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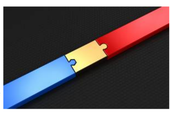
# Holding states to a higher standard: allegations of corruption in international arbitration



*As the global focus on corruption by enforcers and NGOs in recent years has increased, so too has the number of international arbitration cases where serious allegations of bribery or corruption are the central issue. In such cases, write* ***Michael O'Kane*** *and* ***Sarah Cotterill*** *of Peters & Peters, while the more flexible, consensual platform offered by international arbitration assists arbitrators in their independent fact-finding, the lack of clearly defined evidential standards risks creating injustice, in circumstances where a finding of corruption can have a devastating impact on a party. Here, they examine the current position in relation to the evidential standard in international arbitration.*



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## Applicable rules

The various instruments that regulate international arbitration, such as the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce (ICC) and the IBA Rules on the Taking of Evidence in International Arbitration, offer no guidance on evidentiary standards. Instead, total discretion is given to the arbitral tribunal to create and apply rules of evidence and applicable standards of proof. For example, both Article 27(4) of the UNCITRAL Arbitration Rules 2010 and Article 9(1) of the IBA Rules 2010 state that arbitral tribunals "*shall determine the admissibility, relevance, materiality and weight*" of the evidence offered. The discretion afforded to the tribunal means it can apply, on an *ad hoc* basis, different rules of evidence and legal principles when considering an allegation of corruption. This has resulted in a range of evidentiary standards having been applied to corruption allegations made in the course of various international arbitration proceedings.

## 'Clear and convincing' standard

Whereas the 'balance of probabilities' standard is traditionally applied in international arbitration, and in a domestic criminal trial a corruption allegation would generally be subject to the 'beyond reasonable doubt' standard, the 'clear and convincing' standard of proof, said to lie somewhere between the civil and criminal standards, has been most commonly employed in international arbitration cases where corruption is alleged. A similar standard is regularly applied in civil fraud claims, administrative hearings and habeas corpus cases heard by US courts. It requires a plaintiff to prove that it is *substantially* more likely than not that their claim is true, without the requirement to produce evidence to convince the judge or jury beyond any doubt.

'Clear and convincing' is the standard that has been applied by a number of international arbitration tribunals when considering an allegation of corruption. In *Westinghouse and Burns & Roe v National Power Co and Republic of the Philippines* [3], the Tribunal held that corruption must be established by "*clear and convincing evidence amounting to more than a mere preponderance, and cannot be justified by a mere speculation...*." In *Himpurna California Energy Ltd. v PLN* [2] the Tribunal held that a "*... finding of illegality or other invalidity must not be made lightly, but must be supported by clear and convincing proof*". A similar standard has been applied in a number of ICC cases where it is described as "*a strong degree of certainty*" [3], "*...more likely or almost certain that corruption exists*" [4], and as requiring proof of bribery to a "*high degree of probability*" [5]. A higher standard is also applied by arbitral tribunals considering allegations of fraud due to the intent to conceal implications of the fraudulent conduct: "*... it is commonly accepted by ICC arbitral tribunals that allegations of fraud call for a high standard of evidence*". [6] This enhanced standard of proof would appear to reflect the very serious nature of an allegation of corruption. It might also be aimed at preventing baseless and vexatious claims being made against parties and allow all parties to focus more keenly on the principle issues of the case.

Some commentators have proposed that an evidential standard lower than 'balance of probabilities' should apply in cases when corruption is alleged. [7] Two arguments commonly put forward in support of this view are:

1. the lack of investigative power of the tribunal or the parties as compared to domestic courts and police; and
2. the penalties available to the tribunal, which cannot be compared to the sanctions available following a domestic criminal conviction.

These arguments have force, but appear to place insufficient weight on the seriousness of allegation of corruption being found proved by an international arbitration panel. Such a finding can result in debarment from government or World Bank projects, the severing of commercial relationships, huge reputational damage, as well as the possibility of domestic investigation and prosecution. The arguments in favour of a higher standard of proof, and the circumstances in which it is appropriate, are explored below.

## Power to investigate

While lack of an investigating power is a relevant consideration in cases where a *company* is alleging corruption by another company or by a state, this is unlikely to be the case where the allegation is being brought by a state. Corruption that is alleged to have occurred inside the state's border is capable of being thoroughly investigated by domestic police or specialist anti-corruption investigators, who can use coercive powers to question individuals, search premises, conduct surveillance and obtain access to relevant documentary material, such as bank records and emails. If a state alleges corruption beyond its borders, then it has the power to request mutual legal assistance from other states to obtain relevant material, including witness statements. By comparison, a company alleging corruption has no direct power to investigate either domestically or internationally. The limited recourse is to seek witness statements and related documents provided voluntarily and invoke the powers of a tribunal to order disclosure of documents or production of witnesses. If the requested party is unwilling to provide these then in some circumstances, the company could utilise the domestic court process in the arbitral seat to order the production of documents or witnesses.

The limited powers of a company making a corruption allegation against a state were highlighted in the ICSID case *EDF (Services) Limited v Romania*. [8] EDF was unable to produce any documentary evidence of the bribe requests it had allegedly received from Romanian officials and could only rely on witness statements of employees to support its allegation. The Tribunal applied a raised evidentiary standard to EDF's allegation, stating that "*the seriousness of the accusation of corruption... demands clear and convincing evidence*", [9] and holding that EDF had failed to produce evidence of bribery to such a standard. The position of EDF can be compared to that of Metal-Tech in *Metal-Tech v Uzbekistan* [10], a case in which the allegation of corruption was made by the state party, Uzbekistan. In that case, the CEO of Metal-Tech disclosed in his testimony that his company had made payments to politically connected persons, and Uzbekistan alleged that the payments were corrupt and had invalidated the disputed agreement. The Tribunal invited Metal-Tech to produce evidence of legitimate services provided by the politically connected persons, and when Metal-Tech failed to do so the Tribunal drew an adverse inference that no such services had been provided. On the basis of certain 'red flags', or indicia of corruption, including the unjustified payments in respect of which it had drawn the inference, the Tribunal then decided that Metal-Tech had engaged in corrupt activities. Although the Tribunal had effectively reversed the evidentiary burden in respect of one issue (an issue in respect of which Metal-Tech was in a unique position to address), it does seem to have applied a high standard to the final issue, holding with "*reasonable certainty*" that corruption had occurred on the basis of a finding that that was the "*only conclusion*" that could be drawn on the available evidence.

When one considers the ability of a company to investigate corruption as compared to the powers of a state, the disproportionate difference in the positions of the two parties is evident. It follows that the 'clear and convincing' standard should be the minimum applicable standard in circumstances where a company is alleging corruption, but that the standard is arguably too lax when a state is making the allegation.

## Available penalties

Corruption allegations in many domestic jurisdictions are usually dealt with in criminal proceedings brought by the state against an individual or company, which require proof to the standard of 'beyond reasonable doubt'. Such a standard is appropriate and necessary when one considers what is at stake. In the UK, section 7 of the *Bribery Act 2010* criminalises the failures of a company to implement adequate safeguards to prevent bribery. If found guilty of the offence, a company faces an unlimited fine, possible civil claims, public ignominy, adverse market reaction, potential debarment from public contracts and significant negative publicity.

Although international arbitral tribunals cannot impose criminal penalties, an award issued against a company on the grounds of corruption can have a similarly devastating outcome. Arguably, in arbitration cases where corruption is being alleged by a state, because the consequences of a finding of corruption in arbitration are comparable to the sanctions available following a domestic criminal conviction, and because of the state's investigative powers, the higher criminal standard of proof, 'beyond reasonable doubt', should be applied. This is, of course, the standard that states (through their prosecuting agencies) must, and often do, meet in domestic criminal proceedings concerning corruption.

## Concluding remarks

Following the adoption of the United Nations Convention Against Corruption in 2003 and the recognition that corruption poses a serious threat to the "*stability and security of societies... sustainable development and the rule of law*" and is thus against international public policy, there is a growing expectation on international tribunals to be the guardians of international ethics in the global fight against corruption. International arbitral tribunals are well placed to deal with commercial matters involving corruption as the flexible *ad hoc* nature of international arbitration allows the tribunal to apply different standards of proof depending on the type of allegation before it and the party that is making the allegation. It seems clear from recent arbitration cases where the 'clear and convincing' standard was applied that the seriousness of an allegation of corruption must be reflected in the standard of proof required to satisfy that allegation. Considering the significant disparity in positions between the investigative powers of a company compared to a state and the similarities in available and likely outcomes for a finding of corruption in domestic criminal proceedings and international arbitration proceedings, there is a strong argument that the 'beyond reasonable doubt' standard should apply in cases where a state is alleging corruption.

## Notes

1. ICC Case No. 6401.
2. 25 YB Comm Arb 11.
3. ICC Case No. 13545.
4. ICC Case No 14470.
5. ICC Case No 6497.
6. ICC Arbitration, Preliminary Award of 9 October 2008, (2011) 29 ASA Bulletin, Issue 4.
7. M Hwang and K Lim, 'Corruption in Arbitration – Law and Reality' (2012) 8 *Asian International Arbitration Journal*, Issue 1 pp 14-15.
8. ICSID Case No. ARB/05/13.
9. ibid at [221].
10. ICSID Case No. ARB/10/3.

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