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Adverse Inferences in International Arbitration

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1. Introduction

After deciding on the allocation of the burden of proof between the parties and managing the problems that may arise with regard to the production of different types of evidence, the next duty of the arbitral tribunal in relation to evidence is to assess the evidence produced.

Besides the evidence produced by the parties as direct evidence, there may also be missing evidence that can play a role as so-called "indirect" evidence. The adverse inference may be such indirect evidence. It is the inference that the evidence that is not produced by a party, despite being in its possession, is adverse to the interests of that party.

As an adverse inference is often drawn at the request of the other party, it may give the impression that it leads to a shift in the burden of proof. Moreover, as it is a form of indirect evidence, it may also raise more issues relating to its assessment by the arbitral tribunal than direct evidence normally does.

Drawing an adverse inference may therefore require the tribunal to take into account issues relating to the burden of proof, the taking of evidence and the standard of proof.

Moreover, when an adverse inference is drawn as a sanction against a party that is uncooperative in the production of evidence, an arbitral tribunal will have to ensure that due process is respected and exercise with care its authority to assess the evidence by giving to the adverse inference the weight it deserves in the context of all other available—direct and indirect—evidence. [Page196:]

2. Adverse inferences and the burden of proof

As regards the burden of proof (*onus probandi*), arbitrators, like judges, cannot freely decide upon its allocation. They are bound by the applicable law, i.e. substantive applicable law, which in most legal systems puts the burden on the claimant (whether for the principal claim or for the counterclaim): *actori incumbit probatio*. Each party (whether claimant or respondent) has the burden of proving the facts necessary to establish its

claim, its defence or its counterclaim. Some international arbitration rules contain a specific provision in that respect. ¹

Yet, in practice this burden seems to shift sometimes, for example as a result of the intervention of a tribunal-appointed expert or the way in which requests for document production are sometimes (ab)used. Arbitrators may also shift the burden when the claimant has a prima facie case creating a presumption: "that is, if the party carrying the burden of proof 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." ² This shifting of the burden is typically done when it is common ground that one of the parties no longer has access to documentary evidence, for example as a result of a revolution, as the Iran-US Claims Tribunal frequently found.

However, Jeremy Sharpe, who published a thorough analysis of the use of adverse inferences as a sanction for non-production of evidence, points out that it is not the burden of proof but the "burden of production" or the "evidential burden" that is alleviated or shifted in these cases, leaving the "burden of proof" rule of *actori incumbit probatio* intact. ³

The Tribunal Fédéral Suisse has highlighted the difference between the two concepts as follows:

"The obligation of the opposite party to cooperate in the production of evidence, even if it follows from the general principle of good faith (art. 2 Civil Code), is of a procedural nature and therefore outside federal law ... because it does not concern the burden of proof and does not cause its shifting. It is within the context of the assessment of the evidence that the judge decides about the result of the cooperation of the opposite party or that he draws consequences from a refusal to cooperate in relation to the bringing of evidence." ⁴ [Page 197:]

Therefore, the sanction for an opponent who fails to bring evidence that rebuts the prima facie case is not the same as for a party that has not discharged its burden of proof. The arbitral tribunal can (in certain circumstances or under certain conditions, as discussed below) but need not draw an adverse inference from the non-production that, together with the prima facie case established by the claimant, will be part of the total evidence to be assessed by the tribunal when forming its intime conviction.

3. Adverse inferences and the standard of proof

The standard of proof, also known as the quantum or degree of proof, relates to the quality and weight of the evidence brought by the parties; it refers to the degree of probability to which facts must be proven to be true. ⁵

The question how the evidence produced by the parties has to be assessed, i.e. what value has to be given to each of the different forms of evidence, should in principle be answered under the applicable procedural law. ⁶

Most legal systems rely on the principle of free assessment of the evidence by their national judges. ⁷ As the parties in international arbitration are in principle free to determine the applicable procedural law, parties can in principle also freely ⁸ agree on the rules by which the arbitrators have to assess the evidence. The arbitration clause or agreement seldom—if ever—contains a provision on the weighing of the evidence. Sometimes the arbitrators mention their freedom to freely assess the evidence explicitly in the specific procedural rules or in a procedural order. ⁹ In any case, arbitration rules explicitly give the arbitrators the power to determine the weight of any evidence, besides its admissibility, relevance and materiality. This is the case, for example, in:

- Article 25.6 of the UNCITRAL rules;
- Article 25.7 of the Swiss Rules of International Arbitration;
- Article 48a of the WIPO Rules;
- Article 19.2 of the UNCITRAL Model Law;
- Article 26.1 of the Stockholm Chamber of Commerce Arbitration Rules;
- Article 22(f) of the LCIA Rules; and
- Article 9.1 of the IBA Rules on the Taking of Evidence. [Page198:]

These rules confirm the powers of the tribunal for these determinations, without restricting this power in any way. The rules thus confirm the discretion that the arbitrators have when weighing the evidence to reach their "inner conviction".

Thus, in most cases, arbitrators can decide discretionarily on the evidentiary weight they give to each and every element of proof, including indirect proof, which they have received or, as the case may be, not received.

None of the above-mentioned rules for international arbitration fix a standard of proof, however. The required standard of proof is often expressed by international arbitrators in terms of the jurisdiction from which they come.¹⁰ Whereas civil lawyers generally use the concept of the intime conviction of the arbitrator, common law lawyers talk in terms of a "preponderance of the evidence" or "a balance of probability". However, 'in practice, the result is the same'.¹¹

Drawing an adverse inference is, in fact, a possible part of this free assessment. When a party does not submit evidence that one would expect to receive from it, given the prima facie case brought against it, or that it has been specifically requested to produce, whether relating to a document, (expert) witness testimony or a site or object (normally) under its control, this lack of (production of) evidential elements can be included by the tribunal in the overall evidence on which it will form its opinion.

Adverse or negative inferences can be situated in the so-called "standard of proof's scale", which generally distinguishes between "direct" or "primary" evidence and "indirect", "secondary" or "circumstantial" evidence. The distinction is based on the difference in the weight of the respective evidence, not its admissibility.¹² In this scale, documentary evidence is the best direct evidence. An adverse inference belongs to the category of indirect evidence. It is in fact a presumption that a party that presumably has control over certain evidence does not produce it because it is harmful to its case. An arbitrator who, as a fact-finder, makes an unfavourable deduction based on a party's failure to produce evidence that is favourable to it accepts indirect evidence and cannot as such give it the same weight as direct evidence.

Because of its reduced evidential weight, the adverse inference in itself is insufficient evidence to justify an intime conviction or to create a "preponderance of evidence". Its value is relative and depends on the existence and weight of other evidence and its consistency with that other evidence. As already mentioned above, a prima facie case of the claimant, although it [Page199:] does not have the weight of direct evidence in evidential terms, can be completed by an adverse inference drawn against the respondent if he fails to bring any evidence in rebuttal of the prima facie case. The presumption that the adverse inference constitutes may relieve the claimant from having to further prove the case that it established only prima facie.

Even so, an adverse inference always remains secondary evidence, and its effect should not be overestimated by the claimant, who keeps the burden of proof, even if he may have managed to load the burden of production onto the respondent:

"A negative inference has a limited scope of application and may, in fact, not have any practical effect on the proceedings. It is only at the stage of the evaluation of evidence that the tribunal takes negative inferences into account, and the degree of their effect is subjective. If the tribunal is able to base its decision on other documents and grounds, it should do so." ¹³

4. Adverse inference as a sanction for an uncooperative party in the production of evidence

It is widely accepted that arbitral tribunals are allowed to draw adverse inferences, ¹⁴ even if most arbitration rules (e.g. the ICC, UNCITRAL, LCIA and AAA Rules) do not provide any explicit provision to that effect.

The English Arbitration Act provides the power to draw an adverse inference as one of four optional sanctions for an uncooperative party:

"(7) If a party fails to comply with any other kind of preemptory order, then, without prejudice to section 42 (enforcement by court of tribunal's preemptory orders), the tribunal may do any of the following:

- (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
- (b) draw such adverse inferences from the act of non-compliance as the circumstances justify;
- (c) proceed to an award on the basis of such materials as have been properly provided to it;
- (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance." [Page200:]

This article is an appropriate reminder not only that the adverse inference is a mere possibility and not an automatic sanction but also that there are other alternatives.

Article 9.4 of the IBA Rules exclusively mentions the adverse inference as a possible sanction:

"If a Party fails without satisfactory explanation to produce any document requested in a Request to Produce to which it has not objected in due time or fails to produce any document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."

On the other hand, the IBA Rules link the possible adverse inference not only to documentary evidence that is not produced but also to any means of evidence that is withheld:

"If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party." (Art. 9.5)

While the existing rules envisage an adverse inference in cases where a party refuses to comply with an order to produce, it should be noted that a tribunal's power to draw an adverse inference is not limited to cases where document production requests have been declined. The power to draw an adverse inference is part of the arbitrator's general power and duty to weigh all evidence, which may include inferences. Thus, even if the drawing of an adverse inference is generally seen as a sanction that may follow the non-production of a document whose production was requested by a party and/or ordered by a tribunal, it is a much broader phenomenon that has to be put in the context of issues such as the standard of proof and the burden of proof, as indicated below.

Before looking at the above-mentioned IBA provisions in detail, it is worth noting that the adverse inference is certainly not a specific arbitration tool and that, besides the English legislator, the Swiss legislator, for example, has also explicitly provided the adverse inference as a possible sanction. [Page201:]

"The judge can order a party holding a document which is relevant for the resolution of the dispute, to produce it, even if that party does not have the burden of proof. If such party refuses without legitimate reason, the fact is

alleged by the other party may be considered as established." (Article 186 of the Geneva Code of Civil Procedure)

5. IBA formal requirements for drawing adverse inferences

Articles 9.4 and 9.5 of the IBA Rules, which provide the adverse inference as a sanction, under certain conditions, for a failure to comply with a request to make evidence available in accordance with Articles 3.3 and 4.10, imply that a certain number of formal requirements, stemming from these latter articles, have to be satisfied in order for an arbitral tribunal to draw adverse inferences from the non-production of a document.

Firstly, the party against which the adverse inference may be drawn must have been requested or ordered to produce the evidence. Under the IBA Rules, the formal and prior request or order to produce a document is an essential prior condition for an adverse inference.

The mere failure of a party to voluntarily produce a document that it controls does not allow the tribunal to draw a negative inference, or at least that hypothesis is not covered by the IBA Rules.

The structure of both Article 9.4 and Article 9.5 and the use of the word "or" indicate that the request of one party and the order of the tribunal are alternative conditions. These articles allow an adverse inference to be drawn if a party "fails without satisfactory explanation to produce any document" that was:

- either "requested in a Request to Produce to which it has not objected in due time";
- or "ordered to be produced by the Arbitral Tribunal" (Art. 9.4)

or if it "fails without satisfactory explanation to make available any other relevant evidence, including testimony" that was:

- either "sought by one Party to which the Party to whom the request was addressed has not objected in due time";
- or "ordered by the Arbitral Tribunal to be produced" (Art.9.5). [Page202:]

This would mean that it is enough that one party has properly requested the other party to make some evidence available, and the other party has no valid excuse for not doing so, to allow the tribunal to draw an adverse inference without first needing to order the production of the document or the witness testimony. The second of the above-mentioned hypotheses would then cover cases where the tribunal, on its own initiative and without having been requested to do so by the first party, orders the second party to produce some evidence that the tribunal considers material and relevant, but missing.

On the other hand, given the procedure provided for in Articles 3.3 and 4.10, from which it follows that, if the tribunal does not eventually order that the evidence sought by one party be produced by the other, the other party is not obliged to do so, Articles 9.4 and 9.5 could also be interpreted as meaning that no adverse inference can be drawn unless an order of the tribunal has actually been disregarded. In other words, a refusal to comply with a mere request of the other party will not empower the arbitral tribunal to draw an adverse inference from such a refusal, as long as the tribunal has not itself ordered the production (on its own initiative or at a party's request).

Secondly, the evidence requested must be specific, relevant and material. As the IBA Rules require that the document or the witness testimony requested by a party be specific, relevant and material (Art. 3.3(a) and (b); Art 4.10), it follows that the possible adverse inference itself will bear on an issue that is itself specific, relevant and material. This emphasizes the importance of drawing adverse inferences: they may (in combination with other elements of proof) have a determining impact on the decision. As regards the specificity of the adverse inference, see criteria iv and v in section 6 below.

Thirdly, the party requested to submit such documentary or witness evidence must have been given an opportunity to object to the request and explain its failure to make the evidence available. This condition is a mere application of the rights of defence. Since the adverse inference is based on a reversal of the burden to produce, fairness requires that this burden be imposed exclusively on a party that can actually discharge it.

If a party has a valid objection as set forth in Article 9.2 of the IBA Rules, the tribunal cannot proceed with a negative inference. When an arbitral tribunal encounters objections based on privilege, loss or destruction, [Page203:] confidentiality or political/institutional sensitivity (Art. 9.2(b), (d), (e) and (f)), it would of course be inappropriate to presume that the non-production is due to the fact that the document is adverse to the requested party. Objections based on the "unreasonable burden to produce" (Art. 9.2(c)) or "fairness or

equality of the parties" (Art. 9.2(g)) are probably much harder to deal with when deciding whether an adverse inference can be drawn or not. In fact, consideration of these objections may bring out further issues relating to the burden of proof, the shifting of the evidential burden and/or the standard of proof.

6. Further prior conditions for drawing adverse inferences

The IBA requirements discussed in section 5 above aim to ensure that the minimal conditions are fulfilled before a tribunal draws an adverse inference. More precautions may be required, however. They can be distilled from published awards (mainly of the Iran-US Claims Tribunal) and court decisions on challenges of awards that relied on an adverse inference.¹⁵ The criteria follow from the requirement that the negative inference only carries relative weight next to the other evidence and from the tribunal's natural concern for due process.

i. The document exists or should exist and the requested party has or should have access to the evidence sought: "adverse inferences properly may be drawn only if it has been sufficiently shown that the defendant held the documents of evidential value which it refused to submit".¹⁶

Whether or not the IBA rules are applicable and whether or not there was a request for production from a party and a production order by the tribunal, a tribunal shall in all circumstances refrain from drawing an adverse inference unless it is certain that the party against whom the adverse inference might be drawn has control over the document and is in a position to produce it.

Philipp Habegger has noted that it is not uncommon for document requests to be granted even when the requesting party has not been specific in its allegations that the documents are in the other party's possession, custody or control:

"in a recent case, another arbitrator granted several document requests in which the requesting respondent had not demonstrated the likelihood of the possession, custody or control of the requested documents by the claimant."¹⁷
[Page204:]

Drawing an adverse inference in such a case would be negligent on the part of the tribunal. While Article 3(c) of the IBA Rules requires the party requesting production of a document to state the reason why it assumes the documents requested to be in the possession, control or custody of the other party, Article 4.10, by comparison, does not contain a similar requirement for the party requesting certain witness testimony that is not voluntarily offered by the other party to state why it thinks that the other party is in a position to offer the witness testimony sought. The tribunal should nonetheless apply a similar test before drawing an adverse inference from the unavailability of witness testimony sought by one party from the other.

ii. The requested party is responsible for the fact that the document does not exist any more or that it cannot be produced.

When the document or the witness is in the control of uncooperative third parties, the arbitral tribunal will normally refuse to draw an adverse inference from the absence of production of such a document if the requested party cannot be held responsible for the refusal of the third party to produce. It is also possible that a document in the possession of the requested party has physically disappeared. The arbitral tribunal shall not draw an adverse inference if the requested party shows that it is not responsible for the disappearance of the document.

iii. There are no good reasons justifying the non-production.

For a list of possible reasons, the tribunal can take guidance from Article 9.2. of the IBA Rules of Evidence. The explanations provided by the requested party as reasons for not producing the requested documents should be weighed by the tribunal and taken into account before drawing any adverse inferences.¹⁸

As Pietrowski¹⁹ noted in relation to the decision of the Iran-US Claims Tribunal in the case of INA Corp. v. Government of the Islamic Republic of Iran:

"The Tribunal's statement that it found Iran's excuse for failing to produce

documents 'not convincing' is important. To draw an inference against a party for failure to produce evidence not reasonably believed to be in the party's possession would expose the award to nullification on such grounds as denial of justice and [Page205:] contravention of the principle of equality of the parties. For this reason, a tribunal will be reluctant to draw a negative inference unless it is convinced that the party which has failed to produce the evidence in question is in fact able to produce the evidence."

iv. There is relative certainty on the general content of the document.

The requesting party must have explained what the content of the requested document is with a reasonable degree of certainty. The need for sufficient certainty is a consequence of the requirement that the inference must be reasonable, as explained below.

If the possibility to draw an adverse inference arises after an order to produce a document, the requesting party or the tribunal will have ascertained, if the principles of the IBA Rules are followed, that the document requested is adequately described and relevant. In other words, even before the requested party refuses to produce a document, the tribunal should already have an idea of the document's alleged content and have ascertained that it is material to the decision that the arbitrators have to reach.

Even if the adverse inference is drawn independently of any document production incidents, it is essential to envisage what the missing document could bring in terms of relevant and material content. Indeed, if it is not clear what the missing document would prove, it will not be possible to draw an adverse inference.

v. The potential details of the document are not essential.

Since an adverse inference is based on the absence of evidence, it cannot relate to details but only to generalities concerning the contested issue. The fact that the missing document is supposed to (dis)prove cannot be a matter of detail, because it is generally impossible to speculate what minor elements may or may

not have been contained in the missing document and, if mentioned, how they were dealt with. Drawing an inference relating to potential details would be guesswork and is therefore not justified.

For example, ²⁰ when a requesting party pretends that its opponent has an internal document (e.g. board minutes) that contains an acknowledgement of its debt to the requesting party, what adverse inference can a tribunal draw from the debtor's refusal to produce the document? It will probably infer that the debtor acknowledged that it owed something to the requesting [Page206:] party. But it will be unable to infer whether the acknowledgement was for the total amount of the debt or only a part thereof, whether it was an unconditional acknowledgement and whether any modalities were linked to the acknowledgement.

Very often, a requesting party will simply ask the tribunal to draw the "appropriate" adverse inference, but the actual content thereof may be impossible to establish independently. This is where the other evidence available in the case may be crucial (see below).

7. Back to the burden and standard of proof-the relative value of the adverse inference

Even when the above-mentioned prior conditions are met, an adverse inference may be drawn only if it is consistent with the evidential context.

A party cannot possibly win its case on the basis of adverse inference alone. An award must be justified by evidence and arguments brought by the winning party. An adverse inference is only one element among many that make up the total body of evidence that enables the tribunal to reach a decision. A party's claim will have little chance of success when there is only prima facie evidence of the fact that it has to prove. It should be able to positively prove its case at least to some degree, even if only with evidential means that do not carry full weight in the standard of proof balance and that can establish the facts only with some degree of probability.

The party that has the burden of proof must not only bring all corroborating evidence to which it has access ²¹ but should also, in relation to the possible adverse inference flowing

from "missing" evidence, indicate its precise scope and content. In doing so, the requesting party—and certainly the arbitral tribunal when inclined to draw an adverse inference on its own initiative—must ensure that the negative inference is reasonable, consistent with the other facts in the record and logically related to the probable nature of the evidence withheld. These requirements are meant to reduce the subjective aspect that may be implied in an adverse inference (see below). [Page207:]

1. Reasonableness

As pointed out by Jeremy Sharpe, who refers to Bin Cheng, ²² the inference must be one that can reasonably be drawn, often meaning that it complies with the "arbitrators' common understanding of commercial practice". ²³ Sharpe also refers to this "reasonableness" as "consistency with external facts".

2. Consistency with the facts in the record

The adverse inference should not only be consistent with general commercial reality but also with the reality of the actual case as it appears from the other facts in the record. ²⁴

3. Logical relation between the inference and the likely nature of the "missing" evidence

If the tribunal is not convinced that the evidence, if produced, would indeed prove what the adverse inference implies, it should refrain from drawing the adverse inference. Jeremy Sharpe quotes the example of the award in *Frederica Lincoln Riahi v. Government of the Islamic Republic of Iran*, in which the arbitrators refused to draw the inference (that the claimant was the owner of bearer shares) from the respondent's failure to produce the company's share register. Because "Iranian law does not require that transfers of bearer shares be entered into share registers of companies", the arbitrators were "not convinced that the share register 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." ²⁵

Similarly, if many different inferences can be drawn from the non-production (or non-availability) of some evidence, the relation between that missing evidence and the inference may not be strong enough to justify the inference. If "any

number of things, including the possibilities suggested by the claimant might have happened", ²⁶ there is no reason why a tribunal should draw one inference rather than another, unless it is the inference that is most consistent with the context of the other evidence and with commercial reasonableness. [Page208:]

8. Objective-subjective exercise?

With regard to the Frederica Lincoln Riahi case, it should be added that the arbitrators in that case also noted that the claimant 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". This shows that the arbitrators also respected the above-mentioned principle that the person having the burden of proof should discharge it as completely as possible before requesting that an adverse inference be drawn. A claimant that too easily jumps to the conclusion that "appropriate" adverse inferences must be drawn risks neglecting the evidence that it has to bring itself in order to determine what "appropriate" means in the given circumstances.

While arbitrators have discretion when weighing the evidence, as noted above, and drawing an adverse inference thus has a strong subjective element, the above-mentioned conditions and criteria may help the arbitrators to render the process more objective. Moreover, they should preferably show that they have actually applied these conditions and criteria in their award and state their reasons for giving-or not giving-weight to the adverse inference. Finally, the arbitrators should never lose sight of the rights of defence.

9. Respect of rights of defence

As in all instances, but specifically when intending to draw an adverse inference, the arbitral tribunal shall respect due process and safeguard the rights of defence.

As an obvious requirement of due process, the arbitral tribunal should give the party against whom the adverse inference may be drawn enough time and opportunity to produce the required evidence. This is certainly the case when, as under the IBA Rules, the requesting party first addresses its request to the other party and only obtains an order from the tribunal afterwards.

It is advisable that the tribunal also give proper advance notice that an adverse inference will be sought. ²⁷

"Thus, if a party fails to comply with a tribunal directive to produce documents, the tribunal should, as far as 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." ²⁸
[Page209:]

As positive documentary evidence is appreciated far more than a negative inference, it may be even wise for the tribunal to mention in the award that proper advance notice of the possible adverse inference was given to the requested party. ²⁹

Before definitively drawing the adverse inference sought, the requested party should be given a last opportunity to restate the reasons for non-production. Indeed, the mere threat of an adverse inference may cause the recalcitrant party to reconsider its reasons for refusing to produce the document requested.

Finally, the requested party should also be given adequate opportunity to rebut the suggested adverse inference with other means than the evidence sought. This requirement is a mere application of the general principle that a party must always be given an opportunity to rebut adverse evidence. It implies that the tribunal must indicate precisely which adverse inference it intends to draw. As long as the requesting party and the tribunal merely announce an "appropriate" negative inference, the requested party may not be aware of the risk it faces or the defence that it may have against the specific inference, other than the document it was requested to produce. "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 satisfied than in cases where no such endeavour seems to have been made." ³⁰

10. Adverse inferences: illustrations

Most illustrations of adverse inferences come from common law criminal cases. However, they need to be approached with care. Indeed, the standard of proof in criminal law, both in England and other countries, is generally higher than the standard of proof in civil cases, where the standard is the balance of probability, corresponding in practice to the intime conviction du juge rather than the "beyond any reasonable doubt" standard, which is also used by human rights courts or in cases involving allegations of bribery, fraud, corruption or extortion. ³¹

With the exception of the Iran–United States Claims Tribunal, ³² it is rather unusual to find recent published awards of arbitral tribunals where the decision is expressly supported by a reference to adverse inference. This does not mean that arbitrators do not regularly draw adverse inferences, ³³ but it could be an indication that they often prefer not to say that they do so. [Page210:] As suggested in one of international arbitration's basic treatises:

"... in the case of a refusal the arbitrator may not have to rely on the 'adverse inferences' remedy and its limitations. The arbitrator's underlying appreciation of how the case should be decided—the arbitrator's intime conviction—may be fundamentally influenced by the obstinate party's conduct even if this never enters into the rationale given in the arbitrator's award." ³⁴

and

"In practice, arbitral tribunals are often reluctant to rely expressly on such adverse inferences in the written reasons for their decision on the merits of the case. ... [T]he arbitral tribunal may indeed draw and rely upon adverse inferences in establishing the facts and in reaching its conclusions on the merits, albeit not stating so expressly in its award." ³⁵

The published awards that do refer to an adverse inference typically take care to explain that:

the document sought was material and relevant;

the parties were warned that the non–production could lead to an adverse inference;

the party was responsible for the non–production; and

the document sought had been requested specifically by the tribunal.

The following extract from a 1996 ICC award shows, however, that tribunals do use their power to draw an adverse inference with respect for due process principles and that an

adverse inference may lead to a standard of proof that comes close to certainty ("aucune hésitation"):

"Si X avait communiqué ses dossiers, qui étaient d'une importance capitale pour la question primordiale de cet arbitrage, le Tribunal et Y auraient été en mesure de déterminer la date à laquelle les expériences de X commencèrent et l'importance de l'utilisation d'informations confidentielles fournies par Y. ...

En raison du défaut de production par X de ses dossiers d'expérience (relatifs à P') et de ses dossiers concernant les brevets, nous avons été privé de la meilleure preuve pour se prononcer sur la question de [Page211:] savoir si les expériences et l'usage de l'information eurent eu lieu avant ou après que les secrets d'affaires soient entrés dans le domaine public ...

Les parties étaient formellement averties de ce que le manquement conscient d'une partie à produire des documents pertinents dans l'arbitrage pouvait conduire le tribunal à tirer une conclusion défavorable vis-à-vis de cette partie.

En raison du refus de X de produire les pièces concernant son expérience relative à P', et ses dossiers concernant le brevet, ceci malgré une demande formelle de production de pièces et une mise en garde par le Tribunal, nous n'avons aucune hésitation à déduire que le travail expérimental de X et son « utilisation » a commencé avant que trois secrets de fabrication de Y ne soient entrés dans le domaine public... Nous n'avons également aucune hésitation à déduire qu'à l'occasion de ses expériences et recherches sur le Produit P', X a détourné des informations confidentielles qu'elle avait reçues de Y en violation de l'accord de confidentialité conclu par les parties." ³⁶

Case law of national courts is more prolific on this point. National court decisions on arbitral awards that have drawn adverse inferences from a party's refusal to comply with an order to produce documents are reluctant to review the tribunal's assessment of the evidence and thus confirm by and large the tribunal's discretionary power, provided due process was respected:

"If after hearing arguments from both parties, the tribunal decided wrongly not to draw an adverse inference, this would result in an error of fact finding and/or law, which is not a ground for setting aside an award."

Dongwoo Mann + Hummel Co Ltd v. Mann + Hummel GmbH [2008] SGHC 67

"Even the fax received by the petitioner was not produced. The learned arbitrator therefore drew an adverse inference against the petitioner. The learned arbitrator also comments on the demeanor of the witnesses examined before him. I cannot accept the submission of the learned counsel for the petitioner that an arbitrator cannot be influenced by the demeanor of a witness examined in his presence. Apart from stating the proposition, no material in support thereof has been produced by the petitioner. [Page212:]

The learned arbitrator has examined the entire evidence laid before him and given cogent reasons for his findings, based on an overall assessment of the evidence before him. He is the final judge of facts and his findings cannot be disturbed, particularly when it is not even the petitioner's case that this is a case of no evidence at all."

Bhandari v. Satish Jassal, High Court of Delhi, 3 August 2007, OMP No. 257/2007

"The Tribunal did not agree with or condone or otherwise tell Mexico how to lead its evidence. In procedural order number 2 the Tribunal invited the parties to exchange by 31 May 2000 any specific requests for documents—provided that, in the event a Party believed documents requested cannot or should not be produced, it should as soon as possible, provide the requesting Party with its reasons for refusal—the Tribunal indicated it would decide any dispute related to such requests for documents. The Tribunal did point out that if a Party did not comply with a request from the Tribunal to produce documents, the Tribunal could draw appropriate inferences. ...

In the opinion of this Court, Mexico was not unable to present its case as provided by the Model Law, but Mexico failed to present evidence to rebut the

prima facie case of discrimination established by Respondent Feldman."

United Mexican States v. Martin Roy Feldman Karpa, Superior Court of Justice of Ontario, 3 December 2003, Case 03-CV-23500 [2004] YCA 167

Finally, a recent decision of the Tribunal Fédéral Suisse is worth mentioning. It does not relate, strictly speaking, to an award where an adverse inference was drawn but confirms the arbitrators' power to decide with discretion about the assessment of the evidence produced.

The Swiss Supreme Court held that, when an arbitrator decides that redacted documents do not prove a party's case, he does not infringe that party's right to be heard if he does not previously inform that party that the documents do not comply with the standard of proof. The Court also took into account that the arbitrator had stated in his award that even if the documents had not been redacted they could not have proven what the claimant had to prove. It concluded that the party's recourse to the Tribunal Fédéral Suisse erroneously invoked an infringement of public policy and that it was an inadmissible reopening of the assessment of the evidence made by the arbitrator: [Page213:]

"Le recours ne consiste qu'en une remise en cause inadmissible du résultat de l'appréciation des preuves, qu'il s'agisse des pièces incriminées ou du témoignage de W., telle qu'elle a été effectuée par l'arbitre unique."

Tribunal Fédéral Suisse, 9 January 2008, Case 4 A.450/2007

The case seems to contrast with the guidelines described above for drawing an adverse inference:

according to the Tribunal Fédéral, an arbitrator does not disregard due process when he does not inform or warn a party that he considers the evidence produced insufficient;

yet, as shown above, good practice—as reflected in the IBA Rules—requires the arbitrator to warn the party that the non-production of a document requested or ordered to be produced may lead to an adverse inference.

The contrast seems to lie in the fact that a party to whom the burden to produce has been

shifted is given (or should preferably be given) a special warning about the consequences of its refusal, whereas a party that has the burden of proof need not be given a warning or a second chance by the arbitrator who is about to conclude that the evidence produced does not prove the claim.

Is there a difference in the role of the arbitrator in a case where a claimant is (or is not) discharging its burden of proof by bringing "positive" evidence that the arbitrator merely has to assess (in the Swiss case leading to the conclusion that the claimant has not discharged its burden of proof), as opposed to a case where the arbitrator infers "negative" evidence from the failure to produce evidence deemed to exist and to be "produceable"? In other words, why should "due process" require advance warning by the arbitrator prior to drawing an adverse inference but not when he is about to conclude that he considers the evidence insufficient?

A possible explanation may be that, when drawing an adverse inference after having ordered the production of specific evidence, the arbitrator actively "finds" evidence, albeit of less weight than direct evidence brought by a party. When he finds that the evidence brought by a party is insufficient to prove its case, the arbitrator is merely assessing what has been offered to him. This slightly more passive role may explain why the Swiss Supreme Court was less demanding of the arbitrator in terms of giving the party a "second" chance to prove its case. [Page214:]

However, this contrast and comparison may also serve as an illustration of the choice of degree of activity that an arbitrator may develop in a case. Depending on the (un)cooperative behaviour of the parties or for other reasons, he may choose to be more passive or more inquisitorial himself. In the case of the redacted document filed by the claimant, the arbitrator could have requested the production of the unredacted document had he been convinced that it contained the evidence of the claim (quod non in this case). On the other hand, less active arbitrators may abstain from ordering a party to produce evidence and drawing an adverse inference, unless explicitly requested to do so by a party. In each case, the arbitrator has to strike a balance between the exercise of his freedom to assess evidence as it is offered to him and his own active probing for more evidence. In the latter case, due process may require extra safeguards.

11. Conclusion

1. An adverse inference, being an indirect form of evidence, has limited evidential

weight on its own and needs to fit in—and be assessed together with—the totality of evidence that brings the tribunal to its intime conviction

2. An adverse inference is not the result of a shifted burden of proof (the "beneficiary" of the adverse inference must at least show a prima facie case), but can be a sanction for a party's failure to discharge a specific burden to produce imposed by the tribunal, either on its own initiative or at the request of the other party.

3. Before drawing an adverse inference, the tribunal should ascertain that due process is respected.

4. Drawing an adverse inference is a balancing act, combining the exercise of the discretion the arbitrator has when assessing the evidence submitted to him with the concern for due process.

1

See, for instance, Article 24(1) UNCITRAL Rules: "Each party shall have the burden of proving the facts relied on to support his claim or defence."

2

Marvin Feldman v. Mexico, Case no. ARB(AF)/99/1, award of 16 December 2002, 42 ILM 625 at 662 (2003), quoted by Jeremy K. Sharpe, 'Drawing Adverse Inferences from Non-Production of Evidence', 2(4) Arb. Intl. (2006) pp. 552–553.

3

Sharpe, supra note 2, at p. 552.

4

"L'obligation faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral – singulièrement de l'art. 8 CC –, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celle-ci. C'est dans le

cadre de l'appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la preuve." ATF 119 II 305 c. 1b/aa, JdT 1994 I 218.

5

Ian Dennis, *The Law of Evidence* (London, Sweet & Maxwell 1999) p. 342.

6

Bernhard Berger and Franz Kellerhans, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz* (Bern, Stämpfli Verlag 2006).p 438 at 1238

7

Marcel Storme and Burkhard Hess (eds.), *Discretionary Power of the Judge: Units and Control* (Mechelen, Kluwer 2003) p. 58.

8

Subject only to any mandatory rules in the applicable procedural (if any) or substantive law (depending on whether issues of evidence are considered part of the applicable substantive law) that determines the binding weight to be given to certain types of evidence, such as a rule that certain contracts must be proven in writing or a rule that witness evidence is admissible only if there is a commencement de preuve par écrit.

9

See, for example, the procedural order in ICC case No. 7170, according to which "the Arbitral Tribunal will weigh all the evidence freely". Mentioned by Dominique Hascher, *Collection of Procedural Decisions in ICC Arbitration, 1993–1996* (The Hague, Kluwer 1997) p. 25.

10

Arthur L. Marriott, 'Evidence in International Arbitration', 5(3) *Arb. Intl.* (1989) p. 282. See also Robert Pietrowski, 'Evidence in International Arbitration', 22(3) *Arb. Intl.* (2006) p. 380, who also points out that "it could be argued that more frequent articulation of the standard of proof by international tribunals would enhance the appearance of fairness in international arbitration".

11

Marriott, *supra* note 10, at p. 283.

12

Pietrowski, *supra* note 10, at p. 380.

13

Mojtaba Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before*

International Tribunals (The Hague, Kluwer Law International 1996) p. 322.

14

See, among others, Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, 2nd edn. (Zurich/London, Schulthess/Sweet and Maxwell 2007) p. 554; William Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn. (Dobbs Ferry, Oceana Publ. 2000) p. 456; Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Traité de l'arbitrage commercial international* (Paris, Litec 2000) p. 713; Sharpe, *supra* note 2, at p. 549; Andrew de Lotbinière McDougall and Nicolas Bouchardie, 'L'arbitre international et la preuve documentaire. How International Tribunals Establish the Facts of a Case Through Documentary Evidence', *IBLJ* (2008, N°4) p. 517; Thomas H. Webster, 'Obtaining Documents from Adverse Parties in International Arbitration', *17(1) Arb. Intl.* (2001) pp. 56–57; Alan Redfern, 'Interim Measures', in Lawrence W. Newman and Richard D. Hill, *The Leading Arbitrators' Guide to International Arbitration* (Berne, Staempfli Publ. 2004) p. 240.

15

A thorough analysis has been made by Sharpe, *supra* note 2, at pp. 549–571.

16

Sharpe, *supra* note 2, at p. 556.

17

See Philipp Habegger, 'Document Production. An Overview of Swiss Court and Arbitration Practice', in *Document Production in International Arbitration*, *ICC Bulletin 2006 Special Supplement*, pp. 21 ff. at p. 24.

18

See Kazazi, *supra* note 13, at p. 321.

19

Pietrowski, *supra* note 10, at p. 384.

20

For other examples of the difficulty to formulate the adverse inference, see Nadia Darwazeh, 'Document Discovery and the IBA Rules on Evidence: A Practitioner's View', *5(4) Int. Arb.L.R.* (2002) p. 108.

21

It runs the risk that the tribunal will refuse to draw the adverse inference if the requesting party itself has not produced corroborating evidence in its possession or failed to explain why it did not produce it.

22

Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Cambridge University Press 2006) p. 334.

23

Sharpe, *supra* note 2, at pp. 558–559.

24

See Sharpe, *supra* note 2, at p. 559 and his quotations in footnotes 65 and 66: – "circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions, consistent with the facts"; and – "inferences are 'bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts'".

25

Frederica Lincoln Riahi v. Government of the Islamic Republic of Iran, Award No. 600–485–1 (27 February 2003) 28 YB Com. Arb. 474 (1993).

26

Cited by Sharpe, *supra* note 2, at footnote 55, from a 1959 decision of the Italy–United States Conciliation Commission.

27

Thomas H. Webster "wonders whether, if the arbitral tribunal intends to draw a specific inference from failure to produce certain documents, it is not required to give the parties notice thereof". See 'Obtaining Documents from Adverse Parties in International Arbitration', 17(1) Arb. Intl. (2001) p. 51.

28

Sharpe, *supra* note 2, at p. 568.

29

See for instance ICC case No. 8694 (1996): "Les parties étaient formellement averties de ce que le manquement conscient d'une partie à produire des documents pertinents dans l'arbitrage pouvait conduire le tribunal à tirer une conclusion défavorable vis-à-vis de cette partie." 4 JDI 1056 (1997).

30

Quoted by Sharpe, *supra* note 2, at footnote 106, from a 1931 award of the Britain–Mexico Claims Commission.

31

Pietrowski, *supra* note 10, at pp. 379–380; see also Ugur Erdal, 'Burden and Standard of Proof in Proceedings under the European Convention', 26 Eur.L.R. (2001) pp. 73–74.

32

The awards rendered by that tribunal are thoroughly analyzed and discussed by Sharpe, *supra* note 2, at pp. 549–571. His article is a valuable source of material on the topic.

33

Rather, "arbitral tribunals routinely create such inferences in current practice" ('IBA Working Party's Commentary on the New IBA Rules of Evidence in International Commercial Arbitration', 2 *Business Law Int.* (2000) p. 18.

34

Craig, Park and Paulsson, *supra* note 14, at p. 456.

35

de Lotbinière McDougall and Bouchardie, *supra* note 14, at p. 517.

36

Award in ICC case No. 8694, 4 *JDI* 1058 (1997).