Drawing Adverse Inferences from the Non-production of Evidence

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I. INTRODUCTION

ARBITRATING PARTIES, no less than litigating parties, require evidence to prove their cases and to challenge the factual bases of their adversaries’ contentions. That evidence, however, often rests exclusively in the hands of adverse parties, which lack obligation or incentive to divulge harmful information. Arbitrators, moreover, lack imperium and typically cannot compel parties to produce evidence. Judicial assistance also has its limits, as obtaining documents from courts is rarely an effective remedy in international arbitration.1 Arbitrating parties thus risk being deprived, unfairly, of the ability to prosecute or defend against claims.

International and institutional arbitral rules (and some national arbitration laws) ameliorate this problem by authorising arbitrators, implicitly or explicitly, to draw adverse inferences from parties’ non-production of discoverable evidence.2 It is generally accepted that if ‘a party after being ordered to do so refuses to disclose documents without reasonable excuse, the arbitral tribunal is likely to

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infer that the party has something to hide and is likely to treat that party’s future evidence with a degree of scepticism.3

Arbitrators themselves have derivative, institutional interests in drawing – or threatening to draw – adverse inferences from a party’s unjustified failure to produce evidence. By encouraging appropriate disclosure, arbitrators facilitate each party’s right to present its case and ensure that the record contains evidence sufficient to permit issuance of an award based on a full evaluation of the merits, thus promoting the international enforceability of the resulting award and, perhaps, greater voluntary compliance with that award. The very threat of adverse inferences can impel recalcitrant parties to produce unfavourable evidence, thereby allowing their adversaries to make out their claims or defences. Adverse inferences thus help ensure the efficacy, as well as the fairness, of international arbitration.

But what exactly are arbitrators permitted to do? Can arbitrators use adverse inferences to rule in favour of a party that has not produced evidence sufficient to carry its burden of proof?

International and institutional arbitration rules provide few answers. Commentators, moreover, reflexively cite arbitrators’ power to draw adverse inferences, but they, too, offer little practical guidance as to the application of inferences. One commentator suggests that, ‘In an extreme case, the party which fails to carry out an order of the tribunal may find itself “punished” by having an adverse award made against it (but it would seem that this would only be defensible if justified by the evidence and arguments advanced by the winning party)’.4 If an award is justified by evidence and arguments, however, adverse inferences would appear superfluous. Perhaps adverse inferences, after all, are ‘not the fearsome weapon some lawyers seem to imagine, given the fact that most arbitrators would be disturbed at the thought of deeming the burden of proof discharged by an inference’.5

As set forth below, however, arbitration case law suggests that, in appropriate circumstances, arbitrators do employ adverse inferences to enable parties to discharge their burdens of proof in the absence of evidence otherwise sufficient to make their cases. Indeed, given international courts’ and tribunals’ limited fact-finding role, as well as their general lack of coercive power, the burden of proof at times is, and occasionally must be, discharged by ‘the coexistence of sufficiently strong, clear and concordant inferences or of other similar unrebutted

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3 A. Redfern, ‘Interim Measures’ in Newman and Hill, supra n. 2 at pp. 217, 240; see also IBA Working Party, Commentary on the New IBA Rules of Evidence (1991), p. 21 (‘Arbitral Tribunals routinely create such inferences in current practice’). The American judge Learned Hand similarly noted that, ‘When a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt’. Warner Barnes & Co. v. Kokosai Kisen Kабushiti Kaisha, 102 F. 450, 453 (2d Cir. 1939).

4 Redfern, supra n. 3 at p. 240.

5 J. Paulsson, ‘Overview of Methods of Presenting Evidence in Different Legal Systems’ in A. van den Berg (ed.), Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration, ICCA Congress Series No. 7 (1996), pp. 112, 118 (emphasis in original) (but noting that the threat ‘is not an idle one’).
presumptions of fact'. Adverse inferences thus are an essential part of the arbitrator's toolbox.

Before drawing such inferences, however, arbitrators must satisfy themselves of the appropriateness of doing so in the circumstances of each case. This article distils from arbitral awards and decisions the following requirements for drawing inferences leading to an adverse award:

(1) the party seeking the adverse inference must produce all available evidence corroborating the inference sought;
(2) the requested evidence must be accessible to the inference opponent;
(3) the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld;
(4) the party seeking the adverse inference must produce prima facie evidence; and
(5) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.

In distilling these criteria, this article draws liberally on the case law of the Iran-United States Claims Tribunal ("the Tribunal"), for several reasons. First, and most importantly, the Tribunal’s 36 volumes of published decisions, awards and significant orders – now spanning more than two decades – offer unparalleled treatment of countless issues of international arbitration, including important evidential issues. Secondly, the Tribunal routinely confronts issues of adverse inferences and shifting evidential burdens; indeed, revolutionary turmoil in Iran practically guaranteed that arbitrating parties would lack important documentary evidence. Thirdly, the Tribunal has drawn inferences in a wide variety of contexts, including in matters of ownership, expropriation and valuation. Fourthly, its judges hail from disparate legal traditions, including common, civil and Islamic law, and have crafted pragmatic solutions to a host of nettlesome legal issues, including evidential issues. Finally, the Tribunal adopted, with minor modifications, the UNCITRAL Arbitration Rules. Like most sets of arbitration rules, the UNCITRAL Arbitration Rules broadly empower arbitrators in evidential matters, but say nothing specific about adverse inferences. Thus, the

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6 Ireland v. United Kingdom (Irish case), judgment of 18 January 1978, European Court of Human Rights, (1980) 58 ILR 190 at 264 (noting that inferences can satisfy even the requirements of 'proof beyond reasonable doubt').

7 See D. Sandifer, Evidence Before International Tribunals (rev. edn, 1975), p. 147 (noting that adverse inferences are 'the most effective sanction [international tribunals] have to impose upon parties negligent or recalcitrant in the production of evidence').


9 One commentary notes that the UNCITRAL Arbitration Rules' 'loose [procedural] framework, combined with the bitter impasse between the United States and Iran ... make IUSCT presumptions particularly poignant examples of the possibility of cross-cultural common sense at law'. T. Franck and P. Prows, 'The Role of Presumptions in International Tribunals' in (2005) 4 Law and Practice of International Courts and Tribunals 197 at p. 219 note 74.

Tribunal's use of adverse inferences may help elucidate application of an important principle neglected by most international and institutional rules and, perhaps, spur the progressive development of an international *lex evidentia.* This, in turn, may lead to more rational, more predictable and fairer international arbitral awards.

When considering criteria for drawing adverse inferences, one must always bear in mind issues relating to the burden of proof and not simply the standard of proof. The general rule in international arbitration is *actori incumbit probatio:* each party bears the burden of proving the facts relied on to support its claim or defence, regardless of that party's formal position as claimant or respondent. Indeed, numerous international tribunals 'have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof'. This ultimate burden of proof (or *onus probandi*) never shifts between the parties during the arbitration.

Once a party bearing the ultimate burden of proof establishes a *prima facie* case, however, the burden of production (or *onus proponendi*) shifts to the responding party to rebut that evidence; that is, if the party carrying the burden of proof

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11 See C. Brower, 'The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence' in R. Lillich (ed.), *Fact-Finding Before International Tribunals* (1992), pp. 147, 150 ("Perhaps we are seeing the emergence of a *lex evidentia* that will embrace common principles for the evaluation of evidence by international tribunals.")

12 Sandifer, *supra* n. 7 at p. 127 ("[T]he burden of proof rests upon him who asserts the affirmative of a proposition that if not substantiated will result in a decision adverse to his contention") (citation and internal quotations omitted); see also A. Redfern, 'The Practical Distinction between the Burden of Proof and the Taking of Evidence: An English Perspective' in (1994) *10 Arb. Int'l* 317 at p. 321 ("The practice of nearly all international arbitral tribunals is to require each party to prove the facts upon which it relies in support of its case"). The International Court of Justice has held similarly. See e.g., *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, judgment of 26 November 1984, [1984] ICJ Rep. 169 at 437 (noting that "it is the litigant seeking to establish a fact who bears the burden of proving it").

13 Sandifer, *supra* n. 7 at p. 127 ("This burden may rest on the defendant, if there be a defendant, equally with the plaintiff, as the former may incur the burden of substantiating any proposition he asserts in answer to the allegations of the plaintiff"). In international cases, there may be no formal 'claimant' or 'respondent', as when the case is brought under a *compromis.* See e.g., *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, judgment of 15 June 1962, [1962] ICJ Rep. 6 at 15-16 ('As concerns the burden of proof, it must be pointed out that though, from the formal standpoint, Cambodia is the plaintiff, having instituted the proceedings, Thailand also is a claimant because of the claim which was presented by her').


16 See *International Ore & Fertilizer Corp. v. Razi Chemical Co. Ltd,* award no. 351-486-3 (25 February 1968) (dissenting opinion of Brower J), 18 Iran-US Cl. Trib. Rep. 102, note 2 ("A "prima facie case" is a case sufficient to call for an answer") (citation and other internal quotations omitted); *Waste Management v. United Mexican States,* award of 2 June 2001, ARB(AF)/98/2, (2001) 40 ILM 70 at 72 note 8 (dissenting opinion of Mr K. Highet) (distinguishing *onus probandi* from *onus proponendi*).
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'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'; or, as the Commission in the Parker case put it: '[W]hen the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting'.

Although international courts and tribunals sometimes refer to the evidential burden as the 'burden of proof', the concepts are distinct. Arbitral tribunals, therefore, regularly impose the burden of producing evidence on a party even when that party does not carry the ultimate burden of proof.

The *Feldman* case, a NAFTA Chapter 11 arbitration, illustrates the peril of failing to produce evidence to counter a claimant's *prima facie* case. The dispute concerned Mexico's application of certain tax laws to the export of tobacco products. The claimant principally alleged that Mexico improperly refused to rebate excise taxes applied to his company while extending those benefits to similarly situated Mexican companies. Although the Tribunal lamented the 'limited amount of relevant factual information' in the record, it ultimately agreed that Mexico had breached its obligation under NAFTA art. 1102 concerning national treatment. The tribunal concluded that the claimant had 'established a presumption and a *prima facie* case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption'. The tribunal also questioned Mexico's failure to produce evidence in its exclusive possession that could have disproved the claimant's *prima facie* case, asking: 'Why would any rational party have taken this approach ... if it had information in its possession that would have shown that the Mexican owned cigarette exporters were being treated in the same manner as the Claimant?'. Finding no satisfactory answer, the tribunal held that 'it is entirely reasonable for the majority of this Tribunal to make an inference based on the Respondent's failure to present evidence on the discrimination issue'. That inference, the tribunal held, coupled with the claimant's *prima facie* case, was sufficient to justify a ruling in the claimant's favour.

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20 *ibid.* at 660. The relevant provision, art. 1102(2), states: 'Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments'. *ibid.* at 659.
21 *ibid.* at 662.
22 *ibid.* at 663.
23 *ibid.*
A dissenting arbitrator, however, rejected the tribunal's analysis, concluding:

[T]o be able to affirm that a State systematically violates its own laws, in order to give a less favorable treatment to the investors of the other State, or with any other purpose, evidence that clearly proves those facts must be had; I am of the opinion that for such affirmation simple inferences are not enough; that if there exists a pattern of conduct, there would be diverse manifestations that would permit any of the parties to prove it in a convincing and reliable way. 24

As discussed below, however, this reasoning is not consistent with international arbitral practice, and thus was rejected by the Superior Court in Ontario in an application to set aside the arbitral award. 25 The dissenting arbitrator failed to identify the criteria for drawing, or refusing to draw, adverse inferences from the non-production of discoverable evidence, the subject to which we now turn.

II. CRITERIA FOR DRAWING, OR REFUSING TO DRAW, ADVERSE INFERENCES FROM THE NON-PRODUCTION OF EVIDENCE

(a) Party Requesting Adverse Inference Must Produce All Evidence Accessible to it Corroborating Inference Sought

Arbitral tribunals may refuse to draw adverse inferences when the requesting party itself likely has access to evidence corroborative of the inference sought, but has failed to produce that evidence or adequately explain its non-production. 26

The Hilt case at the Iran-United States Claims Tribunal illustrates the point. 27 There, the claimant sought damages arising from a terminated employment

25 In the Matter of an Arbitration pursuant to Chapter Eleven of the NAFTA between Marvin Roy Feldman and the United Mexican States, judgment of 3 December 2003, Superior Court of Justice of Ontario, (2004) 29 YB Com. Arb. 167 at 178. The court also confronted the important question of whether Mexico could, consistent with its domestic law, produce the evidence necessary to rebut the claimant’s allegations. Among other grounds for setting aside the award, Mexico argued that it was unable to present its case, as the tribunal had stated that ‘it would only draw adverse inferences in the event of a Party’s failure to comply with its orders’, but allegedly ‘drew impermissible inferences because Mexico, in complying with its own domestic law governing taxation law enforcement and taxpayer privacy protection, refused or failed to disclose confidential information’. ibid. at 170. The court, however, dismissed this claim, observing that Mexico could have (i) ‘provided the information as to how many corporations were getting rebates — whether they were domestic or foreign corporations and how much the rebates were ... without divulging the names of the taxpayer’, or (ii) ‘indicated to the Tribunal if consent had been sought from the taxpayers in order to allow Mexico to divulge the information’, ibid. at 174–175. The court’s decision was upheld on appeal. United Mexican States v. Marvin Roy Feldman Karpo, judgment of 11 January 2005, Court of Appeal for Ontario, (2005) 30 YB Com. Arb. 99.
26 See e.g., Dallal v. Islamic Republic of Iran, award no. 53-149-1 (10 June 1983), 3 Iran-US Cl. Trib. Rep. 10 at 17 (refusing to draw adverse inferences and noting that the claimant’s ‘reticence to provide information about the character of the transaction cannot be sufficiently justified by his alleged concern for the safety of relatives and business connections in Iran, since it had been quite possible for him to give further details ... without revealing the identity of his relatives and business connections’).
contract, including damages for a 25 per cent salary increase to which she claimed entitlement. The respondent (which by then controlled the claimant’s former employer) had ‘access to information within its records’ that could have settled the disputed issue, but failed to produce that evidence.\(^{28}\) Despite the respondent’s non-production of the critical evidence, however, the Tribunal declined to draw adverse inferences, noting that the claimant herself ‘had access to corroborating evidence but failed to present it or offer any explanation as to its absence’.\(^{29}\)

For the same reason, the Iran-United States Claims Tribunal refused to draw adverse inferences in favour of the claimant in the *Levitt* case, despite the Tribunal’s finding that the respondent had flouted Tribunal discovery orders.\(^{30}\) *Levitt* involved a dispute between an American contractor and, among others, an Iranian agro-industrial company. The claimant principally sought compensation for unpaid services for the construction of an irrigation system in Iran. During protracted proceedings, the Tribunal issued a series of document production orders. Following the respondents’ failure to comply fully with those orders, the Tribunal ‘put the Respondents on clear notice that the Tribunal remains free to draw appropriate conclusions’ from one of the respondents’ non-production.\(^{31}\) Although the respondents disclaimed possession of or access to the requested documents, they subsequently introduced into evidence two of the requested documents and referenced others in their pleadings. When pressed, the respondents further denied having access to certain of the undisclosed documents, professed a desire not to ‘burden’ the Tribunal with too many documents, and claimed, in any case, that the undisclosed documents had been sufficiently described by other documents in the record.\(^{32}\)

The Tribunal noted that the respondents’ ‘often contradictory and evasive explanations suggest[ed] deliberate non-compliance rather than an inability to produce’.\(^{33}\) The Tribunal further warned that it would consider the respondents’ ‘failure to produce ordered documents in weighing the evidence that was before it’, noting that ‘it is an accepted principle that an adverse inference may be drawn from a party’s failure to submit evidence likely to be at its disposal’.\(^{34}\)

That said, the Tribunal stressed that the respondents’ failure to comply with document production orders did ‘not relieve the Claimant of his obligation to muster all the evidentiary support at his disposal’, as the claimant bore the ultimate burden of proving his claims.\(^{35}\) The claimant’s evidence suffered from two serious defects. First, the claimant purportedly kept almost all relevant

\(^{28}\) *ibid.* at 160.

\(^{29}\) *ibid.*


\(^{31}\) *ibid.* at 163 (internal quotations omitted).

\(^{32}\) *ibid.* at 164 (award); *ibid.* at 187, 188, note 2 (concurring and dissenting opinion of Allison J).

\(^{33}\) *ibid.* at 164.


\(^{35}\) *ibid.* at 180.
documents in his Tehran office, and 'apparently did not even keep a copy of the Contract documents in his New York office'.

Secondly, the claimant's 'failure to produce as a witness a key former employee who had been in charge of the irrigation project in Iran left an important gap in Claimant's proof'. The Tribunal thus refused to draw adverse inferences from the respondents' failure to produce rebuttal evidence (despite specific orders from the Tribunal requiring production) and denied the claimant recovery on that particular claim.

The Levitt case thus suggests that arbitral tribunals may refuse to draw adverse inferences from 'a party’s deliberate non-compliance with Tribunal orders' if the requesting party has failed to produce documentary evidence that a party reasonably would be expected to produce, or if it has failed to offer available testimony that, in lieu of the documents requested, might have closed important gaps in the requesting party’s case.

The dissenting arbitrator in that case, Judge Allison, criticised the Tribunal’s failure to draw adverse inferences under those circumstances. He acknowledged that, 'Where a party has wilfully failed to comply with Tribunal orders for the production of documents highly relevant to the issues in a case, it is a matter of judgment as to how the Tribunal should react'. He reasoned, however, ‘that a party’s deliberate non-compliance with Tribunal orders gives rise to an inference that the production of the requested documents would not have supported that party’s arguments’. The resulting ‘inference in turn tends to enhance the credibility of the allegations of the other party that may not be fully documented but are consistent with the factual pattern established by the evidence in the case’, and 'tends to diminish the credibility of the non-complying party’s own allegations of fact'.

Judge Allison’s conclusions fully jibe with other Tribunal precedent. The crucial point, however, is that arbitrators will not draw adverse inferences leading

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36 ibid. at 184. Indeed, even the dissenting arbitrator conceded that the claimant’s ‘failure to maintain virtually any records outside Iran is rather inexplicable in a corporation with experienced and sophisticated management’. ibid. at 187, 188–189 (concurring and dissenting opinion of Allison J); see also Indonesia v. Amco Asia Corp., annulment decision of 16 May 1986, (1987) 12 IB Com. Arb. 129 at 143 (noting that ‘a reasonably prudent foreign non-resident investor may be expected in the ordinary course of business to keep copies of such documents outside the host State’); Knesevich Claim (1951–54), decision of International Claims Commission, (1954) 21 ILR 154 at 155 (‘It would seem reasonable to believe that at some time during that [10-year] period, when private, international communication was quite free, the claimant would have received from his brother some written communication reflecting the acquisition of at least some of these shares of stock and something in writing by way of acknowledgement of the claimant’s interest therein. It would be the kind of record which, in such a transaction, a reasonably prudent businessman would be expected to retain’).

37 Levitt v. Iran, supra n. 30 at 189 (concurring and dissenting opinion of Allison J).

38 ibid. at 187.

39 ibid. at 188.

40 ibid.; see also Daniel Dillon v. United Mexican States, decision of 3 October 1928, Mex.-US General Cl. Comm., 4 Rep. Int’l Arb. Awards 368 at 371 (concurring opinion of American commissioner) ('Evidence produced by one party in a litigation may be supported by legal presumptions which arise from the non-production of information exclusively in the possession of another party') (emphasis added); Cheng, supra n. 14 at p. 325 (noting that adverse inferences may be drawn 'where counter-proof can easily be produced but its non-production is not satisfactorily explained') (citations omitted).
to an adverse award against a party that has failed to produce discoverable evidence in its possession if the claiming party itself likely has access to evidence corroborative of the inference sought, but has failed to produce that evidence or adequately explain its non-production.

(b) Party Requesting Adverse Inference Must Establish that Requested Party Has, or Should Have, Access to the Evidence Sought

Unsurprisingly, arbitral tribunals refuse to draw adverse inferences if the requesting party has not established that the requested party has, or should have, access to the requested evidence. That is, adverse inferences properly may be drawn 'only if it ha[s] been sufficiently shown that the defendant held documents of evidential value which it refused to submit'.

The Edwards case at the Iran-United States Claims Tribunal illustrates the point. There, the claimant argued that he had fled Iran hastily in November 1979 amidst the Islamic Revolution, and in the process abandoned important business records essential to his contract claims. In lieu of the relevant agreements, he produced some invoices and two affidavits vaguely describing the contractual relationships underlying his claims. The claimant, however, argued that Iran had gained access to contracts and other relevant evidence from his office in Tehran, and asked the Tribunal to draw adverse inferences from Iran’s failure to produce those requested documents. The Tribunal refused. The Tribunal acknowledged the evidentiary hurdles confronting claimants displaced by the Islamic Revolution. The Tribunal further acknowledged the claimant’s contention that Iran had failed ‘to offer proof in rebuttal of the Claimant’s assertions’. In the end, however, the claimant simply failed to convince the Tribunal that the respondent ‘came into actual possession of the documents in question’. As such, the Tribunal could not permissibly ‘shift the burden of proof’ to Iran or draw adverse inferences from Iran’s non-production.

Arbitral tribunals similarly may refuse to draw adverse inferences from a party’s failure to produce evidence ostensibly in its control if that evidence in fact is in the hands of adverse or uncooperative third parties. In the INA Corporation case, for instance, the Iran-United States Claims Tribunal stated that a party could not ‘be held accountable for the failure of organizations over which [it] had no control to provide the requested information’. Thus, ‘[n]o negative

41 Decisions of the Arbitral Commission on Property Rights and Interests in Germany, The Arbitral Commission, Koblenz, 1958–67, vol. 2, p. 210; see also H. A. Spalding v. Ministry of Roads and Transport of the Islamic Republic of Iran, award no. 212-437-3 (24 February 1986), 10 Iran-US Cl. Trib. Rep. 22 at 32 (holding that, ‘even though Claimant’s Tehran records are no longer available to Claimant it does not follow that they are available to Respondents and that inferences therefore may be drawn against them’).
43 ibid. at 293.
44 ibid.
45 ibid.
Inferences are possible from these circumstances. Other international tribunals have affirmed this principle.

Occasionally, however, a party's purported inability to produce evidence is pretextual, as the evidence sought might well be in the hands of a parent, subsidiary or related company. In such cases, the arbitral tribunal may determine that the requested documents are in fact accessible to the requested party, and may draw appropriate inferences from their non-production.

Likewise, a tribunal may conclude that a party's lack of access to evidence arises from destruction of that evidence. A tribunal may, as circumstances require, draw appropriate adverse inferences from non-production of such evidence.

(c) Inference Sought Must be Reasonable, Consistent with Facts in the Record and Logically Related to the Probable Nature of the Evidence Withheld

Inferences are logical conclusions derived not only from proven facts in the record, but also from 'general experience or common intuition'. As the 1951 Abu Dhabi arbitral award makes clear, however, invocation of 'common' experience or intuition can open the door to individual and cultural biases. To guard against such biases, international arbitral tribunals generally look to additional factors before drawing inferences. In all cases, inferences must (i) conform to generally known facts (that is, they must be reasonable); (ii) conform to existing facts in the record; and (iii) relate logically to the likely nature of the evidence impermissibly withheld.

(i) Inferences must be reasonable

Bin Cheng notes that 'it is legitimate for a tribunal to presume the truth of certain facts or of a certain state of affairs, leaving it to the party alleging the contrary to establish its contention'. He cautions, however, that 'in every case', the inference

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47 ibid.
48 See e.g., T. Buergenthal, 'Judicial Fact-Finding: Inter-American Human Rights Court' in R. Lillich (ed.), Fact-Finding Before International Tribunals (1992), pp. 261, 267 ('[T]he Court's power to draw negative inferences from the failure of a party to present evidence ostensibly in its control will not always help to decide a case, for the evidence may be in the hands of uncooperative third States').
50 An American commentary lists five elements for drawing so-called spoliation inferences: (1) an act of destruction must be shown to have occurred; (2) the destroyed evidence must be relevant to the dispute; (3) the destruction must be intentional; (4) the destruction must have occurred when legal proceedings were pending or foreseeable; and (5) the destruction must be attributable to that party or to its agents. See J. Gorelick et al., Destruction of Evidence (1989), para. 2.5. Some courts have suggested a sixth element: the inference opponent must have had a duty to preserve the destroyed evidence. ibid. para. 2.5 (2007 Supp.).
51 Franck and Prows, supra n. 9 at p. 204.
52 Petroleum Dev. (Trucial Coast) Ltd v. Sheikh of Abu Dhabi (1952) 1 ICLQ 247 at 250–251 (after concluding that 'it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments', the umpire applied English law as 'principle[s] of ecumenical validity' and 'mere common sense'); see also C. Brower and J. Sharpe, 'International Arbitration and the Islamic World: The Third Phase' in (2003) 97 Am. J Int'l L 643 at p. 644.
53 Cheng, supra n. 14 at p. 304.
must ‘be one which can reasonably be drawn’.

In other words, tribunals may infer ‘that an act has been committed or that a fact exists’, but only in ‘circumstances that usually attend such an act or fact’. ‘Mere suspicions’, by contrast, ‘never can be a basic element of juridical findings’. Indeed, where a party’s evidence veers from ‘the normal state of affairs’, the tribunal may not only decline to draw adverse inferences, but may apply that party’s burden of proof with ‘particular strength’.

In many cases, ‘reasonableness’ simply reflects the arbitrators’ common understanding of commercial practice. The Iran-United States Claims Tribunal, for instance, has concluded:

- in the absence of contemporaneous objections, invoices or payment documents presented during the course of the contract are presumed to be correct, and payable;
- the failure to dispute an account for a lengthy period of time places a burden on the respondent to demonstrate that the account was inaccurate.

54 ibid. p. 325 (citation omitted).

55 The Greiner Claim, decision of 12 February 1959, Italy-United States Conciliation Commission, (1960) 30 ILR 454 at 455 (concluding that, ‘Any number of things, including the possibilities suggested by the claimant might have happened’).


58 See Houston Contracting Co. v. National Iranian Oil Co., award no. 378-173-3 (22 July 1988), 20 Iran-US Cl. Trib. Rep. 3 at 24-25; see also Lockheed Corp. v. Government of Iran, award no. 367-829-2 (9 June 1988), 18 Iran-US Cl. Trib. Rep. 292 at 308 (‘The communications referred to above and the invoice constitute sufficient contemporaneous, although circumstantial, evidence to establish a rebuttable presumption that these repairs were carried out’).


60 See RAM International Industries v. Air Force of the Islamic Republic of Iran, decision no. DEC 118-148-2 (28 December 1993), 29 Iran-US Cl. Trib. Rep. 383 at 390–391; Time, Inc. v. Islamic Republic of Iran, award no. 139-166-2 (22 June 1984), 7 Iran-US Cl. Trib. Rep. 8 at 11; Harold Birnbaum v. Islamic Republic of Iran, award no. 549-967-2 (6 July 1993), 29 Iran-US Cl. Trib. Rep. 260 at 280; Rockwell International Systems, Inc. v. Government of the Islamic Republic of Iran, award no. 438-430-1 (5 September 1989), 23 Iran-US Cl. Trib. Rep. 150. In Rockwell, the Tribunal stated: ‘Considering the evidence in its entirety, the Tribunal concludes that, subject to some adjustments, the Claim for invoices through August 1979 is sufficiently substantiated, reasonably documented, and conclusive. Rockwell has, therefore, at a minimum established a prima facie case for payment of the invoices. Prima facie evidence must be recognized as a satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn. This is particularly true where the difficulty of proof is the result of the respondent’s failure to raise objections in a timely manner and in such a way that the claimant could adequately establish its Claim. In such a case, a lower standard of proof is acceptable’, ibid, at 188 (citing Sandifer, supra n. 7 at pp. 169–174).

a party which delays detailing its objection to a claim for payment bears
the burden of proving its justification; and
where a party’s invoices typically contain substantiating documentation, the
absence of such documentation presumptively invalidates those invoices.

These are but a few examples of the presumptions relating to the non-
production of evidence that arbitrators, on the basis of their shared commercial
experience, reasonably have drawn in international arbitrations.

(ii) Requested inference must be consistent with facts in the record

Adverse inferences not only must be consistent with external facts (or with
‘commercial reality’), but also must lead to conclusions consistent with facts in the
record. That is, ‘no inference can be drawn which is inconsistent with facts
incontrovertibly established by the evidence’.

This principle finds longstanding support in the jurisprudence of international
courts and tribunals. In the Corfu Channel case, for instance, the International
Court of Justice refused to draw adverse inferences against the United Kingdom
in the face of a factual record contrary to the inference sought. There, the
United Kingdom declined to produce certain naval orders on grounds of military
secrecy. The United Kingdom argued that, in any case, the documents were
irrelevant, as the orders were contingent on facts that never arose. The ICJ
decided to ‘draw from this refusal to produce the orders any conclusions differing
from those to which the actual events gave rise’.

The Italy-United States Conciliation Commission ruled similarly in the Steinway
case. There, Steinway & Sons sought to recover the value of a concert grand piano
that it had lent to the Giuseppe Verdi Conservatory in Milan. The conservatory
was damaged during an aerial bombardment in 1943, and the piano was destroyed.
Steinway & Sons filed a claim with the Commission through its Italian sales agent, which obtained an official registration receipt in the claimant's name. In its defence, the respondent produced a letter from the claimant's sales agent, in which the agent: (i) failed to identify the claimant as the owner of the piano at the time of its destruction, and (ii) acknowledged that the documents proving contemporaneous ownership of the piano were destroyed during the aerial bombardment. The respondent argued that the agent should be presumed, 'in the absence of precise evidence to the contrary', to have purchased the piano from the claimant prior to its destruction.

The Commission, however, refused to draw the requested inference. Although the Commission acknowledged that the proposed 'presumption of fact would fill the gap in the evidence needed to support the contention of the respondent', it concluded that the record evidence 'destroy[ed] any basis for such a presumption'. That is, the Commission reasoned that, if the Italian sales agent had owned the piano, it would have claimed on its own behalf to recover for its loss under domestic war-damage legislation, rather than on behalf of the claimant in an international claims commission. The Commission thus declined to draw inferences contrary to documentary evidence in the record, namely the registration receipt acknowledging the claim in the name of Steinway & Sons.

(iii) Requesting party must establish a logical connection between likely nature of evidence withheld and inference sought

In all cases, a party seeking an adverse inferences must establish 'a logical nexus between the probable nature of the documents withheld and the inference derived therefrom'. A tribunal's analysis necessarily will be case-specific.

In some cases, the logical connection is obvious. The INA Corporation case at the Iran-United States Claims Tribunal is illustrative. The respondent there argued that the claimant was not entitled to compensation for the expropriation of its shares in an Iranian insurance company because the enterprise had a negative net worth. To support its valuation, the respondent produced a post-expropriation

70 ibid. at 861–862.
71 ibid. at 862.
72 ibid.
73 ibid.
74 W.L. Craig, W. Park and J. Paulsson, International Chamber of Commerce Arbitration (3rd edn, 1998); see also Corfu Channel case, supra n. 67 at 18 (stating that 'inferences of fact and circumstantial evidence ... [are] admitted in all systems of law ... [and] must be regarded as of special weight when ... based on a series of facts linked together and leading logically to a single conclusion').
75 INA Corp. v. Government of the Islamic Republic of Iran, award no. 184-161-1 (12 August 1985), 8 Iran-US Cl. Trib. Rep. 373. But see Arthur J. Fritz & Co. v. Sherkate Tavonie Sherkathaye S相爱ne, award no. 426-276-3 (30 June 1989), 22 Iran-US Cl. Trib. Rep. 170 (Tribunal failed to draw adverse inferences from the respondents' failure to produce documents referenced by other documents relied on by respondents; see ibid. at 183, 190 (dissenting opinion of Allison J) (arguing that '[w]hen a party in possession of evidence that is clearly relevant and would be of assistance to the Tribunal opts to make a selective presentation apparently designed not to illuminate the facts but only to support its own arguments, that party assumes the risk that the Tribunal will reach its own conclusions as to the content of the material withheld'). The Fritz case appears inconsistent with Tribunal jurisprudence regarding adverse inferences.
audit report of the company. That report contained a number of footnotes evidencing unorthodox accounting methodologies. One footnote, for instance, stated that 'the attached financial statements have not been prepared on the basis of acceptable accounting principles used by other operating insurance companies'.76 Another opaque footnote stated that certain adjustments had been made to the company’s valuation because ‘the company [was] no longer continuing its operations as it used to do (i.e. before nationalization)’.77 At the claimant’s request, the Tribunal ordered the respondent to produce the financial documents underlying the audit report. The respondent refused, claiming at the hearing that the requested documents were too ‘voluminous’.78 The respondent, however, failed to provide any ‘indication of the actual amounts of material involved or any description of the alleged problems involved which prevented submission of the materials by Respondent or their inspection by [Claimant]’.79 The Tribunal rejected the respondent’s explanations, stressing the necessity of the documents to the respondent’s valuation of the expropriated company. The Tribunal concluded that the ‘various notes ... qualify the report to such a degree that it is impossible, without examination of the underlying documents ... to evaluate the results of the audit’.80 Accordingly, the Tribunal drew an adverse inference from the respondent’s failure to produce the underlying documents, disregarded the respondent’s audit reports, and awarded the claimant the full amount claimed.81

In other cases, however, the logical relation between the adverse inference sought and the likely nature of the documents withheld is not as obvious. The Riahi case at the Iran-United States Claims Tribunal is illustrative.82 There, the claimant, a dual Iran-US national, sought, among other things, US$4,228,000 for the expropriation of 2,010 bearer shares of Khoshkeh, an Iranian importer and distributor of specialty steel. The Tribunal accepted the claimant’s ownership of the 1,500 shares that were registered in her name prior to their conversion to bearer shares. The Tribunal, however, rejected her claimed ownership of 510 additional bearer shares, which she allegedly received from her Iranian husband just prior to the formal expropriation of those shares by Iran. The claimant failed to produce certificates for the 510 shares, relying instead on affidavits from herself and from her husband, excerpts from her husband’s diary and roughly contemporaneous letters from the company’s managing director.

At the claimant’s request, the Tribunal twice ordered the respondent to produce the company’s share register and public registration records, which she

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76 LVA Corp., supra n. 75 at 382.
77 ibid.
78 ibid.
79 ibid.
80 ibid. at 381–382.
81 See also Harold Birnbaum v. Islamic Republic of Iran, award no. 549-967-2 (6 July 1993); 29 Iran-US Cl. Trib. Rep. 260 at 285 (disregarding evidence for lack of supporting material and the failure to explain the basis of the calculations).
claimed would have proven her ownership of the additional 510 bearer shares. When the respondent failed to produce those documents, the claimant asked the Tribunal to draw appropriate adverse inferences and to award her compensation for the expropriated shares.

The Tribunal, however, denied her claim. While acknowledging the difficulties facing the claimant, the Tribunal concluded that she had 'neither produced the share certificates nor demonstrated that the shares were transferred to her prior to the date [that her husband's] property was expropriated'.

The Tribunal also declined to draw adverse inferences from the respondent's failure to produce the company share register and public registration documents, concluding:

Iranian law does not require that transfers of bearer shares be entered into share registers of the companies. In addition, Article 10 of the Articles of Association of Khoshkeh provides that only the transfer of registered shares requires the approval of the board of directors and recording in the share register. The Tribunal therefore is not convinced that the share register or other requested corporate records of Khoshkeh would show that the Claimant owned these 510 bearer shares and that the transfer of those shares from her spouse took place before his shares were expropriated.

Dissenting on this issue, Judge Brower questioned the Tribunal's conclusion that there was no logical nexus between the documents withheld and the inference sought by the claimant. He concluded:

[T]he Respondent has failed and refused, repeatedly, to comply with Orders to produce the documents that would prove, one way or the other, the facts in regard to the Claimant's shareholdings, namely the share register and the public registration records. The Respondent has never disclaimed possession, custody and control of these records. Indeed, its contention that these records are publicly available to the Claimant confirms its own access to them. The determined failure to produce them therefore compels the Tribunal to infer that they do support the Claimant's claimed ownership of 2,010 shares. Instead, the Tribunal refuses to draw adverse inferences against the Respondent because it 'is not convinced that the share register or other requested corporate records of Khoshkeh would show that the Claimant owned these 510 bearer shares and that the transfer of those shares from her spouse took place before his shares were expropriated'. As a close corporation, however, Khoshkeh may well have recorded bearer share transfers. Regardless, the Tribunal cites no authority for its holding that a party requesting an adverse inference must 'convince' the Tribunal that the requested documents would in fact support that party's position. To reward the Respondent for its calculated flouting of two separate Tribunal Orders to produce the corporate books and records of Khoshkeh is thus unjust and inequitable. Indeed, the Tribunal's putative concern for 'the possible difficulties that an owner of bearer shares can face in proving ownership of shares in the absence of actual share certificates' here rings especially hollow.
Riahi thus affirms that, in every case, a tribunal must carefully weigh the likely import of missing evidence before drawing, or refusing to draw, adverse inferences.

(d) Party Seeking Adverse Inference Must Produce Prima Facie Evidence

Arbitral tribunals will not draw adverse inferences if the requesting party has failed to produce *prima facie* evidence of its claim or defence. *Prima facie* evidence is that 'which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive'.

In practice, arbitral tribunals will not draw adverse inferences if the requesting party has failed to introduce evidence that is, under the circumstances, reasonably (i) consistent, (ii) complete and (iii) detailed.

(i) Party requesting adverse inference must produce reasonably consistent evidence

Tribunals need not draw adverse inferences from a responding party's failure to produce evidence if the requesting party has failed to tell a consistent story and produce consistent evidence. This is not to say, however, that arbitral tribunals demand complete consistency, or that they will not try to resolve evidential discrepancies. Rather, the issue is one of reasonableness under the circumstances.

The Malek case at the Iran-United States Claims Tribunal illustrates the point. There, the claimant, a dual Iran-US national, principally sought recovery for the alleged expropriation of real estate in Iran. The Tribunal determined that the respondent possessed, but failed to produce, documents that could have shed light on key issues. The Tribunal informed the respondent that 'the Tribunal has had recourse, on a number of occasions, to the principle that an adverse inference may be drawn from a party's failure to submit evidence likely to be at its disposal'.

The Tribunal, however, reaffirmed that it is the claimant who carries the 'burden of proving the facts upon which he relies'. The Tribunal determined that 'the Claimant did not maintain throughout the proceedings a consistent

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86 *International Ore & Fertilizer Corp. v. Razi Chemical Co. Ltd.*, award no. 351-486-3 (25 February 1988) (dissenting opinion of Brower J), 18 Iran-US Cl. Trib. Rep. 98 at 102, note 2 (citation and internal quotations omitted); see also *Cheng*, supra n. 14 at p. 324 (*prima facie* evidence 'does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary').


88 See e.g., *Kenneth P. Yeager v. Islamic Republic of Iran*, award no. 324-10199-1 (2 November 1987), 17 Iran-US Cl. Trib. Rep. 92 at 108 (acknowledging that '[t]he burden of proof in this respect is on the Claimant', but adding that 'no unreasonable standards may be applied').


90 The Tribunal found 'it difficult to comprehend why these records, to which the Respondent must have had direct access, were not submitted as evidence'. *ibid.* at 286.

91 *ibid.* (citing cases).

92 *ibid.* at 288.
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story.\textsuperscript{93} Rather, the claimant told one story in his request for arbitration and a different story in his pleadings. ‘On balance’, the Tribunal concluded, ‘the deficiencies in the Claimant’s presentation concerning the date on which the Claim arose – an issue ... central to this Case – are too important to accept that the burden of proof ... has shifted to the Respondent’.\textsuperscript{94} Accordingly, the Tribunal refused to draw adverse inferences against the respondent.

The 	extit{Kiaie} case at the Iran-United States Claims Tribunal illustrates the critical importance of consistent evidence in cases in which the party seeking an adverse inference has produced little documentary support for its claim.\textsuperscript{95} The claimants there alleged that Iran had expropriated their interests in an Iranian company incorporated to develop an industrial city. The claimants introduced affidavits from one of the company’s officers (Mr Miraftab), contemporaneous correspondence between Mr Miraftab and one of the claimants, and an audit report referencing the company’s share register. The claimants asked the respondent to produce the share register, but the respondent refused, despite the fact that its own witness had cited the share register in his affidavit.\textsuperscript{96}

The Tribunal stressed that, ‘due to the paucity of documentary evidence regarding ownership in this Case, the sufficiency and consistency of the Parties’ allegations on this matter is of particular significance’.\textsuperscript{97} The Tribunal then examined, and criticised, the claimants’ testimony:

\begin{quote}
[T]he Claimants have presented varied and fundamentally inconsistent allegations as to the source of the funds used to pay for the shares, the manner in which those funds were transferred to Iran, the role of Mr. Miraftab in the acquisition of shares by the Kiaies, the date of that acquisition, the number of shares purchased and the names in which those shares were held.\textsuperscript{98}
\end{quote}

The Tribunal acknowledged that, ‘in appropriate circumstances, the failure of the Respondent to produce evidence available to it may justify the Tribunal in drawing adverse inferences from that failure’.\textsuperscript{99} Under the ‘particular circumstances of this Case’, and ‘given the inconsistencies in the Claimants’ own versions of events’, however, the Tribunal held that ‘it would not be appropriate to do so’.\textsuperscript{100}

The 	extit{Isaiah} case at the Iran-United States Claims Tribunal, by contrast, demonstrates that a party can prevail on its claims with relatively little evidence, a consistent story and an adverse inference.\textsuperscript{101} Mr Isaiah claimed to be the owner

\begin{footnotesize}
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\item \textsuperscript{93} \textit{ibid.} at 291.
\item \textsuperscript{94} \textit{ibid.} at 291–292.
\item \textsuperscript{96} \textit{ibid.} at 69–70.
\item \textsuperscript{97} \textit{ibid.} at 60.
\item \textsuperscript{98} \textit{ibid.} at 69.
\item \textsuperscript{99} \textit{ibid.} at 70 (citing cases).
\item \textsuperscript{100} \textit{ibid.}
\end{itemize}
\end{footnotesize}
and holder of a bank cheque for US$380,000 drawn on the International Bank of Iran. Mr Isaiah brought a claim for unjust enrichment against the bank's state-owned successor, alleging that the cheque was dishonoured for insufficient funds. The cheque was made out to a former business associate of the claimant, Mr Farkash, who had endorsed it to Mr Isaiah. Mr Isaiah claimed that the cheque represented payment for his share of a transaction for the sale and shipment of beer to Iran prior to the Iranian government's expropriation of the beer-importing company. The claimant alleged that the respondent had access to the expropriated company's business records, and that those records, if produced, would have shown the company's debt to him.

In its defence, the respondent bank suggested that the claimant had fabricated evidence in order to recover the funds, as the real party in interest, an Israeli, lacked standing before the Tribunal. The Tribunal, however, noted that the respondent 'presented no evidence to substantiate its defense except its suspicions'.102 By contrast, the Tribunal concluded that the claimant's documents, 'buttressed by credible testimony at the Hearing, constitute[d] a prima facie case that the money represented by the check was Isaiah's money and that he ha[d] held the claim for that money from the time the bank check was dishonored'.103 'In the absence of evidence to the contrary', the Tribunal held, 'that evidence is decisive'. 104

(ii) Party requesting adverse inference must produce reasonably complete evidence

Arbitral tribunals may refuse to draw adverse inferences if the party requesting the inference fails to produce evidence that, in light of the parties' activities and relationship, a tribunal ordinarily would expect to find in evidence.105 That is, in addition to producing all available evidence corroborative of the inference sought, the party requesting an inference, more generally, must produce reasonably complete – and thus reasonably compelling – evidence.106

Again, a tribunal's task necessarily is case-specific. In the Sola Tiles case, for instance, the Iran-United States Claims Tribunal noted that, '[w]hile the Claimant must shoulder the burden of proving the value of the expropriated concern by the best available evidence, the Tribunal must be prepared to take

102 ibid. at 238.
103 ibid. at 238–239.
104 ibid. at 239.
105 See Melzer Mining Co. case (United States v. United Mexican States), (1929) Opinions of the Commissioners 228: '[I]t may be taken for granted that Mexico could have furnished evidence with respect to the amount and value of the property taken. And it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto which is made in the memorial. However, even though this assumption be justified, the Commission would not be warranted in awarding the amount claimed for the pipeline. The evidence produced by the United States is altogether too uncertain'. ibid. at 233.
106 See e.g., In re Odell, decision of 13 May 1931, Britain-Mexico Claims Commission, (1931) 6 ILR 423 at 424 ('In cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court can be more easily satisfied than in cases where no such endeavor seems to have been made').
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some account of the disadvantages suffered by the Claimant, namely its lack of access to detailed documentation, as an inevitable consequence of the circumstances in which the expropriation took place’.  

In other cases, by contrast, such as the Spalding case, the Tribunal found that a party’s evidence fell short of expectations. There, the claimant sought US$7.2 million for work allegedly performed for (and profits lost from) certain road projects in Iran. The claimant explained that he lacked access to relevant supporting documents abandoned in Tehran, but that the respondents did have access to those documents, and that adverse inferences should be drawn from their failure to produce them.

The Tribunal, however, was troubled by the paucity of the claimant’s evidence, which consisted of a mere 34 documents. The Tribunal highlighted the fact that, on average, ‘less than a document a month [was] produced relating to a period of nearly four years of allegedly intensive contractual involvement with the Iranian Government’. The Tribunal also noted that the claimant principally introduced correspondence ‘generally reflecting solicitation and negotiation rather than actual contractual relations or the rendering of compensable services’. ‘It would stand to reason’, the Tribunal concluded, ‘that if a substantial corporation with extensive experience in road building were engaged over a period of four years not just in soliciting contracts in Tehran but also in the actual performance of material engineering, design and architectural services, as alleged, it would have more extensive documentation at its disposal’. Accordingly, the Tribunal refused to draw adverse inferences from the respondent’s alleged failure to produce documents, and held that the claimant had not carried the burden of proving its claim.

(iii) Party requesting adverse inference must produce reasonably formal and detailed evidence

Tribunals may decline to draw adverse inferences if the requesting party’s evidence is, in the context of the particular case, deemed insufficiently formal or detailed. The Nemazee case at the Iran-United States Claims Tribunal is illustrative. There, the claimant, a dual Iran-US national, sought over US$225 million for the expropriation of real estate and corporate stock that his father and grandfather allegedly transferred to him in 1979. The claimant stated that he no

107 Sola Tiles, Inc. v. Government of the Islamic Republic of Iran, award no. 298-317-1 (22 April 1987), 14 Iran-US Cl. Trib. Rep. 223 at 238; see also George Edwards v. Government of the Islamic Republic of Iran, award no. 451-251-2 (5 December 1989), 23 Iran-US Cl. Trib. Rep. 290 (refusing to draw adverse inferences from the respondent’s non-production of evidence where the claimant itself had failed to indicate the precise terms of the contracts, failed to document the amount of work completed, failed to provide any account of the payments received under the contracts, and failed to produce invoices relating to the payments sought).


109 ibid., at 31.

110 ibid.

111 ibid.

longer had access to documentary records demonstrating his legal title to those assets, as his family had abandoned the evidence in Iran while fleeing the Islamic Revolution. The claimant’s principal evidence consisted of photocopies of various letters allegedly demonstrating ‘that all steps were taken that could be taken to complete the formalities of the transfers indicated’. The claimant requested that Iran be ordered to produce various documents and records that he claimed established his ownership of the property and its subsequent expropriation.

Issues arose as to whether the claimant could be deemed the beneficial owner of the real property and stocks allegedly transferred to him, and whether the respondent’s failure to produce critical documents could justify the Tribunal’s drawing of adverse inferences against it. The Tribunal held that the imprecision (and inconsistency) of the claimant’s evidence militated against drawing adverse inferences from the respondent’s non-production. The Tribunal was ‘concerned by the extreme informality of the letters that the Claimant has submitted and the lack of detail in them, particularly in light of the number and value (allegedly $225 million) of the properties involved’. For example, of the three letters in which the claimant’s grandfather purported to transfer real estate valued at US$38 million, none provided ‘a description or the deed numbers of the property or indicate[d] any other way which parcels of real estate were to be transferred’. The Tribunal observed that ‘[s]uch an omission is noteworthy given the fact that at least one of them allegedly was intended to serve as an instruction to the Notary Public to prepare the appropriate documents’.

The Tribunal acknowledged ‘the Respondent’s failure to submit copies of many documents that would support its denial that the alleged transfers took place, such as share registers of the companies in question, deeds of ownership, Registry ledgers or notarial records’, which undermined ‘the plausibility of its contentions’. The Tribunal nonetheless concluded that the extreme informality of the claimant’s critical evidence, as well as certain gaps and inconsistencies in that evidence, fell short of a prima facie case, thus leading the Tribunal not to draw adverse inferences from the respondent’s failure to produce the requested evidence.

(e) Tribunal Should Afford Requested Party Sufficient Opportunity to Produce Evidence Prior to Drawing Adverse Inferences Against It

Arbitrators strive not only to provide fair proceedings, free from bias or favouritism, but also a process that appears fair to the parties. As such, arbitrators are well advised to inform parties of their obligations, including their evidential obligations, during the arbitration proceedings. Thus, if a party fails to comply with a tribunal directive to produce documents, the tribunal should, as far as

113 ibid. at 191 (citations and internal quotations omitted).
114 ibid. at 200.
115 ibid.
116 ibid.
117 ibid. at 202.
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possible, issue an order informing that party of the consequences of non-compliance, including the fact that adverse inferences may be drawn against it. This should help avoid surprise and ensure due process.

In this regard, Professor Reymond argues:

On balance, I tend to think that the arbitrator has the duty and the authority to indicate to the parties that if they want to prove or disprove a fact or a set of facts that is central in the arbitration, they have to adduce the evidence that he considers as appropriate: documents v. witnesses, contract with a third party v. letters referring to that contract, expert evidence v. declarations of witnesses, etc. It is always awkward for an arbitrator to dismiss a claim on the basis of the failure of a party to bring evidence which it had the burden of providing unless there was a clear indication to that effect beforehand.

The *Avco* case at the Iran-United States Claims Tribunal graphically illustrates the danger of failing to advise parties of their evidential obligations. The claimant in that case had sought guidance from the Tribunal at a pre-hearing conference as to the evidence required to prove amounts due on hundreds of invoices. (Unusually, both the respondent and the Iran-appointed member of the Chamber failed to attend the conference.) At that conference, the claimant discussed with the two arbitrators in attendance the possibility of engaging an independent auditor to certify the existence and amounts of invoices, in lieu of producing the invoices themselves. The chairman of the Chamber stated that he was not 'enthusiastic [about] getting kilos and kilos of invoices', and was understood to have agreed that the claimant could substitute an auditor's report for the actual invoices.

Three years later, however, the Chamber (with a new chairman and with the Iran-appointed member now participating) rejected the claimant’s invoice claims presented on this basis. A majority of the Chamber held that the auditor’s

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118 See e.g., Hong Kong International Arbitration Centre Small Claims Procedure, 4 July 2003, art. 6. (‘There shall be no Discovery, but, if in the opinion of the arbitrator a party has failed to produce any relevant document(s), he may order the production of such document(s) and may indicate to the party to whom the order is directed that, if without adequate explanation he fails to produce the document(s), the arbitrator may proceed on the assumption that the contents of the document(s) do not favour that party’s case’). See also *Final Award in ICC Case No. 6497 (1994), (1999) 24a YB Com. Arb.* 71 at p. 77 (noting, in a procedural order: ‘[C]laimant has refused to produce such documents [relating to subcontracts]. The arbitral tribunal notes that the only reason invoked by claimant … is “business secrecy over matters which are not in dispute”. The arbitral tribunal will draw in due time the possible consequences of claimant’s position’).

119 C. Reymond, ‘The Practical Distinction between the Burden of Proof and Taking of Evidence: A Further Perspective’ in (1994) 10 *Arb. Int’l* 323 at p. 325; see also A. Reiner, ‘Burden and General Standards of Proof’ in (1994) 10 *Arb. Int’l* 328 at p. 338 (‘The real difficulty [regarding adverse inferences] … seems to be the information and communication between the parties and the arbitral tribunal to avoid any surprise or violation of due process of law’); R. von Mehren, ‘Rules of Arbitral Bodies Considered from a Practical Point of View’ in (1992) 9(3) *J Int’l Arb.* 105 at p. 111 (noting that arbitral tribunals ‘can, of course, advise the parties that the tribunal will draw whatever inferences it deems appropriate from a failure to comply with an instruction to produce evidence’).


certification presented in accordance with directions given at the pre-hearing conference (which corroborated testimony from the claimant’s officers) could not substitute for the actual invoices to prove the invoice claims. The respondents thus prevailed on the issue, despite their failure specifically to challenge any aspect of the auditor’s report.

Dissenting, Judge Brower (who alone of the three deciding Chamber members had attended the pre-hearing conference) concluded that the Tribunal had ‘misled the Claimant, however unwittingly, regarding the evidence it was required to submit, thereby depriving Claimant, to that extent, of the ability to present its case’.122 The claimant successfully raised this defence to prevent enforcement of an award against it in US courts.123

The Avco case reaffirms the importance of ensuring that parties understand their evidential obligations. Failing to do so not only renders the process less efficient, cost-effective and fair, but also jeopardises the enforceability of the resulting award.

That said, parties cannot rely on arbitrators to advise them how to prosecute or defend their cases. Tribunals rightly assume that parties submit all relevant evidence at their disposal supporting their claims or defences.124

Nor can parties justify complain if inferences are drawn against them from the non-production of relevant evidence solely because they were not specifically warned of the consequences of their dereliction.125 Jurists for centuries have recognised that ‘[i]f he who could and ought to have explained himself has not done it, it is to his own detriment’.126

Nevertheless, because inferences should never substitute for available evidence, and because even the threat of adverse inferences can impel parties to produce important evidence, whenever possible tribunals should endeavour to inform parties that adverse inferences may be drawn against them from their failure to comply with disclosure obligations.

III. CONCLUSION

In the absence of a general power to compel parties to produce evidence, arbitrators rely on adverse inferences, both to induce parties to produce critical

122 ibid. at 231.
124 See e.g., Steinway Claim, supra n. 69 at 861 ("The Commission must assume that the respondent Government has submitted with its Answer all of the evidence developed in its investigation of this claim which supports its contention that the claimant corporation was not the owner of the property in question at the time of loss").
125 See e.g., Protiva v. Iran, supra n. 87 at 110–115 (drawing adverse inferences against respondent despite the absence of a document production order); Harold Birnbaum v. Islamic Republic of Iran, award no. 549-967-2 (6 July 1993), 29 Iran-US CI. Trib. Rep. 260 at 280 (same).
evidence and to ensure that litigants are not fatally disadvantaged by their adversaries’ unjustified refusal to produce discoverable evidence exclusively in their possession. Adverse inferences, therefore, not only facilitate appropriate disclosure, but also enable parties to prevail on their claims and defences in the absence of evidence otherwise sufficient to carry their burdens of proof. Coupled with *prima facie* evidence, adverse inferences can establish ‘a moral conviction of the truth of an allegation’.127

For those who insist on holding parties in international adjudication to the evidential standards of domestic courts, it is worth recalling Judge Azevedo’s admonition that ‘[i]t would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risk of occasional errors, a court of justice must be content’.128

Equitably allocating the parties’ evidential burdens, weighing direct and circumstantial evidence and applying inferences rationally and fairly is no small task for any court or tribunal, but that difficulty cannot be a reason for denying parties relief to which they are entitled.129 It is hoped that the criteria set forth above will help tribunals allocate parties’ evidential burdens more rationally, predictably and equitably.

127 Cheng, *supra* n. 14 at p. 325.