

Role of arbitral tribunals in combatting economic crime in international arbitration

Burden and standard of proof

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General

Who → **burden of proof**

With what level of probability → **standard of proof**

BoP/SoP in international arbitration

No uniform approach

- no predetermined rules
- party autonomy
- discretion of tribunals

Corruption – role of BoP/SoP

Why do BoP/SoP matter?

- decisive to the outcome of corruption findings
- finding of corruption can have drastic consequences (outcome, enforceability, ...)

Corruption – role of BoP/SoP

Challenges:

- corruption intrinsically difficult to prove (fragmentary, inconclusive and imperfect evidence)
- limited investigatory powers of tribunals

BoP/SoP as a solution?

- shifting the BoP?
- lowering the SoP?

Burden of proof

Art 27(1) of UNCITRAL Arbitration Rules:

“Each party shall have the burden of proving the facts relied on to support his claim or defence.”

Burden of proof

Shift the BoP to the alleged party?

- *prima facie* (inconclusive) evidence of corruption
- when, under what conditions?

ICC Case No. 6497:

- as long as the required provision of counter evidence is “possible” and “not too burdensome” to the alleged party
- “only under special circumstances” and “for very good reasons”
- **pros**: arbitral discretion, enhance corruption findings
- **cons**: fair trial/equal treatment, manipulative allegations

Standard of proof

Rules

- no predetermined rules
- discretion

Art 27(4) of UNCITRAL Arbitration Rules

Art 9(1) of IBA Rules on the Taking of Evidence in Intl Arbitration

Art 31(1) of Ljubljana Arbitration Rules

“the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence”

Standard of proof

Common-law vs. Continental jurisdictions

- inner conviction (sufficient to convince)
- balance of probabilities / preponderance of evidence (more likely than not)
- beyond reasonable doubt
- clear and convincing evidence

Standard of proof

Practice

- arbitral discretion → absence of a uniform approach
- lack of transparency in arbitral awards re SoP
- impact of any SoP may be difficult to assess
(undisputed evidence / clearly irrelevant evidence)

Standard of proof & corruption

Heightened SoP

- beyond reasonable doubt, clear and convincing
- the more serious the allegation and its consequences, the higher standard of proof
- danger: no corruption where there IS corruption
- easier task for tribunals?

Standard of proof & corruption

Lowered SoP

- *prima facie* evidence
- danger: corruption where there is NO corruption

Standard of proof & corruption

Moderate SoP

- balance of probabilities / inner conviction
- appropriate balance between the pursuit of commercial interests and the integrity of corruption findings
- criminal activities, but not criminal proceedings

Propositions

Moderate SoP

No shift in the BoP before the SoP is satisfied

Other tools:

- drawing inferences from circumstantial evidence
- drawing adverse inferences from non-production of evidence (Art 9(5) of IBA Rules)

Need for common understanding and methodology!