

PROVING CORRUPTION IN INTERNATIONAL ARBITRATION: A BALANCED STANDARD FOR THE REAL WORLD

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The evidence of Claimant's witness – Mr Nassir Ibrahim Ali

"...protocol in Kenya required that I should in addition make a "personal donation" to President Moi. ... X advised me that the appropriate donation ... was US\$2 million. I was further advised by him that the donation should be in cash.

...

I brought [part of the cash in Kenyan shillings] to my meeting with President Moi in a brown briefcase. When we entered the room where the President received us, [I] put the briefcase by the wall and left it there. After the meeting [I] collected the briefcase from where [I] had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced by fresh corn.

I felt uncomfortable with the idea of handing over this "personal donation" which appeared to me to be a bribe. However, this was the President, and I was given to understand that ... I didn't have a choice if I wanted my investment contract"

World Duty Free Company Ltd v. Republic of Kenya
(ICSID Case No. Arb/00/7)
Award, 4 October 2006, paragraph 130



Question: How can our process ensure that it is equal to the ingenuity of those that conceal corruption?

Answer: ?



“The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality. ... The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.

But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat.”

*Himpurna California Energy v. PLN, Final Award
4 May 1999, paragraph 118*



"It is clear that, like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected.

...

Because of the near impossibility to "prove" corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were duly met."

Karen Mills, Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitrations Relating Thereto ICCA Congress Series, No. 11 (Kluwer 2003), p295



"On August 24, 2001, following receipt in London of a telephone call that invited him to come to Romania to resolve the extension issue, Mr Weil met at the parking lot of the Hilton Hotel with Mr Sorin Tesu, Chief of Cabinet to Prime Minister Nastase. Their discussion was short. After Mr Weil refused to pay a USD 2.5 million bribe requested by Mr Tesu, the latter left the parking lot. Mr Weil then left Romania the following day, on August 25, 2001.

On October 19, 2001, Mrs Liana Iacob, State Secretary under Prime Minister Nastase, repeated the bribe request to Mr Marco Katz, logistics and operational director of ASRO, during a private conversation held at her home in Bucharest, confirming that the request was made on behalf of Prime Minister Nastase. Mr Katz reported the meeting to Mr Weil during a phone conversation. Mr Weil once again categorically refused to comply with this request."

***EDF (Services) Limited v. Romania*, Award
8 October 2009, paragraphs 71 and 72**



“The heart of Claimant’s case is that the contractual arrangements at the Otopeni airport were not extended beyond their ten-years term because Mr Weil refused to pay a USD2.5 million bribe to secure the extension, and was clearly impossible to reconcile with the legitimate and reasonable expectation of Claimant. Respondent flatly denies that such a request for a corrupt payment was made. **In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence.** There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.”

EDF (Services) Limited v. Romania
Award, paragraph 221



Question:

How can our process ensure that it is equal to the ingenuity of those that conceal corruption?

Answer:

Our process will not ensure that it is equal to the ingenuity of corruptors, and/or those that they corrupt, if arbitrators simply fail to take account of that ingenuity, and where necessary adapt for it, in the conduct of their proceedings.



Question 1. **Is it appropriate for arbitral tribunals to heighten the standard of proof?**

Question 2. **How should arbitral tribunals ultimately apply the standard of proof?**



Proposition No. 1:

Whilst the standard of proof should not be relaxed for allegations of corruption, by the same token it should not be made more severe.



Lord Hoffmann on the English law position

“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 in *In re H (Sexual Abuse, Standard of Proof) (Minors)* [1996] AC 563, 586, 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.**”

Secretary of State for the Home Department v. Rehman
[2001] UK HL 47, paragraph 55



“The inference that it was the company’s money was drawn from exceedingly scanty evidence. Nevertheless as there was no particle of evidence the other way, the court could not upset the decision of the commissioners that the moneys in the secret account belonged in their origin to the company.”

Fen Farming Co Ltd v. Dunsford (No. 2)
[1973] STC 484



Proposition No. 2:

Plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation.



"In a claim for fraud it is for the Claimant to prove fraud, notoriously one of the most difficult things to prove in civil proceedings. Nonetheless, it is also the case that in most fraud cases, a conclusion reached by the court that fraudulent conduct has taken place, will be based upon inference rather than by direct evidence."

Doe and another v. Skegg and another
[2006] EWHC 3746, at paragraph 36



Proposition No. 3:

Where an inference is a reasonable conclusion to draw from the balance of the evidence, then Tribunals should be willing to draw it to determine allegations of illegality as they would any other allegation.

