Proving Corruption in International Arbitration: A Balanced Standard for the Real World

*Constantine Partasides**

I. INTRODUCTION

1. I begin by inviting you all to look beyond the confines of the world of international arbitration for a moment.

2. We have just seen the close of a decade in which the fight against corruption has been close to the top of the international agenda. In a little over ten years the OECD,[1] EU,[2] African Union,[3] and United Nations[4] conventions against bribery and corruption have transformed our world.

3. Whilst bribing local officials to procure government contracts was until surprisingly recently considered to be an unsavory but unavoidable (and therefore acceptable) cost of doing business in the developing world, there now

* Head of the international arbitration group, Freshfields Bruckhaus Deringer LLP, London. Mr. Partasides has acted as counsel and arbitrator in over 50 *ad hoc* and institutional arbitrations, including under the rules of UNCITRAL, the ICC, LCIA, AAA and ICSID. He is a solicitor-advocate (Higher Courts Civil).

[1] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (17 December 1997).

[2] Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (3 June 1997).

[3] African Union Convention on Preventing and Combating Corruption (11 July 2003).

[4] United Nations Convention against Corruption (31 October 2003).

exists a firm international consensus that such practices are both morally *and legally* repugnant.

4. If one needed a justification for this shift in morality and law (and sometimes it is good to remind ourselves of that justification) let us take but one example: Equatorial Guinea. You may not be surprised to hear that Equatorial Guinea is a country in which over 60% of the country's citizens live on less than $1 a day. You may be surprised to hear that this is a country that has an overall per capita gross domestic product greater than those of Italy, South Korea, or Saudi Arabia.[5] There will be a variety of reasons for this financial black hole, but we can all be sure that corruption is one of them. And there are of course too many other examples.

5. As many in this room are lawyers who spend most of their time—as do I—representing investors, let us be clear that the scourge of corruption is not only unacceptable for its effect in maintaining the poverty of the poorest on this planet. Let us also recognize that it must also be opposed for the way in which—for investors—it distorts competition: improperly menacing investors to incur concealed investment costs, and improperly punishing those investors that do not succumb to those menaces.

6. So this is not an issue in which one is required to take sides between investors and States. This is not about punishing investors or rewarding States, or *vice versa*. Every participant in the international economy has an interest in the eradication of corruption.

7. It is against this backdrop that issues of illegality and corruption are featured in the landscape of international arbitration with greater regularity today than ever before.

8. These issues give rise to a variety of important questions, including those dealt with by my co-panelists as to the *effect* of corruption on a contractual or treaty claim. My remarks today relate to a different question: the question of *proof*—the level of proof that should be required to demonstrate corruption in international arbitration.

9. It is often said that corruption is easy to allege in international arbitration, but difficult to prove. My own interest in the subject was born of a case in which I was personally involved that rendered this sound bite utterly irrelevant.

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[5] Open Society Justice Initiative, "Corruption and Its Consequences in Equatorial Guinea: A Briefing Paper," (Open Soc'y Inst., July 2009).

10. And so I began with the special case of *World Duty Free v. The Republic of Kenya*.[6]

11. Many people by now know the facts of this case. In June 2000, an Isle of Man corporation, World Duty Free Company Ltd. ("WDF"), launched ICSID proceedings against the Republic of Kenya. It did so pursuant to an arbitration clause in a contract by which WDF had been awarded the exclusive concession to run the duty-free operations at Kenya's international airports in Nairobi and Mombasa.

12. Six years later, in October 2006, this ICSID case ended in extraordinary circumstances, with a Final Award in which an Arbitral Tribunal composed of Gilbert Guillaume, Andrew Rogers Q.C. and Johnny Veeder Q.C.:

- found that the contract under which the Claimant brought its claims was procured by the payment of a cash bribe to the then sitting Head of State, President Daniel arap Moi; and, on that basis
- held that the Claimant's claims should be dismissed immediately and in their entirety.

13. Let me briefly recall the facts of this case, and the evidence of corruption that finally emerged.

14. In bringing its ICSID claim, WDF alleged that Kenya expropriated its duty-free concession by using its corrupt judiciary improperly to appoint a receiver over WDF's Kenyan operations. Thus, its case was, itself, founded on allegations of corruption.

15. However, in its only witness statement, that of its owner and CEO, Mr. Nassir Ibrahim Ali of Dubai (and Pakistan, and Iran, and Canada—judging by his various passports), Mr. Ali volunteered—just by way of background—a quite extraordinary description of the facts relating to the manner in which his concession contract had originally been procured.

16. Here is an extract:

> As a leading businessman in Dubai, I met in normal business circles, one Mr. X, a Kenyan … From my discussions with X, I came to understand that he was politically and powerfully connected in the Kenya government. Wishing to diversify my business into Kenya, I asked X his advice on arranging the necessary licences

[6] *World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. Arb/00/7, Award (4 October 2006) ["*World Duty Free*"].

> and authorisations for the establishment of duty-free complexes in Nairobi and Mombassa airports.
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> …
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> X informed me that although my concept for establishing duty-free complexes at Nairobi and Mombassa airports … would require significant investment, which I believed would be for the national benefit of Kenya, protocol in Kenya required that I should in addition make a "personal donation" to President Moi.
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> …
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> X advised me that the appropriate donation … was US$2 million. I was further advised by him that the donation should be in cash.
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> I brought [part of the cash in Kenyan shillings] to my meeting with President Moi in a brown briefcase. When we entered the room where the President received us, [I] put the briefcase by the wall and left it there. After the meeting [I] collected the briefcase from where [I] had left it. On the departing journey I looked in the briefcase and saw that the money had been replaced by fresh corn.
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> I felt uncomfortable with the idea of handing over this "personal donation" which appeared to me to be a bribe. However, this was the President, and I was given to understand that ... I didn't have a choice if I wanted my investment contract.[7]

17. This was not so much a "smoking gun" of corruption, as a Technicolor video of the gun being fired.

18. How did the Tribunal react to this evidence of corruption?

19. It held that, as a matter of law, the Contract was unenforceable and, on this basis, struck out the Claimant's claim entirely. In striking out the claim in its entirety, this Tribunal was not shy about giving voice to the moral dimension of the issues before it, saying that:

> [Corruption] is more odious than theft; but it does not depend upon any financial loss and it requires no immediate victim. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion … a state contract procured by bribing

[7] *Id.* paras. 11–19.

> a state officer is legally unenforceable, as an affront to the public conscience.[8]

20. Whether one agrees or disagrees with the outcome in *World Duty Free*, one observation I think we can all agree with is that it is destined to remain an unusual, if not unique, decision because of the particular circumstances in which it was rendered.

21. How often can we expect a claimant itself to offer the evidence of illegality that will—in all likelihood—consign its claim to failure?

22. Not only are admissions against interest unlikely, but in truth those that participate in bribery often exercise great ingenuity to conceal the illegality. The question I wish to pose today is:

> *How can our process ensure that it is equal to that ingenuity?*

23. To put the question a little more tendentiously:

> *Given the limits of an arbitral tribunal's powers of investigation and compulsion, how can we, the participants in this process, ensure that international arbitration does not become a soft touch for those that instigate, or participate in, corruption?*

24. Let me take as my starting point a statement made by an international Arbitral Tribunal a decade ago deciding an UNCITRAL arbitration between CalEnergy's Himpurna California Energy Ltd. and the Republic of Indonesia's State electricity corporation, PLN, in which intimations of illegality were made:

> The members of the Arbitral Tribunal do not live in an ivory tower. Nor do they view the arbitral process as one which operates in a vacuum, divorced from reality … The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways. They would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption.
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> But such grave accusations must be proven. There is in fact no evidence of corruption in this case. Rumours or innuendo will not do. Nor obviously may a conviction that some foreign investors have

[8] *Id.* para. 173.

> been unscrupulous justify the arbitrary designation of a particular investor as a scapegoat.[9]

25. Ours is, after all, a legal process, and allegations of bribery—however difficult they may be to prove—must be proven.

26. The question then becomes: how should arbitral tribunals require or allow allegations of corruption to be proven?

27. One answer was provided in a paper delivered at the ICCA Congress in London in 2002 by an arbitrator with significant experience with government contracts. In her paper, Karen Mills, a U.S. lawyer who has worked in Indonesia for many years, described in detail the various concealed forms which corrupt payments may take, and then commented as follows:

> It is clear that, like most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected … How can we, as arbitrators sitting on tribunals established to adjudicate disputes that have arisen under such projects, ensure that we do not allow ourselves to overlook such corruption and, by so doing, perpetuate the damage that has been inflicted thereby?
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> …
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> Certainly the corrupt party will make every effort to obscure or disguise the corrupt conduct. And often the party victim of such corruption, which in infrastructure projects may be the government-related party, will have been denied access to the evidence necessary to establish it and/or, worse, prohibited from presenting what evidence they may have by the very officials who benefited.
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> …
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> Because of the near impossibility to "prove" corruption, where there is a reasonable indication of corruption, an appropriate way to make a determination may be to shift the burden of proof to the allegedly corrupt party to establish that the legal and good faith requirements were in fact duly met.[10]

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[9] *Himpurna California Energy Ltd (Bermuda) v. PT. (Persero) Perusahaan Listrik Negara (Indonesia)*, Final Award (4 May 1999), paras. 219–220.

[10] Karen Mills, "Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto," ICCA Congress Series No. 11 (Kluwer 2003), at 295.

28. Whilst one can understand and sympathize with the sentiment motivating these views—particularly from a lawyer who has practiced for many years in a jurisdiction that has been ravaged by corruption—a simple shifting of the burden of proof, all in one go, is rightly difficult for any lawyer to accept.

29. But I want to focus on a very recent decision by an ICSID Tribunal that goes in the opposite direction. In my view, it goes too far in the opposite direction not only by fixing the burden of proof where many of us would say it belongs (on the party making the allegation), but also by raising the standard of proof by which that burden is discharged in a way that brushes aside too quickly the difficulty of demonstrating such concealed acts.

30. The Award in *EDF (Services) v. Romania*[11] was rendered in October 2009. The case involved an investor, EDF (Services) ("EDF")—not to be confused with Electricité de France—that was incorporated in the Bailiwick of Jersey, a dependency of the United Kingdom, to which the UK–Romanian BIT had been extended.

31. EDF's investment in Romania consisted of its participation in a joint venture ("JV") company with Romanian entities owned by the Romanian Government. The JV was—and this will sound familiar—given the right to establish duty-free services at Romania's three international airports.

32. Once its investment had been made and its operations were up and running, EDF looked to exercise its contractual right to extend its participation in the JV vehicle indefinitely.

33. This is where its trouble began:

(i) first, its JV partner challenged—successfully—its contractual right to extend the JV, resulting in the JV being dispossessed of its premises at the airport;
(ii) next, Romania passed an Emergency Decree, regulating duty-free businesses in such a way as to have the effect of revoking the JV's licenses; and
(iii) finally, in the resulting auctions of the liberated licenses, EDF was individually disqualified from participating, leading to the bankruptcy of its JV.

34. EDF made the case that the refusal to accede to its contractual extension, and the measures that were taken subsequently, were motivated by "no other

[11] *EDF (Services) Ltd. v. Romania,* ICSID Case No. Arb/05/13, Award (8 October 2009) ["*EDF (Services) v. Romania*"].

reason than EDF's refusal to comply with demands for bribes from senior Romanian Government officials in August and October 2001."[12]

35. The specific allegation was as follows:

> On August 24, 2001, following receipt in London of a telephone call that invited him to come to Romania to resolve the extension issue, Mr. Weil met at the parking lot of the Hilton Hotel with Mr. Sorin Tesu, Chief of Cabinet to Prime Minister Nastase. Their discussion was short. After Mr. Weil refused to pay a USD 2.5 million bribe requested by Mr. Tesu, the latter left the parking lot. Mr. Weil then left Romania the following day, on August 25, 2001.
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> On October 19, 2001, Mrs. Liana Iacob, State Secretary under Prime Minister Nastase, repeated the bribe request to Mr. Marco Katz, logistics and operational director of ASRO, during a private conversation held at her home in Bucharest, confirming that the request was made on behalf of Prime Minister Nastase. Mr. Katz reported the meeting to Mr. Weil during a phone conversation. Mr. Weil once again categorically refused to comply with this request.[13]

36. This Award is interesting and instructive in a variety of respects, including how the Tribunal dealt with the legal submission by the Claimant that the alleged bribe demand by Mr. Tesu and Mrs. Iacob on behalf of Prime Minister Nastase is attributable to Romania as a matter of international law.

37. In this regard, the Tribunal found that for the bribe demand to be attributable to Romania, the officials that made it must have been acting not in their personal interests, but on behalf and for the account of the Government of Romania.[14]

38. However, I will focus on the way in which the Tribunal dealt with *proof* of the alleged fact of corruption—not its legal effect in incurring or not incurring the responsibility of the Republic of Romania. How do you fairly evaluate proof of a parking lot and a living room conversation?

39. In the face of the testimony of Messrs. Weil and Katz in support of the Claimant's case, Romania flatly denied the fact of the bribe demand, and in support of its denial:

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[12] *Id.* para. 69.
[13] *Id.* paras. 71–72.
[14] *Id.* para. 232.

- put up both Tesu and Iacob as witnesses, squarely denying the allegation;
- pointed to the absence of any contemporaneous allegation of corruption by the Claimant;
- pointed to the absolving decision of the Romanian Anti-Corruption Authority on the same allegation; and
- pointed to the fact that the Emergency Decree was not discriminatory (affecting not only the Claimant), and was aimed at regulatory reform necessary for Romania's accession to the EU.

40. The Tribunal reached the view that the allegation of the bribe demand had not been proven, largely based on its view that Claimant's witnesses lacked credibility (though it noted, interestingly, that it also had doubts as to the reliability of the Respondent's witnesses). In my view, a reader of the Award has no reasonable basis upon which to take issue with the Tribunal's ultimate conclusion that the bribery demand had not been adequately proven.

41. What I do question is the standard of proof imposed by the Tribunal in undertaking its evidentiary review. In a key paragraph of the Award, the Tribunal stated:

> The heart of Claimant's case is that the contractual arrangements at the Otopeni airport were not extended beyond their ten-years term because Mr. Weil refused to pay a USD2.5 million bribe to secure the extension, and was clearly impossible to reconcile with the legitimate and reasonable expectation of Claimant. Respondent flatly denies that such a request for a corrupt payment was made. *In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence.* There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing.[15]

42. I invite you to focus on the two highlighted sentences, for I suggest that they constitute a surprising—if not contradictory—juxtaposition of ideas.

[15] *Id.* para. 221 (emphasis added).

43. The Tribunal is telling us that allegations of this type of illegality are by definition "notoriously" difficult to prove. Yet it nevertheless proceeds to impose an enhanced standard of proof on the allegation. Its message is a difficult one to accept: "Dear investor, you will inevitably find the allegation almost impossible to prove, but we are nonetheless going to raise the evidential hurdle to make it even harder."

44. I fear this kind of juxtaposition ("The Tribunal recognizes that it is very difficult to prove corruption, but we are regardless going to make it even more difficult to prove.") is precisely where international arbitral tribunals can show themselves to live in the most remote of ivory towers.

45. Going back to the question I posed earlier, let me provide my own answer: our process will not ensure that it is equal to the ingenuity of corruptors, and/or those they corrupt, if arbitrators simply fail to take account of that ingenuity, and where necessary adapt for it, in the conduct of their proceedings.

46. This answer leads to two further specific questions that I would like briefly to explore with you today.

1. Given the typically concealed nature of corruption, is it appropriate for arbitral tribunals to heighten the standard of proof?
2. Given the typically concealed nature of corruption, how should arbitral tribunals ultimately apply the standard of proof?

47. For each of these questions I will offer a proposition or two, before concluding my remarks.

II. HEIGHTENING THE STANDARD OF PROOF

48. The *EDF (Services) v. Romania* Award is not the first time that one can find reference to the heightened standard of "clear and compelling" evidence. This same formulation has been referred to and applied in a number of corruption arbitrations over the years.

49. In the *Westinghouse* case, the Tribunal demanded "clear and convincing evidence" of corruption amounting to "more than a mere preponderance."[16] In the *Hilmarton* case, the Tribunal demanded proof "beyond doubt" of corruption.[17] And you can find others if you look.

[16] *Westinghouse Int'l Projects Co., Westinghouse Elec. S.A. and Barns & Roe Enterprises, Inc. v. Nat'l Power Corp. and The Republic of the Philippines*, ICC Case No. 6401, Preliminary Award (19 December 1991), paras. 33–35.

[17] *Hilmarton Ltd. v. Omnium de Traitment et de Valorisation S.A.*, ICC Case No. 5622 (1988), para. 23.

50. The following is my first proposition: **whilst the standard of proof should not be relaxed for allegations of corruption, by the same token it need not be made more severe.**

51. In offering this proposition, let me say that those who presume that courts around the world unquestioningly raise the standard of proof when dealing with serious allegations should tread with care. The approach taken by courts in many places tends to be far more balanced and sophisticated than that. I have not conducted a survey, but let me give you the English law position in dealing with the serious allegation of fraud, as summarized by Lord Hoffmann to the English House of Lords only a few years ago, in the case of *Secretary of State for the Home Department v. Rehman*:

> The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in In *re H (Sexual Abuse, Standard of Proof) (Minors)* [1996] AC 563 at 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.[18]

52. I see no compelling reason why arbitral tribunals need be more demanding than English courts in this regard.

53. Put another way, in determining an appropriate standard of proof, arbitration tribunals should take account not only of the seriousness or likelihood of the allegation, but also the intrinsic difficulty of proving it.

54. Arbitral tribunals that take account of this difficulty of proof would certainly not be innovating. We need only look to numerous claims tribunals, which in recent history have taken into account particular difficulties of proof in setting their standards of proof. Thus:

- the International Criminal Court explicitly does not apply the criminal standard of "beyond reasonable doubt" to the award of reparations

[18] *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47, [2002] 1 All ER 122, paras. 140–141.

to victims because of the difficulty of proving loss to victims in the circumstances of its cases[19];

- the United Nations Compensation Commission required only a "reasonable minimum" of evidence for some categories of claims brought before it[20]; and
- the Claims Resolution Tribunal for Dormant Accounts in Switzerland required a relaxed evidentiary standard of "plausibility in the light of all the circumstances" that the Claimant is entitled in whole or in part, to the dormant accounts.[21]

55. It is not my proposition that the burden of proof in civil law arbitrations should be relaxed in the same way. An arbitral tribunal determining liability in a single case is not a mass claims tribunal determining mass claims broadly (sometimes with a particular policy mandate). However, there is something to be learned from the way in which—in the interests of fairness—these tribunals have taken account of the challenge the parties before them face in substantiating their claims due to the circumstances of those claims.

56. This leads me to the following conclusion: exercising the flexibility inherent in their mandates to take account of the intrinsically difficult nature of demonstrating a bribe, arbitral tribunals need not relax—but should not enhance—the civil law standard of "the balance of probabilities" or "more likely than not."

57. And so we move to a discussion of the second question that I posed.

III. APPLYING THE STANDARD OF PROOF

58. To recap, where we see some arbitral tribunals applying a heightened standard of "clear and compelling" evidence, we see many English courts requiring "cogent" evidence to discharge a normal standard of the balance of probabilities.

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[19] Int'l Criminal Court, Revised Draft Rules of Procedure and Evidence, PCNICC/2000/L.1/Rev.1/Add.1 (April 2000).

[20] Decision taken by the Governing Council of the United Nations Compensation Commission, 27th mtg., Sixth sess., U.N. Doc. S/AC.26/1992/10 (26 June 1992), at 19, para. 35(2)(c) ("Rules for Claims Procedure").

[21] Claims Resolution Tribunal for Dormant Accounts in Switzerland, "Rules of Procedure for the Claims Resolution Process" (15 October 1997), art. 22, *available at* http://www.crt-ii.org/_crt-i/frame.html.

59. This gives rise to an obvious question: Is that simply another way of saying the same thing? One forum may talk of "clear and compelling" whilst the other talks of "cogent," but do they effectively amount to the same thing, effectively applied in the same way?

60. My research suggests that the answer to that question is "no." Where as some arbitral tribunals show unthinking rigidity in applying the "clear and compelling" standard, many courts show very careful flexibility in determining whether the evidence before them is sufficiently "cogent."

61. And they show this flexibility by:

- looking at the "balance" of the evidence before them; and
- when appropriate, relying on inference to fill the gaps that circumstance leaves unfilled.

62. Again, I focus on the practice of English courts. In applying the standard of a balance of probabilities, English courts look to the balance of evidence offered by both sides.

63. In practice this means that once a certain *prima facie* threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate—given the nature of the allegation—for the defendant to sit back and not contribute to the evidentiary exchange on that issue.

64. One sees this in a number of tax-related fraud cases. The case of *Fen Farming Co. Ltd. v. Dunsford (No.2)*, for example, was an appeal against a tax inspector's decision that Fen Farming was liable for additional tax on the basis that its managing director, "K," had willfully and fraudulently concealed a bank account.[22]

65. Reaching the decision that the managing director's bank account had been willfully concealed, and inferring that the money in the director's account belonged to the company and was therefore relevant to its assessment of tax, the Court said:

> K had given no adequate explanation as to the concealed bank account; indeed he had concealed its existence from the Revenue by the terms of the certificate he gave in the course of the 1947 enquiry. In the circumstances the commissioners were justified in drawing the inference that there had been wilful default on the part

[22] *Fen Farming Co. Ltd. v. Dunsford (No. 2)* [1973] STC 484.

> of K. The only real question was whether such default was default on his own behalf or default in his capacity as managing director of the company. That depended on whether or not the money in the hidden account, as it originally accrued, was the money of the company. *The inference that it was the company's money was drawn from exceedingly scanty evidence. Nevertheless as there was no particle of evidence the other way, the court could not upset the decision of the commissioners that the moneys in the secret account belonged in their origin to the company*.[23]

66. So we come to my second proposition: **plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation.**

67. Taking the example of the *EDF (Services) v. Romania* case, if Romania had not presented Mr. Tesu and Ms. Iacob to rebut the witness evidence of Messrs. Weil and Katz, I suggest it would have been appropriate for the Tribunal to require the Respondent State to present those witnesses, and to draw adverse inferences if Romania failed to do so.

68. Finally, I turn to the concept of inference, which, I suggest, is not an uncommon mode of judicial reasoning, whatever your forum.

69. There are many English law fraud cases in which courts resort to inference. I shall refer only to one, the case of *Doe v. Skegg*, involving allegations of fraudulent misrepresentation by the seller of a residential property to induce the purchaser to buy.[24]

70. In England, when one sells a residential property one is obliged to complete a Seller's Property Information Form (PIF), which requires the seller to answer many specific questions about its property including the following questions under the heading "Disputes":

- Do you know of any disputes about this or any neighboring property?
- Have you had any negotiations or discussions with any neighbor which affect the property in any way?

71. The seller in this case answered both questions "no," even though he had been involved in an ongoing dispute with a neighbor about the latter's son, who had been making a nuisance of himself on a regular basis.

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[23] *Id.* paras. 484–485 (emphasis added).

[24] *Doe and another v. Skegg and another* [2006] EWHC 3746 (Ch).

72. In subsequently bringing a claim against the seller for fraudulent misrepresentation, the purchaser was required to prove that, in completing the PIF, the seller knew that what was being written was untrue.

73. For his part, the seller testified that he had thought carefully about the questions posed, and had reached the conclusion that the dispute he had with the neighbor was about his son's *behavior*. It was not a dispute "about this or any neighboring property" (for example relating to ownership or boundaries that would affect the property).

74. Although this was at least a credible explanation given the terms of the PIF, the court found against the seller, holding that his answers to the PIF questions amounted to fraudulent misrepresentation, and in so doing stated:

> In a claim for fraud it is for the Claimant to prove fraud, notoriously one of the most difficult things to prove in civil proceedings. *Nonetheless, it is also the case that in most fraud cases, a conclusion reached by the court that fraudulent conduct has taken place, will be based upon inference rather than by direct evidence*.[25]

75. I invite you to compare these two sentences to the extract from the *EDF (Services) v. Romania* Award with which I began this discussion.

> In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence. The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence.[26]

76. Notice how similar the first sentences are. Note, in contrast, how dissimilar the second sentences are. Whilst the English court proceeds from its recognition that corruption is notoriously difficult to prove to emphasize the importance of inference, the Arbitral Tribunal in *EDF (Services) v. Romania* retreats behind an enhanced standard of proof.

77. This brings me to my third and final proposition: **where an inference is a reasonable conclusion to draw from the known or assumed facts, Tribunals should be willing to draw the inference to determine allegations of illegality as they would any other allegation—indeed more so given the often deliberately concealed nature of an illegality.**

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[25] *Id.* para. 36 (emphasis added).

[26] *EDF (Services) v. Romania*, *supra* note 11, para. 221.

IV. CONCLUSION

78. We often tell our litigation colleagues how much they have to learn from the practice of arbitration. And rightly so. But sometimes we have something to learn from them too. A comparison of arbitral practice and English court practice on issues of illegality suggests that it is arbitral tribunals that have a lesson to learn in flexibility on the issue of evaluating evidence of a concealed illegality.

79. That flexibility is in fact even more important in arbitral proceedings than in court proceedings. Deprived of the court powers of evidentiary compulsion to subpoena witnesses and to require the production of documents, a failure to take account of the challenges in proving corruption will in the long term expose our process to the charge that it is a soft touch on corruption in an increasingly unaccommodating modern world.