The Guide to Evidence in International Arbitration - Second Edition

Standards of Proof and Requirements for Evidence in Special Situations
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Released to coincide with the new IBA rules on evidence, *The Guide to Evidence in International Arbitration* steers a course through what can otherwise be one of the most divisive topics in international arbitration. The Guide to Evidence in International Arbitration fills a gap in the literature by bringing together law and practice and providing a holistic view of the issues surrounding evidence in international arbitration, from strategic, cultural and ethical questions to what to do in certain settings. Along the way it offers various proposals for improvements to the received approach.

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Standards of Proof and Requirements for Evidence in Special Situations

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INTRODUCTION

This chapter considers how tribunals make determinations when there is conflicting evidence. Specifically, it addresses the consideration of evidence in the context of the burden and standard of proof. Related to this is the use of burden-shifting mechanisms, which tribunals may consider when the available evidence does not present a complete picture. This chapter also considers the burden and standard of proof in special situations, such as allegations of corruption and the use of estimations to prove damages.

As a general rule, most national arbitration laws do not make express provision for rules of evidence, and most arbitration institutional rules, if they touch on matters of evidence at all, will tend to allow these matters to be decided by the tribunal on an ad hoc basis. Article 19(2) of the UNCITRAL Model Law is representative, providing that 'the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.' However, there is available for the guidance of tribunals the International Bar Association's Rules on the Taking of Evidence in International Arbitration 2020 (the IBA Rules), which are widely adopted by international tribunals, often as a guide rather than a binding set of rules, but in practice treated as de facto rules.

BURDEN OF PROOF

INTRODUCTION

Burden of proof refers to the principle that the party seeking to rely on a particular fact having the burden of establishing it. This principle is provided for in Article 27(1) of the UNCITRAL Arbitration Rules 2010, which states: 'Each party shall have the burden of proving the facts relied on to support its claim or defence.' This procedural duty by necessary implication carries an evidential consequence: if a party fails to provide evidential support for its allegations without a satisfactory explanation, the allegations will be unproved and, therefore, dismissed. Few institutional rules adopt such an explicit provision, presumably leaving this issue to be determined by the tribunal having regard to its own criteria for the particular case in hand, but, as a general rule of practice, this principle is widely adopted by international tribunals.

From a procedural standpoint, the burden of proof applies to both the claimant and the respondent, in accordance with the principle of onus probandi actori incumbit: he who asserts a fact must prove it. Claimants have the burden of proving claims, and respondents the validity of any defences, counterclaims or set-off rights. Both parties must produce evidence to substantiate their cases. However, the tribunal, having wide discretion in evidentiary matters, may, as influenced by the sequence of facts, or in accordance with the substantive law or other circumstances of the case, allocate to either party the risk of not producing the evidence in support of their case. Nevertheless, Article 27(1) of the UNCITRAL Rules remains relevant as a rule of procedural flexibility, which (1) places both parties on notice that they are bound to substantiate their factual allegations with evidence, (2) makes clear that both parties may bear the risk of failing to prove their allegations if they do not do so, and (3) relieves the tribunal from having to inform each side at various stages of the proceedings as to whether the risk of non-production of evidence is placed or has shifted to them.

SUBSTANTIVE LAW AND THE BURDEN OF PROOF
In some jurisdictions, particularly those of civil law countries, the substantive law may contain rules on the allocation of burden of proof. However, these rules will often require no more than for the claimant to produce evidence in support of its allegations.\[^{12}\] The customary approach in international arbitration is for the tribunal to apply the procedural rules on the burden of proof chosen by the parties, but also to give regard to any provisions of the substantive law influencing the allocation of the burden.\[^{13}\]

Gary Born opines that the allocation of burden of proof, therefore, is likely to raise questions of choice of law. In particular, tribunals must decide whether to apply the law of the arbitral seat (based on the theory that burden of proof is procedural), the law governing the underlying substantive issues, or some international standard.\[^{14}\] Born submits that the tribunal should allocate the burden of proof in light of its assessment of the applicable substantive law and the procedures adopted in the arbitration. In so doing, the tribunal can fashion specialist rules specific to the substantive issues and procedures in each case, instead of applying the burden of proof rules of any specific jurisdiction.\[^{15}\] However, in many (if not most) cases, especially in commercial (as opposed to treaty) arbitrations, the issue of burden of proof is not a matter of controversy, even when parties and tribunal members are from different legal traditions.

The key issues in dispute are likely to become apparent during the case management conference held after the first exchange of pleadings or memorials (as the case may be). At this stage, it is sensible practice for a tribunal to discuss with the parties whether they are aligned on the appropriate standard of proof to be applied to the issues in contention so that the parties may prepare their respective cases in the light of any disagreements that are revealed after that discussion.

**FACTORS AFFECTING BURDEN OF PROOF**

Although the party with the burden of proof must satisfy it, a tribunal may accept that some propositions are so obvious that proof is not required. For instance, a tribunal member who is an expert in a particular profession may be more inclined to use their own knowledge and not require formal proof. However, these inclinations may lead to issues of due process if parties are deprived of sufficient opportunity to present their respective cases.\[^{16}\] It is inadvisable, therefore, for any tribunal to make a finding of fact or expert opinion without evidence in that regard having been proffered by any party. If these findings are important links in the tribunal’s reasoning process leading to any finding on a material issue in the arbitration, a party may subsequently challenge the award on the ground that it was not given a fair opportunity to present contrary evidence, factual or expert. This would be in contravention of Article 18 of the UNCITRAL Model Law, which provides that each party shall be given a full opportunity of presenting its case.\[^{17}\]

The issue of due process was discussed by the Singapore Court of Appeal in *CBS v. CBP*.\[^{18}\] The Court held that the arbitrator, in requiring parties to show that their evidence had ‘substantive’ value before deciding whether to allow it through an oral hearing, had committed a material breach of the rules of natural justice.\[^{19}\] This resulted in prejudice to the appellant as the oral evidence it sought to adduce was integral to its defence. When the appellant’s witnesses were shut out altogether (a process known as witness-gating), its defence was therefore prejudiced.\[^{20}\] The Court of Appeal thus upheld the High Court’s decision to set aside the final arbitral award in favour of the appellant.\[^{21}\]

**STANDARD OF PROOF**

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INTRODUCTION

Standard of proof determines whether the evidence a party has produced in support of its factual allegations is sufficient to establish the facts in question. The standard may be determined by the relevant substantive law or customary practice. Standard of proof must be considered both in terms of the obligation on the party with the burden of proof and in terms of the tribunal’s conclusion after each party has presented its evidence. For instance, a claimant with the burden of proof may present a prima facie case that satisfies the standard of proof required at that stage, but the respondent may subsequently present evidence that leads to the tribunal’s decision in the respondent’s favour. The weighing of evidence is thus a relative exercise considering the relevance, materiality and probity of conflicting evidence before the tribunal reaches its decision. Article 27(4) of the UNCITRAL Arbitration Rules gives the tribunal the broadest authority to decide on evidentiary matters, stating: ‘The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.’ The Article applies to standard of proof, covered by the terms ‘relevance, materiality and weight’ of the evidence. In this way, although few arbitration institutional rules include such a provision, the substance of Article 27(4) finds its way into most arbitrations by virtue of Article 19 of the UNCITRAL Model Law, which mirrors Article 27(4) (or vice versa) and is likely to appear as part of the arbitration law of the vast majority of the 120 states and territories that have adopted the Model Law.

SUBSTANTIVE LAW AND THE STANDARD OF PROOF

Arbitral statutes and rules rarely provide for principles of standard of proof. Standard of proof is seen as problematic because of issues of characterisation in terms of procedural versus substantive law and the subjective standards of tribunals. Specifically, common law legal systems treat standard of proof as procedural, whereas civilian systems treat it as substantive. Common law legal systems apply the ‘balance of probabilities’ test, which calls for a claim to be upheld if the tribunal is convinced by the evidence that the claim is more likely than not true. Conversely, civil law legal systems apply the ‘inner conviction’ test, which asks whether the arbitrator regards the evidence to have reached a level at which they are personally satisfied with the veracity of an allegation. Nevertheless, there is unlikely to be a noticeable difference between the common law and civil law standards as articulated, with the ultimate test being a preponderance of evidence. The only remaining doubt is whether some civilian systems require a higher level of conviction than merely on a balance of preponderance.

FACTORS AFFECTING STANDARD OF PROOF

Tribunals may consider the substantive nature of an allegation brought against a party when determining the applicable standard of proof. For allegations of particular gravity, tribunals may apply a higher standard of proof, such as in sports arbitrations convened to consider questions about the use of performance-enhancing drugs. Many sporting disputes are settled by the Court of Arbitration for Sport, which uses the standard of ‘comfortable satisfaction’. This falls between the civil balance of probabilities and the criminal standard of ‘beyond reasonable doubt’, having regard to the fact that doping charges, in effect, are quasi-criminal charges attracting severe penalties of suspension for prolonged periods that could materially affect an athlete’s livelihood and earnings. Conversely, tribunals may apply a standard of proof that is lower for requests of interim measures, such as security for costs.
Most arbitration rules and arbitration laws do not contain principles governing the standard of proof. Whatever the applicable law or governing rules, they usually provide for a very broad flexibility on evidentiary matters subject only to the contrary agreement of the parties. For instance, Article 19(2) of the UNCITRAL Model Law provides that ‘the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence’. Similar language can be found in leading arbitration rules and other national laws and the IBA Rules. Some institutional rules go even further as to specify that tribunals are not obligated to apply national rules of evidence. This can be found in the most recent Hong Kong International Arbitration Centre Rules and the London Court of International Arbitration Rules, as well as the Singapore International Arbitration Centre Rules, which state, ‘the Tribunal is not required to apply the rules of evidence of any applicable law’. This broad evidentiary discretion is said to allow arbitrators to ‘tailor the conduct of the proceedings to the specific features of the case without being hindered by any restraint that may stem from traditional local law, including any domestic rule on evidence’.

Greenberg and de Zitter have argued that, both in theory and practice, there are three main approaches:

- an autonomous standard derived from arbitration practice;
- the domestic law of evidence of the applicable substantive law (lex causae); or
- the domestic law of evidence of the seat of arbitration (lex arbitri).

The choice between the lex causae and the lex arbitri is usually described as a question of characterisation (i.e., whether the standard of proof is characterised as a procedural or substantive legal issue).

One may refine this argument to say that, in practice, the choice is between treating standards of proof as a procedural or substantive issue.

There is some authority to support this view that:

Although there is some authority for the proposition that, at common law, questions relating to the burden of proof are matters for the lex fori, there is much to be said for treating them as substantive, for the outcome of a case can depend on where the burden of proof lies. As Lorenzen says, ‘the statement that courts should enforce foreign substantive rights but not foreign procedural laws has no justifiable basis if the so-called procedural law would normally affect the outcome of the litigation.’ This is reflected in the Restatement proposition that where the primary purpose of the rule as to burden of proof in the lex causae is to affect decisions of the issue rather than to regulate the conduct of the trial, it will be applied in preference to the rule of lex fori.

Although it should be noted that this passage relates to burden of proof, it nonetheless is persuasive.

However, as noted above, the arbitration law of some countries as well as several frequently used rules of arbitration institutions expressly allow non-reliance on the national law of evidence, which therefore appears to allow the tribunal to apply whatever criteria it wishes in its discretion in relation to the standard of proof. However, the Greenberg and de Zitter approach discussed above would suggest a careful examination of the particular legal rule
in issue under the governing law to establish whether the application of that rule under the *lex causae* requires a concomitant application of the same evidential standard of proof as required under the *lex causae*. In these cases, the *lex causae* may require applying the same standard of proof as under the *lex causae* to enable the tribunal to apply the *lex causae* in the same way as it would be in the courts of the *lex causae*.

In the experience of at least the principal author, tribunals very rarely expressly address the issue of standard of proof (except when there are allegations of fraud, corruption or other criminal offences) despite exhortations from writers that this matter should be addressed by the tribunal with all parties at an early case management conference. This issue therefore tends not to be given much attention by tribunals in practice even if their members come from different legal traditions.

However, in the above-mentioned cases of fraud, corruption or other criminal offences, the Greenberg and de Zitter approach may need to be adopted. For example, if the claim includes allegations of serious criminal offences, the tribunal will normally have to consider the appropriate standard of proof for finding this allegation to be made out. If the *lex causae* is US law but the seat is London, a case can be made for applying the US standard of 'clear and convincing proof' as opposed to the English standard of 'a balance of probabilities' to ensure that the mixing of the two legal traditions does not result in injustice.

The preferred method is for tribunals to apply uniform standards of proof and not attempt to set up multiple standards depending on the circumstances of the case. Thus, although approaches to standard of proof may vary, such as in the above-mentioned situations, the legal articulation of the standard of proof should remain constant. It should instead be the body of evidence required to establish this standard of proof that varies depending on the circumstances. Examples of these special circumstances are discussed further below.

**PRIMA FACIE EVIDENCE AND SHIFTING THE BURDEN OF PROOF**

Prima facie evidence is proof that is sufficient, if not contradicted, to establish a party's contention. To be considered prima facie proof of a contention, the evidence must not be open to several equally plausible and opposing interpretations. In international arbitration, it is generally considered that evidence that establishes a contention to a level of prima facie certainty is sufficient to shift the burden of proof from one party to the other. This burden shifting concerns the risk of non-production of evidence; it does not displace the procedural duty on both parties throughout the arbitration to substantiate their allegations. If a party, be it claimant or respondent, fails to provide sufficient evidence to substantiate its position, it risks not satisfying the tribunal of its case. Alternatively, the burden of proof may be shifted because of either a presumption found in the applicable law, contractual rules or standards, or the presentation of affirmative defences.

The risk of non-production may also refer to the onus of proof, which falls on the party that faces a preponderance of evidence against it, or on the party otherwise needing to convince an adjudicator at any point in the arbitration. In a practical sense, it is immaterial whether the party with that onus has the burden of proof or not. At the point when a party is called on to produce evidence, the opposite party has better evidence, and the party with the onus of proof will lose if it does not produce adequate evidence on rebuttal to the contrary. Whether the standard of proof has been satisfied thus depends on the evidence presented by both parties.

**REQUIREMENTS FOR EVIDENCE IN SPECIAL SITUATIONS**
ALLEGATIONS OF FRAUD OR CORRUPTION

The prevailing arbitral practice subjects complainants of corruption to a high standard of proof. However, some commentators have suggested that a tribunal should make it easier for parties to establish the existence of corruption by reversing the burden of proof (i.e., requiring a party to disprove its involvement in corrupt activities where prima facie evidence of corruption exists) or by lowering the default balance of probabilities standard of proof. This is because complainants are often unable to produce direct physical or documentary evidence of corruption.

EDF (Services) Ltd v. Romania (EDF) helpfully illustrates some of these difficulties. In EDF, the investor alleged that it was the victim of senior Romanian officials’ demands for bribes on two separate occasions, once at the car park of the Hilton Hotel in Romania and again at a Romanian State Secretary’s private residence. The investor could only rely on the testimony of its employees, who allegedly received the bribe requests in its attempt to prove corruption by the respondent. This was countered by the respondent’s witnesses’ denials (the very persons accused of soliciting bribes), the lack of protest by the investor at the time the alleged solicitation of bribes occurred, and the absolving decision of the Romanian Anti-Corruption Authority. The state of evidence was thus such that it was difficult for the investor to successfully prove corruption on a balance of probabilities. The tribunal expressed sympathy for the investor’s position, observing that ‘corruption . . . is notoriously difficult to prove since, typically, there is little or no physical evidence’.

However, far from setting a more lenient standard of proof for the investor than the balance of probabilities standard, the tribunal raised the evidentiary bar, proclaiming that ‘[t]he seriousness of the accusation of corruption . . . demands clear and convincing evidence’. It is no surprise that the tribunal held that the evidence adduced by the investor was ‘far from being clear and convincing’.

The preferred view for tribunals addressing proof of corruption is that (1) there should be no shifting of the burden of proving corruption as ‘allegations of illegality must, like any other allegation, be proven’, and (2) tribunals should continue to apply the balance of probabilities standard when evaluating allegations of corruption. This is because it is too radical to depart from such a basic and widely accepted rule as the requirement that a party must prove the facts on which it wishes to rely. The rule prevents parties from making baseless assertions and secures the integrity of the fact-finding process. It is also a rule of natural justice and due process that, if abridged in relation to proof of corruption, may have a knock-on effect for other issues on which proof is difficult to obtain. Further, the balance of probabilities standard of proof should be retained. This is because the tribunal is dealing with corruption as a matter of civil liability, not criminal liability. The beyond reasonable doubt criminal standard of proof would also be almost impossible to satisfy given the difficulty in proving corruption.

The balance of probabilities standard should be understood and applied in a nuanced fashion, taking into consideration the particular circumstances of each case. Factors such as the seriousness of the allegations of corruption and their legal consequences if proven, the inherent likelihood or unlikelihood of corruption in the specific case, and the intrinsic difficulty of proving corruption must be considered when determining whether corruption is proved on a balance of probabilities. Lord Justice Hoffmann (later Lord Hoffmann) has illustrated how the inherent unlikelihood of a particular alleged event may heighten the cogency of the evidence required to establish its occurrence.
some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent’s Park was more likely than not to have been a lioness than to be satisfied to the standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

Interestingly, the tribunal in *Libananco Holdings Co Ltd v. Republic of Turkey* arrived at the same conclusion as Hoffmann LJ, but in different words:

In relation to the Claimant’s contention that there should be a heightened standard of proof for allegations of ‘fraud or other serious wrongdoing’, the Tribunal accepts that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that ‘the graver the charge, the more confidence there must be in the evidence relied on’, this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.

Other common law jurisdictions, such as Canada and Singapore, have also adopted the English approach. Varying the quality of evidence required to prove corruption according to the above-mentioned factors does not entail a departure from the balance of probabilities standard. Instead, it means that the balance of probabilities standard should be applied flexibly.

Under this rubric, a tribunal may consider circumstantial evidence in determining whether corruption has been proven. For instance, in *Metal-Tech Ltd v. Republic of Uzbekistan* (Metal-Tech), the tribunal recognised a list of indicators of corruption established by the international community (‘red flag’ principles), such as an adviser’s lack of experience in the sector involved, and any close personal relationship between the adviser and the government that could improperly influence the latter’s decision. These ‘red flags’ and similar indicia of corruption could be potential forms of circumstantial evidence from which certain inferences and conclusions might be drawn by the tribunal. In *Metal-Tech*, the tribunal sought to determine whether corruption had been established with ‘reasonable certainty’. Based on the evidence, the tribunal found that bribery had been made out against the claimant with respect to two consultants engaged by the latter.

A tribunal may also draw adverse inferences from a party’s failure or inability to adduce counter-evidence where there is prima facie evidence of its involvement in corruption. These inferences allow the tribunal to make a finding of corruption when the evidence is otherwise insufficient to meet the balance of probabilities standard. The tribunal in *Metal-Tech* considered that ‘[i]n a number of cases, tribunals have indeed stated that they would draw inferences from non-production [of evidence ordered to be provided]’. Further, national legislation can provide for specific situations in which adverse inferences may be drawn. For instance, Section 24 of Singapore’s Prevention of Corruption Act provides, inter alia, that in any trial into an offence under the Act, the fact that an accused person is in possession of pecuniary resources disproportionate to their known sources of income (which they cannot satisfactorily account for) may be proved as corroborating the testimony of any witness in the trial that the accused person accepted gratification corruptly.
these circumstances, the burden of proof shifts to the accused person to account for the impugned possessions. This kind of burden shifting is also adopted by other countries, and merely reflects a lesson of human experience, which can be adopted by tribunals faced with questions of possible corruption (or fraud) where certain facts that would naturally raise reasonable suspicions of corruption or fraud in a civil case cry out for an explanation to rebut those suspicions. In these cases, it is common for tribunals to draw an adverse inference from proven facts that, if not satisfactorily explained or rebutted, would lead a reasonable tribunal to draw an adverse inference.

The party seeking an adverse inference must provide prima facie evidence of the facts supporting its claim before this kind of inference may be drawn. The Court of Appeal of England and Wales in Wisniewski v. Central Manchester Health Authority held that a court may draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. However, there must be some evidence adduced by the opposite party that raises a case to answer, before the court is entitled the draw the desired inference. If the reason for the witness’s absence or silence satisfies the court, no such adverse inference may be drawn.

There is a stronger and more developed line of authority from Australia on the question of when an adverse inference can be drawn when a party on whom there is a prima facie onus to answer a material allegation raised by the other party fails to do so. This is known as the rule in Jones v. Dunkel, which comes into play when there is an unexplained failure by a party to give evidence to call witnesses or to tender documents or other evidence. In appropriate circumstances, this may lead to an adverse inference that the uncalled evidence would not have assisted the party.

**Any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.**

This rule has been extended to situations in which a party fails to ask questions of a witness in evidence in chief.

Finally, tribunals should proceed with caution and only draw an adverse inference if it arises naturally from the facts, and is so cogent or compelling that it tips the preponderance of evidence in favour of the existence of corruption. Different circumstances require different strength and quality of evidence to prove corruption, and adverse inferences alone may not always fill crucial gaps in the evidence. The balance of probabilities standard should remain the compass, but it is to be understood and applied flexibly so as to accommodate the specific circumstances of each case.

**USE OF ESTIMATIONS TO PROVE DAMAGES**

As addressed in The Guide to Damages in International Arbitration, the burden of proof relating to damages lies with the party making a claim, a counterclaim or any assertion. The standard of proof for damages remains the ‘balance of probabilities’ test in common law jurisdictions. In civil law jurisdictions, some adopt the ‘inner conviction’ test, while others have no defined standard of proof and instead grant judges extensive leeway to determine damages-related facts. Nevertheless, although the articulation of the standard of proof varies from one legal system to another, it often leads to a similar analysis.
Awards for damages may be declined for want of proof. For instance, in the *Chorzów Factory* case,[79] the Permanent Court of International Justice (PCIJ) declined to award damages because the German government failed to satisfy its burden of proof with respect to certain damage elements suffered, even though the PCIJ recognised that the German government had not failed to draw attention to circumstances that were said to prove damage.[80]

Occasionally, however, it may be difficult to measure a pecuniary loss even though it is clear that it has been incurred. Courts have recognised that this is no bar to awarding substantial damages to the claimant,[81] although the tribunal must then be cautious about how much it awards by way of damages without adequate justification for the actual quantum arrived at. An often-quoted authority is Justice Devlin, who held in the High Court of England and Wales in *Biggin v. Permanite* [82] that the inability to precisely measure diminution in the market value of the impugned goods did not bar an award of substantial damages to the claimant. A similar position has been adopted in other common law jurisdictions.[83] Generally, therefore, although it remains true that ‘difficulty of proof does not dispense with the necessity of proof’,[84] the standard demanded can seldom be that of certainty. Even if the standard of proof is that of reasonable certainty, this only demands evidence from which the existence of damage can be reasonably inferred and that provides adequate data for calculating the amount.[85]

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**Endnotes**

1 Michael Hwang is a Senior Counsel and Clarissa Chern was an intern at Michael Hwang Chambers LLC, Singapore. The authors thank Cosima Wimmers, an associate at the firm, for her assistance in the preparation of this version of the chapter.  ~ Back to section


4 International Bar Association, Rules on the Taking of Evidence in International Arbitration, 2020 (IBA Rules), Article 9(1) and its predecessors serve as the leading guideline from which arbitral institutions and ad hoc tribunals take reference. See Singapore International Arbitration Centre (SIAC) Rules 2016, Article 19(2) and Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, Article 22(2). The London Court of International Arbitration (LCIA) Rules have expanded on the IBA Rules, at Article 22(1)(vi).  ~ Back to section

6 2010 UNCITRAL Arbitration Rules, Article 27(1).  Back to section


9 Waincymer, op. cit., at p. 765.  Back to section

10 O’Malley, op. cit., at p. 212.  Back to section

11 id., at p. 213.  Back to section

12 id., at p. 214.  Back to section

13 id., at p. 215.  Back to section


15 id., at p. 2489.  Back to section

16 Waincymer, op. cit., at p. 780.  Back to section

17 Model Law, Article 18.  Back to section

18 CBS v. CBP [2021] 1 SLR 935.  Back to section

19 id., at [71] and [76].  Back to section

20 id., at [85].  Back to section

21 id., at [103].  Back to section

22 O’Malley, op. cit., at p. 215.  Back to section

23 Waincymer, op. cit., at p. 768.  Back to section
24 2010 UNCITRAL Arbitration Rules, Article 27(4). According to David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, Oxford University Press, 2013), ‘nothing in Article 27(4) prevents the arbitral tribunal from following the formal rules of evidence of a national system familiar to both parties’. If a tribunal deems it appropriate, it is also free to apply the evidentiary rules applicable in national courts (subject to general due process constraints). See Born, op. cit., at p. 2482. For instance, hearsay evidence and leading questions are generally accepted, except as provided for in the 2020 IBA Rules, Article 8.3. However, some institutional rules specifically provide that tribunals are not required to apply the rules of evidence of any applicable law. See SIAC Rules, Article 19(2).  


26 SIAC Rules, Article 19(2), HKIAC Rules, Article 22(2) and LCIA Rules, Article 22(1)(vi).  


28 Waincymer, op. cit., at p. 766.  


30 Waincymer, op. cit., at p. 767.  

31 O’Malley, op. cit., at p. 218.  


33 Caron and Caplan, op. cit., at p. 560 (‘Prima facie proof may also suffice where the experience of the tribunal leads it to conclude that the evidence indicates the probable existence of a certain state of affairs.’).  

34 O’Malley, op. cit., at p. 219.  

35 SIAC Rules, Article 19(2), HKIAC Rules, Article 22(2) and LCIA Rules, Article 22(1)(vi).  


39  On a similar note, see Paul Torremans et al. (eds), *Cheshire, North & Fawcett: Private International Law* (15th edition, Oxford University Press, 2017), at p. 85, which also points out that the English Contracts (Applicable Law) Act 1990 provides (at Schedule 1, Article 14(1)) that the rule of the law governing the substance of the contract ‘which raise[s] presumptions of law’ determine the burden of proof that should be applied. It is only if these rules are to be classified as one of substance that they are to be applied in place of the law of the forum.  

40  Waincymer, op. cit., at p. 769.  

41  O’Malley, op. cit., at p. 220.  

42  id., at p. 221.  

43  id., at p. 223.  

44  id., at p. 222.  

45  Waincymer, op. cit., at p. 773.  


47  id., at pp. 598–99.  

48  *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13 Award 8 October 2009 (*EDF*) at [221].  

49  Hwang and Lim, op. cit., at p. 599.  

50  *EDF*, at [221].  

51  ibid. (emphasis added).  

52  ibid.  

53  Hwang and Lim, op. cit., at p. 607.  

54  id., at p. 608.
55  id., at p. 609.  ~Back to section

56  Secretary of State for the Home Department v. Rehman [2001] UKHL 47 at [53].  ~Back to section

57  Libananco Holdings Co. Ltd v. Republic of Turkey, ICSID Case No. ARB 06/8, Final Award, 2 September 2011, at [125]. See also Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB 12/14 and 12/40, Award, 6 December 2016 at [240], relying on the foregoing paragraph.  ~Back to section


59  Hwang and Lim, op. cit., at pp. 609–11.  ~Back to section

60  Metal-Tech Ltd v. Republic of Uzbekistan, ICSID Case No. ARB 10/3, Award, 4 October 2013 (Metal-Tech), at [293].  ~Back to section

61  The following have been identified as potential indicia of corruption in general under the United Nations Convention Against Corruption and Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: (1) the establishment of off-the-books accounts; (2) the making of off-the-books or inadequately identified transactions; (3) the recording of non-existent expenditures; (4) the entry of liabilities with incorrect identification of their object; (5) the use of false documents; and (6) the intentional destruction of bookkeeping documents earlier than foreseen by the law.  ~Back to section


63  Metal-Tech, at [243].  ~Back to section

64  id., at [326] and [351].  ~Back to section

65  Tribunals are permitted to rely on presumptions or inferences regarding evidence. This is not limited to cases on corruption. See Born, op. cit., at p. 2486.  ~Back to section

66  Hwang and Lim, op. cit., at p. 618.  ~Back to section

67  Metal-Tech, at [245].  ~Back to section

68  Prevention of Corruption Act (Cap. 241, 1993 Rev Ed), at Section 24(1).  ~Back to section

69  O’Malley, op. cit., at p. 228.  ~Back to section

71 (1959) HCA 8; 101 CLR 208.  

72 id., per the Right Honourable Justice Frank Kitto in the High Court of Australia, at [5].  

73 See Commercial Union Assurance Co of Australia Ltd v. Ferrcom Pty Ltd (1999) NSWLR 389, where the Honourable Justice Kenneth Handley suggested that a court should not draw inferences favourable to a party where questions were not asked in evidence in chief.  

74 Hwang and Lim, op. cit., at p. 618.  

75 id., at p. 619. The authors acknowledge the source of these remarks on the rule in Jones v. Dunkel by Chris Nowlan, Barrister.  


78 id., at p. 11.  

79 Case concerning the Factory at Chorzów (Germany v. Polish Republic), Claim for Indemnity (Merits), No. 13, Judgment of 13 September 1928, PCIJ 1928, Series A, No. 17.  


83 In Penvedic Contracting Co v. International Nickel Co of Canada (1975) 53 DLR (3d) 748 (Supreme Court of Canada), the difficulty of accurate assessment of additional expenses incurred by a builder was held to be no reason for not making a reasonable estimate (cited in McGregor, op. cit.).  

84 Aerial Advertising Co v. Batchelors Peas [1938] 2 All ER 788 at 796, per Atkinson J (cited in McGregor, op. cit.).
85  McGregor, op. cit., at p. 326.