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Revealing the Man behind the Curtain

Proving Corruption in International Commercial Arbitration

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Summary

There is unanimity within the arbitration community that corruption is disrupting international trade and that arbitrators must not let arbitration be a safe forum for enforcement of contracts tainted by such illicit acts. Due to the hidden nature of corruption, often hiding behind an agency agreement, the most challenging question facing arbitrators has shown to be how to handle the rules of evidence. Awards show that there is an inconsistency in the treatment of the burden and standard of proof as well as the significance given to circumstantial evidence. Two trends can be spotted where the first approach is to argue that the seriousness of the accusations calls for a heightened standard of proof. The second trend is to argue that the seriousness to the contrary calls for a pragmatic approach to the rules of evidence, allowing a less rigid view on the standard of proof and use of circumstantial evidence or even a shift in the burden of proof.

The focus of the thesis is on evidentiary aspects of corruption cases and how arbitrators have dealt with these challenges. The overall question is how arbitrators should handle the rules of evidence in corruption cases from a *lege ferenda* perspective. It is argued that the inconsistency in the handling of proof is sometimes misguided and that there are reasons to agree on a common starting point for applying the rules of evidence to corruption cases. Arbitrators should realise the frightening fact that it is their weighing of the evidence which is usually decisive for the outcome and accordingly there is a responsibility to conduct this operation carefully. The tools and procedural flexibility to reveal corruption exist even if there is no perfect solution on how to do it.

Sammanfattning

Det råder enighet inom internationellt skiljeförfarande om att korruption är skadligt för internationell handel och att skiljemän måste förhindra att skiljeförförandet blir ett forum för att ge verkan åt avtal grundade på sådana handlingar. Eftersom det ligger i sakens natur att korruption är förtäckt, ofta av ett agentavtal, är den mest utmanande frågan hur skiljemän ska hantera bevisreglerna. Skiljedomar visar på en inkonsekvent hantering av bevisbörda, beviskrav och betydelsen av indirekt bevisning. Två olika tendenser kan urskiljas där den första synen är att anklagelser av sådan art är så allvarliga att de kräver att beviskravet höjs. Den andra tendensen är att istället argumentera för en pragmatisk syn på bevisreglerna och tillåta en mindre rigid syn på beviskrav, betydelsen av indirekt bevisning och till och med skifta bevisbördan.

Denna uppsats fokuserar på bevisrelaterade frågor i anledning av korruptionsfall och hur skiljemän har hanterat de utmaningar som sådana fall aktualiserar. Den övergripande frågeställningen är hur skiljemän bör hantera bevisfrågor när det gäller korruption utifrån ett *lege ferenda*-perspektiv. Det argumenteras för att det inkonsekventa hanterandet av bevisreglerna är omotiverat och att det finns anledning att komma överens om en gemensam utgångspunkt för bevisreglernas tillämpning i korruptionsfall. Skiljemän måste också komma till den skrämmande insikten att det oftast är bevisvärderingen som är avgörande för utgången i målet och därför göra denna bedömning med omsorg. Verktygen och processuellt utrymme finns för att avslöja korruption, även om det inte finns en perfekt lösning på hur det ska gå till.

Abbreviations

BIT	Bilateral Investment Protection Treaty
IBA Rules on Evidence	International Bar Association Rules on the Taking of Evidence in International Arbitration
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICC Rules	Arbitration and ADR Rules of the International Chamber of Commerce
OECD	The Organisation for Economic Co-operation and Development
OECD Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	United Nations Commission on International Trade Law Model Law on International Arbitration
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules

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1. Introduction

1.1 Background

It is evident that corruption is a devastating widespread evilness tainting international trade, which needs to be fought by all means.[1] When corruption shows its many faces in the context of international commercial arbitration (ICA) one might come to question what lies within the scope of "all means" and more importantly, which "means" there are. When approaching these cases there seems to be no lack of unanimity that corruption is bad, but still it can be argued that arbitrators are not successfully helping the global community preventing the detrimental consequences of corruption.[2] What is the core problem of confronting the face of corruption in ICA and can there ever be a consensus on how to deal with it?

The biggest challenge for arbitrators and the most delicate issue in corruption cases has shown to be establishing that corrupt behaviour has at all occurred in connection to the disputed contract.[3] Although, allegations of corruption are frequently made tribunals rarely find enough proof thereof. One explanation to this pattern could be that it lies within the nature of corrupt behaviour not to reveal itself and that this leads to complications in the establishing of evidence. If corruption cannot be proved all other questions arising at other stages of the arbitration proceedings tend to become of more theoretical than practical relevance.[4]

It is understandable that the discretion given to the arbitrators to decide matters of burden, standard and weighing of proof is not always easy to manage and especially not in cases of corruption. However, freedom is always accompanied by the burden of responsibility and arbitrators must reflect on what consequences the approach taken to rules of evidence and corruption will have. A rigid application might unable proving corruption and consequently send the message that ICA is a safe forum for those interested in resolving disputes without suffering the civil consequences of their illegal activities. On the other hand, retreating from established legal practice by loosening standards might provide

[1] Raouf in Fernández-Ballesteros & Arias 2010, p. 1, ICC Case 1110.
[2] Rose 2014, p. 227 f.
[3] Albanesi & Jolivet 2013, p. 31, Raouf in Fernández-Ballesteros & Arias 2010, p. 5.
[4] See Rose 2014, p. 183.

those interested in escaping the performance of a contract the possibility to succeed with falsely claiming corruption. Regardless of the use of a rigid or loose approach the result will be the same: A failure for the arbitration community to effectively handle corruption and in the long run, to be somewhat dramatic, a diminishing credibility for arbitration as a legitimate forum for dispute resolution.

1.2 Purpose and Research Inquiries

The aim of the thesis is to describe and elaborate on how arbitrators handle the rules of evidence in corruption cases. Before answering the overall question it is necessary to address the following issues;

- How is corruption defined and why is it relevant to ICA?
- Which rules of evidence apply to ICA?
- How have arbitrators handled the rules of evidence in corruption cases?

After dealing with the first three questions the final and overall inquiry of the thesis will be addressed from a *lege ferenda* perspective;

- How *should* arbitrators handle the rules of evidence when adjudicating corruption cases?

1.3 Delimitations

There are different forms of corruption which can become relevant to ICA, but this thesis only elaborates on corruption tainting the disputed contract, either because it provides for or has been procured by corruption. Corrupt actions tainting the arbitration proceedings, such as bribery relating to the arbitrator or witnesses, will be excluded. Because of the broad definition of corruption as well as national differences, a consequence is difficult delimitations and a grey zone where the scope of the definition can be questioned.[5] Such issues will be excluded and in the following it is assumed that the acts of corruption discussed are unwanted and illegal acts.

[5] See Nappert 2013, p. 3 f.

Corruption appears and is a highly relevant issue in both ICA and investment treaty arbitration. Within ICA investment arbitration has emerged containing many of the elements of a purely commercial dispute, but also holding others. Investment disputes can be divided into contract and treaty-based arbitration, where the first is based on a commercial contract, but the second on a treaty. The bilateral investment protection treaty (BIT) provides protection for investors falling under the scope of it and usually includes a right to request for arbitration. A private entity can base the request for arbitration on the treaty and an arbitration agreement is not necessary nor even a contractual relation between the government and the contractor.[6]

The consequences of a positive finding of corruption in an investment treaty dispute diverge from the consequences of such a finding in ICA.[7] This is due to clauses defining investments protected under a BIT, which often includes a legality clause stating that an investment needs to be made in accordance with the local laws of the host-state. The result of a positive finding of corruption is that requirements of an investment for falling within the scope of the BIT are not met. The outcome is thus often a lack of jurisdiction of the arbitrators.[8] Since it is not necessary that there even is a contract between the state and the investor the dispute is not of the same contractual character as in ICA. In the absence of a contract the BIT will form the basis of rights and obligations and although BITs often overlap they are not identical.[9] Thus the civil consequence of nullity of the main contract and potential invalidity of the arbitration agreement, discussed below, are therefore not relevant in the same way.[10]

Including investment treaty disputes in the scope of this thesis would firstly, be practically difficult given the limited time and pages. It would be necessary to repeatedly separate investment treaty disputes from ICA. Secondly, it would be difficult to reach conclusions stretching over the two given their different features. Therefore the thesis will not include investment treaty arbitration. It is important to not confuse investment treaty arbitration with contractual arbitration of investment character, which is based on a contract and not

[6] Bishop et al 2014, p. 10, Hobér 2013, p. 11.
[7] Hwang & Lim 2012, p. 12 f. See also Meshel 2013, Kendra & Bonini 2014.
[8] Meshel 2013, p. 272, See Redfern & Hunter 2009, p. 474 f.
[9] Hobér 2013, p. 13.
[10] See sections 3, 4.2.

a treaty. These arbitrations do not attain the features connected to the BIT and will therefore be included.[11]

Furthermore, the awards used come basically only from institutional arbitration, but there are no convincing reasons to limit the scope of the reached conclusions to arbitrations conducted with assistance from an institution. This is because the differences in procedure do not in a decisive way actualize as regards to the evidence.[12] Institutional rules are, as many national laws, not very detailed on evidence and this results in the procedural differences not affecting this issue.

1.4 Methodology and Materials

1.4.1 The Traditional Legal Method

The methodology used is the traditional legal method which is also referred to as a dogmatic method.[13] It is focused on interpreting legal texts in accordance with the hierarchy of norms and by distinguishing between the law as it is, *lege lata*, and the law as it ought to be, *lege ferenda*.[14] The hierarchy of norms differentiates sources with authority from non-relevant sources and includes law, case law, preparatory acts and legal doctrine in descending order.[15] The distinction of the law as it *is* and as it *ought* to be is a cornerstone for legal argumentation to certify the quality of the work. In other words, to be able to assess what is the objectively described content of the law and what is the subjectively influenced view of the writer in what ought to be the law.[16] This separation is not clear-cut since the interpretation of the *lege lata*, is conducted by a subject through studies of legal texts.[17] Both the authors of the texts and the subject performing the interpretation are influenced by values of the outside world and it is simplistic to claim that a purely objective content of the law, separated from subjective values, exists.[18] A

[11] Disputes involving a state can however contain certain features such as political consideration and the importance of public international law see Hobér 2013, p. 17, 33 ff.
[12]Born 2014, p. 168 f., Wallgren-Lindholm in Cordero-Moss 2013, pp. 61-81, Gaillard & Savage 1999, p. 32 f.
[13] It is not certain if there is one method or what the method even includes, see Sandgren 2005 p. 649 f., Svensson 2014, p. 212 f.
[14] Sandgren 2005, p. 651, Svensson 2014, p. 220 f., Jareborg 2004, p. 8.
[15] *Ibid.*
[16] See Peczenik & Schött 1993, p. 723 f., Svensson 2014, p. 214.
[17] *Ibid.*
[18] See Jareborg 2004, p. 7, Sussman 2014, Drahozal 2003, p. 32 f.

complete distinction of the description of the *lege lata* and *lege ferenda* is not possible and it seems more objective to acknowledge the subjective elements than to ignore them. Working against the fiction that the *lege lata* can be objectively extracted is hiding the subjective necessity imbedded in the process of interpretation.

1.4.2 Hierarchy of Norms Surrendered?

In ICA the hierarchy of norms can be said to be modified due to the importance given to sources flowing from private functions instead of solely public authorities.[19] The reason for the modification is the international element and significant independence from national laws and courts, which makes it necessary to adjust the view on sources of authority. Mandatory rules, guidance and convincing reasoning decisive in ICA is collected from international conventions and treaties, national laws, arbitral rules, procedural orders and agreements between the parties, arbitral awards, case law and scholarly writings.[20] When comparing case law to arbitral awards there is no appellant order for the latter and the tribunal is principally only accountable to the parties. Additionally awards are seldom published and thus hard to access, which makes the accessible material fragmentary and difficult to draw conclusions from.[21] Awards are because of these reasons generally stated to lack theoretical precedential value, but arbitrators nonetheless tend to value the reasoning in awards.[22] The main source available to research in ICA is however legal literature. The confidential nature still spills over affecting the content of the literature as well because a natural consequence of the confidentiality aspect is that only those taking part in arbitration proceedings will ultimately know what is really going on. The legal literature is therefore mainly the works of practitioners and not legal scholars.

It is possible to detect somewhat of a circular stream within ICA and its sources of law. The field is simply ruled by practice and notwithstanding the lack of binding precedents the reasoning of arbitrators are valued and often followed by arbitrators and the arbitration community. Furthermore, it is the same persons who are the authors of most literature. One could argue that ICA on the case-by-case level is formed by practitioners through

[19] See Strong 2009, p. 130.
[20] *Ibid*, p. 131.
[21] Drahozal 2003, p. 23 ff., Gaillard & Savage 1999, p. 187 f.
[22] See Strong 2009, p. 142 f.

awards, which are often followed by other arbitrators and later the same views are further established and shaped through the comments on the practice. These comments are then provided by those who created it in the first place. Although the confidential and practice oriented nature of ICA is an inherent consequence of its history and the confidentiality of the process the circular flow can seem controversial to an outsider. On top of the similarities to a closed society club, there is also a spin-off effect particularly present in ICA, but also in the dogmatic way of reasoning. If a view is expressed in an award, which theoretically lacks precedential value, commentators might nonetheless refer to this statement repeatedly and after a sufficient amount of references it becomes a "truth" or a given "fact" which becomes a part of the practice. At times it is necessary to be observant to this pattern and question the accuracy of such references.[23]

The hierarchy of norms will not be abandoned, but it is important to recognize that the main material will be provided through awards, when available, but mostly through legal literature. Due to the limited material and the circular element the awards and commentaries will be treated carefully in the forthcoming. There is always a risk of mistaking the extreme for a normality or vice versa, or as others have expressed it, a two-headed rhinoceros for a rabbit.[24] This risk cannot and should not be ignored, but still it shouldn't prevent from aspiring to examine and answer questions relating to arbitration practice. I will not draw any conclusion on an arbitration practice as such flowing from the reasoning in the awards due to the above, but also because of the even more case-by-case limitation and the incomplete reasoning often provided. Many commentaries on corruption in ICA are similar and it has been essential to limit the used literature to the pieces which contribute the most in reasons and reflections.

1.4.3 Finding the Lege Lata

Another challenge is to with any certainty establish the *lege lata* with the fragmentary material of ICA. The main reason is that awards are only rarely published. Furthermore, even though ICA is often referred to as an autonomous field of law it is also a cocktail of law containing ingredients from common law and civil law families.[25] Flourishing in the

[23] One example is references to ICC Case 1110 elaborated on below, where the commentators refer to Lagergren's condemnation of corruption repeatedly although Lagergren does not provide any sources of this fact himself.
[24] See Paulsson 1998, Drahozal 2003.
[25] Born 2014, p. 214 ff., Gaillard & Savage 1999, p. 44 f.

virtue of flexibility the stand taken on the balance of national and international interests becomes even more diverse in the interpretation by arbitrators and the awards in which these interpretations are articulated. Collectively these reasons result in a difficulty to with certainty establishing the *lege lata*. If it is difficult to conclude what something is it is also hard to allude on how it ought to be. Supposing that the *lege ferenda* perspective is based on and relates to the conclusions on the law as it is, this uncertainty will also naturally transfer to the conclusions on what the law ought to be.

If all the difficulties articulated above are taken into account, it is my hope that at least an objective *suspicion* on what constitutes the *lege lata* can be provided, still recognizing the inevitable element of subjectivity attached to the interpretation of awards and literature. The *lege ferenda* perspective hence has an outset of relating to something, even if only a suspicion.

1.5 Disposition

Part I of the essay (sections 2, 3 and 4) constitutes a background aiming at providing a context of the issue of corruption in ICA. Section 2 will briefly describe ICA and its common features, while section 3 will first provide facts on corruption before proceeding to a definition of corruption. Because of the different possible scenarios in which corruption occurs in connection to arbitration, these will be portrayed using examples from case law. In section 4 the challenges of corruption issues arising at different stages of the arbitration will be elaborated upon and the aim is to provide a brief, but comprehensive notion of the varying dilemmas. Section 3 and 4 thus answers the first research question of how corruption is defined and why it is relevant to ICA. It seems necessary to give room for a thorough background on this delicate matter before proceeding to the evidentiary aspects. Hopefully when arriving at Part II a solid foundation for the handling of evidence and the forthcoming discussion has been established.

Part II (sections 5 and 6) is the core of the thesis which in detail will present and elaborate on the evidentiary matters connected to ICA and corruption. In section 5 the necessity of laying out the applicable law to govern matters of evidence will be done, followed by a presentation of the concepts and the rules of evidence in ICA. This section addresses the second research question of which rules of evidence are applicable to ICA. Section 6 will

be the highpoint of this essay and unravel how arbitrators have applied rules of evidence to corruption cases and thus answer the third research question.

Finally Part III (section 7) will give an overview of the already answered initial research questions, but mainly discuss the overall question and aim of this thesis; how should arbitrators handle the rules of evidence when adjudicating corruption cases?

Part I

2. Key Features of ICA

Arbitration as a form of dispute resolution is probably as old as trade itself and in recent decades, alongside of globalization and increased trade and investments, the use and interest for it has increased dramatically.[26] It is a field of law which has emerged through practice by providing a flexible and effective alternative to litigation. The purpose behind providing a legal framework for the effective use of ICA is to stimulate the machinery of the world trade and in international disputes arbitration is the default form of dispute resolution.[27] For the novice arbitration might appear complicated, but to the contrary the aim is to offer a simple and flexible procedure. It is merely two parties agreeing by the virtue of freedom of contract to settle a dispute by appointing one or more arbitrators who are entitled to adjudicate the case and issue a final and binding award on the matter.[28]

International arbitration is characterized by an international or transnational element to the dispute manifested in the nationality or the will of the parties, the seat of the arbitration or the performance of the contractual obligations in a foreign country.[29] Procedural flexibility, cost-effectiveness, speed and finality, confidentiality and the expertise accessible by the party-appointed judges are the commonly expressed advantages of arbitration in general.[30] In international disputes further advantages are the possibility to choose a neutral seat of the arbitration, the applicable law and the widely accepted enforcement of awards internationally due to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[31]

Regardless of the aimed simplicity and flexibility of ICA it is also a complicated field of law due to the international element of the disputes. Various jurisdictions can obtain claims on the application of their national laws and thus multiple questions of applicable law arise. Since different laws can apply to different aspects of the dispute, such as the

[26] Born 2014, p. 24, 93 f.
[27] *Ibid*, p. 98, Redfern & Hunter 2009, p. 1.
[28] *Ibid.*
[29] UNCITRAL Model Law Art 1(3), Redfern & Hunter 2009, p. 8 f., Gaillard & Savage 1999, p. 51.
[30] Redfern & Hunter 2009, p. 32 ff., Born 2014, p. 72 ff.
[31] Redfern & Hunter 2009, p. 30, Born 2014, p. 73-93.

proceedings and the merits of the case, a complex web of rules from different jurisdictions, institutions and contracts can evolve.[32]

3. What is Corruption and why is it Relevant to ICA?

3.1 Defining Corruption – The Man

Corruption has been broadly defined as the "use of entrusted power for private gain".[33] In the 2014 Transparency International's Corruption Perceptions index 69% of the 175 countries included in the survey scored below 50 on the scale of 0-100, where 0 is highly corrupt and 100 is very clean. Somalia and North Korea are at the bottom of the list scoring 8 and Denmark is the cleanest country scoring 92.[34] Even though international initiatives have recognized the fight of corruption and set it on the map as a global issue there is still a long way to go. Especially in the developing world the costs of corruption are tremendous and some argue that corruption is the most important problem facing the world today.[35]

One of the fundamental expressions of corruption is the giving and receiving of bribes and corruption is often even used as a synonym for bribery.[36] In the scope of this essay corruption will be used in this narrower sense and as a synonym for giving and receiving bribes. The United Nations Convention against Corruption (UNCAC) defines giving bribes as:

> The promise, offering or giving, to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in

[32] Redfern & Hunter 2009, p. 2.
[33] Transparency International, http://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/.
[34] Transparency International's Corruption Perceptions Index published on the 3rd December 2014.
[35] Gallup International, 28 February 2014, World Bank Group President Kim, World Bank Press Release 19 December 2013.
[36] Sayed 2004, see introduction chapter.

order that the official act or refrain from acting in the exercise of his or her official duties.[37]

Receiving a bribe follows the same description except that it is a solicitation or acceptance of the above.[38] The UNCAC Convention as well as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) are aimed at criminalizing corrupt behaviour and securing enforcement of the efforts against such actions among their members.[39] Neither the OECD nor the UNCAC definition is informative on the scope of what actually constitutes a bribe from a legal point of view since it is up to the member states to regulate the details further. The different national views on the definition and scope of bribery is a challenge to international disputes since the accused bribery could be legal according to the *lex causae*, but illegal in the state where the actions were committed.[40]

The vague elements of the *crime* of bribery have been outlined above, but what does criminal law has to do with a commercial contract to be adjudicated by arbitrators? Criminal prosecution can be invoked in national courts and handle the criminal aspects of the bribery, but there are also civil effects of criminal acts which ensure the prevention and minimizing of the consequences of illicit actions. To not lend a helping hand to enforce contractual obligations and rights following from bribery, such contracts are considered null and void.[41] Courts and other judiciary institutions, such as arbitrators, confronted with a contract obtained or tainted by bribery are therefore to declare it null and void and refuse to enforce it.

[37] UNCAC Art 16.1.
[38] UNCAC Art 16.2.
[39] Sacerdoti in Karsten & Berkeley 2003, p. 50.
[40] See Sayed, 2004 p. 423 and Chapter 7, Hwang & Lim 2012, p. 4.
[41] See Council of Europe Civil Law Convention on Corruption Art 8, see also Sayed 2004, Chapter 8.

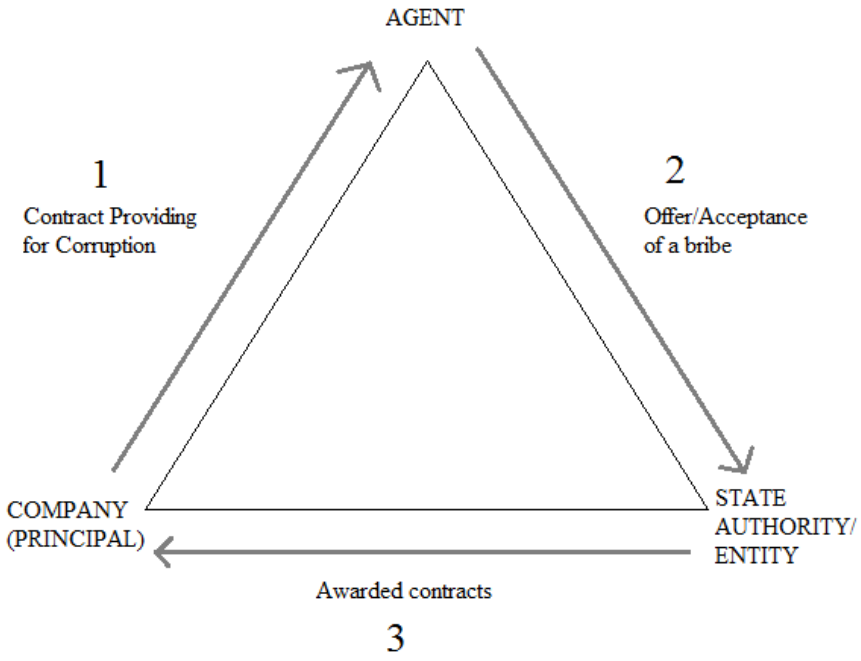
3.2 "Agency Agreements" – The Curtain

3.2.1 Introducing the Corruption Triangle

If the man is corruption one could say that the curtain he is usually hiding behind is an "agency agreement"[42] of some kind.[43] The common starting point is that a company wants to enter into a contractual relationship abroad, usually in a country not ranked particularly high in the Transparency International's Corruption Perceptions Index. A highly common feature is the involvement of an "agent" somewhere along the process of entering into the wanted contractual relationship. The agent can be legitimately hired to help the Company acquire the necessary permits or the like or, as is usually claimed later during the arbitration proceedings, to bribe state officials to help the company obtain contracts.[44] Although it is common to hire consultants and agents, these arrangements can be seen as a red flag. Some jurisdictions even prohibit the use of intermediaries in public procurement.[45] Corruption allegations enter into arbitration due to the fact that both the agency contract and the contract later awarded to the company will usually include an arbitration clause.[46] Corruption is a particularly wide spread problem in certain international business sectors such as public works and construction, arms and defence and oil and gas.[47]

The interactions are three separate, but at the same time related interactions between company, agent and state entity. These interactions can be illustrated by the triangle below.

[42] The terminology is not completely consistent but I will refer to "agency agreements" throughout the thesis. The citation marks is to note that the classification of the agreement is usually to hide the fact that the "agent" is hired, only or partly, to commit bribery as an intermediary.
[43] See Crivellaro in Karsten & Berkeley 2003, p. 109.
[44] Philip in Karsten & Berkeley 2003, p. 157.
[45] Scherrer 2002, p. 29 f., Rose 2014, p. 24 f.
[46] Crivellaro in Karsten & Berkeley 2003, p.112 f., Hwang & Lim 2012, p. 24 f.
[47] Pieth, Cremades & Cairns in Karsten & Berkeley 2003, p. 41, 70.



In the relation between the company as principal and the agent (1) a contract regulating or intending that the agent should commit bribery is a contract *providing* for corruption. The active actions of bribery relevant for the crime occurs through the actions between the agent and the state authority (2). The fruit of the agency agreement and the illicit actions is the contracts awarded to the company (3) in the relation between the company and the state entity and these contracts can be said to be *procured* by corruption. A potential dispute can concern either the agency agreement (1) or the awarded contracts (3). The interactions between the agent and the state entity (2) will not be subject to a dispute on its own, but will be a relevant theme of evidence to establish that a contract is procured by or providing for corruption. Below the situations which can cause the issue of corruption to enter into arbitration proceedings will be described.

3.2.2 A Dispute Concerning the Consultancy Agreement

The claimant (usually the agent) requests for arbitration claiming that the respondent (usually the company) has failed to pay the commission fee stipulated in the disputable agency contract.[48] The company then either refuses to pay due to i) the failure of the agent to provide agreed services or ii) because of corrupt actions conducted by the agent causing

[48] Crivellaro in Karsten & Berkeley 2003, p. 113.

the disputable contract to be null and void.[49] In the first situation the contract may well be hiding an intent of administering bribes, but the company might not prefer to admit this was a common intent of the parties and relies on a breach of contract instead. Still, the arbitrator might notice the "fishy" smell and the questions regarding his right and obligation to investigate *sua sponte* arise.[50] The famous Lagergren case was the first to set corruption on the map for arbitration and will provide an example of this situation;

> A British company (the respondent) entered into a commission agreement with an Argentinian businessman (the claimant and agent) to obtain public contracts concerning supplying of electrical equipment to a state-owned company in Argentina. The respondent refused to pay the commission fee and the claimant requested for arbitration. None of the parties alleged any corrupt behaviour from either side. However, the respondent claimed that the claimant had not provided any services for the obtaining of the contract finally rewarded, but solely for other contracts which had not been rewarded to the respondent.[51]

The situation portrayed above is perhaps more common when both parties aim at hiding the illicit acts. It is a complicated case since it is unlikely that evidence of corruption will be accessible without the involvement and allegation of one of the parties. This in turn actualize questions of the arbitrator's right and obligation to investigate on own initiative, but will in most cases not result in a positive finding of corruption. In the above mentioned case the parties unintentionally provided the arbitrator with a, for him, convincing case of proved bribery. Another situation is when one of the parties raise allegations of bribery;

> The claimant (the agent) assisted the respondent (the company) in being awarded contracts in several Middle Eastern countries. The respondent refused to pay the commission fees and claimed before the arbitral tribunal that the purpose of the contracts was to bribe state officials.[52]

The party alleging bribery will gain by escaping the performance of the contract if it is declared null and void by the arbitral tribunal. At the same time both parties have taken part in the illicit acts, but were one of them is now gaining from its own wrongdoing.[53] It has been recognized that this might not be a just solution in all cases however, it is the civil sanction of a contract providing for bribery. Those entering into such arrangements

[49] *Ibid.*
[50] Cremades & Cairns, Philip in Karsten & Berkeley 2003, p. 79, 147 ff.
[51] ICC Case No. 1110.
[52] ICC Case No. 6497.
[53] Raouf in Fernández-Ballesteros & Arias 2010, p. 14.

will have to deal with the consequences. It is possible to consider the involvement of the alleging party by adjusting the distributed costs of the arbitration.[54]

3.2.3 A Dispute Regarding the Contracts Awarded to the Company

A dispute can also arise as regards to the fruit of the bribing which is the contract awarded to the company.[55]

> The Claimants (Westinghouse and Burns & Roe) paid commission fees to a local agent, an associate of the former president, and was awarded contracts with the respondent (the National Power Co. of the Philippines). The Claimants requested arbitration and sought recovery of outstanding payments and the respondent refused to pay because of argued bribes paid by the Claimants through the agent.[56]

The alleging party in this situation had not taken part in any illicit acts. Some argue that the civil sanction of nullity should not necessarily taint such a contract, but that the innocent party should be able to maintain the contract if wanted.[57] According to some national public procurement laws it is either prohibited or severely restricted to use intermediaries when procuring with state-owned companies.[58] This is because of the possibly increased unforeseen costs of including a third party, but also because of the fact that such arrangements might conceal bribes.[59] In disputes regarding the awarded contract claims have also been raised that the contract is invalid because of a breach towards national public procurement laws.[60] This alternate road is tempting since it can constitute a short-cut avoiding the entire issue of corruption, requiring only proving the existence of an agency agreement and no acts of corruption.

[54] Scherrer 2002, p. 36.
[55] Crivellaro in Karsten & Berkeley 2003, p 113.
[56] ICC Case No. 6401.
[57] See Sayed 2004, p. 355 ff.
[58] See ICC Case No. 5622
[59] Scherrer 2002, p. 30 Sayed 2004, 29 ff.
[60] Sayed 2004, 29 ff., ICC Case No. 8113.

4. Challenges Facing the Arbitrators

4.1 Servants of the Parties or Guardians of International Ethics

The consequences of corruption has been outlined above, but it can be questioned if the arbitrators of international disputes are at all obligated to consider the global fight on corruption when adjudicating corruption cases. Corruption is contrary to international public policy and if the arbitrators fail to address allegations adequately the award's finality might be at risk.[61] ICA is a private form of dispute resolution where the arbitrator collects legitimacy and mandate to adjudicate a dispute from the parties' agreement.[62] As a consequence of increasing numbers of disputes settled through arbitration and the development of ICA as an autonomous field of law, the importance and authority of ICA is growing. The expectations on arbitrators are heightened the more influence ICA is given. At the same time ICA is situated in between globalization and increased trade on the one hand and increased penalization of business law on the other.[63] Due to the fact that ICA is the default form of dispute resolution in international affairs the civil consequences of illegal acts, such as corruption, will usually end up at the table of arbitrators.[64] The parties' interests are sacred and it could be argued that the arbitrators' mission is simply to enforce the contract as it is adjudicated.[65] However, as ICA's significance is growing and when arbitrators are the only ones adjudicating the matter, it is legitimate to anticipate the consideration of public interests and the need to maintain good ethical standards in international trade. The crucial question is if the arbitrators should play the part of the servant of the parties, guardians of international ethics or both.[66]

The fundamental importance of party autonomy should not be undermined, but at the same time ICA is not operating in a legal vacuum.[67] If the purpose of ICA is to provide an effective form of dispute resolution to further and enable international trade it seems

[61] Raouf in Fernández-Ballesteros & Arias 2010, p. 707 f., Briner in Karsten & Berkeley 2003, p. 157 f., see ICC Case No. 7047.
[62] Born 2014, p. 225, 229.
[63] Mourre 2006, p. 95 f., Sayed 2004, p. 2 ff.
[64] *Ibid*, p. 96 f.
[65] Born 2014, p. 2130, Mourre 2006, p. 97, Crivellaro in Karsten & Berkeley 2003, p 109.
[66] See Mourre 2006, p. 97 f, Cremades & Cairns in Karsten & Berkeley 2003, p. 85.
[67] Sayed 2004, p. 159 ff., Born 2014, p. 2154 f, 2163 f.

contradictory if the detrimental consequences of corruption are not effectively dealt with.[68] The internationally recognized fight against corruption and the following responsibility to actively participate in it binds states and its judicatory authorities, where arbitrators can be included. If arbitrators handle corruption cases in a manner which limits the opportunity to effective remedies against corruption, it could be argued that they fail to fulfil their international undertakings.[69] The most nuanced view is probably that both the parties' interests and the global fight against corruption must be recognized and the arbitrator's role is balancing the role as a private judge with the fact that awards rendered by arbitrators significantly affect the ethics in international trade. However, no certain conclusions can be drawn since it appears as arbitrators and commentators do agree on the distaste for and need for fighting corruption, but disagree on how it should be done.

The dilemma of the arbitrators' role is present throughout all stages of the arbitration proceedings where corruption allegations and suspicions are handled. If none of the parties claim illicit actions the arbitrator is confronted with the potential role as an investigator of the issue.[70] Another situation is when the parties have chosen a national law which tolerates a behaviour which is illegal at the seat of the arbitration or in the country where they were committed. The boundaries of the parties' choice of applicable law is then actualized.[71] When it comes to the rules of evidence the role of the arbitrator is relevant for deciding if these rules should be applied in a manner which considers the nature of corruption. Must the general standards on evidence be adjusted to the context of corruption or can the tribunal operate within the usual frame of ICA to issue an acceptable ruling? The overall answer is probably that they *should* consider the context of corruption, but breaking down *how* the consideration in fact should be demonstrated in the specific dealings with evidence is a complex issue.[72] It is impossible to answer the latter with any precision without relating to the procedural context in which the rules of evidence operate as well as their application to corruption cases. Hence, the issue will be revisited in connection to the specific rules of evidence.

[68] See *Ibid*, p. 98.
[69] Compare Raouf in Fernández-Ballesteros & Arias 2010, p. 2, Strong 2009, p. 131.
[70] ICC Case No. 1110, Sayed 2004, p. 62, Mourre 2006, p. 97 f., Hwang & Lim 2012, p. 14, 17, Born 2014, p. 1043.
[71] Sayed 2004, 167 ff.
[72] See Nappert 2013, p. 1, 5.

4.2 Preliminary issues

The first challenge is deciding whether or not the arbitrators are able to at all adjudicate the dispute in which the bribery accusations has been raised. Questions relating to jurisdiction and admissibility of claims should usually be dealt with in the initial stage of the arbitration to avoid unnecessary costs and time-spill, but also to limit the possibility for a party seeing the risk of losing to abuse jurisdictional objections.[73]

4.2.1 Arbitrability

Settlement through arbitration is only accessible for disputes deemed arbitrable and it is up to each national jurisdiction to decide the specific requirements. Areas of law inflicting the public interest, such as family law and criminal law, are usually exempted from the jurisdiction of arbitrators.[74] An allegation of bribery can actualize criminal prosecution which falls within the jurisdiction of national courts due to the public interest in criminal matters. At the same time contracts entered into as an outflow of such illegal behaviour will be subject to civil remedies. Because corruption is deeply immoral it can be questioned if such matters, regardless of its civil context, should be able to be settled through arbitration. The first known position taken on bribery in ICA stated that corruption was not arbitrable. The sole arbitrator Lagergren declined jurisdiction due to *non-arbitrability* and argued that parties to illicit contracts have forfeited their right to seek assistance from any part of the justice system, both national courts and arbitrators.[75] It was obvious, at least to the arbitrator, by evidence provided by the parties that the purpose of the contract was to bribe Argentinian state officials. The overall trend within ICA has gone towards accepting more issues as arbitrable and the view taken by Lagergren is now outdated. Today arbitrators generally see these matters as arbitrable and accept jurisdiction.[76]

Another argument for declining jurisdiction on this ground is to argue that public procurement related matters are non-arbitrable because of the public interest in such engagements. This only applies in a dispute where there is a connection to a public

[73] Redfern & Hunter 2009, p. 354.
[74] *Ibid*, p. 123 ff.
[75] ICC Case No. 1110.
[76] See Hwang & Lim 2012, p. 63.

procurement, but cannot apply in a dispute including the procuring state itself since the state decides which disputes are arbitrable.[77]

4.2.2 Invalidity of the Arbitration Agreement

Since the civil consequence of a main contract tainted by bribery is nullity another issue at the preliminary stage is whether the nullity will also impose on the agreement to arbitrate. Firstly, the nullity of the main contract is dependent on a positive finding of corruption which in turn requires convincing proof thereof. It is highly unlikely that the tribunal is presented with such evidence at an initial stage. Secondly, even when such proof exists the principle of separability will usually inhibit the nullity of the main contract to transfer to the arbitration agreement.[78] Separability of the contracts is however, not an absolute obstacle for invalidity of the arbitration agreement.[79]

The principle is founded on the notion that even if the main contract is not binding, due to whatever reason of termination, invalidity or other, the arbitration agreement should be regarded as a separate agreement.[80] The question is if the principle of separability survives even when the main contract is tainted by corruption. Indeed the reason for the separability is to enable arbitration even when the underlying contract is invalid, but it can be argued that there can be situations where the invalidity taints the arbitration agreement. A door has been left open for the possibility to break the separability in cases of gross violation of public policy. The example of drug-trafficking has been suggested but corruption has not deemed to fall into that category of violations.[81] Later case law has confirmed that the principle of separability prevails the finding of corruption within the main contract and the grounds for invalidity must be connected specifically to the arbitration agreement for it to be deemed invalid.[82]

Declining jurisdiction might at first seem highly condemning towards corruption, which was surely the intent of Lagergren, but looking at the consequences of accepting

[77] Sayed 2004, p. 29 f.
[78] Redfern & Hunter 2009, p. 117 ff.,
[79] *Ibid*, p. 119, Sayed 2004, p. 46 f.
[80] Redfern & Hunter 2009, p. 117, UNCITRAL Model Law Art 16(1), Sayed 2004, p. 44.
[81] See Westacre Investment Inc v. Jugoimport-SPDR Holding Co. Ltd and others, 1998 2 Lloyd's Reports 135.
[82] Fiona Trust & Holding Corporation and Others v. Privalov and Others 2007, EWCA Civ 20, Sayed 2004, p. 50 f.

jurisdiction another view evolves. Because if he had accepted jurisdiction and tried the merits of the case his conclusion that the contract aimed at bribery would have resulted in declaring the contract null and void. Is this so bad? Furthermore, most cases do not contain such prima facie evidence or even any convincing evidence establishing corruption and thus declining jurisdiction before assessing the merits of the case is not an appropriate alternative.[83] The approach taken within the arbitration community seems to be to accept jurisdiction and in cases where corruption can be proved the contract will usually be declared null and void on the merits.[84]

4.3 Ruling on the Merits of the Case

Clearly, the real confrontation with the face of corruption begins when the arbitrators are to establish the facts of the case. It lies within the nature of a bribe, as an illegal act, not to be thoroughly documented and for that reason not leaving much traces. Accordingly the available evidence, if any, is usually indirect evidence.[85] The uncertainty of the evidence leaves little room for deciding any part of the case on documents or preliminary hearings and the arbitrators must proceed to trying the merits of the case.[86] Because of the difficulty in proving corruption the rules of evidence and the arbitrator's assessment of the evidence will with few exceptions be completely decisive for the outcome of the dispute.

Due to the hidden nature of corruption proving it can be time-consuming and costly for the alleging party and some parties might for these reasons refrain from sufficient investigations. At the same time it appears that the lack of evidence in some cases could be a consequence of an attempt at tainting the arbitration proceedings.[87] The conclusion is that the evidence presented before the tribunal will often be fragmentary and on top of this the tribunal cannot compel the parties to produce evidence.[88] To tackle these difficulties the arbitrators will take recourse to the rules of evidence and as their procedural flexibility is extensive there is room for different solutions to the challenges

[83] Crivellaro 2014, p. 256.
[84] Redfern & Hunter 2009, p. 133, See ICC Cases No. 4145, 8891.
[85] Crivellaro 2014, p. 256.
[86] *Ibid*, see Redfern & Hunter 2009, p. 413.
[87] Rose 2014, p. 184.
[88] See Born 2014, p. 2315 f.

of corruption.[89] The arbitrators could acknowledge the difficulty for the accusing party in complying with the burden of proof and perhaps the standard of proof required should be lowered. Another option is to recognize the alleging party's struggle by drawing adverse inferences and let circumstantial and indirect proof altogether be given a greater weight of evidence. On the contrary, one could argue that the allegations put forward are serious since they deal with criminal activity and therefore the standard of proof should be raised.[90]

Recognizing the poorly accessible evidence and the international condemnation of corruption one could assume that the view taken on the application of the rules of evidence would take this into account. Arbitrators do seem to emphasize the distaste for corruption and the need to not let arbitration be a safe resort for it.[91] The difficulty in accessible proof is also recognized.[92] However, when it comes to the application of the rules of evidence the views diverge sufficiently. Arbitral awards show that arbitrators do not share a common standpoint on how to handle the rules of evidence and the accompanying challenges.[93] The technical rules of evidence, as the burden and standard of proof, are treated differently as well as the significance of indirect proof. Within the arbitration community at large the opinions of commentators is as shattered as those articulated in awards.[94] The disunion is apparent in conceptual questions of evidence as well as the overall approach to corruption and the role and responsibility of arbitrators in the fight against it. Unless the handling of evidence is made carefully and with consideration to the specific nature of corruption, there is a risk that arbitral tribunals take part and contribute to the global plague of corruption by enforcing illegal contracts.

4.4 Final Stages

Although allegations of corruption are frequently made the awards will most likely conclude that no such actions have been proved and the contract will be enforced. In the aftermath eventual challenges to the award or its recognition and enforcement can be made. The losing party will most likely use all available measures to escape the award or

[89] Rose 2014, p. 184
[90] ICC Case No. 5622.
[91] Himpurna Case.
[92] Rose 2014, p. 183.
[93] Compare for example ICC Cases No. 5622, 6401, 6497, 8891.
[94] See among others Mills 2006, Crivellaro 2014, Menaker & Greenwald 2014, Rose 2014.

its enforcement and in connection to awards dealing with corruption there are many alternatives to choose from.[95]

The two procedures of setting aside and refusing recognition or enforcement are separate and fills different functions, where the setting aside of an award in whole or in part goes to the core of curing the cause and where refusing recognition and enforcement rather treats the symptoms.[96] In corruption cases where no corruption is found the losing party can seek to set aside or annul the award because it is contrary to public policy.[97] Contracts tainted by corruption is contrary to national as well as international public policy.[98] Another option is to claim that the tribunal lack jurisdiction and that the arbitration agreement is invalid or that the issue is non-arbitrable.[99] Nonetheless, national courts are not likely to find enough proof of corruption regardless of the reason for their involvement when the tribunal failed to do so. Hence, all potential grounds for setting aside and refusing enforcement and recognition supposing a positive finding of corruption is still, due to the very nature of corruption, hard to succeed with.

[95] Redfern & Hunter 2009, p. 623.
[96] *Ibid,* p. 626 f.
[97] See Redfern & Hunter 2009 p. 614 f., 656, see Westacre v. Jugoimport.
[98] Raouf in Fernández-Ballesteros & Arias 2010, p. 708 f.
[99] See Redfern & Hunter 2009, p. 596, 599, 655.

Part II

5. Evidence in ICA

5.1 Introduction

The outcome of most disputes settled through arbitration is decided by the evidence of the case.[100] The purpose of evidence is to establish the facts which the parties rely on and the methodology used by arbitrators to succeed with this task is to apply different rules or concepts of evidence. Such rules include the burden and standard of proof, admissibility of evidence and the production of documents. These rules together form a coherent system aimed at fulfilling the purpose of enabling the arbitrators to establish the facts of the case.[101] Even though this is the overall aim of evidence it is not equal to by absolute measures seeking the truth. It is always a compromise between truth seeking on the one hand, and efficiency of the process on the other, where the rules of evidence reflect this balance.[102]

In ICA the rules of evidence is probably the issue where the legal traditions of common and civil law diverge the most. However, even within these traditions there are many dissimilarities and the division of common and civil law is therefore not clear-cut.[103] Nonetheless the most obvious differences belong to the procedure, such as the possibilities of production of documents, admissibility of evidence and the distribution of engagement in the evidence taking by the judge and the parties.[104] Since one isolated rule reflects other positions taken on other rules, both traditions could be said to balance the same interests of truth and efficiency, but in various ways. In international disputes often including parties, counsels and arbitrators from different jurisdictions a relevant question is which rules of evidence to apply bearing the separate traditions in mind. For decades there has been a debate on where arbitration collects is legitimacy and what relation it has to national laws and the seat of the arbitration. It is argued that ICA has evolved separately from these national laws as well as the seat and has now become an autonomous field of

[100] Redfern & Hunter 2009, p. 384, Lew et al 2003, p. 553.
[101] Waincymer 2012, p. 746.
[102] *Ibid*, p. 743 f.
[103] *Ibid*, p. 745, Redfern et al, 1994, p. 340, Redfern & Hunter 2009, p. 385.
[104] Waincymer 2012, p. 745 f, Redfern & Hunter 2009, p. 386.

law.[105] Applying this view on the issue of evidence suggests that neither civil nor common law understandings should be entirely decisive. Instead one could look for the rules of evidence as it has evolved in international practice and according to ICA. Indeed the international element permeates the conception and expectations of all involved in the dispute. Nonetheless, without entering into details of this autonomous trend one cannot escape from the fact that the methodology of establishing the facts and the theoretical views on these matters has its roots in both civil and common law.[106]

5.2 Applicable Law - Belonging to the Procedure or the Substance?

An important question for deciding the applicable law, and thus the relevant rules of evidence, is to know whether to characterize matters relating to evidence as either belonging to the procedure or the substance of the case. There is no clear classification of evidentiary matters because they can include elements of either procedure or substance or alternatively be a mix of the two.[107] Hence, it might be necessary to separate the various rules of evidence to search for the ultimate answer.[108] To in detail classify this area of law is not essential for addressing the research questions posed and therefore only a brief outline of the applicable law will be done.

Within the arbitration community it is apparent that different opinions on the characterisation of evidence exists.[109] It has been suggested that the burden and standard of proof belongs to the merits of the case governed by *lex causae* because of the decisive impact on the existence of a claim.[110] Others argue that it belongs to the law governing the procedure. An alternative is to separate each rule and characterize it independently, but this could result in losing the coherency and the function of rules in its interplay with other rules.[111] Perhaps the most satisfying solution is to accept the mixed nature of the issue and regard it as such, considering both the *lex arbitri* and the *lex causae* if necessary and depending on the case before the tribunal.[112] The characterization can affect the

[105] See Born 2014, p. 214 ff.
[106] Kazazi 1996, p. 54.
[107] See Born 2014, p. 2315.
[108] Waincymer 2012, p. 748.
[109] Reiner in Redfern et al 1994, p. 330, Born 2014, p. 2315, Albanesi & Jolivet 2013, p. 31.
[110] Reiner in Redfern et al 1994, p. 322, 328.
[111] Waincymer 2012, p. 748 f.
[112] Reiner in Redfern et al 1994, p. 322, 328, 334, Born 2014, p. 2315.

possibility to challenge the award due to the fact that challenging the award on the merits is highly restricted while procedural standards are more available.[113]

In this context the subject of interest is however, which rules of evidence to apply in ICA and although the answer can depend on the specific laws or rules of laws applied, the following sections will elaborate on these rules. It will be clear from the following that the view on some rules of evidence are surprisingly similar while others diverge. Regardless, on an overall level the same rules of evidence are applied to ICA, but their application can be dependent on the applicable law of the case.[114]

5.3 The Arbitrator's Rights and Duties

Before elaborating on the specific details of the rules of evidence the arbitrator's rights and duties as regards to the assessment of evidentiary matters will be described. First, it is obvious that arbitrators both by logic and by various rules have mandate to assess the evidence of the case.[115] The handling of evidence is also a mission taken seriously by arbitrators due to its decisive role.[116] The fact that arbitrators have a right to assess the evidence is something else than the question of *how* this assessment should be carried out. The UNCITRAL Rules stipulate that;

> The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.[117]

The ICC Rules provide that;

> The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.[118]

It is important to acknowledge that matters relating to evidence fall within the scope of party autonomy and parties are entitled to agree on evidence standards. It is not common that parties in fact agree on such directives and therefore the arbitrator's discretion consists.[119] Most arbitration acts and rules do not provide any detailed rules on the

[113] Reiner in Redfern et al, 1994, p. 330.
[114] Pietrowski 2006, p. 373.
[115] Born 2014, p. 2306 f., Reiner in Redfern et al 1994, p. 336, Kazazi 1996, p. 165.
[116] Redfern & Hunter 2009, p. 385.
[117] UNCITRAL Rules Art 27(4).
[118] ICC Rules Art 25.1.
[119] UNCITRAL Model Law Art 19, Reiner in Redfern et al 1994, p. 334, Born 2012, p. 179.

arbitrators' assessment of evidence and as a consequence it is usually expressed that this discretion is vast.[120] The flexibility of procedure is a common feature of ICA and it is not surprising that the treatment of evidence follows the same pattern.[121] The flexibility contributes to different interpretations of the concepts and rules of evidence, as will be clear when going into the details below.[122] Arbitrators will usually not conduct any strict application of specific rules of evidence according to neither national nor international law. However, arbitrators are entitled to do so if they consider it appropriate.[123] Indirectly the discretionary power is nonetheless limited by the ultimate scrutiny of national courts providing opportunities to set aside and annul awards.[124]

The arbitrators must operate within the frame of the mandate given to them by the parties. Thus arbitrators must follow the parties' agreement, if any, on matters of evidence. Oversteps on mandate could be argued in corruption cases where arbitrators independently investigate the facts of the case. No absolute conclusions can be made, but it seems to fall within the scope of the mandate to solve the dispute and the finality of the award to on own initiative investigate such matters.[125] It has also been considered necessary to secure fundamental principles of due process in arbitration and this restriction on the arbitrators applies throughout every aspect of the procedure, including the assessment of evidence.[126] A failure to respect due process when assessing evidence can result in the setting aside or annulment of an issued award.[127] The tribunal should be careful not to intervene where unneeded and make sure not to support one party in succeeding with proving corruption since this would be contrary to treating the parties equally.[128] In addition to due process essential public policies, national and international, should be considered and an award in contradiction to such values can be set aside or refused recognition or enforcement.[129] The arbitrator's role in the fact finding depends on the specific case and the arbitrator's legal background, but regardless arbitrators should when possible communicate matters of evidence with the parties to avoid surprising

[120] *Ibid*, p. 174, Lew et al 2003, p. 557.
[121] Redfern in Redfern et al 1994, p. 320, Lew et al 2003, p. 357.
[122] See Kazazi 1996, p. 367 f.
[123] Born 2012, p. 174.
[124] Reiner in Redfern et al 1994, p. 328, Lew et al 2003, p. 557 f.
[125] See Born 2014, p. 1043 f.
[126] Redfern & Hunter 2009, p. 335.
[127] See *Ibid*, p. 600, p. 643.
[128] See *Ibid*, p. 317, Rosell & Prager 1999, p. 347.
[129] Raouf in Fernández-Ballesteros & Arias 2010, p. 708 f.

them.[130] A proactive arbitrator for example requesting for evidence by the parties will create more possibilities for drawing inferences than if he remains passive.[131]

Summarily the arbitrators are entitled to assess evidence in a flexible manner as long as respect is paid to the above mentioned considerations. The general rights and restrictions on the discretion of arbitrators have been laid out and now it is reasonable to proceed to the material rules of evidence applied in ICA.

5.4 The Burden of Proof

It is the arbitrator's duty to establish the facts of the case by assessing the evidence, but it is the duty of the parties to *convince* the arbitrator of which facts are established. This is done by presenting evidence supporting the facts of the case.[132] In some cases the existence of facts is still uncertain after the presentation of evidence. Because of impartiality reasons the arbitrators should only interfere carefully during the proceedings and cannot take a stand to favour one party until the end and at issuing an award.[133] Nonetheless the tribunal has been entrusted with the mission of solving the case despite insecurities in the evidence and cannot dispose of the case because of this reason. The burden of proof provides a solution to the issue of ambiguous evidence and offers the arbitrator an opportunity to solve the case without ultimately seeking the truth.[134]

There is no doubt that there is a burden of proof, but the question is rather who should carry it.[135] The burden of proof can be described as a risk allocation, where one party bears the risk of a certain fact not being proved.[136] Logically such a rule is only needed when there is uncertainty after all evidence has been presented in the case. [137] Practically the burden of proof is an important factor at an earlier stage since the parties can foresee who bears the risk and thus that party is motivated to bring forward accessible evidence.[138] Reasonably such a risk is best placed on the party relying on the fact to support its claim. This is the very essence of the internationally accepted principle of *actori incumbit*

[130] Reymond in Redfern et al 1994, p. 324.
[131] Waincymer 2012, p. 775.
[132] Kazazi 1996, p. 29.
[133] *Ibid*, p. 28 f.
[134] *Ibid*, p. 27 f.
[135] *Ibid*, p. 53.
[136] Waincymer 2012, p. 761, Kazazi 1996, p. 29.
[137] Hanotiau in Redfern et al 1994, p. 342.
[138] Kazazi 1996, p. 28 f.

probatio, dating back to Roman law and which has affected both civil law and common law perceptions.[139] Most arbitration rules and national arbitration acts does not regulate the burden of proof, with the exception of the UNCITRAL Rules.[140] The principle is widely recognized and some claim that it forms a part of a universal principle of law.[141] The burden of proof is to be separated from, however connected to, the standard of proof. The latter decides the degree of evidence needed to establish a fact and fulfil the burden of proof.[142]

Referring back to the discussion on differences between common and civil law, the burden of proof initially demonstrates a rule which is expressed the same regardless of tradition. The concept of the burden of proof nonetheless diverge sufficiently. The common law tradition has two concepts where the first is the *legal burden* of proof, converging with civil law and the above description also applicable in ICA. The second concept is the *evidential burden* referring to the claimant's obligation to produce enough evidence to at all establish a case in the first place.[143] This is a consequence of the jury system in common law countries and is not applicable in ICA, instead it is only the legal notion and thus the civil law understanding of the burden of proof which applies.[144]

Among commentators in ICA it has been argued both that the burden of proof can shift to the defending party and that the burden is absolute and can never shift.[145] It is not possible to definitely determine whether the conflicting views are simply a result of confusion in terminology or if it relates to basic perceptions of the concept. As the ability of the burden to shift is a proposed alternative when dealing with corruption it however, seems inevitable to at least try to bring some clarity into this matter. The idea of shifting comes from the fact that if the claiming party supports a fact with enough evidence the opposing party has an opportunity to counter and if convincing evidence is presented the claiming party will need to provide more evidence to satisfy the standard of proof.[146] Above the function of the burden of proof has been said to be a risk allocation and this

[139] Waincymer 2012, p. 762, Kazazi 1996, p. 54 f.
[140] See UNCITRAL Rules Art 24.
[141] Redfern & Reiner in Redfern et al 1994, p. 320, 332, Sayed 2004, p. 92.
[142] Kazazi 1996, p. 376 f.
[143] *Ibid*, p. 31.
[144] *Ibid*, p. 32.
[145] Compare Mills 2006, p. 9 and Menaker & Greenwald 2014, p. 2 ff.
[146] Waincymer 2012, p. 761 f.

means that if the existence of a certain fact remains uncertain the party with the burden of proof will lose.

The rule understood in this way does not state that one of the parties *must present* the evidence, but simply that if a party claims a fact which is not proved the claim supported by the fact will fall.[147] Certainly the most common situation is that the party claiming something will also present the evidence supporting the facts however, if the evidence or parts thereof is in the hands of the other party the tribunal can order production of documents.[148] In that case the ordered party will have the obligation of presenting the evidence, but if the party does not he will not lose the case if the fact remains uncertain. However, if the tribunal draw adverse inferences of the behaviour so that the degree of evidence in support of the fact is satisfied he will lose. Still, this is because the fact is not uncertain anymore and it can be argued that the use of the burden of proof was actually not necessary to solve the case. The example including production of documents is merely to illustrate that the burden of proof does not always coincide with the burden to present evidence. [149]

An enlightening section generally guiding on the distinction between the burden and standard of proof is provided in the Rompetrol case.

> "…the burden of proof defines which party has to prove what, in order for its case to prevail; the standard of proof defines how much evidence is needed to establish either an individual issue or the party's case as a whole. As soon as the distinction is stated in that way, it becomes evident that the burden of proof is absolute, whereas the standard of proof is relative. By this the Tribunal means (again, in simple terms) that if, according to basic principle, it is for the one party, or for the other, to establish a particular factual assertion, that will remain the position throughout the forensic process, starting from when the assertion is first put forward and all the way through to the end."[150]

[147] See Kazazi 1996, p. 367 f.
[148] Born 2014, p. 2320 ff.
[149] See Hanotiau in Redfern et al 1994, p. 348.
[150] Rompetrol N.V v. Romania, ICSID Case No. ARB/06/3, this is an investment treaty arbitration but still it can provide guidance on the general understanding of the concepts.

It seems reasonable that the burden to establish the facts one relies on to support the case does not shift to the other party only because enough proof is presented. Nonetheless, if the opposing party does not want to lose the case he must counter the evidence. This does not mean that the burden has shifted, but simply that the *balance* of evidence is in favour of the claiming party at that time. This situation is sometimes referred to as the concept of *onus of proof* meaning that the party in risk of losing due to the current imbalance and uncertainty must put forward more proof not to lose.[151] The *onus of proof* naturally shifts along with the balance of the case as it is affected by the presented evidence and has been described as;

> "The respondent does not in that sense bear any 'burden of proof' of its own, but if it fails where necessary to throw sufficient doubt on the claimant's factual premises, it runs the risk in turn of losing the arbitration…"[152]

These matters might seem theoretical in nature, but even so it is important for the forthcoming discussion on corruption how these concepts are identified and treated. If it is argued that the burden of proof, according to the view of equalling risk allocation, should shift to the defendant this is something completely different from shifting the *onus of proof*. The observations done above will be highly relevant to section 6.1 where the reasoning of tribunals will be elaborated upon.

5.5 The Standard of Proof

The standard of proof is not uniformly defined within ICA, but it refers to the degree of evidence needed to establish a fact of the case and to fulfil the burden of proof.[153] There is no guidance to seek from international conventions on arbitration, national arbitration laws or arbitration rules when looking for the applicable standard. According to legal doctrine the general standard of proof in ICA is somewhere close to the common law standard "balance of probabilities" or "preponderance of evidence".[154] The meaning of the standard is that the existence of a proposition is more likely than not.[155] In the civil

[151] Waincymer 2012, p. 772.
[152] Rompetrol N.V v. Romania, ICSID Case No. ARB/06/3.
[153] Kazazi 1996, p. 323 f.
[154] See Pietrowski 2006, p. 379, Redfern & Hunter 2009, p. 388, Born 2014, p. 2313.
[155] Waincymer 2012, p. 765.

law tradition the general standard of proof is expressed more subjectively as the "inner conviction" of the judge, but this inner conviction must form its basis in the weighing of the evidence before the judge and thus the preponderance of evidence.[156] On the opposite the balance of probabilities operated by the common law judge also inhabits a subjective element where the judge has to decide when there is an overweight.[157] It is hard to escape the fact that the weighing of evidence contains objective and subjective elements.[158] Consequently the practical differences outflowing from the common and civil law are not as striking as expected.

Although the general standard of proof is balance of probabilities the standard can vary depending on the case and the applicable law. The arbitrators have procedural freedom to apply the standard of proof deemed appropriate. Notwithstanding where the standard is set it is crucial that the tribunal communicate this with the parties during the proceedings to avoid surprises. Such precautionary actions will also further the end of issuing a final award, not in the risk of being challenged or annulled because of the failure to respect due process.[159]

5.6 Forms of Proof and its Admissibility

There is a division of direct and indirect evidence in ICA and depending on which category an evidence belongs to it will affect its evidentiary weight at the evaluation stage.[160] Direct, or primary evidence, for proving the existence of a fact is documents or witness testimonies in themselves establishing the fact. An example could be that a disputed fact is whether parties agreed on a certain quality relating to a contract concerning the sale of goods. A direct evidence would be the written contract itself specifically stating the quality and if it is an oral agreement, it would be a witness who was a part of the negotiations and entering into the contract. Indirect, secondary or circumstantial proof is on the other hand evidence which is not necessarily as strongly linked to the existence of a fact. Returning to the previous example, assuming that there is a written contract, a witness describing the agreed quality stated in the written contract

[156] Reiner in Redfern et al 1994, p. 334, Kazazi 1996, p. 324.
[157] Waincymer 2012, p. 766.
[158] See Kazazi 1996, p. 325.
[159] See Waincymer 2012, p. 761.
[160] See Pietrowski 2006, p. 380.

is an indirect evidence thereof.[161] In this case the contract itself is the manifestation of the agreed terms and the witness is a second hand source of the same information. The best accessible evidence should be presented as it will be given more weight in accordance with the best-evidence rule.[162]

Within the common law jurisdictions it has been deemed necessary to regulate the admissibility of mainly indirect evidence due to the involvement of a non-judicial jury.[163] The civil law approach is to allow most evidence but regard the "quality" of the evidence at the evaluation stage instead.[164] In ICA the view on evidence, unless there is an agreement entered into on the matter, will to some extent depend on the arbitrators' legal background. Experienced arbitrators are however, in general reluctant to limiting the possibility to establish the facts of a case by technical rules even if it lies within their discretionary power.[165] Generally the conclusion is that all evidence is admissible.[166]

5.7 Production of Evidence

Parties shall produce the documents on which they rely upon to support their claims or defence.[167] Historical or other obvious facts does not need to be proved.[168] Connecting the production of evidence to the burden of proof it seems natural that not only shall a party *prove*[169] the facts relied upon to support its claims, but also *produce* the necessary evidence. Even though the burden remains on the claiming party, the obligation to produce evidence in the form of documents is subject to exceptions and it is possible for the party to request the opposing party to produce documents.[170] The purpose of this option is to provide the best possible circumstances for establishing the facts of the case.

The differences between common and civil law is considerable on the possibility to oblige the other party to produce documents, because it relates to the positions taken on the role

[161] *Ibid.*
[162] Redfern & Hunter 2009, p. 389.
[163] Waincymer 2012, p. 792.
[164] See Pietrowski 2006, p. 380, ICC Case No. 6497.
[165] Redfern & Hunter 2009, p. 386 f.
[166] Scherrer 2002, p. 31.
[167] UNCITRAL-rules Art 18(2), Redfern & Hunter 2009, p. 391.
[168] Pietrowski 2006, p. 385.
[169] Not in the context of physically doing so, but being obligated to persuade the tribunal of the existence of a fact.
[170] Redfern & Hunter 2009, p. 319, 390 ff.

of the arbitrator and the admissibility of proof.[171] Adjustment to the environment of ICA has therefore been necessary and it seems as neither the procedural code of *lex arbitri* nor *lex causae* applies unless the parties have agreed so.[172] Questions relating to the production of documents thus falls within the discretionary powers of the arbitrators, but due to the varying traditions a common standpoint has been taken through the widely accepted International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules on Evidence).[173]

After a party has produced available evidence in its possession the party can request the arbitrators to obligate the opposing party to produce documents. The arbitral tribunal can order the requested production if the documents are not in the hands of the requestor, identifiable and relevant to the case.[174] Nonetheless, the arbitral tribunal cannot enforce the order unless assisted by national courts. Such assistance can often be time-consuming and ineffective unless the requested documents are decisive for the case.[175] The requested party may also object to the issued order to produce documents. If the request fulfils the requirements and the requested party does not provide a reasonable explanation for not producing the documents adverse inferences can be drawn by the behaviour.[176]

5.8 Evaluation of Evidence

5.8.1 The Weight of Evidence

When all evidence of the case has been presented it is up to the arbitrators to finally decide which facts have been established. The weight of each evidence must be decided and compared to the applicable standard of proof. Generally indirect proof will have less evidentiary weight than direct, as mentioned above. Evaluating proof is no scientific or statistical operation, but appreciating the likelihood of the evidence providing for a certain fact. It is obvious that this operation is under influence of subjectivity.[177] Not only is it likely that two arbitrators assume different weight to the identical evidence in the same

[171] *Ibid*, p. 385, Born 2014, p. 2344 f.
[172] Redfern & Hunter 2009, p. 392.
[173] *Ibid*, p. 393, Waincymer 2012, p. 756.
[174] IBA Rules on Evidence, Art 3, Born 2014, p. 2361 ff.
[175] Redfern & Hunter 2009, p. 319, 325.
[176] *Ibid*, p. 399, IBA-rules Art 9.5.
[177] See Kazazi 1996, p. 325.

case, but also that the standard of proof is interpreted differently.[178] The view on what constitutes the requirement of balance of probabilities might not converge to the view of another.[179] It is important to bear this in mind and be aware of the inability to properly understand what is going on in the head of an arbitrator. Still, this is an inherent human factor necessary for doing a case-by-case assessment.[180] Arbitral awards should generally be reasoned unless the parties have agreed otherwise, but there are no requirements on the quality of the reasons. The arbitrators do not have to list the evidence presented or describe how the assessment of each evidence has been made.[181] Even though rules of evidence are decisive arbitrators normally do not address these issues satisfactorily in awards, perhaps due to the subjective element.[182]

5.8.2 Inferences

Arbitrators use inferences to create efficiency in the process and it could be assimilated to a helping tool establishing a case on uncertain evidence. It is nonetheless only an outflow of the arbitrator's right to assess the presented evidence, or the absence thereof, and its weight. A positive inference is not very problematic since it is a conclusion in a positive direction where a fact is connected, although not very strongly, to another fact. An adverse inference on the other hand is an assessment of the fact that for example, a withheld document is not presented and that the reason is that it is unfavourable for the party who has it in its possession.[183]

The tribunal may also draw an adverse inference of the fact that there is available direct evidence not presented in the case.[184] Allegations not supported by any attempt at providing evidence might also result in inferences of the behaviour as a possible tactic for winning time or spreading doubts as to the credibility of the opposing party.[185] Indirect proof put together can provide a prospect of establishing the existence of a fact meeting the standard of proof.[186] It is crucial that adverse inferences relating to a party's

[178] Reiner in Redfern et al, 1994, p. 340.
[179] Waincymer 2012, p. 766 f.
[180] See Kazazi 1996, p. 377, Drahozal 2003, p. 32, Sussman 2014.
[181] Born 2014, p. 3039 ff.
[182] Kazazi 1996, p. 325.
[183] Waincymer 2012, p. 774.
[184] Pietrowski 2006, p. 383.
[185] Kröll et al 2011, p. 502 f.
[186] ICC Case No. 4145.

behaviour is treated carefully not to risk inflicting due process.[187] An inference or presumption, positive or negative, can of course be out ruled by other presented evidence.[188] It is hard to grasp the true concept of inferences, but perhaps indirect evidence could be seen as simply a form of evidence, not so strongly related to a fact, and the inference is the conclusion the arbitrators is drawing on this connection.

Allowing circumstantial evidence and inferences thereof is sometimes said to constitute a lowering of the standard of proof. This is not correct because the standard of proof and allowing circumstantial evidence to be decisive are two separate issues. The standard of proof could be met by either indirect or direct evidence, but to meet the standard with only indirect proof will usually require more separate indirect proof pointing in the same direction.[189]

6. Application of Evidentiary Rules in Corruption Cases

It is now time to merger the explained cases of corruption with the rules of evidence elaborated on in section 5 and see which paths arbitrators have chosen to go down. Remember that above a separation was made between a contract providing for and a contract procured by corruption. This distinction will be valuable as we proceed to handling the evidence since the cases can actualize different solutions.

6.1 Shifting the Burden of Proof?

6.1.1 In Favour of Shifting

One suggested way of overcoming the difficulties of proving corruption is to shift the burden of proof to the defendant of such allegations. ICC Case No. 6497 concerned a contract alleged of *providing* for corruption. The defendant refused to pay the consultancy fees and claimed that the purpose of the consultancy agreements was to bribe state officials. First the tribunal concluded that it is the party alleging bribery who has the

[187] See Pietrowski 2006, p. 384, Reiner in Redfern et al 1994, p. 337.
[188] Waincymer 2012, p. 773 Pietrowski 2006, p. 384.
[189] Menaker & Greenwald 2014, p. 11, see ICC Case No. 13515.

burden of proof and in case the evidence presented is not convincing the tribunal should reject the allegations even if it has some doubts. The tribunal then stated that;

> "The 'alleging Party' may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Art. 8 Swiss Civil Code). However, such *change in the burden of the proof* is only to be made in special circumstances and for very good reasons." (My emphasis)

It has been argued that even though the tribunal clearly states "change in the burden of proof" the action which is spoken of is drawing adverse inferences.[190] Regardless, some commentators seem to support this option of shifting the burden of proof in favour of the alleging party under specific conditions, mainly when *prima facie* evidence has been presented.[191] How much evidence is sufficient and what threshold this evidence must reach is not clear, but it is at least not as high as preponderance of evidence.

The underlying argument for altering the burden of proof is that corruption is notoriously hard to prove. Bribes are seldom documented and its traces usually buried. The contract may well be an attempt at hiding the true intent, payments are not made through common arrangements and bank transfers etc. will not be accessible. Witnesses sometimes are available but usually not those who has the first hand information since these persons are at risk of facing criminal charges if admitting to bribery. The witness of the party with interests from escaping the contract might not be as highly valuable as those of the opposite party.[192] The accused party might be the only one who has access to any convincing evidence. Another argument is that an innocent party should be able of proving that the contract did not provide for bribery since records of bank transfers and performed services should be easy to provide if they exist.[193]

[190] See Mourre 2006, p. 103.
[191] Mills 2006, p. 9, Raouf in Fernández-Ballesteros & Arias 2010, p. 701.
[192] An exceptional case is however World Duty Free Company Limited v. Republic of Kenya ICSID Case No. ARB/00/077.
[193] Raouf in Fernández-Ballesteros & Arias 2010, p. 701.

6.1.2 Arguments Against Shifting

The majority of arbitrators and commentators to the contrary agree on that the burden of proof should not be shifted.[194] In several arbitral awards it has been expressed that the burden of proof lies on the alleging party.[195]

> "If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant."[196]

> "…the burden of proof lies on the shoulders of that party who raised the argument of nullity."[197]

There is a well-founded reluctance to reverse this fundamental principle if presented with *prima facie* evidence. First, it can be questioned what lies within *prima facie* evidence, which standard to apply and the appropriateness of deciding the outcome of a case in such a manner.[198] *Prima facie* evidence is used to be able to continue with assessing the case and not to decide it since the outcome can be tainted by factual errors. Such a solution seems to be in conflict with due process since it lies within prima facie evidence that it is uncertain and that the case has to be established later in the proceedings.[199]

Second, it appears to be in risk of conflicting principles of due process to let the defending party bear the risk of an allegation raised by the other party not being established.[200] The result would be that the accusing party could pass the task of convincing the arbitrators to the opposing party. Such a solution appears controversial and foreign to most legal traditions. A consequence of the above is an opening for baseless allegations of corruption.[201] A party wanting to escape a contract could claim nullity based on corrupt

[194] See Rose 2014, p. 217 ff., Hwang & Lim 2012, p. 21 f., Partasides 2013, Menaker & Greenwald 2014, p. 4, Raouf in Fernández-Ballesteros & Arias 2010, p. 14.
[195] See ICC Cases No. 7047, 12990, 13384.
[196] ICC Case No. 7047.
[197] ICC Case No. 13384.
[198] Rose 2014, p. 217 f.
[199] *Ibid*, Kazazi 1996, p. 328.
[200] Mourre 2006, p. 95, 103.
[201] Rosell & Prager 1999, p. 347, Hwang & Lim 2012, p. 28.

actions knowing that it only has to provide weak evidence to succeed. Although this can be questioned since *prima facie* evidence is still needed and *per se* the allegations are not baseless. The accusing party could nonetheless gain time and use such an allegation as a guerrilla tactic to diminish the credibility of the opposing party. On top of all this it is also a solution on a logical off-road if one relies on the function of the concept of the burden of proof and its absolute nature. Shifting the burden of proof is a controversial solution to most commentators.

6.2 The Standard of Proof

6.2.1 A Heightened Standard

Although the common standard of proof in ICA is preponderance of evidence some arbitrators and commentators speak in favour of a higher standard in cases relating to serious allegations of criminal character. The notion behind this is the seriousness itself and the nature of the accusations, which in some national jurisdictions is reflected in a heightened standard of proof.[202] Tribunals have applied a standard equivalent to requirements of criminal prosecution and demanded proof beyond reasonable doubt.[203] There was no detailed reasoning behind applying this standard except for the seriousness of the accusations and the fact that such allegations could not be proved by mere suspicions. A less extreme, but nonetheless high standard, is to require something in between the criminal and the civil standard and tribunals have articulated it in different terms;

> "…a strong degree of certainty."[204] "…converging and serious elements that make it more likely or almost certain that corruption exists."[205] "…must be supported by clear and convincing proof."[206]

Highly regarded authors have stated that a higher standard of proof applies and others refer to a dominant trend of applying such a standard.[207] The most frequently claimed

[202] ICC Case No. 6401, Born 2012, p. 175.
[203] ICC Case No. 5622.
[204] ICC Case No. 13515.
[205] ICC Case No. 14470.
[206] Himpurna UNCITRAL ad hoc arbitration, ICC Case 13914.
[207] See Raouf in Fernández-Ballesteros & Arias 2010, p. 5, Reiner in Redfern et al 1994, p. 336, Born 2012, p. 175.

reason for raising the standard is because the illegal nature of the allegations put forward and the fact that national courts in civil cases like these apply a higher standard than the preponderance of evidence.[208] The consequences of a positive finding of a serious allegations is said to be more severe relating to criminal conduct and thus requiring a higher threshold.[209] Another reasoning used is that there is a presumption for the validity of contracts which requires a high standard of proof if one claims invalidity.[210] Furthermore, a high standard has been said to prevent a party from making baseless allegations wishing to obstruct the proceedings to gain time or diminish the credibility of the opposing party. Corruption among high state officials has also been said to be a rare phenomenon and since it is unlikely it requires strong evidence.[211]

6.2.2 Applying the General Standard

The common standard somewhere close to preponderance of evidence is usually applied in ICA and one could argue that it should also normally apply in corruption cases.[212] The reasons for this approach is that corruption cases in ICA are civil matters, regardless of the relation to illicit acts, and includes two commercial parties who have requested arbitrators to decide their contractual dispute.[213] National courts have also spoken in favour of the view that there exists only one standard of proof in civil matters and that the tribunals have applied a higher standard of proof than required in the courts.[214] Even if the accusations are serious and relates to a globally condemned behaviour, the consequences of a positive finding of corruption in arbitration are contractual nullity or invalidity and can thus not be compared to the sanctions related to criminal prosecution. The seriousness relating to an eventual stigma and bad publicity connected to such actions are not likely due to the fact that the proceedings are confidential. Furthermore, the risk of national prosecution due to an award on corruption is oversimplified since a national criminal prosecution is completely independent from the reasoning and outcome of the arbitration and requires evidence meeting the applicable criminal standard of proof. Raising the standard of proof in ICA due to the risk of baseless allegations of corruption

[208] ICC Case 6401.
[209] Sayed 2004, p. 103.
[210] ICC Cases No. 13914, 13515.
[211] Himpurna Case.
[212] See ICC Case No. 10518, 12990.
[213] See Nappert 2013, p. 5, Hwang & Lim 2012, p. 28 f., 36.
[214] Menaker & Greenwald 2014, p. 9.

obstructing the proceedings is logically faulty since applying the preponderance of evidence would still require evidence of such actions. Consequently baseless accusations are not prevented by a higher standard of proof since baseless allegations are never accepted even under the general standard.[215]

6.2.3 Concluding Remarks

There is no uniform view on the applicable standard of proof in corruption cases and this is probably the issue suffering from the most diverging opinions.[216] In many cases the standard of proof is not even articulated by the tribunal, but even if it is there is no detailed reasoning on the matter.[217] A survey of awards dealing with corruption made in 2003 showed that 14 out of 25 tribunals applied a heightened standard of proof and in 11 cases the general balance of probabilities was applied.[218] The standards of proof applied in these awards stretches from the criminal standard of beyond reasonable doubt to a relaxed balance of probabilities. It has been suggested that the approach taken towards the standard of proof reflects the attitude towards corruption at large and that a high standard usually results in a negative finding, while a lower standard will result in a positive finding.[219]

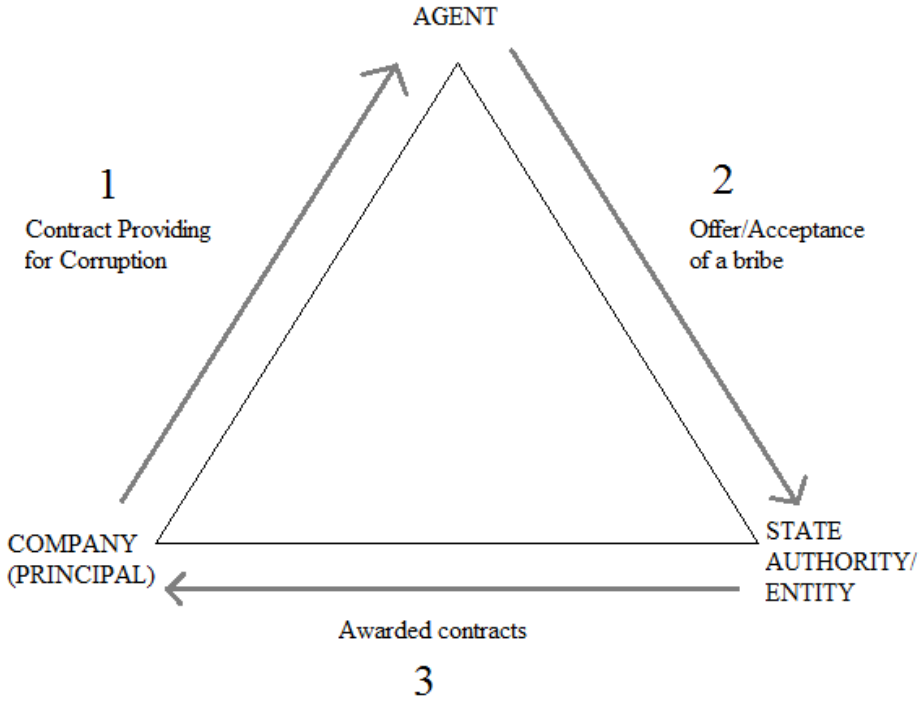
6.3 The Evaluation of Proof

6.3.1 Elements Relevant to Prove

At the evaluation stage the arbitrators will weigh the presented evidence against the standard of proof and decide which facts have been established. If there is uncertainty the party bearing the burden of proof will lose the claims based on those facts. First, a brief overview of the elements and relevant facts which can be subject to evidence when dealing with corruption shall be given. These elements naturally will reflect the outline of interactions and the definition of bribery given in section 3 and the triangle of corruption will become of use again. After briefly presenting the possible elements

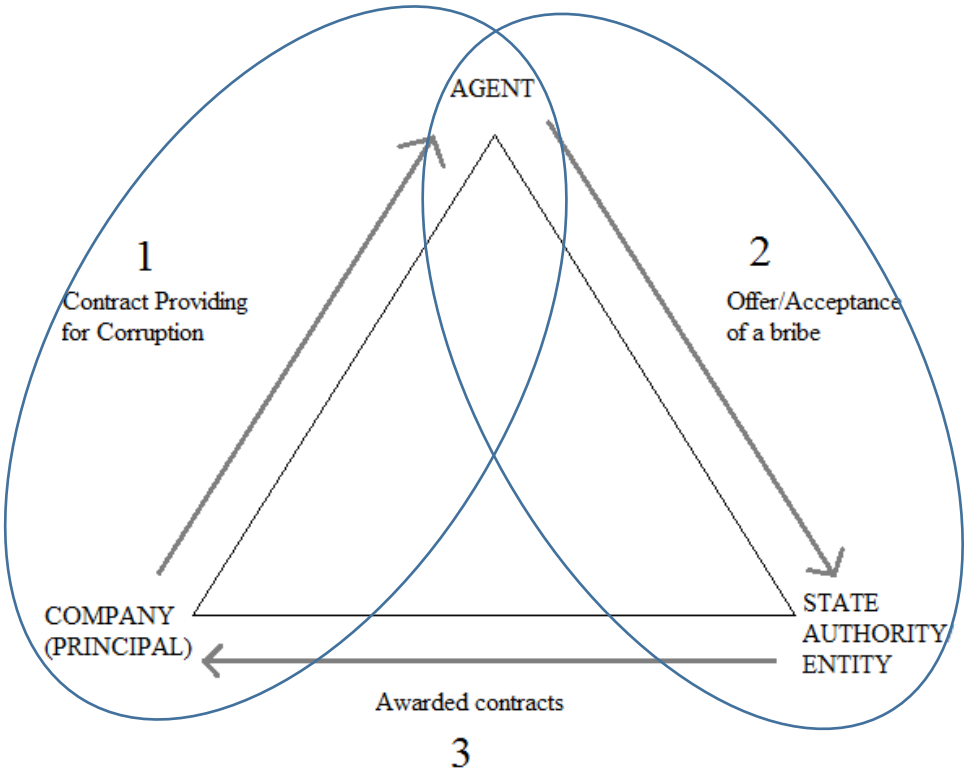
[215] Menaker & Greenwald 2014, p. 10.
[216] Compare ICC Cases No. 4145, 5622, 6401, 6497, 8891, 12990, 13515, 14470, 14878, 10518.
[217] Redfern in Redfern et al 1994, p. 326.
[218] Crivellaro in Karsten & Berkeley 2003, p. 114 ff.
[219] Sayed 2004, p. 106, 423.

relevant to prove corruption a more detailed illustration of the circumstantial evidence relating to those elements will be given.



Regardless of if the dispute concerns the agency agreement (1) or the awarded main contracts (3), the root of the corruption will usually resort within the agency-principal-relation (1) and the actions taken by the agent (2). Therefore the required evidence in both cases lies within the same elements of the contractual relation. However, it is important to bear in mind that the contract disputed in the proceeding before the tribunal is different in the two cases and the civil sanction of nullity or invalidity is not necessarily the same for a contract providing (1) and the contract procured by corruption (3). In a dispute concerning the latter the evidence also flows from a contract between the awarded company and a third party not included in the proceedings. If the company does not want to cooperate in providing requested documents, for example the agency contract, and the agent or the bribed official is not willing to testify the insight into the root of corruption can be limited. However, in a dispute concerning the agency agreement the cooperation of one of the parties will at least give the opportunity of access to some documentation. Still, the true intention behind such documents can be hidden and accordingly the wording of them misleading. The important thing to understand is that it is the root of the

corruption which will be subject to evidence regardless of the fact that a dispute belongs to relation 1 or 3.[220]



The contract itself and its terms will naturally be of importance. Since the parties to bribery arrangements are usually aware of the illegal nature of the commitments the contract might not provide much information or even actively hide their true intentions. Consequently it is often necessary to dig deeper into the intentions of the parties and go beyond the contractual terms and look at the contract with a critical perspective. Thus the conduct of the parties and other manifestations of their intent can become important. [221] It can also be relevant to look at the interactions between the agent and the state authority (the suspected acceptor of the bribe). The relevant elements reflect the definition of bribery presented above and aims at establishing the actual giving and receiving of a bribe. The offer of an advantage and a followed acceptance or agreement by the state official, the receipt of the advantage and the influence on the acceptor's behaviour are thus given facts targeted by evidence of a party proving corruption.[222]

[220] See a general outline in Sayed 2004, p. 106 ff.
[221] ICC Case No. 6248, Sayed 2004, p. 101 f., 110.
[222] See ICC Case No. 6401. However, there might be diplomatic reasons for not explicitly point towards corrupt behavior conducted by high state officials, see Reiner in Redfern et al 1994, p. 335.

6.3.2 Circumstantial Evidence of Corruption

Even though the burden and standard of proof have been heavily debated in connection to corruption cases it can be argued that the treatment of circumstantial evidence at the evaluation stage is the most decisive issue for the outcome.[223] This is because notwithstanding the technical standards articulated, corruption cases contains the feature of poorly accessible evidence. Indirect and circumstantial evidence will basically always be the only proof and thus the arbitrators' handling of it will decide the case.[224]

All circumstances which do not on its own necessarily establish bribery can still be indirect proof or indicia of such actions. The common existence of particular elements in bribery arrangements has resulted in the use of red flags as a warning sign that corruption might be concealed.[225] However, it is important to understand that the lack of a necessary link provides an uncertainty to the relying on such evidence due to the fact that the circumstances can be explained by other reasons than corruption. Therefore it might be necessary to be pragmatic towards overgeneralization of the significance of certain facts and the use of red flags as indications of corruption.[226] In the end the assessment of evidence must be done with consideration to all relevant circumstances of the case and arbitrators must decide whether the presented evidence is sufficient to meet the standard of proof. Circumstantial evidence has been accepted by various tribunals in corruption cases, but the view on how much such evidence is needed diverge.[227] Below the most frequently used circumstantial evidence will be presented.

A starting point for establishing the facts is usually the relevant contracts and both in the case of a contract providing and procured by corruption the relevant contract to assess is usually the agency contract.[228] However, since it is highly possible that the true intention of the contract is actively hidden behind terms which are aimed at legitimizing the contract the contractual terms are but one of many relevant facts.

[223] Menaker & Greenwald 2014, p. 11.
[224] Scherrer 2002, p. 29, 31, Rose 2014, p. 196.
[225] ICC Guidelines on Agents, Intermediaries and Other Third Parties, 2010.
[226] *Ibid*, Menaker & Greenwald 2014, p. 12
[227] ICC Cases No. 3916, 4145, 12990, 13515.
[228] Sayed 2004, p. 101.

I) The Remuneration of the Agent

One of the strongest indications of corrupt actions is a remarkably high agency fee not in relation to the services performed by the agent.[229] This can constitute circumstantial proof of corruption because the reason that the remuneration is high could be due to the fact that the agent is committing crimes for the award of contracts to the company.[230] However, there could be other explanations for a high fee such as the expertise and experience of the agent. On its own a remarkable fee can be a red flag however, not equal or even necessarily linked to a positive finding of corruption.[231] The fee needs to be assessed in the light of all circumstances and especially the services provided by the agent to know if it is unusually high. Generally the fee is a percentage of the value of the contracts awarded to the principal, which on its own does not have to be a sign of corruption since it is common practice.[232] In arbitral awards around 30 % of the value of a main contract has been deemed both as justified and unjustified compared to the circumstances of the case.[233] Unusual payment terms for the agency fee might also be a circumstantial evidence of bribery, but can also be a part of tax planning.[234]

II) The Services and Structure of the Agent

The assessment of the remuneration is done in comparison to the services rendered by the agent. If the agent's services are limited in duration or not even specified in the contract and the agency fee is high the arrangements can seem disproportionate and thus constitute a strong indication of corruption.[235] Strikingly vague or detailed contractual terms on the services of the agent can also raise suspicions that the parties are trying to conceal illicit behaviour.[236] Another indicia is if the remuneration is completely conditioned to the award of contracts by a state authority. If the agent is really providing services relating to a common agency contract the payments would not be completely conditioned to a contract with a third party but relate to the actual

[229] Crivellaro in Karsten & Berkeley 2003, p. 111, see ICC Cases No. 6497, 8891, 12990, 13515.
[230] Crivellaro in Karsten & Berkeley 2003, p. 112.
[231] ICC Case No. 4145.
[232] Scherrer 2002, p. 32 f.
[233] ICC Case No. 6497, 9333.
[234] Scherrer 2002, p. 36.
[235] ICC Cases No. 8891, 13515.
[236] Scherrer 2002, p. 31, ICC Case No. 12990.

services rendered by the agent.[237] An inexperienced agent coming from a company resident in an off-shore country not appearing to be in active business supports the conclusion that no qualified services has been rendered or even intended.[238] Accordingly an unusually high fee must be explained by some other reason than the excellent work of the agent, perhaps the arranging of bribes.[239] However, the structure and residence of the agent can also be a part of extensive tax planning strategies.[240]

III) The Conduct of the Parties

Since the contract might only be a baseless construction hiding the parties' intentions it is more rewarding to look at the parties' behaviour in relation to their arrangements and the performance of the contract. Letters or other documentation can reveal the true intentions as in the Lagergren case.[241] Records and documents specifying the agent's services is invaluable evidence since it secures the fact that the agency contract is not a mere curtain of providing bribes.[242] However, it is possible that the agency contract is only partly tainted by such actions and also includes legal services.[243] Due to the fact that arbitral tribunals cannot compel parties to produce requested documents a party can simply refuse to oblige. If an agent refuses or fails to put forward documentation on its rendered services which should be accessible the tribunal may draw adverse inferences on the failure. Again the explanation for the failure or refusing to provide documents could be that no legitimate services have been performed. Especially when the documents requested could easily prove the absence of corruption it appears startling that a party would refrain from clearing the suspicions against him.

IV) Interactions between the Agent and the State Entity

Circumstances relating to the active giving or receiving of bribes is obviously of value if there is any proof thereof. Reliable witness statements directly proving the illicit acts are not common. Thus, other elements which could construct a bond can be possibly established by proving close friendship or family relations between the agent

[237] Crivellaro in Karsten & Berkeley 2003, p. 111.
[238] Scherrer 2002, p. 34.
[239] Crivellaro in Karsten & Berkeley 2003, p. 112.
[240] Scherrer 2002, p. 34.
[241] ICC Case No. 1110.
[242] Scherrer 2002, p. 32.
[243] ICC Case No. 1110.

and the state official.[244] The agent's professional and personal social network with important contacts is a complicated issue because even though this influence can be used for illegal purposes one of the main assets of a legitimate agent is at the same time its influence and contacts. If there has been openly held negotiations between the agent and the state authority this is an indication that the arrangements are legitimate. However, it is still possible that a state official arranges meetings in secret, without the knowledge of its superiors, with the agent or that different persons are involved in the open negotiations and in other contacts with the agent.[245]

V) Wide Spread Corruption

It is evident that corruption is a common feature of certain business areas in certain countries and this has been accepted as circumstantial evidence of corruption.[246] Evidence of wide spread corruption can be in the form of surveys or other information from for example the ICC, Transparency International or the OECD.[247] However, it is not sufficient to establish corruption simply by proving the wide spread existence thereof, but the alleging party must claim an individual transaction of a bribe.[248]

VI) Adverse Inferences

A highly relevant issue in corruption cases is the use of adverse inferences when assessing the evidence of the case. The use of adverse inferences is a useful tool for arbitrators as there is no compelling authority in ICA. A tribunal faced with potential circumstantial evidence during the proceedings can request the party to put forward evidence proving that legitimate services has been rendered and if the requested party fails to present such evidence without a reasonable excuse the tribunal can draw adverse inferences of the behaviour of the party.[249] The parties' behaviour thus becomes an indirect proof of corruption itself. Adverse inferences should be used carefully and when there is an explanation of the party's behaviour other than the adverse inference of corruption such an inference is out ruled.

[244] Scherrer 2002, p. 34, ICC Guidelines on Agents, Intermediaries and Other Third Parties.
[245] Scherrer 2002, p. 34.
[246] See ICC Cases No. 3916, 1110, 12990.
[247] Scherrer 2002, p. 32.
[248] Ad hoc Award 1995, Scherrer 2002 p. 32.
[249] Sayed 2004, p. 116 ff.

It is not possible to conclude how many of these circumstances are needed to establish corruption since it is a case-by-case assessment. An illustrative case is ICC Case No. 12990 where the fact that the claimant could not provide any documentation for services of negotiating a large scale contract, a remarkably high fee together with the existence of wide spread corruption made the tribunal conclude that the claimant had arranged bribes. Another example is ICC Case No. 13515 where the remuneration was 40 percent of the contract, the payments were paid to the agent abroad and the agent's involvement was only 26 days but the contractual relation was set for five years.

6.4 Are Arbitrators Obliged to Consider the Nature of Corruption when Applying the Rules of Evidence?

Briefly returning to the discussion[250] on the role of the arbitrator as a servant of the parties or guardian of international ethics, it is apparent from arbitral awards that arbitrators do recognize the need to consider the nature of corruption when dealing with evidence. The duty to ensure the finality of the award also calls for consideration to corruption as it is contrary to transnational public policy.[251] The actual consideration however, takes different expressions where two trends can be spotted. The first trend is to distinguish the seriousness of corruption by acknowledging the strong evidence needed to prove such grave accusations. The second trend is to the contrary to emphasize the seriousness in such behaviour escaping exposure due to its hidden nature and that the rules of evidence should be adjusted thereto. Both trends can be relevant depending on the case and there is simply no magic formula suitable for all cases. Due to the procedural flexibility elaborated on above there are no specific requirements for *how* the consideration to the nature of corruption should be done when applying the rules of evidence, except from respecting the general requirements in ICA.[252]

[250] See section 4.1.
[251] Raouf in Fernández-Ballesteros & Arias 2010, p. 708 f.
[252] See section 5.3.

Part III

7. Discussion

7.1 Summing up the Addressed Issues so far

7.1.1 How is Corruption Defined and why is it Relevant to ICA?

The definition of corruption can be collected from international conventions such as the UNCAC or OECD Convention however, to fully grasp the actual crime it is necessary to resort to national laws. Variations in the national views on corrupt behaviour can create problems for the arbitrators when deciding what constitutes illegal behaviour causing nullity to the main contract.[253] Allegations of corruption raise challenges for the arbitrators through every stage of the arbitration proceedings. Many interesting theoretical as well as practical questions arise as regards to both jurisdictional matters, dealing with the merits and at the final stages if a party seeks a national court to set aside or refuse the award's recognition or enforcement. However, because of the hidden nature of bribery arrangements the most delicate issue facing the arbitrators is how to apply the rules of evidence and enable parties to at all establish that corrupt behaviour has occurred.

7.1.2 Which Rules of Evidence Apply to ICA?

Arbitrators use the rules of evidence to be able to establish the facts of the case and due to the procedural flexibility of ICA the arbitrators have a vast discretion in the application of such rules and the assessment of evidence. Regardless of qualifying these matters as governed by the *lex arbitri* or *lex causae* most national laws do not contribute with much guidance. The flexibility and discretion of the arbitrators together with the confidentiality of the proceedings and the lack of reasoning on the application of the rules of evidence, makes it difficult to decide any common standards of evidence in ICA. Nonetheless there are some fundamental concepts and rules that can be identified, even if the application itself cannot be certified. An essential rule is that the burden of proof lies on the party

[253] Nappert 2013, p. 3.

who supports its claims on the fact and another that the standard of proof decides the degree of evidence needed to establish the existence of the fact. The common standard of proof is somewhere close to the preponderance of evidence. All evidence is admissible but the evidentiary weight can be adjusted to the quality and form of the presented proof. The assessment of proof and the weighing process is a subjective operation which will most likely be affected by the arbitrator's legal background and experience.

7.1.3 Arbitrators' Handling of the Rules of Evidence in Corruption Cases?

Arriving from the conclusion that evidence in ICA at large is a topic associated with uncertain answers, it might not come as a surprise that evidence in the context of corruption is even more intricate. There is no uniform approach seen in awards or legal commentaries on how to handle the rules of evidence when dealing with corruption allegations. Two attitudes can be spotted, where the first is pro heightening the standard of proof making it even more difficult to prove corruption. The second approach is to either treat corruption cases as other civil matters or recognizing the difficulties by adjusting the application of the rules of evidence by a shifting in the burden of proof or allowing greater significance to inferences and presumptions. It has been argued that the approach to corruption in general is decisive for which standard that the arbitrator will apply. According to this view the arbitrator will take a stand and then adjust the application of the rules of evidence to his decision.[254] Circumstantial evidence has been permitted and it seems that certain features appear commonly in bribery arrangements and lately this has been recognized by arbitrators. Awards show examples of the decisive nature of the treatment of indirect evidence as the same facts has resulted in different outcomes due to the weighing of such evidence.

[254] Sayed 2004, p. 423.

7.2 How should Arbitrators handle the Rules of Evidence when Adjudicating Corruption Cases?

7.2.1 Is there a Need to Agree?

A common stand on the applicable standards regarding evidence would be a step forward both on evidence in ICA at large, but also on the issue of corruption. It is perhaps impossible and even inappropriate to reach a complete procedural consensus on the rules of evidence due to the great variation in cases before international tribunals.[255] Still, somewhat of a common standpoint to the approach to the rules of evidence could contribute with foreseeability for the parties and credibility for ICA in its handling of corruption.[256] If there is no chance at succeeding with allegations of corruption or if there is inconsistency in the arbitration practice there is no incentive for the parties to pursue time-consuming and costly investigations to find qualitative evidence of corruption. Furthermore it would prevent the risk of arbitrators appearing partial or inconsistent in their application of for example the standard of proof.[257] To be able to reach any uniformity and predictability in the handling of evidence arbitrators should address the difficult encounters with corruption sufficiently in their reasons. It is not sensible to avoid the issue only because it is difficult to explain. The confidentiality of ICA will however, limit the development of a uniform approach since the awards will only rarely be published.

7.2.2 Suggesting a Common Ground for the Burden and Standard of Proof

Convincing reasons speak in favour of the fact that the burden of proof as understood by this author is absolute and cannot shift. It is not logically reasonable to have an order where a party alleging facts in support of its case can sit safe after presenting vague *prima facie* evidence and where the opposing party has to prove its innocence, otherwise risking to lose the case. The balance of the evidence, the *onus of proof*, can however be altered during the taking of evidence. If the alleging party brings enough proof to alter this

[255] Kendra & Bonini 2014, p. 452.
[256] Raouf in Fernández-Ballesteros & Arias 2010, p. 14, see also Kazazi 1996, p. 323.
[257] *Ibid.*

balance in its favour the opposing party will lose the case if no counterevidence is presented disrupting the balance. The opposing party will then not lose due to the uncertainty of the existence of a fact, but because the fact claimed by the alleging party has been established meeting the standard of proof. In cases where the evidence is not meeting the required standard of proof the burden of proof will decide who the losing party is. When indications of corruption are apparent it might feel tempting to cure this uncomfortable situation by shifting the burden of proof. In a case where the accused refuse to provide documents and serious suspicions cannot be proved the bitter truth is that the burden of proof should not be shifted and that such accusations must be proved by the alleging party.

The seriousness of accusations of bribery, the rare existence of it, the stigma, risk of national prosecution and risk of baseless claims have lead many arbitrators and commentators to conclude that a higher standard of proof apply in corruption cases. However, if the reasons are further looked upon they are not convincing. On the other hand it seems even inappropriate to *automatically* apply a high standard of proof when recognizing the inherent difficulties in establishing corruption by any evidence, but also in consideration of international undertakings in fighting corruption. Firstly, making something which is already notoriously difficult to prove almost impossible to prove by raising the standard of proof, appears to be contradictory.[258] Furthermore, corruption cases in ICA concerns a civil matter with civil consequences and it should therefore usually be sufficient to establish corruption by preponderance of evidence. The fear expressed for the severe consequences of a positive finding of corruption in ICA is not motivated. Partly because of confidentiality of the proceedings, which minimize the risk of stigma and bad publicity and partly because of the complete independence of national courts requiring a higher degree of proof in criminal matters. Baseless accusations will logically be unfounded and thus not satisfy the general standard of proof. Such accusations are therefore not prevented by a heightened standard. Unless there are particular circumstances of the case other than the mere corruption allegation implying that a higher standard should apply, the common standpoint should therefore be the preponderance of evidence.

[258] Crivellaro 2014, p. 257, Hwang & Lim 2012, p. 116.

There is consensus as to the fact that corruption is both bad and notoriously difficult to prove, as well as to the world wide commitment through various conventions that corruption must be fought by all means. Respecting the international undertakings of providing effective remedies a heightening of the standard of proof does not seem reasonable.[259] It could even be argued that such a solution is not recognizing the obligation of providing effective remedies and accordingly in the risk of failing to respect due process. If those undertakings are to be seriously respected by ICA an automatic raise in the standard of proof is perhaps not a step in the right direction.

7.2.3 The Importance of Circumstantial Evidence and the Evaluation Process

Concluding that there is hardly ever any direct proof of corruption, circumstantial evidence becomes decisive for establishing corruption regardless of the applied standard of proof. If the discussion keeps focusing on the ability of the burden of proof to shift and the applicable standard of proof we come no closer to diminishing corrupt practices.[260] A more significant question is often how to evaluate the available fragmentary evidence.

Since the circumstantial evidence can bring uncertainty and it is the arbitrator's task to weigh the presented proof, the evaluation process, highly affected by subjectivity, will be crucial and needs to be nuanced.[261] Depending on the arbitrator's attitude and experience of corruption an identical case could have different outcomes. It is impossible and not wanted to overgeneralize the weight given to certain circumstances nor provide a recipe for all ingredients necessary to establish a case of corruption. The individual prerequisites for each case as well as the slippery nature of corruption often hiding behind agency arrangements, creates too much complexity to provide easy formulas without at the same time losing the precision needed to navigate the murky waters of corrupt practices. However, some features appears repeatedly in bribery arrangements and the arbitrator should be aware of these and avoid letting a naive approach result in a validation of an illegal contract, which by a pragmatic handling of the evidence could have been avoided.

[259] Rose 2014, p. 216.
[260] Scherrer 2002, p. 36.
[261] *Ibid.*

7.2.4 Pay Attention to the Man behind the Curtain

Corruption cases will basically always be challenging when it comes to evidence and the true trial is not who can runt the fastest to the emergency doors and conclude that there is no proof of a man behind the curtain. The real challenge is who can use the technical tools available and the procedural flexibility in a serious attempt at assessing the proof of corruption in a proactive and pragmatic manner.[262]

To truly have a chance at revealing the man behind the curtain arbitrators might need to question conventional methods. The unchallenged virtue of due process and party autonomy might have to be reconsidered in this context, since these genuinely sound safeguards can be used by corrupt parties.[263] The arbitrator's role as a servant of the parties should be questioned and arbitrators should face the fact that in many cases they are the sole adjudicators of international trade. They possess vast flexibility and discretion in procedural matters and are often highly experienced in international transactions.[264] When corruption cases fall under the jurisdiction of ICA this creates both challenges and responsibilities and it is obvious that arbitrators take the issue seriously. The question is whether arbitrators are up for the task of trying to pull the curtain and to reveal the corruption hiding behind it. Just as Dorothy and her friends saw the Wizard of Oz appear from behind the curtain arbitrators do have opportunities to see corruption appear from behind agency arrangements.[265] The option to ignore the movement from behind the curtain or the extraordinary circumstances surrounding it is always an easy alternative.

It is my personal belief, after attending an ICC conference addressing corruption in November 2014, that arbitrators are up for the task and that there is a genuine will to address the evidentiary challenges of corruption adequately to not let ICA be a safe forum for contracts tainted by corruption.[266] Arbitrators do not live in an ivory tower[267] and corruption allegations must be proven, but to enable any opportunity of proving it even the most experienced arbitrator will probably find the confrontation with the man behind the curtain to be a demanding trial. The evidentiary matters are decisive when dealing

[262] Rose 2014, p. 227 f.
[263] *Ibid*, p. 228, Nappert 2013, p. 5 f.
[264] Mourre 2006, p. 97, 115 ff.
[265] The musical film *The Wizard of Oz* from 1939.
[266] 34th Annual Meeting of the ICC Institute of World Business Law, Addressing Issues of Corruption in Commercial and Investment Arbitration, 24th of November 2014, Paris.
[267] Himpurna Case.

with corruption cases and a consensus on some of the issues would contribute with predictability and guidance for both the arbitration community and the parties. The tools to cope with the evidentiary difficulties exist even if there is no perfect formula on how to use them.

The Wizard of Oz says “Pay no attention to the man behind the curtain” as his scheme of pretending to be a wizard is about to be revealed to Dorothy and her friends in *The Wizard of Oz*. The most reasonable way to reveal corruption in ICA is to do the exact opposite and pay close attention to the man behind the curtain, because in the end he might reveal his true nature.

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