Adverse Inferences in International Arbitral Practice

By Simon Greenberg and Felix Lautenschlager*

This article was borne of the authors' experience of adverse inferences in practice, and in particular a suspicion that they are often misunderstood, misused or avoided. On the basis of their analysis of 33 ICC arbitral awards in which the arbitral tribunal was requested to draw an adverse inference, the authors seek to categorize adverse inferences, distinguishing between those that are 'improper' and those that are 'proper' and giving concrete examples of each. They consider how adverse inferences really work and explain that, far from being a vague sanction for non-compliance with an arbitral tribunal's order, an adverse inference can be a genuine piece of evidence that fills a gap in a case otherwise incapable of being proven. They warn, however, that caution must be exercised where an arbitral tribunal considers drawing a 'proper' adverse inference, as it may have a bearing on due process. This was illustrated by a decision of the Singapore High Court in 2008, which the authors discuss in some detail.

Cet article est issu de l'expérience acquise par les auteurs de nombreux cas pratiques dans lesquels il était question de tirer des conclusions négatives. Ils estiment en particulier que ces conclusions sont souvent mal comprises, mal utilisées, ou simplement évitées. En se fondant sur l'analyse de 33 sentences arbitrales CCI rendues dans des affaires où il a été demandé au tribunal arbitral de tirer des conclusions négatives, les auteurs tentent de classer ces dernières en plusieurs catégories, en distinguant celles qui sont authentiques de celles qui ne le sont pas, et en en donnant des exemples illustratifs. Ils étudient la manière dont les conclusions négatives fonctionnent réellement, et expliquent que, loin de constituer une vague sanction du non-respect d'une ordonnance du tribunal arbitral, une conclusion négative peut constituer un véritable élément de preuve qui comble une lacune dans une cause impossible à prouver par ailleurs. Ils invitent cependant à la prudence lorsqu'un tribunal arbitral envisage de tirer une conclusion négative authentique, car celle-ci peut avoir une incidence sur le respect du principe du contradictoire. Il en fut ainsi dans une décision de la Haute Cour de Singapour de 2008, à laquelle les auteurs consacrent un développement circonstancié.

Este artículo nació de la experiencia de los autores en el establecimiento de presunciones desfavorables en la práctica y en concreto, ante la sospecha de que aquellas suelen ser mal interpretadas, mal aplicadas o ignoradas. Analizando 33 laudos arbitrales de la CCI en los que se solicitó al tribunal arbitral que aplicara presunciones desfavorables, los autores intentan clasificar las presunciones desfavorables, distinguiéndolas entre aquellas que son "impropias" y las que son "propias" y ofreciendo ejemplos concretos para cada uno de los casos. Abarcan el método de funcionamiento real de las presunciones desfavorables y explican que, lejos de limitarse a una leve sanción del incumplimiento de una orden del tribunal arbitral, una presunción desfavorable puede resultar ser un elemento de prueba de gran valor que suple el vacío de aquellos hechos que no hubiesen podido ser demostrados de otro modo. No obstante, advierten que debe prestarse extremo cuidado cuando un tribunal arbitral considera la aplicación de presunciones desfavorables "propias", ya que podrán tener una repercusión en las garantías procesales. Esto se ilustró en una sentencia dictada por el Tribunal Superior de Singapur de 2008, que los autores exponen de forma detallada.

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1. Introduction

There is much discussion in the world of arbitration on how best to manage the vast quantities of documentary evidence frequently produced. Yet equally challenging is the question of how best to judge a case in which evidence is lacking. This dearth may be due to a genuine absence of evidence or to a party's reluctance or refusal to reveal information that may compromise its case. The delicate task facing the arbitrator will be to decide how to interpret the party's conduct in such situations. One of the most common responses is to consider drawing adverse inferences.

The authors have seen the issue of adverse inferences arise in arbitration in different instances and from different perspectives, namely as counsel, as secretary to various arbitral tribunals and in numerous arbitral awards that were reviewed in order to assist the ICC International Court of Arbitration ('Court') to scrutinize draft arbitral awards.

What further triggered the idea for this paper was the general feeling, particularly from reviewing ICC awards, that despite all the talk about adverse inferences, arbitral tribunals are in fact pretty reluctant to rely on them. That is not to say that they never rely on them. But in an attempt to be pragmatic, they quite often skirt around the adverse inference contention, preferring to tread safely and rely on other evidence.

This inspired the authors to conduct empirical research, based on ICC arbitral awards, with a view to examining how arbitrators deal with requests to draw adverse inferences.

The article first sets out the adverse inference principles and how they are applied in practice (see section 2 below); it then turns to an analysis of the examined ICC awards (see section 3 below) before commenting on adverse inferences and due process (see section 4 below); and brief concluding remarks (see section 5 below).

2. Background and arbitrators' powers

Contemporaneous documentary evidence is usually considered to be the best form of evidence in international arbitration. The same can generally be said for court litigation in civil law countries, although in common law courts one normally needs to complement contemporaneous documents with testimonial evidence.

Obtaining the right documents can therefore be crucial to your case. Arbitral tribunals can and often do order the production of documents, yet they lack the power to enforce orders for production in the same way that courts can. For example, an arbitral tribunal is not empowered to charge a party or individual with contempt of court for failing to comply with an order; nor can it arrange for the relevant judicial or police authorities to search and seize documents physically from a person's premises. While some domestic arbitration laws provide for assistance from state courts in this respect, these provisions rarely operate effectively for international arbitrations. In any event, recourse to domestic courts is generally undesirable because one of the reasons parties choose arbitration is precisely to avoid litigating in courts, particularly foreign courts.

The difficulties in enforcing these orders mean that a party may be tempted to refuse to comply with a document production order if it considers the requested documents to be damaging for its case. This raises a question as to what an arbitral tribunal can do about that.

An arbitral tribunal has two broad options:

1. draw an adverse inference, provided all relevant circumstances are in place for that (as further developed below); or

2. using its discretion in relation to the allocation of costs at the end of the case, effectively punish the non-producing party with a costs order. This second option obviously does not help the party that has been unable to make its case as a result of the missing evidence so it is not really a satisfactory solution.

An arbitral tribunal's power to draw adverse inferences is well established as a matter of international arbitration practice. There is a wealth of authoritative academic support for that power and a wealth of arbitral awards, notably emanating from the work of the Iran-United States Claims Tribunal, whose awards are

published.[1] The principle is also reflected in some national arbitration laws (e.g. English Arbitration Act 1996, section 7).

2.1. Burden of proof, proper and improper adverse inferences

It will be helpful, at the outset, to clarify what is meant by an adverse inference for the purpose of this paper.

Sometimes it is said that drawing an adverse inference is similar to shifting the burden of proof. As one ICC arbitral tribunal put it:

> [The] burden [of proof] may shift to the responding party to rebut that [*prima facie*] evidence, when the party carrying the burden of proof furnishes [*prima facie*] evidence sufficient to raise a presumption that what is claimed is true.

This view is, however, not shared by all arbitral tribunals and commentators. As another ICC arbitral tribunal put it:

> It would in particular rarely, if ever, be appropriate to shift the burden of proof from the party requesting the production of documents to the party ordered to produce the same. …
>
> Nevertheless, where a party does not comply with an order for the production . . . the Tribunal may come to the conclusion that an adverse inference should be made with regard to a specific fact.

Vera van Houtte[2] and Jeremy Sharpe[3] suggest that it is not the burden of proof which shifts to the non-producing party, but rather the 'burden of producing evidence'.

While this is true for most cases, there are some instances in which the burden of proof indeed changes to the party which refuses to produce documents. The inferences drawn by arbitral tribunals are not stereotypical. There are many degrees of inferences, which vary in their force depending on the strength of the requesting party's case without the requested documents (which is often referred to as '*prima facie* evidence'), and the expected quality of the evidence that is not presented.

One problem may lie in the wide use of the term 'adverse inference'. Depending on the requesting party's case, and the nature of the withheld evidence, the arbitral tribunal can draw different conclusions which, in turn, vary in their nature.

To simplify comprehension, we will in the following use 'claimant' to refer to the party requesting the documents and/or the adverse inferences, and 'respondent' to refer to the party refusing to produce documents, witnesses, etc.

(a) Not an adverse inferences issue

In some cases, the mere absence of evidence filed by the respondent of its own volition is described as potentially leading to an adverse inference.

Example: C produces a promissory note in which R acknowledges that it owes and promises to pay C USD 1,000. C tenders a witness statement that R has not paid. R claims to have paid but does not produce a receipt showing payment, nor does R produce witness evidence. Because R has not produced a receipt, the arbitral tribunal concludes that it can 'draw an adverse inference' that R has in fact not paid yet.

However, this is not really drawing an adverse inference, or any inference. In this example, C has simply discharged its burden of proof, namely C showed that there was a promissory note obliging R to pay. The onus to prove payment lies on R, which it has not discharged. It is thus possible for the arbitral tribunal to conclude that (i) R promised to pay C USD 1,000 and (ii) R has not paid yet.

Accordingly, in two of the examined ICC awards, the arbitral tribunal noted that adverse inferences need not be drawn against a party that already bears the burden of proof for the fact in issue. The question will be whether that party has proved the fact or not.

(b) Improper adverse inferences

Probably the most common kind of adverse inference drawn in the reviewed ICC awards is what will be referred to by the authors as 'improper' adverse inferences. This is not meant to diminish their importance. They are, in fact, an essential tool for assessing evidence and probably the most widely used adverse inference.

In this scenario, the claimant's case is consistent and conclusive based on the evidence presented by it. In the absence of any defence, the claimant should win the case.

Example: C produces the above promissory note for US$ 1,000. C submits (through witness evidence) that R has only paid US$ 500, and thus still owes another US$ 500.

1 Numerous examples of these awards in relation to adverse inferences are summarized in J.K. Sharpe, 'Drawing Adverse Inferences from Non-Production of Evidence' (2006) 22:4 *Arbitration International* 549.

2 V. van Houtte, 'Adverse Inferences in International Arbitration', in T. Giovannini & A. Mourre, eds., *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*, Dossier VI, ICC Institute of World Business Law (Paris: ICC, 2009) 196.

3 Sharpe, *supra* note 1 at 551–552.

The adverse inference comes into play when R, in turn, introduces witness testimony affirming that it already paid USD 800, leaving a debt of only USD 200. While C had discharged its burden of proof in the first place, R now puts the threshold up a notch by contending something else. In order to win, C now has to produce more evidence.

The absence of additional evidence produced by C could lead to a situation of conflicting witness statements, and the arbitral tribunal would have to decide which witness it believes.

In a modified scenario, C claims that it issued R with a receipt showing the payment of only USD 500. For the sake of argument, C did not retain a copy of the receipt, but can establish to the satisfaction of the tribunal that it exists. R refuses to produce the receipt without good reason.

When the arbitral tribunal deliberates in this scenario, R's refusal may directly influence the weighing of the conflicting testimonial evidence. The fact that R did not produce the receipt might lead the arbitral tribunal to draw an inferencein support of C's contention that only USD 500 was paid.

The reason why we call this kind of adverse inference 'improper' is because the inference only influences the weight attached to *existing* evidence.[4] There are no real gaps in C's evidence, which is conclusive for resolving the issue in favour of C even without the improper adverse inference. The non-production of the receipt by R means only that the arbitral tribunal is prepared to attach more weight to C's witness statement than it does to R's witness statement.

One ICC arbitral tribunal in the reviewed awards neatly summarized this approach as follows, while refusing to draw the requested adverse inference:

> Nonetheless, the inferences which may be drawn, even if strong, are not presumptive: they must be weighed against the factual evidence to which the Tribunal has already referred. So weighed, they do not in the Tribunal's view suffice to discharge the burden of proof which rests on the Claimants, on this part of the case.

For illustration, here is an example based on a real ICC award:

C contended that C and R entered into a loan agreement under which payments from R to C were due. R denied the existence of the loan agreement. C produced the loan agreement, but R argued that the signatory on behalf of R lacked authority to enter into the agreement. However, there was evidence that R had already made partial payments under the loan agreement. Thus, R was ordered to produce its audited financial statements for the relevant period which should show the partial payments. R refused to comply with that order. The arbitral tribunal drew an adverse inference that the loan agreement was ratified because payments were already made to C. While C's case was conclusively proven in itself, R's refusal to produce made C's evidence stronger.

Virtually all cases in which an arbitral tribunal states that it would be prepared to draw adverse inferences, but finds this unnecessary for its conclusion, will fall into this category. If the direct evidence on file is sufficient to rule in favour of the claimant, some arbitral tribunals are reluctant to state expressly that it was the adverse inference that tipped the scales. It is important to note that what is often described as a '*prima facie* case' in these instances is anything but *prima facie*. It might be a relatively weak case, but a complete one.

'Improper' adverse inferences are sometimes drawn without a party having made an express application and, as the arbitral tribunal only uses the inference in order to weigh the evidence presented by the parties, the arbitral tribunal will not in all cases be required to put the parties on advance notice of the measure (as explained below in section 4) in order to preserve due process.

(c) Proper adverse inferences

By proper adverse inferences we mean situations where the claimant's case on a particular point is genuinely incomplete with regard to evidence. Short of documents being produced by the other side, or an adverse inference being drawn, the claimant will lose because it has not established the facts necessary to succeed.

A proper adverse inference is where the respondent's refusal to produce documents or witnesses leads to the presumption that the documentary or testimonial evidence would be in the claimant's favour. Unlike improper adverse inferences, a proper adverse inference is not used to *reaffirm* evidence already presented by the claimant, but rather to *substitute* for a piece of essential evidence. The inference is, in other words, a genuine gap filler. In this instance the claimant might well *lose* its case based on its own evidence alone even if the respondent did not advance a defence.

4 cf. V. van Houtte, *supra* note 2 at 200.

There are two very illustrative examples amongst the ICC awards reviewed for this article. The following scenarios are freely modelled on them:

C purchased ten shipments of raw materials from R. For each shipment, R produces analysis reports as to the quality of the material, which establish that the material complies with the contractual specifications. C mixes the delivered materials of the first six shipments with other materials of different origin and sells it on. C then receives complaints from its customers and starts testing R's raw materials as from the seventh shipment. Tests performed on the last four shipments show that the quality of the material is far below the contractual standard and, accordingly, that the reports provided by R are inaccurate. Other evidence raises a suspicion that R might have conspired with the laboratory to produce forged reports. R is ordered to produce the documents underlying the analysis reports and documents relating to the origin of the raw material. R refuses to produce them. The tribunal draws the adverse inference that *all ten* shipments were below the contractual quality standards.

This illustrates the basic difference between proper and improper adverse inferences. In this case, C had no evidence at all to show that the first six shipments were not in conformity with the contract. It had not tested those shipments, and the material was mixed and sold on. This genuine gap was closed by the adverse inference that R's documents, if produced, would have shown what C could not prove. One might consider that C was fortunate in this case that the existence of such documents in R's possession could not seriously be denied.

A second illustrative case involved a tender process:

C and R were shareholders of a joint venture company ('Co.'). Co., under R's supervision, was supposed to invite tenders for a construction process. At the end of the alleged process, R presented a sophisticated chart to C showing that B was the lowest bidder amongst four. The chart was not handed to C. Later, C alleged that R fabricated the tendering process to secure an overpriced contract for B. In fact, the arbitral tribunal found it to be 'common ground' that no other bids for this particular tender had been received. C had no direct evidence to establish that the chart was fabricated deliberately to mislead C. However, as R refused to produce the chart and the underlying documents as ordered, the tribunal drew the inference that R had in fact presented such a chart, and that it was intentionally misleading.

Contrary to what has been suggested by commentators,[5] the burden of proof in these cases may well be shifted to the respondent, but only with regard to the very specific fact in question. Unlike with improper adverse inferences, the claimant does *not* have sufficient evidence itself to discharge its burden of proof. If the respondent did not put forward a defence, the claim should still fail.

The crucial but unproven fact is, at first, often aired to the arbitral tribunal based on allegations, suspicions and leads which are in themselves not sufficient to convince the arbitral tribunal that the alleged fact is true. They are, however, sufficient to arouse the arbitral tribunal's curiosity and, accordingly, the arbitral tribunal might order the respondent to produce documents or make an appropriate witness available for cross-examination.

If the respondent refuses, the arbitral tribunal could assume the *unproven* fact to be true unless the respondent *proves* otherwise. This is effectively shifting the burden of proof for this specific fact.[6] While it is true that a party cannot win a case on an adverse inference alone,[7] the reviewed cases show that a proper adverse inference can fill a crucial gap and be an essential element for the claimant to win its case.

That being said, the claimant always has to present *prima facie* evidence which makes the claimed fact appear plausible. Under the heading of proper adverse inferences, this evidence is indeed only *prima facie* in the sense that, without the adverse inference, it would not be sufficient for establishing the claimant's case.

Where the arbitral tribunal considers drawing 'proper' adverse inferences (whether upon a party's application or its own motion), it must give special consideration to due process. The arbitral tribunal should, before drawing the adverse inference in its award, put the non-compliant party on notice that it might do so and that the burden of proof for the fact in question now effectively lies with that party.[8] That party may then need to be offered an opportunity to produce the requested (or other) evidence to discharge its burden to prove the opposite.

5 V. van Houtte, *supra* note 2 at 200; J.K. Sharpe, *supra* note 1 at 552.

6 cf. the case referred to in section 3.2 below.

7 V. van Houtte, *supra* note 2 at 205.

8 Ibid. at, 208; cf. section 4 below.

2.2. Adverse inferences as a 'sanction'

In the authors' view, the drawing of an adverse inference should not be described as a 'sanction' or punishment for non-production, even though some commentators describe it as such.[9] It is not a sanction at all (as a costs order can be in certain circumstances), but rather a rule of evidence which, if the elements are made out, creates an indirect[10] piece of evidence that needs to be weighed together with all the rest of the evidence. Thus an adverse inference is a type of evidence like documentary evidence, testimonial evidence and expert evidence. As explained further below (in section 4), this is why, where the arbitral tribunal feels that it might need to rely on an adverse inference relating to the failure to produce a requested and ordered document, it should inform the parties in advance and ensure that they have a proper opportunity to present submissions on that piece of evidence, i.e. on whether the arbitral tribunal should draw an adverse inference and how that inference could fit in with the rest of the evidence.

2.3. The test for drawing adverse inferences

There is no overarching set of rules for the drawing of adverse inferences in international commercial arbitration. However, some requirements are common and found repeatedly when examining arbitral awards.

The 2010 IBA Rules on The Taking of Evidence in International Commercial Arbitration ('IBA Rules') provide some guidance (section 2.3(a) below). Further, Jeremy Sharpe has published an excellent analysis of Iran-United States Claims Tribunal cases which will be compared to awards made in ICC arbitrations (section 2.3(b) below).

(a) IBA Rules

Adverse inferences are referred to in the IBA Rules, which are now widely accepted as a reflection of international arbitration practice even when they are not specifically adopted for a particular case. The rule was first set out in the 1999 version of the IBA Rules and was repeated, unmodified but with a slightly different article number, in the 2010 version. Article 9(5) of the 2010 IBA Rules provides:

> If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

Article 9(6) complements this:

> If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.

Thus Article 9(5) relates to documents not produced and Article 9(6) relates to other evidence.

An important observation from both these provisions is that they only apply where there has been either (i) a request for evidence from a party that was not objected to in due time or (ii) an order from the arbitral tribunal to produce evidence. The first refers to the situation where the claimant makes a production request and the arbitral tribunal grants the respondent a reasonable time to object. If the respondent fails to object, it is deemed to have accepted the production request. This non-response alleviates the need for a production order from the arbitral tribunal. In these cases, adverse inferences based on non-production can, theoretically, be made even without an express order for production.[11] However, in practice most arbitral tribunals in this situation would provide the respondent a further opportunity to produce and should, in any event, still put that party on notice of the possibility of an adverse inference being drawn.

It is interesting to note that the arbitral tribunal expressly considered the IBA Rules in only three of the 33 reviewed ICC arbitral awards. This is understandable given that, apart from establishing the principle that adverse inferences can be drawn, the IBA Rules provide virtually no guidance as to how and when.

9 e.g. V. van Houtte, *supra* note 2 at 195. However, it may simply be a question of language because Ms van Houtte certainly sees the rule as one of evidence, as is clear from the approach of her article in general.

10 V. van Houtte, *supra* note 2 at 198.

11 A different view is held by Ms van Houtte, *supra* note 2 at 202, who is of the opinion that 'no adverse inference can be drawn unless an order of the tribunal has actually been disregarded'. However, procedural *orders* imposing timetables for production of documents commonly include a date by which documents not subject to an objection must be produced. Such a scheduling order implies an order to produce those documents.

(b) Jeremy Sharpe's analysis of the international *lex evidentia*

In a very instructive article, Jeremy Sharpe has distilled the Iran-United States Claims Tribunal's then 36 volumes of published awards which span over two decades and formulated the following five-prong test for drawing adverse inferences:[12]

1. The party seeking the adverse inference must produce all available evidence corroborating the inference sought;

2. the requested evidence must be accessible to the inference opponent;

3. the inference sought must be reasonable, consistent with facts in the record and logically related to the likely nature of the evidence withheld;

4. the party seeking the adverse inference must produce *prima facie* evidence; and

5. the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.

The analysis below establishes that this test is consistent with ICC awards, but with variations in individual instances. We refer back to these five points when presenting the result of our analysis of ICC awards below (see section 3 below).

3. Analysis of ICC arbitral awards

The analysis in this section is based on 33 ICC awards rendered between 2004 and 2010 in which a party requested the arbitral tribunal to draw an adverse inference.[13] As some of these awards deal with more than one fact which was to be proven or supported by drawing adverse inferences, we have analysed a total of 36 instances and will refer to them as such.

As mentioned above, in reviewing draft ICC arbitral awards, the authors sensed that arbitral tribunals were reluctant to draw adverse inferences. They sometimes skirt around the issue and decide the case by other means, presumably in an effort to avoid creating due process concerns.

This feeling seems to have been confirmed by studying the ICC awards. In fact, in 20 of the 36 instances examined (58%) the arbitral tribunal stated that it was not necessary to draw an adverse inference to reach its conclusion. Amongst those 20 instances were three where the arbitral tribunal said that it could draw adverse inferences but that doing so would be redundant.

In 12 of the 36 instances the arbitral tribunal actually drew an adverse inference and in only seven instances was the drawing of an inference decisive for the outcome of the case. All 12 instances in which the arbitral tribunal was prepared to draw adverse inferences were based on a party's non-production of documents following a document production order. In one of those 12 instances, the arbitral tribunal additionally relied on the fact that a witness had refused to answer some questions, and in two cases the arbitral tribunal expressly reinforced inferences drawn from the non-production of documents with the non-presentation of a witness.

The studied awards provide insight into the reasons for which adverse inferences are requested and the elements for granting them, each of which is presented in turn.

3.1. Reasons for seeking an adverse inference

The most common reason for a party to seek adverse inferences is the non-production of documents (19 instances out of 36, representing 53%). This figure includes both cases where one side has a general suspicion that the other side has omitted to produce documents, and cases where one side openly refuses to produce certain documents, for example because they were allegedly destroyed or are confidential.

In 11 of those 19 instances the arbitral tribunal concluded that the documents not produced would have been adverse to the interests of the non-compliant party. The fact that 10 of those 11 successful instances involved a refusal to produce one or more very specific documents demonstrates that arbitral tribunals require more than a general contention that the other side did not engage in proper document production. The eleventh successful instance did involve a more general shortcoming in document production obligations, but it was quite clear that the party against whom the inference was sought had simply held back an entire category of relevant documents.

12 Sharpe, *supra* note 1 at 550.

13 Extracts from some of these and other relevant ICC awards are published in this issue of the Bulletin.

In nine instances out of the 36 (25%), the arbitral tribunal was asked to draw adverse inferences because the opposing side either did not call a critical fact witness or did not present a witness for cross-examination. While it was generally acknowledged that the absence of a witness could be a ground for drawing adverse inferences, no fact in the studied awards was established based exclusively on the absence of a witness.

In three instances the arbitral tribunal refused to draw an inference because the party requesting it had not attempted to call the witness either, let alone subject him or her to a subpoena or deposition. In another instance the arbitral tribunal refused to draw adverse inferences because the witness allegedly could not appear for cross-examination due to ill health, but the arbitral tribunal stated that it would attach very little weight to the written witness statement. In three instances the arbitral tribunal avoided the issue by noting that whether or not it drew any inference made no difference to its final conclusions. In two instances, the arbitral tribunal stated that it would draw adverse inferences based on the absence of a witness, but in both instances the finding was coupled with an inference based on the refusal to produce documents.

Some of the other reasons (i.e. apart from non-production of a document or non-appearance of a witness) why arbitral tribunals were requested to draw adverse inferences are quite colourful. Amongst them are cases where the party against whom the inference was sought:

- applied to a state court for an injunction to stop the arbitration;
- called a witness who was one if its employees;
- called a witness who relied on the privilege against self-incrimination to excuse his failure to answer a question relating to pending criminal investigations (interestingly, according to this arbitral tribunal the privilege against self-incrimination in the circumstances was inapplicable in ICC arbitration);
- failed to present expert evidence on the quantum of damages;
- failed to identify or prove the date of a certain document (which failure should lead to an inference about the date of the document);
- called a witness who refused to cooperate in a related criminal investigation (in this case the drawing of an adverse inference was rejected because the witness did appear in the arbitration and was examined by both sides);
- had a potential witness under its control who refused to testify in a state court in connection with a related case;
- refused to let the requesting side inspect certain machines which were the subject-matter of the dispute (the arbitral tribunal found it more appropriate to order the refusing party to allow the requesting party to perform an inspection and imposed certain rules for the inspection); or
- called a witness who 'downplayed' events or could allegedly not remember key facts.

Only one of the above-listed other requests was successful, that where the witness refused to answer questions that might have incriminated him. It should be noted, however, that in that case the arbitral tribunal also relied on the fact that certain documents were not produced.

3.2. Requirements for successfully obtaining an adverse inference

Another feeling that we developed in the course of reviewing arbitral awards was that where arbitral tribunals are asked to draw adverse inferences they sometimes fail to give proper consideration to the seriousness and importance of the issue.

The review of the above-mentioned awards confirms this perception. It would be inaccurate to attempt to quantify those as a percentage because of the subjective nature of assessing whether an arbitral tribunal's analysis is thorough or not. In addition, as noted above, some of the rather silent decisions arose from the fact that in many cases the arbitral tribunal did not enter into a discussion of the requirements because it found that the drawing of any inferences would make no difference to the result.

There are, however, instances in which one cannot shake off the impression that the arbitral tribunal did not give the necessary attention to the possibility of drawing adverse inferences, or dismissed them highhandedly. We found two such examples.

In the first example, the authors had the benefit of an *ad hoc* award excerpt—i.e. not an ICC award—in which one party refused to produce certain documents and failed to call certain of its own employees as witnesses. Concerning the witnesses, the arbitral tribunal decided not to draw an express adverse inference because the requesting party had not attempted to call these witnesses either.[14] Concerning the documents, the arbitral tribunal acknowledged that the documents should have been produced and that only unconvincing reasons for their non-production had been offered. However, rather than entering into a proper analysis with a view to drawing a specific adverse inference, the arbitral tribunal decided to take this failure to produce into account 'in a general way', thus drawing a 'negative inference of a general nature'. It was not clear which of its findings, if any, were actually influenced by the general negative inference and which were not. Further, the arbitral tribunal held that it was not prepared to revise its conclusions drawn on the basis of evidence actually presented by reference to 'absent evidence'; a finding which suggests a point blank rejection of proper adverse inferences as a matter of principle.

In the second example, the claimant had commenced arbitration against the respondent for unlawful use of know-how. A potential witness could have answered a crucial question as to whether the development of a certain material was a commercial secret which he allegedly learned from his previous employer (the claimant), or whether it was a parallel development by his new employer (the respondent). The respondent did not call the witness and the claimant requested adverse inferences.[15] Apparently in order to avoid basing its decision on adverse inferences, the arbitral tribunal refused to draw adverse inferences but concluded that the inference sought (i.e. that the witness used commercial secrets) was 'probable' anyway. The arbitral tribunal offered no substantiated reasons for this finding. The tribunal added that if it had any doubt (which it said it did not), it would have drawn the inference as sought.

Fortunately, not all awards deal with the issue of adverse inferences so lightly.

In one interesting instance, the arbitral tribunal held, as a matter of principle, that the power to draw adverse inferences rests with the arbitral tribunal itself and technical experts are not permitted to rely on them in the course of issuing expert opinions.

In at least three instances, the arbitral tribunal deeply analysed the adverse inference issue. Interestingly, the first two of those three, which are quoted immediately below,[16] are somewhat contradictory regarding whether or not the drawing of an adverse inference can involve shifting the burden of proof to the non-compliant party.[17]

In the first award, delivered in 2010, a sole arbitrator sitting in Latin America summarized the principle as follows:[18]

> It is a well-established principle in international commercial arbitration that arbitrators may draw adverse inferences against a party that refuses, without reasonable excuse, to disclose documents and information under its control, essential to prove or disprove claims asserted against it. The use of such power by an arbitrator is an exceptional one, and should only be used when the arbitrator is satisfied that certain requirements are met.

The arbitrator then set out the requirements as follows:

> An essential element for the drawing of adverse inferences is that the party seeking such negative inferences must *produce* prima facie *evidence that is sufficient to establish a fact* in the absence of any evidence to the contrary. The general rule in international arbitration, as well as in any proceeding, is that each party bears the burden of proving the facts relied on to support its case. That is, the party who asserts a fact is responsible for providing proof thereof. … However, *such burden may shift to the responding party to rebut that evidence, when the party carrying the burden of proof furnishes evidence sufficient to raise a presumption that what is claimed is true.* (Emphasis added).

In this case, the arbitral tribunal's decision did in fact rely on drawing an adverse inference.

In the second case, seated in Paris in 2004, the Terms of Reference provided with foresight as follows:

> If a Party fails without satisfactory explanation to produce any document requested by the other Party and subsequently ordered to be produced by the Tribunal, the Tribunal may infer that such document would be adverse to the interests of that Party.

The arbitral tribunal, composed of three well renowned arbitrators, rejected a contention that it should take guidance from a US Federal Appeal Court decision on the basis that a trial there had nothing in common with an arbitration seated in Paris. It went on to state what perhaps can be described as the general problem with document production and adverse inferences in international arbitration:

14 This is in line with the approach generally found in ICC awards, cf. section 3.1 above and section 3.2(a) below.

15 In this case the arbitral tribunal did not contemplate whether or not the claimant should have called the witness in question itself, cf. section 3.1 above and section 3.2(a) below.

16 The third case is quoted in section 3.2(b) below.

17 cf. section 2.1(c) above.

18 Referring to the ICSID decision in *Marvin Feldman v. Mexico*, case no. ARB(AF)/99/1, award of 16 December 2002, (2003) 42 *International Legal Materials* 625 at 662.

The arbitral tribunal does not hesitate to state that orders for the production of documents often reach their limits when a party to an arbitration elects not to comply with such orders, or does not do so fully. Given the different approaches, different views and practices regarding orders for the production of documents which prevail all over the world, an international arbitral tribunal will normally be reluctant to draw a quick conclusion from a party's non-production of documents. It would in particular rarely, if ever, be appropriate to shift the burden of proof from the party requesting the production of documents to the party ordered to produce the same.

The arbitral tribunal then described its approach as follows:

Nevertheless, where a party does not comply with an order for the production of a very specific document, and where the arbitral tribunal has *reason to believe that such document exists, and no valid excuse for its non-production* is offered, the Tribunal may come to the conclusion that an adverse inference should be made *with regard to a specific fact*. In other words, in such case, the fact that the requesting party cannot meet its burden of proof with respect to a specific point would lead to the dismissal of its claim, even if all the other elements of such claim would have been shown to exist. Thus, an adverse inference with respect to one fact will not automatically be a substitute for all the other elements of a claim as to which the party bearing the burden of proof will have to provide sufficient and satisfactory evidence. (Emphasis added).

The party requesting the inference in that case failed because it could not establish that the allegedly unproduced document did in fact exist.

However, the two cases just described are not as far apart as they might seem at first glance. Both accept that a fact can be established by an adverse inference. While the first arbitral tribunal calls this 'shifting the burden of proof',[19] the second arbitral tribunal rather considers 'burden of proof' to refer to the entire set of facts which must be proven.

That aside, most arbitral tribunals restrict themselves to a fragmental analysis of available tests. In some instances, this will be due to the fact that the adverse inferences stand or fall with only one requirement. In other cases, it appears that arbitral tribunals establish or examine the requirements only superficially.

We have found the five-prong test developed by Jeremy Sharpe[20] helpful, and accordingly we present the examples of requirements as set out in the examined ICC awards under the headings of his test. It must be noted that the five prongs of the test are not always exclusive but in some cases overlap.

(a) The party seeking the adverse inference must produce all available evidence corroborating the inference sought.[21]
As a first requirement, an arbitral tribunal can refuse to draw adverse inferences if the requesting party itself has likely access to evidence which could help to prove the inference sought.

This requirement is taken a step further in three of the analysed ICC awards. If an adverse inference is sought because the other side fails to call a certain witness, the requesting party must attempt to call that witness itself, notwithstanding the fact that the witness is not under its sphere of influence, but rather 'belongs' to the other side.

This requirement is closely related to requirement 4, namely that the requesting party must produce *prima facie* evidence and we have allocated other illustrative examples at section 3.2(d) below.

(b) The party requesting adverse inferences must establish that the requested party has or should have access to the evidence sought.[22]
This requirement is unsurprising, but it can be very difficult in certain cases for the arbitral tribunal to determine whether the requested party has or should have possession of the requested evidence.

While this requirement is easy to establish if a party blatantly refuses to produce a specific document, it is difficult if a Redfern Schedule (as they often do) simply states that 'no such documents exist'. Sometimes, the opposing side will request adverse inferences based on this representation, but an arbitral tribunal may lack the means to conclude that the document exists and is in the requested party's possession.

An arbitral tribunal could, however, refuse to draw inferences when it is of the view that no *decisive* documents are being withheld. As one arbitral tribunal put it:

The Arbitral Tribunal finds that the evidence produced in this case has been sufficient to determine the facts relevant to the issues in dispute. The existence of a decisive or extremely relevant document not produced . . . which could eventually alter the Tribunal's findings or change the outcome of the case is, in the Arbitral Tribunal's view, highly unlikely.

One arbitral tribunal put the threshold very high and required that in cases involving the non-production of documents, the failure must be found to have been 'designed' or 'in bad faith'. This appears to be an isolated approach and was not reflected in the remainder of the reviewed awards.

19 As do the authors, cf. section 2.1(c) above.

20 See section 2.3(b) above.

21 J.K. Sharpe, *supra* note 1 at 553.

22 J.K. Sharpe, *supra* note 1 at 556.

Now and then a party states that it cannot produce a certain document because the document has disappeared or no longer exists. In these cases, if the reason for disappearance is outside the power of the requested party, or if there is a good reason for the document's disappearance, the arbitral tribunal will be reluctant to draw adverse inferences.[23]

One case imposed a rather harsh test on the requested party. The requested party stated that the requested e-mails were purged from their servers when its IT hardware was replaced. Employees of that party were prepared to confirm this under oath. The arbitral tribunal nonetheless drew adverse inferences. The award included no discussion of whether the destruction of emails in this situation was reasonable. One might expect an arbitral tribunal at least to consider how long business documents should be preserved. The arbitral tribunal in this case merely observed that '[c]ompanies do not normally dispose of their—electronic or paper—files after a relatively short period of time'. Parties should not be permitted to benefit from a big-bin policy, but nor should they be required to keep all e-mails and documents indefinitely.

Another pertinent award, rendered in 2006 by an arbitral tribunal chaired by an experienced common lawyer, was even more particular when it came to consider drawing an adverse inference for allegedly untraceable documents. The arbitral tribunal asked itself:

- What could the missing documents be expected to record?
- What are the alleged circumstances of their disappearance?
- Is there credible evidence to prove an 'innocent' disappearance of the documents?

In this case one side contended that a ship's logbook was lost in a fire. The other side argued that the logbook, if available, would have shown that the vessel ran aground while under the first party's command. The arbitral tribunal concluded that the logbook would also have provided evidence of relevant facts that the first party used in its defence. Accordingly, the arbitral tribunal did not draw an inference in either direction.

Also under this heading belong cases in which a witness cannot appear for cross-examination for a valid reason, such as illness. In one of the reviewed cases, the arbitral tribunal refused to draw inferences from the fact that a sick witness refused to appear for cross-examination. In order to preserve the other side's due process rights, since it could not test that witness's evidence, the arbitral tribunal decided that it would attach very little weight to the absent witness' written testimony.

If a witness is under the opposing side's control or influence, a party must first attempt to call that witness itself before it can seek adverse inferences.[24]

(c) The inference sought must be reasonable, consistent with facts in the record and logically related to the probable nature of the evidence withheld.[25]

This implies another requirement, which one might consider goes without saying: the requesting party must make clear what inference it wishes to be drawn.

In practice, this is not always done. Sometimes counsel take a scatter-gun approach to adverse inferences. One arbitral tribunal refused even to consider the drawing of adverse inferences because the party seeking the inference did not identify exactly what inference relating to which precise fact it wished to be drawn.

The requirement that the inference must be reasonable and consistent with the remainder of the record plays an important role in cases where a party seeks to draw proper adverse inferences. If the evidence on record and the *prima facie* evidence combined are only conclusive if a certain unproven fact is assumed, the arbitral tribunal can draw adverse inferences.

In the raw material case referred to above[26] the direct evidence on record included the ten (allegedly false) test certificates by the seller, and only four test certificates of the buyer, which showed results different from those on the seller's certificates. The buyer had no test certificates of its own for the first six shipments. As the seller refused to produce the documents underlying its test certificates and relating to the origin of the goods, the arbitral tribunal drew the adverse inference that all ten batches of the raw material were not in compliance with the contract. Only this construction of the available evidence was consistent with the other direct and *prima facie* evidence. The arbitral tribunal stated that it was 'most plausible' that all the raw material was of inferior quality (and hence that the seller's certificates were false) in the absence of any explanation by the seller as to why the buyer's and the seller's tests showed such huge analysis discrepancies.

23 V. van Houtte, *supra* note 2 at 204.

24 See section 3.1 above.

25 J.K. Sharpe, *supra* note 1 at 557.

26 See section 2.1(c) above.

Also in the tender process case referred to above[27] the fact contended by the requesting party was consistent with the other evidence on record. The inference sought was that the chart showing bids had been manufactured to mislead the claimant. This proposition sat well with the remainder of the evidence. In this case, too, it was the absence of an explanation and the underlying documents relating to how the chart was prepared that tipped the scale for the arbitral tribunal to draw the requested inference.

(d) The party seeking an adverse inference must produce *prima facie* evidence.[28]
In addition to the previous requirement, a couple of the reviewed ICC awards required *prima facie* evidence of the fact to be established.

One award states that the party seeking an inference 'must produce *prima facie* evidence that is sufficient to establish a fact in the absence of any evidence to the contrary'. This test, however, belongs to the realm of improper adverse inferences. What the arbitral tribunal describes in this test is direct evidence, albeit weak. *Prima facie* evidence in the sense of proper adverse inferences is insufficient to establish a fact, even if it provides a hint into the right direction.

In one case the arbitral tribunal introduced this requirement by noting that adverse inferences are inappropriate where it would 'amount more to speculation and conjecture than properly weighing the evidence on the record'.

In another case the arbitral tribunal was asked to assess the quantum of damages (valuing the dilution of a shareholding) merely based on an adverse inference resulting from the fact that the respondent had failed to produce certain documents that it had been ordered to produce. The arbitral tribunal held as follows:

> In such connection, the Arbitral Tribunal is of the view that a determination of the quantum of damages merely by resorting to adverse inferences would be speculative and even arbitrary or tantamount to assuming the authority of arbitrating this case *ex aequo et bono* or as *amiable compositeur.* The Arbitral Tribunal points out that it has only been vested with authority to decide this case *ex lege*, i.e., in accordance with the applicable [state X] law, and that there is no persuasive evidence or allegation before it that under the applicable [state X] law it is vested with discretionary powers so broad as to permit it to quantify damages solely or primarily on the basis of adverse inferences.

(e) The arbitral tribunal should afford the requested party sufficient opportunity to produce evidence prior to drawing adverse inferences against it.
The requested party should be warned that the arbitral tribunal is considering drawing an adverse inference. This is essential if the arbitral tribunal considers drawing a *proper* adverse inference, i.e. where the claim could not succeed without the adverse inference.

This impacts directly on due process rights, and is therefore relevant when a party seeks to set aside an award or resist its enforcement on the basis that it was denied a proper opportunity to present its case. Due process was scarcely discussed directly in the reviewed ICC awards.

In one case, the arbitral tribunal expressly emphasized that it is an important factor in this regard if the production order was made early in the proceedings, so that the requested party was provided an opportunity either to produce the documents or explain why they cannot be produced.

It might be advisable for an arbitral tribunal that is contemplating basing its award on adverse inferences to record in the award (i) that a party was ordered to produce documents, (ii) that it refused to abide by that order and (iii) that it was forewarned about and provided an opportunity to comment on the effect of the missing evidence. Another helpful procedural step is to include or at least refer to the power to draw adverse inferences in the Terms of Reference.[29] As will be shown in the following section, arbitral tribunals are well advised to invite specific submissions on whether or not adverse inferences should be drawn.

27 See section 2.1(c) above.

28 J.K. Sharpe, *supra* note 1 at 563.

29 cf. the case cited in section 3.2 above.

4. Due process concerns: treatment by domestic courts

One of the reasons that arbitral tribunals are said to be reluctant to use adverse inferences is because, quite understandably, they are concerned about due process and providing the parties with a proper opportunity to present their cases. It is therefore instructive to look at some domestic case law to see whether state courts will actually set aside awards because an arbitral tribunal has relied on an adverse inference.

Perhaps the most interesting case law is the 2008 Singapore High Court decision of *Dongwoo Mann + Hummel Co Ltd v. Mann + Hummel GmbH* [2008] SGHC 67. The due process issue was raised in the belief that the arbitral tribunal should have drawn an adverse inference but declined to do so, resulting in the claimant being unable to present its case.

The essential background for present purposes is that the claimant lost the arbitration and sought to set aside the award on the grounds of breach of natural justice. In the course of the arbitration the claimant had successfully obtained from the arbitral tribunal an order that the respondent produce certain technical documents. The respondent refused on grounds relating to the confidentiality of those documents and provided evidence in the form of a confidentiality clause from a contract between the respondent and a third party which, it claimed, established that the requested documents were confidential. The arbitral tribunal still rejected the respondent's objection of confidentiality and confirmed its order that the respondent must produce the technical documents.[30] The respondent, in breach of that order, never produced the documents.

Later in the proceedings—and this transpired to be crucial—the arbitral tribunal sought and obtained submissions form the parties on whether or not it should draw an adverse inference as a result of the respondent's failure to produce the technical documents. The arbitral tribunal ultimately ruled in the award that the respondent had provided a satisfactory excuse for not producing the documents and declined to draw an adverse inference.

The Singapore High Court refused the claimant's motion to set aside the award, noting the following:

1. If there is a justified reason for the non-production, then there is no cause to draw an adverse inference. Drawing an inference requires that the party requesting the arbitral tribunal to do so establishes that the opposing party breached its obligation to disclose.

2. Both the arbitrators' award and the High Court decision placed significant weight on the fact that the parties had been given ample opportunity to plead on the issue of whether or not an adverse inference should be drawn. That fact, according to the High Court, meant that there was no breach of natural justice because the claimant had an opportunity to present its case and argue that the adverse inference should be drawn.

3. The arbitral tribunal was entitled to reject the claimant's position in that respect and find that no adverse inference should be drawn. That decision of the arbitral tribunal is a decision on a question of law and/or fact in which, even if it were incorrect, a court reviewing the award has no right to interfere. (NB: The same reasoning could be applied where an adverse inference is actually drawn. So long as the parties have sufficient opportunity to present arguments on whether or not the arbitral tribunal should draw an adverse inference then there should not be an issue of due process because the arbitral tribunal's decision in that respect would go to the merits of the case and not be reviewable. In other words, if there has been a failure to comply with a document production order, then the question of whether an adverse inference should be drawn as a consequence of that failure must be put to the parties).

The case, overall, strongly confirms that an arbitral tribunal should take seriously, and consider thoroughly, the possibility of drawing adverse inferences as a result of a party's failure to comply with a document production order, and should offer the parties the possibility of arguing on that point.

30 A secondary issue was that the claimant was never provided with that confidentiality clause in the contract between the respondent and the third party, nor design drawings attached to it, but that is not relevant for present purposes.

5. Conclusions

In brief, the following concluding remarks and advice can be drawn from the above analysis:

1. There is no doubt that arbitral tribunals have the power to draw adverse inferences. Adverse inferences are requested relatively frequently. The question is whether they really work, i.e. whether arbitrators diligently apply adverse inferences in practice.

2. Adverse inferences are a form of indirect as opposed to direct evidence. They are obviously not as probative as direct evidence and special concerns apply in relation to their assessment. Adverse inferences can result in a partial shift in the burden of proof where the opposing side has provided *prima facie* evidence of the point it seeks to establish. An inference drawn from the non-production then forms part of the overall evidence and as a substitute for direct evidence. (Of course where the other evidence is strong enough the adverse inference may not be necessary at all.)

3. In general, it is unfortunate that arbitral tribunals quite often steer away from dealing with adverse inference requests.

   - On the one hand, it might be considered that this is not cause for concern if the arbitral tribunal genuinely finds the request redundant or finds an alternative route to reaching the same decision.

   - However, a very important aspect of adverse inferences is their deterrent effect. In order to ensure compliance with orders in general, parties should be made to feel genuinely concerned that if they do not produce relevant documents without a properly proved, plausible excuse, then the case could turn against them for that reason. The benefit of this deterrent effect is seriously diluted if arbitrators are reputed to skirt around rather than deal head on with adverse inference issues.

4. Related to the previous point, in some instances where arbitrators do deal with adverse inference requests, they fail to do so in sufficient depth.

5. Arbitral tribunals should be more open to use costs orders as sanctions for the failure to comply with their orders in general. However, such sanctions must be separated from the consideration of whether it is proper to draw an adverse inference because a favourable costs order is hardly sufficient compensation for a party that has lost its case due the opposing side's refusal to supply evidence it was ordered to supply.

6. Where an arbitral tribunal is considering drawing an adverse inference it should warn the parties in advance and seek submissions on whether to do so.