

STANDARD OF PROOF IN INTERNATIONAL ARBITRATION – SEARCH FOR PRECISION IN CONSIDERING CORRUPTION CLAIMS

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“[L]ike most crimes and intentional misconduct, and perhaps more so, acts of corruption and collusion are specifically designed not to be able to be identified or detected”

Karen Mills, “Corruption and Other Illegality in the Formation and performance of Contracts and in the Conduct of Arbitrations Relating Thereto” in *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series no. 11 (2003)

“The absence of an unbroken chain of facts leading to a morally certain conclusion that corruption did occur necessitates reliance on longstanding legal tools familiar to national and international courts and tribunals concerning rules of evidence on standards and burdens of proof, presumptions, and inferences that lead to a proper “connection of the dots”.

Aloysius Llamzon and *Anthony Sinclair*, “Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct” in ICCA Congress Series No. 18 (Miami 2014), van den Berg (ed) (2015)

Generally applicable standards of proof

COMMON LAW JXs	HIGH	CIVIL LAW JXs
BEYOND REASONABLE DOUBT		BEYOND REASONABLE DOUBT (some jurisdictions and ECHR)
CLEAR AND CONVINCING EVIDENCE		"INNER CONVICTION" OF A JUDGE
COMFORTABLE SATISFACTION		
BALANCE OF PROBABILITIES / PREPONDARENCE OF EVIDENCE		
	LOW	

"Where shall we place allegations of corruption?"

Highest standard of proof/Beyond reasonable doubt

“In a survey of arbitral case law on corruption, it was found that in just **one out of twenty-five cases**, a “**low**” standard of proof was applied, whereas in **fourteen cases**, a “**high**” standard of proof applied, which were variously described as “certainty”, “clear proof”, “clear and convincing evidence”, “conclusive evidence”.

Michael Hwang and Kevin Lim, Corruption in Arbitration – Law and Reality, ICCA web-cite.

Beyond reasonable doubt

(evidence is certain or the explanations are the only reasonable explanation)

“The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”

In re Winship, 357 U.S. 358 (1970)

Clear and convincing evidence

“The employee's ultimate burden is to establish retaliation *“by a preponderance of the evidence, but the **evidence must be clear and convincing in nature.**”* Evidence is **clear** *“if it is certain, unambiguous, and plain to the understanding,”* and it is **convincing** *“if it is reasonable and persuasive enough to cause the trier of facts to believe it.”* Clear and convincing evidence is “not a quantum of proof, but rather a **quality of proof.**””

Foster v. Alliedsignal Inc., 293 F. 3d 1187 (10th Cir. 2002)

“The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as *“clear and convincing evidence”*, although the Tribunal deems that precise terminology less important than the enhanced proof requirement that it expresses”.

Dadras International et al. and the Islamic Republic of Iran et al., Award No. 567-213/215-3 (7 Nov 1995), para. 124.

Balance of probabilities/preponderance of evidence

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, **on the evidence, the occurrence of the event was more likely than not.** When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the *more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.*”

In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, 586

“some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, **cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.**”

Secretary of State for the Home Department v Rehman [2003] 1. A.C. 153, at 55.

Inner conviction of a judge (arbitrator)

France and Belgium - “to satisfy the burden of proof means to establish the **existence of a probability or likelihood** which is **sufficient to convince the judge**”

Bernard Hanotiau, “Satisfying the Burden of Proof: The Viewpoint of a ‘Civil Law’ Lawyer in the Standards and Burden of Proof of Proof in International Arbitration, 10 Arb. Int. (1994, no. 3), p. 345.

Italy and Spain - “black box” - whatever the judge considers appropriate in reaching the “truth” or “moral certainty”.

Germany - judge shall decide whether the facts are “true” or “untrue”.

Ukraine - internal persuasion based on comprehensive, complete, objective and direct assessment of all available evidence.

Comfortable satisfaction

“Taking into account the nature of the conflict in question and **the paramount importance of fighting corruption of any kind in sport** and also considering the **nature and restricted powers of the investigating authorities of the governing bodies of sport as compared to national formal interrogation authorities**, the Panel is of the opinion that cases of match-fixing should be dealt with in line with the CAS constant jurisprudence on disciplinary doping cases. Therefore, *the UEFA must establish the relevant facts to the **comfortable satisfaction** of the Court having in mind the seriousness of the allegation which is made.*”

CAS 2009/A/1920 FK Pobeda, Aleksandar Zabrcanex, Nikolce Zdraveski v. UEFA at para. 85.

“The standard of comfortable satisfaction is a flexible one, i.e. greater than a mere balance of probability but less than proof beyond a reasonable doubt bearing in mind the seriousness of the allegation which is being made.”

CAS 2013/A/3256 Fenerbahçe Spor Kulübü v. UEFA, Award, para. 277

The Briginshaw test – the more serious the allegation and its consequences, the higher level of proof required for a matter to be substantiated. The standard is not beyond the reasonable doubt, but the more serious the allegation, the more persuasive the proof must be.

Chris Davies, “The ‘comfortable satisfaction’ standard of proof: applied by the court of arbitration for sport in drug-related cases” [ONLINE] 2 UNDAULawRw 2012, p. 4-5

““In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering figure to an affirmative conclusion. the nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a **comfortable satisfaction** that the tribunal has reached both a correct and just conclusion.”

Briginshaw v Briginshaw (1938) 60 CLR 336, 350

Examples of corruption cases

- 1) **Siag** – “clear and convincing evidence” standard. “An alternative term with the same meaning is that employed in CAS anti-doping arbitrations, namely proof to the “comfortable satisfaction” of the Tribunal.”

Siag v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, para. 326

- 2) **EDF** – “clear and convincing evidence”

EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, para. 221

- 3) **Metal-Tech** – “reasonable certainty” allowing referring to circumstantial evidence

Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, para. 243

Is it all about evidence, their weight on creating a reasonable belief of the decision-maker (arbitrator) and not the name of a standard itself? Probably, YES

Or should they be at least reasonably persuaded that the corruption have taken place? Probably, YES

Do arbitrators and parties need a clear cut standard in approaching the corruption allegations in commercial or investment arbitrations? Probably, NO



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Comments &
Suggestions