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Adverse Inferences as Sanctions in International Arbitration

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International arbitration is a widely preferred alternative dispute resolution mechanism for many desirable characteristics, such as, party autonomy, procedural flexibility, ability of parties to select their arbitrators, as well as, finality of arbitral awards, among others. However, because arbitral tribunals derive their authority and jurisdiction from the parties' agreement(s) to arbitrate their dispute(s), arbitral tribunals lack coercive powers that national courts have. At times, arbitral tribunals have to deal with circumstances of non-production and/or spoliation of evidence, and due to the lack of coercive authority, it may be challenging to compel such recalcitrant parties to produce the relevant evidence and/or witnesses. Therefore, adverse inferences drawn against the recalcitrant parties may be the most effective sanctions. This article explores the sources of authority for arbitral tribunals to make such adverse inferences and argues for a precise set of rules or standard to be consistently applied by the arbitral tribunals in order to increase predictability in arbitral proceedings. Additionally, some of the critical issues when considering adverse inferences as sanctions are discussed.

Key Words : international arbitration, evidentiary sanction, spoliation of evidence, adverse inference(s), arbitral tribunals

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Ⅰ. Introduction

Arbitration is an alternative dispute resolution mechanism, in which arbitral tribunals – whom the disputing parties have chosen – will preside over the arbitral proceedings, review the merits of the dispute(s), and render their final decisions known as arbitral awards. International arbitration[1] has been a widely used dispute resolution mechanism for parties dealing with matters of international aspects, such as, conducting businesses abroad and/or with parties from foreign nations, among others. International arbitration is well-known and preferred for its efficiency and effectiveness in coming to a resolution of dispute(s) without the parties having to appear at foreign national courts. Moreover, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Convention," arbitral awards are readily recognized and enforced by foreign national courts, unless recognition and enforcement of such are refused based on a narrow set of grounds pertaining mainly to fundamental procedural defects.

Additionally, due to party autonomy, one of fundamental principles of arbitration, parties to arbitration have the freedom to choose their arbitrators, procedural rules that would apply to their proceeding(s), where they would be having the proceedings, as well as, an arbitral institution to administer their proceedings, if necessary. Essentially, as long as fair and equal treatment of parties and due process rights are preserved and protected, arbitration is an effective and efficient dispute resolution mechanism, particularly also because there is no appellate review of arbitral awards. However, because arbitral tribunals exclusively derive their authority and jurisdiction from parties' agreement(s) to resolve their dispute(s) by way of arbitration, they lack any coercive power that national courts inherently have. Therefore, at times, especially when dealing with recalcitrant parties, the lack of coercive power of arbitrators may be a hurdle that parties may encounter and must overcome. For instance, when a party does not cooperate with requests for production of documents, the arbitral tribunal may order production of such evidence against the non-cooperating party, as the fact-finding process is a crucial part of any dispute resolution. Nevertheless, it is

1) For purposes of this article, arbitral proceedings of international commercial matters and investor-state disputes are not distinguished.

unclear what can be done in case of non-compliance of the party with the tribunal's production orders because arbitrators do not have coercive power or the authority to hold anyone in contempt like national courts do.

An adverse inference is one type of remedial measures and/or sanctions that may be, and commonly are, drawn against a recalcitrant party for non-disclosure, non-production, and/or spoliation of evidence that is needed for relevant proceeding(s).[2] With an adverse inference, it is generally inferred that such non-disclosed and/or non-produced evidence is not favorable to the non-disclosing/producing party, in broad terms. Adverse inferences are discretionary tools available for decision makers, and while the purposes they are intended to serve – punishment and deterrence[3] – may be alike in litigation and in arbitration, their effects may vary in respective proceedings. For instance, in litigation, adverse inferences may serve as genuine gap-fillers in the absence of evidence but often have dispositive and rather devastating effects of tipping the scale against the party against whom such are issued.[4] On the other hand, in arbitration, some believe that adverse inferences do not have such detrimental effects primarily because parties often benefit from the limited nature of adverse inferences that arbitrators are capable of making – so that even when an adverse inference is drawn against the party, that party may still prevail in the arbitral proceeding.[5]

As adverse inferences may play a more significant role in arbitration due to this very

2) Depending on the severity of circumstances, monetary sanctions, such as imposition of costs of proceedings, legal fees, etc., or more severe measures, such as, dismissal of claim(s) and adverse inferences are among discretionary remedial measures.

3) "The adverse inference instruction can serve multiple functions: punishing wrongful conduct, deterring future conduct, and restoring adversary balance of the proceeding." Scheindlin, Shira A. and Orr, Natalie M., "The Adverse Inference Instruction After Revised Rule 37(E): An Evidence-Based Proposal," 83 Fordham L. Rev. 1299, 1300 (2014).

4) "In practice, an adverse inference instruction often ends litigation – it is too difficult a hurdle for the spoliator to overcome. The *in terrorem* effect of an adverse inference is obvious. When a jury is instructed that it may "infer that the party who destroyed potentially relevant evidence did so 'out of a realization that the [evidence was] unfavorable,'" the party suffering this instruction will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly." Facciola, John M., Laporte, Elizabeth D., Preska, Loretta A., and Scheindlin, Shira A., "The Philip D. Reed Lecture Series Panel Discussion: Sanctions in Electronic Discovery Cases: View from the Judges," 78 Fordham L. Rev. 1, 8 (2009).

5) Bedrosyan, Alexander Sevan, "Adverse Inferences in International Arbitration: Toothless or Terrifying?" 38 U. Pa. J. Int'l L. 241, 247 (2016).

lack of coercive authority of arbitrators, this article explores adverse inferences, as evidentiary sanctions in international arbitration. In doing so, trends and rules pertaining to how adverse inferences are drawn in U.S. court proceedings are discussed first in section II, and their use and effects in international arbitration are discussed in section III. Some of the crucial issues to be considered before an arbitral tribunal makes adverse inferences are discussed in section IV, with conclusory remarks in section V.

Ⅱ. Adverse Inferences as Sanctions in U.S. Court Proceedings

When an adverse inference is drawn against a party, it is generally inferred that such non-disclosed and/or non-produced evidence is not favorable to the non-disclosing/producing party. In other words, the fact-finder would essentially consider the non-disclosure and/or non-production of evidence to be indirect evidence of a fact to be established.[6)]

The courts in the U.S. have long been making adverse inferences for spoliation[7)] of evidence based on the courts' inherent authority to do so. In litigation, an adverse inference of presuming that the missing information/evidence was unfavorable to the spoliator party, a jury instruction that it may or must presume such information was unfavorable to the party, are among the "more severe" sanctions, along with dismissal of the action or a default judgment against the spoliator party. However, while the purposes underlying spoliation sanctions are consistent across the country in that they aim to deter and punish parties for non-production and to restore the evidentiary balance amongst the parties, courts have been inconsistently granting such sanctions.

6) "For example, the claimant in an arbitration may argue that goods that the respondent delivered to it for resale were of poor quality, and the respondent may refuse to produce results of quality control tests the respondent had done for the goods. The factfinder can then infer, or consider this non-production to be indirect evidence of, the fact that the goods were of poor quality (whereas direct evidence of the goods' poor quality would be the test results themselves)." *Id.*

7) "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

For instance, as to spoliation of electronically stored information (ESI), the Second Circuit has granted adverse inference jury instructions based on the spoliator party's mere negligence or gross negligence, while the Tenth Circuit has required a showing of bad faith by the spoliator party to grant such sanctions.[8] As such, while adverse inferences have long been a commonly granted sanction, the resulting case law has not been consistent across the U.S.

Therefore, in an effort to promote uniformity of such case law on sanctions for spoliation of ESI, the Federal Rules of Civil Procedure has been amended in 2015, adding that courts should issue these severe sanctions only upon a finding that the "party acted with the intent to deprive another party of the information's use in the litigation."[9] Although the case law established since the amendment has not been entirely consistent due to various reasons, such as, the difficulty of actually determining the party's intent at the time of spoliation of evidence and the courts' ignorance of the rule on point and continued reliance instead on their inherent authority and findings of bad faith, courts have increasingly been more reluctant to grant adverse inferences based on mere negligence of the spoliator parties. Therefore, while not completely successful – at least not yet – some efforts have been made towards creating uniformity of case law, showing that a strict standard to apply in consideration of a severe sanction may be effective. Such uniformity in case law increases predictability of litigation not only for parties but also potential litigants.

However, particularly with adverse inference jury instructions, an adverse inference may be damaging in two-fold in that juries may "infer facts on the specific issue to which the withheld evidence pertains that are much worse than the actual contents of the withheld evidence . . . . [and] they may make inferences beyond the specific issue, regarding the non-producing party's entire case or culpability."[10] On one hand, it seems to appear that the concern in litigation and jury instructions on adverse inferences may be improperly exaggerated due to the overwhelmingly low expectations of juries' capabilities.[11] On the other hand, concerns with carefully crafting jury

8) *Compare Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002) with *Aramburu v. Boeing Co.*, 112 F3d 1398, 1407 (10th Cir. 1997).

9) Federal Rules of Civil Procedure, Rule 37(e)(2).

10) Haney, Caitlin, "Spoliation of Electronic Data Results in Severe Sanctions," Litig. News (November 5, 2013), https://apps.americanbar.org/litigation/litigationnews/top_stories/110513-spoliation-electronic-data.html.

instructions on adverse inferences are legitimate because the instructions should not mislead juries as to punish the spoliator party absent proof of the mental culpability required under the circumstances, for instance, the requisite intent to deprive required pursuant to the Federal Rule of Civil Procedure 37(e)(2).

Because there is no fixed standard or a set of rules that should apply to arbitral tribunals when arbitrators consider the appropriateness of an adverse inference in case of non-production and/or spoliation of relevant evidence, the need for such should be examined. In doing so, whether arbitral tribunals have the authority to make adverse inferences, any existing guide as to drawing adverse inferences, and issues to consider are explored below.

Ⅲ. Adverse Inferences in International Arbitration

For arbitral tribunals, broadly three types of measures may be available to deter a party from withholding evidence: 1) imposing monetary sanctions on the non-producing party, 2) ordering costs of arbitration and the other side's legal fees, and/or 3) drawing adverse inferences against such party. Out of these three measures, adverse inferences "enjoy legal legitimacy and practical effectiveness."[12] Adverse inferences allow inferring the fact that a recalcitrant party withheld direct proof, and thereby aim to restore the parties to the position they would have been, had the withholding party actually produced the withheld evidence.[13]

Adverse inferences in arbitration are highly discretionary, as arbitrators are qualified individuals, usually with years of experience and expertise in arbitral proceedings, when compared to juries. Thus, arbitrators may be less inclined to go beyond what is

11) Some may assume that juries are institutionally incapable of drawing reasoned conclusions about whether and how evidence was lost or destroyed. Sheindlin and Orr, *supra* note 3, at 1309.

12) Bedrosyan, *supra* note 5, at 249. Reasons for such conclusion are that one, it is not so clear whether arbitral tribunals have authority to issue monetary sanctions, and also while arbitrators have authority to impose costs on recalcitrant parties, having to pay fees and costs would not be a sufficient deterrent because "a party would much rather pay the costs of an arbitration that it was able to win because it withheld damaging evidence, than split the costs of an arbitration that it lost because it produced such evidence." *Id.* at 250.

13) *Id.* at 251.

necessary when drawing and applying adverse inferences, and consequently, resulting in less of inappropriate shifting of burden of proof among the parties.

Furthermore, because arbitral tribunals lack coercive powers that national courts inherently enjoy, adverse inferences and other discretionary tools may play a more significant role in conduct of arbitral proceedings. While such tools may be more useful and perhaps even more necessary in arbitration due to the lack of coercive authority of arbitral tribunals, their effectiveness may be brought into question, especially when dealing with non-cooperative, recalcitrant parties. While some believe that the mere threat of adverse inferences alone has a compelling effect on parties to produce relevant and requested evidence, others believe that the deterrent effect of adverse inferences is not as significant in arbitration, when compared to that in litigation.[14)]

Nonetheless, if and when utilized effectively, adverse inferences would properly incentivize more parties to cooperate with document production requests by opposing parties, as well as, comply with production orders of the tribunals since such inferences should take away any advantage of withholding any evidence. As such, because adverse inferences may prove to be the most efficient and effective tool in taking of evidence in arbitral proceedings,[15)] their use and effects should be examined

14) "[A]dverse inferences do not have the same deterrent impact on arbitrating parties as they do on litigating parties. Arbitrators are less likely to draw the sweeping and damaging inferences that juries draw. Parties that have refused to comply with a tribunal's order to produce evidence have then prevailed in their arbitrations, benefiting from the limited nature of the inference that the tribunals went on to draw. Moreover, the other factors that make an adverse inference a powerful deterrent to non-production in litigation – the possibilities that an adverse inference may lead to an award of punitive damages, and that the factfinder's failure to draw an adverse inference against the prevailing party will be successfully targeted on appeal – do not apply in arbitration." Amaral, Guilherme Rizzo, "Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart." 35 J. Int'l Arb. 1, 26 n.105 (2018). It was reported in the 2011 survey of the International Chamber of Commerce awards that arbitral tribunals were reluctant in relying on adverse inferences when making a decision on an issue, to the extent of nearly 60% of cases where a party had asked the arbitrator to make an adverse inference, the arbitrator having refused to grant them as they had not been necessary to reach tribunals' conclusions. Also, it was noted in 2015 that adverse inferences were not often requested by parties and even less frequently granted by arbitrators. "International Arbitration: Can Adverse Inference Fill the Gap Created by Missing Evidence?" Lexology, July 25, 2022.

15) *See* Sharpe, Jeremy K., "Drawing Adverse Inferences from the Non-production of Evidence," Arb. Int'l, Vol. 22, No. 4, p. 551 n.7 citing Sandifer, D., *Evidence Before International Tribunals* (rev. ed., 1975), p. 147, for noting that adverse inferences are 'the most effective sanction [international tribunals] have to impose upon parties negligent or recalcitrant in the production of evidence.'

more in detail.[16] First, authority of arbitral tribunals, if any, to make adverse inferences, will be discussed. Next, the Sharpe 5-factor criteria in arbitral tribunals' consideration of issuing adverse inferences will be examined in this section.

1. Authority of arbitral tribunals to draw adverse inferences in accordance with applicable rules in arbitral proceedings

An arbitral tribunal derives its authority and jurisdiction over the particular arbitral proceeding(s) from parties' consent and agreement to be bound by arbitration in their arbitration agreement(s) and/or dispute resolution agreement(s). In addition to parties' arbitration agreement(s), some applicable rules in arbitral proceedings may provide guidance in case of non-production of evidence without satisfactory explanation. While some exemplary provisions are discussed in this section, it should be made clear that none of these rules and/or provisions mandatorily govern any party's arbitration unless and until the particular parties have agreed to their application, and/or the relevant arbitral tribunal that the parties have selected for their proceeding(s) decides that such rules would be appropriate for conduct of the particular proceedings.

On one hand, some institutional international arbitration rules remain short of mentioning adverse inferences,[17] for instance, the International Chamber of Commerce

16) Also, while judicial assistance in taking of the evidence in arbitral proceedings may be helpful in particular because arbitral tribunals lack coercive power to exert on parties and/or non-parties to arbitral proceedings, this aspect of taking of evidence will not be discussed in this article. Some argue that such judicial intervention runs contrary to the very idea of efficiency of arbitral proceedings. "[D]emanding that a party requesting an adverse inference seek assistance from state courts could possibly defeat the purpose of making adverse inferences altogether, which is to 'help ensure the efficacy, as well as fairness, of international arbitration.'" Amaral, *supra* note 14, at 13. In any event, for more in-depth discussion of judicial assistance of taking of evidence in international arbitration, *see* Jun, Jung W., "The U.S. Supreme Court Limits the Scope of Judicial Assistance in Private International Arbitral Proceedings Pursuant to 28 U.S.C. §1782 in its Recent Decision of *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 U.S. ___ (2022)," Journal of Arbitration Studies, Vol. 32, Iss. 3 (2022). *See also*, Jun, Jung W., "Judicial Assistance in Taking of Evidence in International Commercial Arbitration," Commercial Cases Review, Vol. 32, No. 2 (2019).

17) While the UNCITRAL Arbitration Rules (2021) address evidentiary matters generally in Article 27, there is no mention of adverse inferences. The following is the full text of Article 27: "1. Each Party shall have the burden of proving the facts relied on to support its claim or defence. 2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed

(ICC) International Court of Arbitration Rules provide that an arbitral tribunal may summon parties to provide additional evidence as necessary, but consequences for non-compliance are not mentioned.[18] Another well-renowned international arbitration center, the Singapore International Arbitration Centre (SIAC), explicitly provides in its arbitration rules that arbitrators may impose sanctions as they deem appropriate in relation to parties' failure or refusal to comply with the arbitration rules or the orders of arbitrators, while no mention of any specific sanction in particular.[19]

On the other hand, some arbitration rules implicitly and explicitly provide for adverse inferences by the arbitral tribunals. For instance, the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rule 34(3) provides that the parties must cooperate with arbitral tribunals in production of evidence, witnesses, and experts, and other measures. Also, the arbitral tribunal shall take formal note of the failure of a party to comply with its obligations under the general evidentiary principles of Rule 34 and of any reasons given for such failure.[20] Commentators have interpreted such references to "formal note" in ICSID cases to mean that arbitral tribunals have the discretion to draw adverse inferences.[21]

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by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them. 3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. 4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." Also, the UNCITRAL Model Law on International Commercial Arbitration does not mention adverse inferences.

18) ICC International Court of Arbitration Rules, Art. 25.4 (2021). Similarly, the Hong Kong International Arbitration Centre arbitration rules do not mention events of party non-compliance with respect to evidentiary matters. HKIAC Administered Arbitration Rules Art. 22 (2018).

19) Arbitration Rules of the Singapore International Arbitration Centre Rule 27 provides that, under additional powers of the tribunal, the tribunal shall have the power to, unless otherwise agreed by the parties, and except as prohibited by the mandatory rules of law applicable to the arbitration, "proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules or with the Tribunal's orders or directions or any partial Award or to attend any meeting or hearing, and to impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal." Rule 27(l) (2016).

20) The International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings, Rule 34 (2006).

21) "An analysis of ICSID cases suggests that taking such 'formal note', for all purposes, is equivalent to an *adverse inference*." Amaral, *supra* note 14, at 7. *See also*, "The reference to 'formal note' in art 34(3) of the ICSID Arbitration Rules (n 8) can be traced back to the Hague Convention of 1899." See Convention for the Pacific Settlement of International Disputes (opened for signature 29 July 1899, entered into force 4 September 1900) 32 Stat 1779, art 44 ("The Tribunal can, besides, require from the agents of the parties the production of all Acts, and can demand all necessary

Rules of other arbitration institutions, such as the American Arbitration Association (AAA), explicitly provide that arbitral tribunals may draw adverse inferences and/or make special allocations of costs or even interim awards of costs arising from willful non-compliance of arbitrator's orders, under the enforcement powers of arbitrators.[22] Additionally, the Australian Centre for International Commercial Arbitration (ACICA) provides in its expedited arbitration rules that the tribunal may order a party to produce particular documents as the tribunal may believe to be relevant, and also that if the tribunal believes that a party has failed to produce any relevant document without good reason, it may draw an adverse inference from that party's failure to produce.[23]

Also importantly, the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration provide that if a party fails to produce any requested document by the other party or ordered by the tribunal, without satisfactory explanation, the arbitral tribunal may infer that such document would be adverse to the interests of that party.[24] Such discretionary authority for arbitral tribunals to infer applies also to any other relevant evidence, including testimony sought by the other party to which the party has not objected in due time, or fails to make available any evidence ordered by the arbitral tribunal to be produced.[25] Moreover, in the event the arbitral tribunal determines that a party has failed to conduct in good faith with regard to taking of evidence, the tribunal may, in addition to other measures that are available under the IBA Rules, take such failure into account in its assignment in the costs of the arbitration, as well as, costs arising out of or in connection with the taking of evidence.[26] While the IBA Rules on the Taking of Evidence are not mandatorily applicable, the IBA has issued such rules in order to provide appropriate guidance for consistency in taking of the evidence in international arbitral proceedings and to bridge

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explanations. In case of refusal, the Tribunal takes note of it.'). Polkinghorne, Michael and Rosenberg, Charles B., "The Adverse Inference in ICSID Practice," *ICSID Review*, Vol. 30, No. 3, at 744 n.29 (2015).

22) Arbitration Rules and Mediation Procedures, American Arbitration Association, Rule 23(d) (2013).

23) The Expedited Arbitration Rules of the Australian Centre for International Commercial Arbitration (ACICA), Art. 24.5 (2021).

24) The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, Art. 9(6) (2020).

25) IBA Rules on the Taking of Evidence, Art. 9(7).

26) IBA Rules on the Taking of Evidence, Art. 9(8).

the gap between legal practitioners from common law and civil law jurisdictions. Therefore, in cases where the parties have agreed to be bound by such Rules, or when/if the arbitral tribunal has determined that applying such Rules would be appropriate, these relevant provisions would govern the taking of evidence in particular proceedings.[27] While the IBA Rules provide for permissive adverse inferences under certain circumstances, there is no guide as to how, when, and/or content of such inferences to be drawn in the Rules themselves.

Another noteworthy provision on arbitral tribunals' authority to make adverse inferences is article 10 of Rules on the Efficient Conduct of Proceedings in International Arbitration (also known as the Prague Rules), which provides that if a party does not follow orders of instructions of the tribunal, the tribunal may draw, where appropriate, an adverse inference with regard to that party's respective case or issue.[28] This provision is strikingly different from other rules not only because it is explicit in what the adverse interests should be drawn against, i.e., the party's case or issue, but also because of the breadth of such permissive adverse inferences. The Prague Rules do not replace any institutional arbitration rules, but instead, they are intended to supplement arbitral proceedings as parties have agreed to and/or arbitral tribunals deem appropriate in a particular dispute, like the IBA Rules on Taking of Evidence. Without questioning the ability or qualification of an arbitral tribunal, allowing such broad authority, to the extent that an adverse inference may be drawn as to the respective case or issue, it seems rather sweeping, even considering the "traditional inquisitorial approach" that the Prague Rules are based on. An adverse inference drawn against an issue, let alone, the party's case – especially with no specific guidelines tailoring to narrow circumstances – would surely be a devastating sanction, much like a dismissal of the case in litigation, which ends the particular proceeding. While these severe measures in litigation are permissive sanctions to be imposed only upon a

27) Such rules would govern, except to the extent that any specific provision of the IBA rules may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the parties or by the arbitral tribunal. The IBA Rules on the Taking of Evidence, Art. 1(1).

28) "If a party does not follow orders or instructions of the Arbitral Tribunal, the Tribunal may draw, where appropriate, an adverse inference with regard to that Party's respective case or issue." Rules on the Efficient Conduct of Proceedings in International Arbitration (The Prague Rules), Art. 10 (2018).

finding of an intent to deprive the other party of its use – under Federal Rule of Civil Procedure 37(e)(2) – the Prague Rules only state that if a party does not follow orders or instructions of the arbitral tribunal that the tribunal may draw, where appropriate, an adverse inference. Therefore, "where appropriate" once again highlights the discretion arbitral tribunals have with regard to conduct of arbitral proceedings, which includes the fact-finding process that necessarily encompasses taking of evidence and what to do, absent such relevant evidence. Also, it should be noted that Article 10 of the Prague Rules does not only address any party's failure to follow instructions with respect to evidentiary matters, but throughout all aspects of proceedings as Article 10 is a stand-alone provision of the Rules. While one of the fundamental goals underlying the Prague Rules is to promote efficiency in arbitral proceedings, such sweeping adverse inferences may lead to unnecessarily harsh outcomes. Additionally, the concern that is relieved to a certain extent because the decision-making authority on whether adverse inferences are appropriate may become an issue if the Prague Rules are in play, due to such sweeping effect of the permitted inference.

2. The Sharpe 5-factor criteria in consideration of drawing adverse inferences

Arbitrators must assess the appropriateness of adverse inferences before making them. In doing so, it has been suggested that they should go through the following 5-prong criteria: 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 party against whom the inference is to be drawn; 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.[29] Because this is a 5-element criteria in that all five requirements must be sufficiently satisfied before an arbitral tribunal makes an adverse inference, in absence of any one of the factors, it should lead to the tribunal's determination that an

29) Sharpe, *supra* note 15, at 551.

adverse inference is not appropriate under the circumstances. Each of the five requirements will be examined more in detail below.

First, the party seeking an adverse inference must produce all available evidence corroborating the inference sought. Therefore, in case where the party requesting the adverse inference likely has access to evidence in corroboration of the adverse inference that is being sought, but has failed to produce such corroborating evidence, the arbitral tribunal may refuse to make such inference.[30] This requirement is regarded as the "key to avoid turning requests for adverse inferences into fishing expeditions."[31]

Secondly, the party requesting an adverse inference must establish that the requested party has, or should have, access to the evidence being sought. Hence, an arbitral tribunal may refuse to draw an adverse inference if it has not been sufficiently shown that the requested party has the evidence it allegedly has refused to produce.[32] However, actually proving that the opposing party is in possession of, or at least has some access to the relevant evidence may be a daunting task for the requesting party. In particular, it has been noted that unless the recalcitrant party is flagrantly being uncooperative with arbitral proceedings, it may be very challenging to decipher whether that particular party may simply not have the requested document(s) or something more suspicious, in which case, knowledge and experience of arbitral tribunals would come in handy.[33] An arbitral tribunal would have to assess the withholding of evidence in light of the evidence in existence and also of the common practice and custom in arbitral practice.[34] Nevertheless, this requirement still does not directly deal with instances of non-disclosure and/or non-production of evidence that is allegedly in third-parties' possession, which remains an issue because arbitrators lack

30) Sharpe, *supra* note 15, at 554 (Citing *Kathryn Faye Hilt v. Islamic Republic of Iran*, award no. 354-10427-2 (16 March 1988), 18 Iran-US Cl. Trib. Rep. 154.).

31) Amaral, *supra* note 14, at 12.

32) Sharpe, *supra* note 15, at 557.

33) "While [the second] 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 document 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." Greenberg, Simon and Lautenschlager, Felix, "Adverse Inferences in International Arbitral Practice," *International Arbitration and International Commercial Law: Synergy Convergence and Evolution* 180 (Eric E. Bergsten & Stefan Kroll eds, Kluwer Law International 2011) at 197.

34) Amaral, *supra* note 14, at 15.

coercive powers to compel any party or non-party to produce or to hold anyone in contempt for non-compliance of their orders.

Thirdly, the adverse inference sought must be reasonable and consistent with the facts in the record, as well as, logically related to the probable nature of the withheld evidence. The "reasonableness" in the requirement aims to ensure that adverse inferences are not drawn based on mere suspicions, so that they should reflect arbitrators' understanding of commercial practice.[35] The requirement that the inference must be "consistent with the facts" in the record also aims to ensure that arbitrators would not draw an inference that runs contrary to the facts already established in the record.[36] Additionally, the party requesting the inference must establish 'a logical nexus between the probable nature of the documents withheld and the inference derived therefrom,' and the tribunal's analysis before making the inference should be case-specific.[37] This requirement would likely ensure that adverse inferences that are made against the non-producing party are limited in scope and content.

The fourth element requires the party requesting the adverse inference to produce prima facie evidence. Thus, an arbitral tribunal would not draw an adverse inference if the requesting party fails to produce evidence that is reasonably consistent, complete, and detailed.[38] The final fifth element requires that the arbitral tribunal afford the requested party a sufficient opportunity to produce evidence prior to drawing adverse inferences against it.[39] This last element aims to ensure that parties' due process rights are protected in the arbitral proceedings. It is also considered to be the most controversial requirement due to the question of whether the arbitral tribunal's order for production of evidence is a necessity for the inference opponent's actual or potential knowledge of its obligation to produce evidence.[40]

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35) Sharpe, *supra* note 15, at 559.

36) Sharpe, *supra* note 15, at 560.

37) Sharpe, *supra* note 15, at 561.

38) Sharpe, *supra* note 15, at 564. While what constitutes *prima facie* evidence may be disputed in that it may vary depending on case-by-case analysis, Sharpe summarized *prima facie* evidence as "consistent, complete, and detailed." For instance, some tribunals refer to *prima facie* evidence as "evidence which should stand unless effectively controverted by countering evidence or argument. . . . In other words, it would 'not create a moral certainty as to the truth of the allegation, but [would provide] sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary.'" Amaral, *supra* note 14, at 23.

39) Sharpe, *supra* note 15, at 568.

40) Amaral, *supra* note 14, at 25. The Paris Court of Appeals stated that the arbitrators could draw an

Ⅳ. Critical Issues to Consider Before Drawing Adverse Inferences in Arbitration

In arbitration, the party who makes the allegation bears the burden to produce corroborating evidence.[41] In other words, each party must prove the facts upon which it relies to support its case.[42] Such responsibility of each party is explicitly recognized in UNCITRAL Rules Article 27(1), which states that each party will have the burden of proving the facts relied on to support its claim or defense.[43] However, because institutional arbitration rules are not mandatory, and also in light of party autonomy, parties may agree on a particular set of rules to apply to their arbitral proceedings. In doing so, fair and equal treatment of parties should be respected and preserved. Therefore, an arbitral tribunal, in making decisions on what may be proper and appropriate for conduct of the arbitral proceedings, should not shift the burden of proof among the parties[44] – particularly if such would risk running contrary to the

adverse inference even if there had not been an order of production of evidence prior to drawing of adverse inferences in its 2017 decision of the case that involved a challenge to an arbitral award by the Dresser-Rand Group Inc. and Dresser-Rand Holdings Spain SLU on the grounds that the arbitral tribunal had failed to invite submissions from Dresser-Rand to explain the non-production of audit reports and that the claimant had not asked the tribunal to draw an adverse inference. *Id.* In that case, the court concluded that the arbitral tribunal decided the case mostly based on documentary evidence that had actually been produced, which appears to have departed from the approach other cases have taken with application of the IBA Rules. *Id.* at 25-26.

41) The widely accepted rule in international commercial arbitration is that each party has to prove the facts on which it relies to support its case. Blavi, Francisco and Vial, Gonzalo, "The Burden of Proof in International Commercial Arbitration: Are We Allowed to Adjust the Scales?" 39 Hastings Int'l & Comp. L. Rev. 41, 43 (2016).

42) *Id.* at 47 citing to Schlaepfer, Anne V., "The Burden of Proof in International Arbitration," *Legitimacy: Myths, Realities, Challenges* 127 (Albert Jan van den Berg ed., Kluwer Law International 2015).

43) UNCITRAL Rules, Art. 27(1) provides that each party shall have the burden of proving the facts relied on to support its claim or defense (2021).

44) On the issue of burden of proof in ICC international arbitration, one ICC arbitral tribunal stated: "[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." On the other hand, another ICC arbitral tribunal stated, "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

parties' arbitration agreement(s) – because doing so may provide reasons to be grounds for setting aside of the arbitral award and/or refusal of recognition and enforcement of the arbitral award pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards.[45]

Another essential issue relates to validity of adverse inferences. While this issue arises more frequently in litigation with juries drawing inferences beyond the scope of what is necessary, or even appropriate, decision makers in all dispute resolution mechanisms must ensure that such adverse inferences are not broader in scope or extent than they need be.[46] Nonetheless, arbitrators are highly qualified decision makers, who are more likely to make narrowly tailored adverse inferences, separated from other issues in dispute.[47] Thus, unless the aforementioned Prague Rules apply to the arbitral proceeding, and/or the arbitral tribunal properly determines that an adverse inference should be drawn against the particular issue, let alone, the whole case, negative inferences should be limited in scope and nature.

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fact." Greenberg and Lautenschlager, *supra* note 33, at 45.

45) The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) Art. V(1) provides the following: Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (The text of Article V(2) is omitted intentionally).

46) Some believe that adverse inference instructions provided by courts to juries may lead juries to make inferences beyond the very issue that the non-produced evidence pertains to. Also, juries may draw negative inferences about the party who had withheld evidence and thereby refused to cooperate with the proceedings and form a predisposition against such party, rather than focusing on the facts of the case. Bedrosyan, *supra* note 5, at 253-54.

47) Bedrosyan, *supra* note 5, at 259-61.

Additionally, a "proper" adverse inference is where the party's refusal to produce documents or witnesses leads to the presumption that such non-produced evidence is in the other party's favor. Therefore, a proper adverse inference actually substitutes for the missing/non-produced material evidence and not merely reaffirm what has been already presented by the requesting party, thereby serving as a genuine gap-filler.[48] At times, the requesting party may lose its claim(s) for insufficient evidence, without a properly drawn adverse inference being a crucial gap-filler, against the recalcitrant party.[49] Nevertheless, it should be noted that the absence of direct evidence does not always translate to mean the worst assumption possible, and therefore, the importance of narrowly tailored inferences is reiterated.

Also, preserving parties' due process should always be one of the most important goals that arbitral tribunals should bear in mind. Therefore, in the event that any party is not producing the requested documents and/or testimony, or is not complying with the tribunal's production orders, the tribunal should put that party on notice for such non-cooperation and/or non-compliance, along with consequences for such non-compliance. Providing adequate notice of prospective consequences and an opportunity to produce and/or comply with tribunal's orders would not only protect the party's due process rights, but would also enhance the predictability of arbitral proceedings, further adding to their legitimacy.[50]

Lastly, when evidence is accidentally lost, it may be logical that a negative inference is not drawn; it also makes sense that when and if evidence is unavailable due to bad faith of a party, then some strong adverse inference should be made against the spoliator party. However, it is rather unclear what arbitrators should do under the circumstances for parties who fall between the above two instances.[51] In court practice, some findings as to the non-producing party's mindset – or, culpability of the spoliator party – are required before the court may impose more severe sanctions, including adverse inferences. For instance, as aforementioned, the amended Rule 37(e)(2) allows for adverse inferences to be made upon the court's finding that the spoliator party had the intent to deprive the other party of use of such evidence.

48) Greenberg and Lautenschlager, *supra* note 33, at 46.
49) *Id.* at 47.
50) Amaral, *supra* note 14, at 26.
51) Scheindlin and Orr, *supra* note 3, at 1311.

While the U.S. courts have not been entirely consistent with either application of the amended rule or drawing of adverse inferences, the underlying purpose for the amendment was to promote uniformity in case law across the United States with respect to sanctions for spoliation of ESI by litigating parties, nonetheless.[52] On the other hand, it has been suggested that in arbitration, rather than identifying the spoliator party's state of mind, or intent with respect to non-produced evidence, the arbitral tribunal should focus on analyzing the party's awareness of and the timing of evidence spoliation.[53] In light of considering the courts' challenging task of determining whether any spoliator party actually acted with the requisite intent to deprive the other party of use of the evidence in question,[54] perhaps applying more of a less strict criteria, such as, the timing and awareness of spoliation of evidence on behalf of the party at issue may be better suited for arbitral proceedings.

Ⅴ. Conclusory Remarks

Some unique characteristics of arbitral proceedings may add to the deterrent effect of such sanctions issued by arbitral tribunals. For instance, parties and their attorneys are often familiar with the arbitrators. Thus, they may be more inclined to comply with orders of the tribunals not only as wise legal practitioners but also in order to maintain favorable professional relationships with arbitrators. Hence, the narrowly tailored inferences may prove to have a far greater impact in arbitration.

Also, a court reviewing the arbitral award on an application for setting aside the award or refusal of its recognition and enforcement, would not reconsider the substantive content dealing with issues, such as whether the arbitral tribunal had

52) For in-depth discussion on severe sanctions for spoliation of electronically stored information since the 2015 amendments to Federal Rules of Civil Procedure Rule 37, *see* Jun, Jung W. and Ihm, Rockyoun, "The Federal Rule of Civil Procedure 37(e) and Achieving Uniformity of Case Law on Sanctions for ESI Spoliation: Focusing on the 'Intent to Deprive' Culpability under Rule 37(e)(2)," 70 Cath. U. L. Rev. 177 (2021).

53) Amaral, *supra* note 14, at 18.

54) *See* Swanson, Kimberly D., "Amended Rule 37(e): Problem Solver or Problem Maker?" 17 Ave Maria L. Rev. 81 (2019), for discussion on how the bright-line rule that is set out by Rule 37(e) tends to be too restricting, and that judges feel that their hands are tied with this most challenging task of determining the requisite "intent to deprive."

properly or appropriately made an adverse inference in the relevant proceeding. Thus, this aspect of finality of arbitral awards calls upon arbitral tribunals to make the right call in their arbitral proceedings initially.

While it may be true that arbitral tribunals are more likely to draw narrow and specific-to-the-issue type of inferences that are separate from other issues in question, a precise set of rules or standard to consistently apply with consideration of some of critical issues when making adverse inferences is necessary. Having a clear standard to apply – and/or consistently applying an existing standard – would enhance the predictability of what to expect in case of non-production and/or spoliation of evidence in international arbitral proceedings. Such increased predictability in arbitral proceedings would also enhance the legitimacy of the proceedings, as a result.

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