convincing and if it can provide this Tribunal with a reasonable certainty" that the corruption allegations were substantiated (while also expressly rejecting the need for a higher level of proof than for other allegations. *Getma International, Getma International Investissements, NCT Infrastructure & Logistique* and *NCT Necotrans v Guinea*, ICSID Case No. ARB/11/29, Award, 16 Aug. 2016, para. 184.

193 *Ampal-American Israel Corp., EGI-Fund* (08-10) *Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC* and *David Fischer v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 Feb. 2016, para. 306; *Niko Resources (Bangladesh) Ltd. v Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 Feb. 2019, para. 803.

126. In *Getma International v Guinea*, the arbitral tribunal used a combination of clear and convincing evidence and reasonable certainty. While observing that the standard of proof for corruption claims need not be higher than other claims, the arbitral tribunal held that its duty is to determine whether the evidence submitted by the party making the corruption allegation is "clear and convincing and if it can provide this Tribunal with a reasonable certainty".[194]

127. In *Kim v Uzbekistan*, the arbitral tribunal assessed the alleged conduct against both the clear and convincing evidence and the reasonable certainty standards.[195]

128. In *Ampal-American and others v Egypt*, the arbitral tribunal noted that whether it applied a heightened standard of clear and convincing evidence, or a less demanding one or a combination thereof, it was not persuaded that the investment had been procured illegally, as the allegations were based on innuendos.[196]

129. In addition to tribunals weighing the evidence in accordance with more than one standard of proof, various tribunals choose to focus on the quality of the evidence rather than the standard of proof as such. A notable commercial arbitration example is the *Vale S.A. v BSG Resources* award.[197] Vale accused BSGR of obtaining mining rights in Guinea through bribery and sought to void their contract. While refusing to endorse a higher standard of proof, the arbitral tribunal used as a baseline the "balance of probabilities" standard, and:

> "require[d] to be satisfied in accordance with the available evidence that it is cogent and commensurate with the gravity of the allegations".[198]

Like the *Niko* tribunal, the *Vale* tribunal drew a distinction between the degree of probability of a grave allegation and the "somewhat stronger" evidence "sufficient to tip the balance from being unlikely in the ordinary course of events to likely, or more probable than not probable".[199] The tribunal reviewed carefully the evidence put forward in support of the allegations being made, which Vale provided in the form of witness testimony, documents, and even prior judicial findings. The arbitral tribunal also drew adverse inferences when BSGR failed to rebut Vale's *prima facie* evidence. In the end, the arbitral tribunal was satisfied that BSGR had indeed bribed officials, meeting the high threshold of proof (if not formally called "clear and convincing"), and ruled in Vale's favour. The tribunal found that the evidence put forward by Vale was sufficient to meet even the "heightened evidential standard" put forward by BSGR.[200] This case illustrates how tribunals can, without endorsing a heightened standard of proof, weigh the evidence with due consideration being given to the fair administration of justice.

130. As one commentator has observed:

> "Because corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high. However, this does not mean that the standard of proof itself should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as 'red flags') cannot come to the aid of the fact-finder. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract 'heightened standard of proof'".[201]

131. The tribunal in *Niko Resources v Bapex and Petrobangla*, quoting this excerpt, explicitly refrained from deciding whether a heightened standard like clear and convincing evidence was required or if preponderance of evidence sufficed in a case involving a Bangladeshi gas project tainted by corruption allegations.[202] In effect, the *Niko* arbitrators considered that while persuasive evidence (in which the Tribunal has a high degree of confidence) was required to find corruption, elevating the standard of proof was not required. Under the flexible approach, which echoes to some extent the one adopted by the *Libananco v Turkey* tribunal described above,[203] arbitral tribunals weigh all available evidence, require a high level of confidence in the evidence put forward, but do not impose a higher threshold, particularly

194 *Getma International*, *Getma International Investissements*, *NCT Infrastructure & Logistique* and *NCT Necotrans v Guinea*, ICSID Case No. ARB/11/29, Award, 16 Aug. 2016, para. 184.

195 *Vladislav Kim and others v Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, para. 614.

196 *Ampal-American Israel Corp. v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 Feb. 2016, para. 306.

197 *Vale S.A. v BSG Resources Limited*, LCIA Case No. 142683, Award, 4 April 2019, paras 352-358.

198 Id. para. 355.

199 Id. para. 356.

200 Id. para. 358.

201 A. Llamzon, *Corruption in International Investment Arbitration* (Oxford University Press, 2014), para. 9.26.

202 *Niko Resources (Bangladesh) Ltd. v Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Decision on the Corruption Claim, 25 Feb. 2019, para. 806.

203 See Section 4.2.1 (iii) "Balance of probabilities".

where that could preclude using inference and indirect proof. As such, a balance between acknowledging the seriousness of corruption allegations and ensuring that such allegations can be properly assessed on the basis of all the relevant evidence can be found. By prioritising the careful weighing of evidence over rigid adherence to standards of proof, arbitral tribunals have the necessary flexibility to address evidentiary challenges in corruption cases.

4.3 Relationship between standards of proof and types of evidence

132. It is not this document's purpose to address what types, categories, or specific items of evidence should be considered by an arbitral tribunal in determining whether a party has met the applicable standard of proof, or stated differently, discharged its burden of proving that corruption took place or the absence of corruption.[204] However, the weighing of the type of evidence offered against the standard of proof endorsed is informative of the approach taken by arbitral tribunals in applying particular standards of proof.

133. Direct evidence in corruption cases is rare but not unheard of. Sometimes an executive will admit under cross-examination what happened, or a whistleblower provides a recording. For example, in an ICSID arbitration, *World Duty Free v Kenya*, the chairman of the Claimant company testified that he paid US$2 million in cash to an individual who had close ties to the Government. He testified that he witnessed this individual deliver a briefcase containing US$ 500,000 in cash to the President of Kenya. The arbitral tribunal ruled that:

> "The relevant facts are indisputable on the evidence adduced before this Tribunal: this is not a case which turns on legal presumptions, statutory deeming provisions or different standards of proof under English or Kenyan law. Indeed, the decisive evidential materials came from the Claimant itself, including Mr. Ali's own written and oral testimony."[205]

134. In other words, the claimant's admission proved the bribe beyond doubt. There was no need for presumptions or indirect evidence. As a result, the arbitral tribunal had "indisputable" proof and declared the contract void for corruption. This case stands out because the direct evidence was basically handed to the arbitral tribunal by the bribe-payer, which is atypical.

135. The mere presence of direct evidence is not dispositive, however; arbitral tribunals must still assess or weigh its reliability, authenticity and credibility to determine that it satisfies the applicable standard. In *MOL v Croatia*, for example, the respondent likewise adduced direct evidence in support of its corruption allegation, notably in the form of the testimony of a witness who claimed to have served as the intermediary for an alleged bribe, which he claimed was destined for the respondent's former prime minister. The arbitral tribunal nevertheless rejected the respondent's corruption allegation after determining, inter alia, that the witness was unreliable and may have had ulterior motives.[206]

136. In sum, direct evidence – while uncommon – is the strongest form of proof of corruption. If available and deemed admissible, it will likely meet any standard of proof and win on the issue. But given its scarcity, as discussed in the next paragraphs, tribunals readily accept that parties may have to rely mainly on circumstantial evidence.

137. Examples of circumstantial evidence include, but are certainly not limited to:

- unusually large or above-market commissions/fees paid to agents or consultants, especially if those intermediaries did not provide commensurate services (e.g. a "consultant" is paid 15% of contract value, far exceeding normal consultancy rates – red flag that the money might be passed on as bribes);
- lack of qualifications or track record of an intermediary who nonetheless was paid big sums (e.g. in *Metal-Tech*, the consultants had no relevant skills, indicating they were likely hired just to funnel payments);
- payments routed through tax havens or shell companies, or use of cash for large transactions (to avoid traceability);
- concealment efforts using false invoices, contracts for fictitious services, backdated agreements (to mask an otherwise inexplicable payment);

204 These matters are addressed in the ICC Commission Supplementary Document Red Flags or Other Indicators of Corruption in International Arbitration.

205 *World Duty Free Company v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 Oct. 2006, para. 166.

206 *MOL Hungarian Oil and Gas Company PLC v Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022, paras 521-544; see also *Republic of Croatia v MOL Hungarian Oil and Gas Plc*, PCA Case No. 2014-15, Award, 23 Dec. 2016, paras 297-333 (also rejecting Croatia's bribery allegation on similar grounds).

- unexplained wealth or spending by a government official shortly after a contract award; evidence of close personal relationships or prior corruption incidents between the individuals involved (showing opportunity and predisposition);
- refusal to disclose bank records or destruction of documents can itself be circumstantial evidence (leading to adverse inference, as discussed);
- and patterns (e.g. every time Company A used Agent B in country X, Company A won contracts despite not being lowest bidder – suggesting Agent B may have bribed on A's behalf).[207]

138. Circumstantial evidence may require inference: the arbitral tribunal goes through a reasoning chain – e.g. "Consultant was paid $5 million with no work product delivered; it is reasonable to infer this money (or a large part) was used to bribe officials". For example, in ICC Case 12990, the arbitral tribunal considered that circumstantial evidence of corruption was established given various "abnormal circumstances", in particular that (i) the claimant was unable to produce evidence that it had performed any of its contractual obligations, (ii) the agreements in question were negotiated quickly and without substantial documentation, (iii) the claimant received a commission of 15% of the purchase price and (iv) a finding of corruption was consistent with the high level of corruption existing in the state in question at the time.

139. While circumstantial evidence (sometimes referred to as "red flags") is a type of evidence and is not a standard of proof, arbitral tribunals on various occasions have linked such evidence implicitly or overtly to the standard of proof endorsed and the types of evidence being weighed.[208] The *Unión Fenosa Gas v Egypt* tribunal ruled that:

> "Corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption. There is no reason in this arbitration, which is not a criminal proceeding, to impose a higher standard of proof";

In the end, the tribunal examined the circumstantial evidence put forward but rejected the corruption allegation.[209]

140. In other instances, arbitral tribunals have notably found that there was evidence of corruption on the basis of circumstantial evidence without sticking to any particular standard of proof:

- In ICC Case 6497, the circumstantial evidence of corruption was deemed established in light of: (i) the high commissions of the claimant, (ii) the absence of description of the services rendered by the claimant, (iii) failure to document services, (iv) the claimant's contradictions in its testimony and false declarations for failing to produce relevant documentary and witness testimony, (v) the claimant's failure to produce relevant documentary such as bank records, and (vi) the fact that the account to which the payments were made was a mere transit account.
- In ICC Case 13515, the red flags identified by the arbitrators as constituting proof of corruption were: (i) the very high remuneration of the claimant, (ii) the fact that the payment was transmitted abroad, rather than in the country in which the activities were allegedly performed, (iii) the absence of sufficient documents provided regarding the contract negotiation and the claimant's services, (iv) the short duration of intervention of the claimant in the project and (v) payments made to the personal bank account of claimant's representative and to the account of a state-owned company.
- In ICC Case 13384, the arbitral tribunal ruled that the following facts that were asserted by the respondent offered no conclusive evidence of corruption: (i) the claimant's location, (ii) the level of remuneration, (iii) the ill-defined purpose of the agreement, (iv) the shortage of written evidence, (v) the absence of indication of a bank account for payment, and (vi) the consultant's lack of experience.

141. In summary, there remain different ways in which tribunals articulate or refrain from articulating the relationship between the nature of the evidence being reviewed and the particular level of proof being required. Tribunals that articulate the two tend to show a fair amount of flexibility in weighing the evidence and endorse a pragmatic fact-finding approach that balances the policy considerations stemming from corruption allegations and the need for fairness and due process in the administration of justice.

---

207 It is also worth noting the relevance of adverse inferences. The absence of documents or other evidence that should normally exist and be put on record can itself be a circumstance. Tribunals may factor in non-cooperation as part of the mosaic of circumstantial evidence.

208 *Jan Oostergetel and Theodora Laurentius v The Slovak Republic*, Final Award, 23 Apr. 2012, para. 303; ICC Case No. 13384, Final Award (2013), extract published in *ICC Int. Court Arb. Bull. – Special Supplement 2013: Tackling Corruption in Arbitration*.

209 *Unión Fenosa Gas, S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 Aug. 2018, para. 7.52.

142. The standard of proof (whether called balance of probabilities, clear and convincing or inner conviction) can be met by circumstantial evidence if it convinces the arbitral tribunal to the required degree.

143. In analysing the evidence presented, best practice suggests that arbitrators should include in their award a discussion of what evidence they considered to constitute direct or circumstantial proof of corruption, why the evidence falls into one or the other category, and how this categorisation influenced their findings.

4.4 Summary

144. International arbitration reflects a blending of common law and civil law traditions, as well as transnational practice. This is reflected vividly in how different arbitrators and legal cultures approach the standard of proof.

145. Regarding the appropriate standard of proof, the landscape is still marked by vigorous debate and differing approaches. Some arbitral tribunals have applied heightened standards – requiring corruption to be proven to a level of "clear and convincing evidence" or even the criminal law standard of "beyond reasonable doubt". Other arbitral tribunals have applied the ordinary civil standard of "balance of probabilities", or standards like or close to "inner conviction". Those favouring a heightened standard are often motivated by the gravity of corruption allegations and the serious consequences of a corruption finding (voiding contracts, denying treaty protections, potential criminal implications). By contrast, those applying a lower standard cite the extreme difficulty of obtaining direct evidence of corruption and the need not to shield wrongdoing behind an unattainable proof requirement. In practice, arbitral tribunals have balanced these policy concerns: arbitral tribunals that have applied a higher standard aim to prevent false accusations from prevailing, while those opting for a lower standard aim to prevent true corruption from escaping accountability. Some authors and practitioners call for a transnational standard of proof for corruption allegations in international arbitration to ensure greater certainty and predictability.[210] However, divergences between legal traditions make the adoption of such a transnational standard challenging, and to date, arbitral tribunals have not adopted such a view.

146. In conclusion, the standard of proof in international arbitration is a critical component of how justice is administered in each case. It is shaped by a mix of legal traditions and pragmatic considerations. Arbitrators must remain fair (due process) and pragmatic (recognising evidentiary realities), while also guarding the legitimacy of arbitration in the eyes of the law (public policy compliance and enforceability). As one commentator aptly noted, arbitrators should adopt the standard that meets their concept of "good justice" in the case. This means being neither blindly strict nor permissively lax, but thoughtfully calibrating how convinced they need to be by the evidence in light of what is being alleged. Careful award drafting is recommended to set forth the motivation behind the decision-making process. By doing so – and by citing prior cases to explain their approach – arbitral tribunals contribute to a growing body of practice that guides future cases, ensuring that standards of proof in international arbitration continue to serve the twin aims of truth-seeking and fairness.

210 J. Bickmann, *Fact-Finding in International Arbitration: The Emergence of a Transnational Lex Evidentiae* (Wolters Kluwer, 2022) p. 67, paras 3.184-3.207.