CHAPTER 26

CORRUPTION IN INTERNATIONAL ARBITRATION AND PROBLEMS WITH STANDARD OF PROOF

Baseless Allegations or Prima Facie Evidence?

[...]

Page: 496

4.1. High Standard of Proof Formulas

There is no uniform standard of proof regarding allegations of corruption in international arbitration, even though it is fair to say that the standard is rather high. In ICC case no 6401 (Westinghouse) the arbitral tribunal held that the principle of 'preponderance of the evidence' would apply for substantive claims. However, with respect to the allegation of corruption, the tribunal argued that pursuant to the laws of the Philippines and the United States (which were the relevant jurisdictions) a higher standard would apply:

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\text{[f]raud in civil cases must be proven to exist by clear and convincing evidence amounting to more than a mere preponderance, and cannot be justified by a mere speculation. This is because fraud is never to be taken lightly.} \]

The arbitral tribunal in ICC case no. 5622 (Hilmarton) demanded proof 'beyond doubt.' However, even this arbitral tribunal acknowledged that it is possible to prove something through indirect evidence. For such 'indirect evidence' the arbitral tribunal considered it 'necessary that a sufficient ensemble of indirect evidence be collected to allow the judge to base his decision on something more than likely facts, i.e., facts which have not been proven.'

Page: 497

Other formulas applied by arbitral tribunals to allegations of corruption required 'clear and convincing proof' or a similar higher standard of proof.

It is often argued that allegations of wrongdoing, particularly serious wrongdoing such as corruption, require more convincing evidence than that required for other allegations. The question remains whether a higher standard for allegations of corruption is really appropriate. This question is particularly pertinent in light of the fact that it is notoriously difficult to prove [corruption] since, typically, there is little or no physical evidence.

4.2. Application of High Standard of Proof Formulas

In many cases of corruption, the burden of proof is not really an issue because of an admission by the party that offered a bribe. This occurred in the seminal ICSID case World Duty Free Company Ltd. v. The Republic of Kenya. In this case,
the claimant alleged that in order to be able to do business with the government of Kenya, he was required to make a 'personal donation' to Mr. Daniel arap Moi, then President of the Republic of Kenya. This donation amounted to USD 2 million and was allegedly supposed to be part of the

consideration paid by the claimant to obtain a contract.44 In other cases, government investigations or corporate compliance programs bring forth legally binding admissions, making discussion about the appropriate standard of proof in such cases unnecessary.45 There are also cases where the arbitral tribunal has no difficulty in finding the existence of corruption.46 However, more often than not, the evidence is not so clear-cut.

As Andreas Reiner has noticed, it seems that for diplomatic reasons arbitral tribunals are often reluctant to find that a state, a state organization or state employees have committed fraud or criminal offenses (as if corruption among state employees or even high-ranking government officials were so unusual).47 A good example of such 'diplomatic protection' is in some commentators' view the decision of the arbitral tribunal in ICSID case no. ARB/05/13 (EDF Services Ltd. v. Romania), where the arbitral tribunal fully recognized that it is 'notoriously difficult' to prove corruption because there is typically 'little or no physical evidence' but nevertheless required 'clear and convincing evidence.'49

Constantine Partasides questioned the standard of proof argument of the arbitral tribunal in this case, arguing that 'this kind of juxtaposition is precisely where international arbitral tribunals can show themselves to live in the most remote of ivory towers.'50 Partasides argues that arbitral tribunals should not relax the standard of proof for allegations of corruption, but by the same token, should not make it more severe.51

In EDF (Services) Ltd. v. Romania,52 it was the foreign investor who alleged corruption on the part of Romania, arguing that the breach of the BIT between the United Kingdom and Romania was caused by the investor's refusal to comply with demands for immense bribes by Romanian government officials. The arbitral tribunal found that the 'seriousness of the accusation of corruption ... demands clear and convincing evidence' and referred to the 'general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.'53 Not surprisingly, the claimant could not sustain its burden of proof because the decisive witnesses' testimony 'was contradicted by the person who, according to the claimant, had solicited the bribe.'54

In cases where a state is involved, often only the state - which should have control over its officials - is in a position to prove that a non-state entity successfully bribed a state official. This might create the rather perverse incentive for a state to benefit from its own omissions in allowing corruption. A cynical advisor of a state party would recommend ensuring that any non-state party (such as an investor in investment arbitration) has to make a bribe in violation of the laws of the host state. The bribery (if sufficiently documented by the state) would then provide the unscrupulous host state with a type of insurance against such a party successfully bringing arbitration claims since the host state could rely on the 'corruption objection to jurisdiction'.55


33 Noradèle Radjai, 'Where there's smoke, there's fire? Proving illegality in international arbitration?' IBA Arbitration Newsletter (March 2010): 139, 142; Dragor Hiber & Vladimir Pavic, 'Arbitration and Crime', Journal of International Arbitration 25, no. 4: 461, 467 (arguing that in 'most of the cases, the evidence bar is set very high.'); see also Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID case no. ARB/05/15 (Award of 1 June 2009), para. 326 ("It is common in most legal systems for serious allegations such as fraud to be held to a high standard of proof"); EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 October 2009), p. 64, para. 221 ("There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.").


Mourre, 101 with references. Final Award of 4 May 1999, Himpurna California Energy Ltd. v. Perusahaan Listruik Negara, in ed. Albert Jan van den Berg, Yearbook Commercial Arbitration, vol. XXV (The Hague: Kluwer Law International, 2000), 11, 42 ('a finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof'). EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 October 2009), p. 64, para. 221.

Reiner, 334-335; Sayed, 102-106; Matthias Scherer, 'Circumstantial Evidence in Corruption Cases Before International Arbitral Tribunals' (International Arbitration and Corruption - Synopsis of Selected Arbitral Awards), International Arbitration Law Review 5, no. 2 (2002): 37-40; Martin, Appendix (Summary of International Arbitration Cases) all with many other reported and unreported theses.

Born, 1858.


EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 October 2009), p. 64, para. 221.


See, for example, the U.S. Department of Justice's press release of 28 June 2010 relating to Technip S.A., 28 June 2010 which announced: 'Technip S.A., a global engineering, construction and services company based in Paris, has agreed to pay a $240 million criminal penalty to resolve charges related to the Foreign Corrupt Practises Act (FCPA) for its participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction (EPC) contracts, the Department of Justice announced today. The EPC contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria, were valued at more than $6 billion.'

International Court of Arbitration of the International Chamber of Commerce, Award of 1963 in ICC case no. 1110, Arbitration International 10, no.3 (1994): 282, 292, para. 17 ('it is, in my judgement, plainly established from the evidence taken by me that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business.').

Reiner, 335.

EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 october 2009), p. 64, para. 221.

Id.


Id.

EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 october 2009).

EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 october 2009), p. 64, para. 221.

EDF (Services) Ltd. v. Romania, ICSID case no. ARB/05/13 (8 october 2009), p. 69, para. 231.