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The Arbitrator's Jurisdiction in Uncovering Fraudulent Evidence: In Light of the Practices of the International Chamber of Commerce

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ABSTRACT

When parties to a dispute select arbitration as their means of resolving the conflict, they rely on evidentiary materials to present claims or defenses. In this context, the likelihood of one party engaging in fraudulent practices in the presentation of evidence and utilizing fraudulent materials to influence the arbitration process is significant. According to the arbitration practices of the International Chamber of Commerce (ICC), it has been established that an arbitrator lacks independent and direct authority to uncover such fraudulent evidence. However, when the opposing party challenges the evidence as fraudulent and raises allegations of fraud in the arbitration, the arbitrator is obliged to address this objection and examine the validity of each piece of evidence according to its nature. Failure by the arbitrator to consider such evidence can undermine the credibility and value of the arbitral award. When the award issued by the arbitration authority is tainted by falsehood and fraud, it loses its enforceability. Therefore, delineating the scope of the arbitrator's authority in the face of fraudulent evidence is of paramount importance. Analyzing arbitration practices and the conduct of arbitrators, particularly within the framework of the ICC when confronted with fraudulent evidence, will ultimately contribute to the establishment of a unified procedure. This article employs a descriptive-analytical methodology, utilizing library resources to address the question of what the scope of the arbitrator's jurisdiction is in uncovering fraudulent evidence.

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Introduction

Arbitration has gained significant attention as an alternative mechanism for resolving international disputes. When parties submit their dispute to an arbitrator based on a prior agreement—whether in the form of an arbitration clause or a separate arbitration agreement—they utilize evidence to substantiate their claims or refute those of the opposing party. Each party resorts to such evidence to persuade the arbitrator and establish the legitimacy of their assertions. In this context, one party may resort to fraudulent evidence. Fraud in the presentation of evidence in arbitration is intended to influence the arbitrator's final decision and the judgment of the arbitration tribunal.

The issue of the arbitrator's authority to discover fraudulent evidence arises at this stage of arbitration. If one party employs fraudulent evidence during the presentation phase, what authority does the arbitrator, as the adjudicative body, possess? Two types of authority can be considered for the arbitrator: first, the independent authority to discover fraudulent evidence, and second, the authority to address fraudulent evidence upon the opposing party's objection and the claim of fraud in the evidence presentation process.

Therefore, the primary question of this research is: how is the arbitrator's authority to discover fraudulent evidence defined? To answer this question, we must first examine the role of the arbitrator as the adjudicative body in the evidence presentation process to determine whether the arbitrator can independently discover fraudulent evidence or must wait until the opposing party requests an examination.

Regarding fraudulent evidence and the conduct of arbitration tribunals in dealing with such evidence, there are no codified rules in international arbitration. Therefore, we must investigate arbitration practices and the behavior of arbitrators in confronting this evidence. Despite the confidentiality of the arbitration process, this research aims to address the primary question by examining published cases and focusing on the practices of the International Chamber of Commerce.

The data collection for this study has been conducted through library research, employing descriptive and analytical methods to elucidate the concepts and subjects under investigation.

1. Fraud in the Presentation of Evidence in International Arbitration

Fraud is defined as the act of manipulating a situation for one's own benefit at the expense of another.[1] Synonyms for fraud include deception, forgery, misrepresentation, and trickery. In legal terms, fraud refers to actions intended to harm the rights or interests of others or to violate a law.[2] Another definition describes fraud as a misleading representation of reality, which can be expressed through words or actions, or by concealing a fact that should be disclosed.[3]

In international arbitration, a specific type of fraud occurs when the parties engage in actions intended to influence the final ruling of the arbitrator and the decision made by the arbitration tribunal. These actions pertain to the nature of the case and negatively affect the outcome of the dispute. Therefore, fraud can be defined as misconduct such as forgery and concealment of documents or the presentation of false information. The material element of substantive fraud involves false statements made to the arbitration tribunal the submission of false evidence (forged documents, perjury, false expert opinions), and other related behaviors (concealing or destroying evidence).

According to the aforementioned definition, one party's aim is to have the arbitration tribunal render a ruling based on the fraudulent maneuvers mentioned. The predominance of the mens rea in this type of fraud complicates the detection of fraud during the evidence presentation, particularly as the tribunal lacks adequate tools to identify the parties' intentions.

It is noteworthy that the methods of presenting evidence in international arbitration are similar to those in judicial proceedings. In Iranian law, the rules governing the evidence are detailed in Articles 248 to 269 of the Civil Procedure Code. Additionally, the Law on International Commercial Arbitration (LICA) references various forms of evidence, including documentation, testimony, expert opinion, and inspection of goods and other properties. Consequently, fraud in the presentation of evidence in international arbitration can be broadly categorized into three types.

1.1. Types of Fraud in the Presentation of Evidence in International Arbitration

1.1.1. Creation and Submission of Forged Documents

Documents are considered a means of evidence in international arbitration, and the parties submit relevant documents to substantiate their claims. Generally, international arbitration favors written evidence over oral testimony. In other words, written documents are regarded as more authoritative than oral evidence.[4] This underscores the significance of forged documents in international arbitration. A forged document is one that has been deceitfully created with the intent to commit fraud or deception, containing information that does not reflect the truth.[5] Such a document is distinct from the original but includes terms or phrases that are misrepresented.

When discussing fraud in international arbitration, it is essential to address the concepts of good faith and commitment to integrity. The parties must conduct themselves in good faith

1 Moein M, *Moein Dictionary* Vol 5 (Ney Publication 2012).
2 Jafari Langeroodi MJ, *Legal Terminology* (Ganje Danesh Publication 2017).
3 legal definition of fraud (thefreedictionary.com) last visited 15 August 2024.
4 Gary B Born, *International Commercial Arbitration*, 2nd edn (Kluwer Law International 2014) p 12.
5 Sezer ZD, 'The Impact of Fraud in International Arbitration: a Question of Admissibility, Jurisdiction or Merits?' (2019) LLM Paper, Faculty of Law and Criminology, Academic Year 2018-2019, Ghent University. P. 23.

regarding any actions necessary for the efficiency, fairness, promptness of the arbitration process, and enforcement of the arbitrator's award.[1] In other words, adherence to good faith in arbitration serves as a guarantee of the integrity of the arbitration process and prevents deceit and fraud by the parties. The submission of false or forged documents undermines the principle of equality and fairness in arbitration. Furthermore, presenting forged documents violates the principle of integrity, which itself is a manifestation of good faith in international arbitration. The goal of submitting forged documents is to create or deny factual claims in the arbitration process.

1.1.2. Fraud in Expert Opinion

Due to the specialized nature of disputes referred to arbitration, arbitrators often require expert opinions on various subjects to render a more accurate decision. Experts may be selected based on the parties' suggestions and agreements or as determined by the arbitration tribunal or arbitrator.[2] When one party introduces an expert, concerns arise because the selection or introduction of an expert is typically aimed at obtaining an opinion favorable to that party's interests. Consequently, there is a high likelihood that an expert may exploit their position and influence the case in a fraudulent manner.[3] This not only undermines the credibility of the arbitration award but may also cause difficulties in the award's enforcement and recognition by national courts. International documents, such as the guidelines for the use of party-appointed experts in international arbitration,[4] outline this issue in Article 4: "An expert's duty, in giving evidence in Arbitration, is to assist the arbitral tribunal to decide the issue or issues in respect of which expert evidence is adduced; An expert's opinion shall be impartial, objective, unbiased and uninfluenced by the pressures of the dispute resolution process or by any Party." Additionally, the protocol for training experts to provide evidence in civil disputes[5] states that the expert report must include statements indicating that the experts understand the duties assigned to them by the court and will act accordingly. Moreover, they are required to prepare a declaration affirming that the content of their report is clear, accurate, and reflects their true and professional opinion. This declaration is referred to as the "Statement of Truth" in paragraph 5 of Article 13 of the protocol.

1.1.3. Perjury by Witnesses

Witness testimony is another means by which parties seek to substantiate their claims; thus, witness testimony can play a crucial role in uncovering the truths of a case. The role of witnesses is to assist the arbitrator in revealing the facts in dispute. However, witnesses may have direct or indirect interests in the case, causing them to present the facts in a manner that favors their interests or those of the party who introduced them. Consequently, there are greater concerns regarding perjury by witnesses compared to expert opinion, as witnesses may be more susceptible

1 Boroumand B, Shahbazinia M and Arabiyaan A, 'Good Faith in Arbitration Procedures (A Comparative Study in Iranian and English Law)' (2020) 24 *Journal of Comparative Legal Studies* 1-24.

2 Article 25 of the International Chamber of Commerce Arbitration Rules states: "The arbitral tribunal may hear the oral statements of witnesses, experts appointed by the parties, or any other person, in the presence of the parties or in their absence, provided that such arrangements have been expressly communicated to them." The subsequent paragraph stipulates: "The arbitral tribunal may, after consulting with the parties, appoint one or more experts, define their mandate, and receive their reports. Upon the request of either party, the parties must be given the opportunity to question the tribunal's appointed expert during the hearing."

3 Uluc,*Corruption in international arbitration* (2016) 58

4 International Arbitration Practice Guideline About Using Party-appointed and Tribunal-appointed Expers, Chartered Institute of Arbitrators.

5 Protocol for the Instruction of Experts to give Evidence in Civil Claims, June 2005.

to corruption. It is important to consider that human errors may lead witnesses to make statements that only partially cover the truth due to memory lapses, which does not necessarily equate to perjury. For this reason, some argue that witness testimony should not be pursued as long as written documents or evidence are available.[1]

2. The Role of the Arbitral Authority in the Evidence Presentation Stage

The delineation of the arbitrator's role in the evidence presentation stage depends on the methods employed in various legal systems. Generally, *common law* and *civil law* legal systems utilize either an adversarial or inquisitorial approach.

In the adversarial method, given the preeminent role of the parties involved, judges or arbitrators do not possess the right to gather evidence. Essentially, the parties have the authority regarding the initiation, suspension, and termination of the dispute. Accordingly, the arbitrator's role is limited to resolving the dispute rather than uncovering the truth.[2] Thus, the arbitrator's intervention is warranted only when the parties violate the procedural rules governing the proceedings or request assistance from the arbitrator. From this perspective, the most effective means of establishing the truth is to allow the parties to take their best measures to substantiate their claims. The competitive nature of the parties in presenting factual matters leads to the exposure of falsehoods and the emergence of the truth. The passive role of the arbitrator in the adversarial method inherently contradicts the discovery of truth, which necessitates the active involvement of the arbitrator, whereas the arbitrator in this method relies on the parties' autonomy.[3]

Many existing viewpoints suggest that the nature and characteristics of arbitration align more closely with the adversarial method. The supporting arguments for this perspective can be articulated as follows:

1. One of the primary features of arbitration is its cost-effectiveness and expedited resolution. If arbitrators were granted extensive powers to gather evidence, it could lead to significant costs and prolonged proceedings.
2. Most parties seeking international arbitration are commercial actors in the global arena. These individuals typically engage experienced lawyers and advisors; therefore, the collection of evidence by these professionals may negate the need for the arbitral authority to conduct its own investigations.[4]
3. Granting extensive powers to the arbitrator may lead to biased behavior or violations of privacy, as the amalgamation of investigative and decision-making functions could enable the arbitrator to misuse their authority.[5]
4. Unlike the public role of courts, in arbitration as a private institution, arbitrators manage the proceedings to achieve an enforceable outcome for the parties. The only public

1 Uluc,*Corruption in international arbitration* (2016) 63

2 Mafi H, *Commentary on the International Commercial Arbitration Law* (1st edn, Judicial Sciences and Administrative Services University Press 2016).

3 Findley KA, *Adversarial Inquisitions: Rethinking the Search for the Truth* (2011) 914.

4 Mohebi M and Jafari Nadushan S, *Inquisitorial and Accusatorial Systems in International Commercial Arbitration* (2015) 27.

5 Samadi Maleh S and Mafi H, *Discovery of Truth in International Commercial Arbitration with Emphasis on the Prague Rules (2018)* (2021) 243.

interest in such proceedings is the necessity of resolving disputes fairly and efficiently; thus, the arbitrators do not bear the additional responsibility of uncovering the truth.[1]

Conversely, the inquisitorial method stands in contrast. In this method, the arbitrator assumes a central role in the proceedings to uncover the truth. This is achieved when the arbitrator is not solely bound by the evidence presented by the parties but also possesses the authority to compare the evidence submitted with the evidence independently discovered.[2] Consequently, in the inquisitorial method, the arbitrator must fulfill a dual role: seeking evidence and thereby uncovering the truth while also issuing an impartial decision as the adjudicator of the dispute.[3]

According to UNCITRAL arbitration rules and the International Bar Association's guidelines on evidence gathering in international arbitration, the adopted approach in international arbitration appears to be a hybrid method. This implies that the arbitrator can evaluate the parties' requests alongside the evidence they have collected, ultimately reaching a balanced decision that considers the characteristics of both methods. Many legal systems favor the use of a mixed method, as it allows them to simultaneously utilize investigative powers under the inquisitorial method and the parties' freedom to argue under the adversarial method.

However, it should be noted that employing a hybrid system is not always the optimal choice. Some scholars argue that there should be no definitive criterion for international arbitration concerning the use of adversarial or inquisitorial methods. Instead, each dispute and case presents unique needs that warrant its own procedural rules. Flexibility in selecting methods for dispute resolution enhances the efficiency of arbitration.[4]

3. Objections to Fraudulent Evidence

The practice of arbitral tribunals, particularly the ICC Arbitration Court, indicates that an arbitrator cannot independently discover and address fraudulent evidence. Instead, they must wait until such evidence is brought to the attention of the opposing party, who must then raise an objection.[5] This section examines the potential objections that may be raised by one of the parties involved in the dispute.

According to international arbitration rules, the tribunal is obligated to send all submissions and related documents from each party to every other party.[6] Thus, the parties have a reasonable period to review the opposing party's evidence. In this context, one party may express doubts regarding the authenticity and validity of the evidence submitted by the other. These doubts may pertain to documents, testimonies, or expert reports. Consequently, one party may object to the presented evidence to resolve their uncertainty—or, in cases where the opposing party has no doubts, to substantiate their claim of the other party's fraudulent or incorrect evidence.

1 Ibid, 246.

2 Justice, Adele "*Comparative Analysis between Adversarial and Inquisitorial Legal Systems*" (2017).Social Sience Research Network, p7-8. Available at SSRN: https://ssrn.com/abstract=3077365. Last check Aguest 21, 2024

3 Ibid.

4 Born, *International Commercial Arbitration* (2014) 209

5 In the practice of the International Chamber of Commerce, there are no instances where an arbitrator separately discovers and examines fraudulent evidence. Generally, in the process of evidence gathering in accordance with Article 25 of the ICC Arbitration Rules, the arbitral tribunal may summon either party to present additional evidence during the proceedings.

6 Article 3 of the International Chamber of Commerce Arbitration Rules and paragraph 4 of Article 17 of the UNCITRAL Arbitration Rules.

3.1. Claim of Fraudulent Document

One of the challenges in arbitration is addressing documents whose authenticity or content is disputed. These are referred to as challenged or disputed documents.[1] Objections regarding either the procedural or substantive authenticity of such documents can take the form of claims of fraud.

Allegations of fraud in a document may relate to its content, signature, or manner of execution. In international commercial and non-commercial arbitration cases, there are numerous instances where one party has raised claims of fraud regarding submitted documents. For example:

In the ICSID case of *Churchill Mining Plc and Planet Mining Pty Limited* v. *Indonesia*, Indonesia submitted a request to the tribunal to dismiss the claimant's case based on allegations that the mining permits for *Ridlatama mining* were fraudulent and fabricated.[2] Indonesia claimed that the exploration permits and related approvals were obtained through deceit and fraud. The Indonesian government characterized this behavior as a massive, systematic, and complex scheme to defraud them. They also asserted that discovering forgery and fraud in the evidence presented by the claimant would invalidate the entire case. The reason for this claim is that Indonesia argued the claimant's investment was entirely dependent on the rights transferred in the fraudulent permits; thus, fraudulence in the permits undermines the claimant's investment, which is the basis of the lawsuit.[3] Indonesia subsequently requested that the tribunal provide an opinion on the validity of the submitted evidence within three weeks. Ultimately, the tribunal accepted the claim of forgery after reviewing the authenticity of the evidence presented by the claimant, declaring that the fraud in the exploration and exploitation permits nullified the claimant's investment.

In the case of *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, the Egyptian government claimed that Mr. Siag submitted a fraudulent citizenship certificate to the Lebanese Embassy in Cairo as part of his request for the Egyptian government to recognize his Lebanese citizenship, asserting that the documents he provided to support his nationality were fraudulent.[4]

In the *Libananco Holdings Co Limited v. Republic of Turkey* case, Turkey claimed that the key judicial documents relied upon by the claimant were expired. Therefore, the documents provided by the claimant, including share purchase contracts and board meeting minutes claiming the acquisition of shares by the claimant in two Turkish water and electricity companies, were reproduced after their expiration dates and were thus fraudulent.[5]

In another case, *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the claimant presented copies of share certificates and purported purchase agreements to substantiate their claim that they were shareholders of the two Turkish water and electricity companies at the relevant time. Turkey claimed that Europe Cement (the claimant) initiated the lawsuit based on

1 Simon Gabriel, *Dealing With Challenged Documents* (2011) 2.

2 *Churchill Mining Plc and Planet Mining Pty Limited v. Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13, 12 January 2015, ICSID Case No ARB/12/14, ICSID Case No ARB/12/40.Paras. 12-106.

3 Ibid, paras. 95-96.

4 *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, Award, 1 June 2009, ICSID Case No ARB/05/15. Para 231

5 *Libananco Holdings Co Limited v Republic of Turkey*, Award, 2 September 2011, ICSID Case No ARB/06/8. para150

6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 (Award Date: August13,2009)

fraudulent documents that purported to demonstrate ownership in Turkish companies, generally alleging abuse of the arbitration process by the claimant.[1]

In the High Court of the Hong Kong Special Administrative Region, there is a case filed by *ACME TEL FZC* against *Alpha Enterprise* (Hong Kong). In this case, the claimant alleges that the respondent forged a banking information document related to payments.[2]

In ICC case number 17842,[3] the claimant asserted that a series of emails sent by the respondent to the tribunal were fabricated and forged.[4]

In the case of *Technoservice Limited v. NOKIA Corporation*, the claimant alleged that the respondent maliciously and intentionally filed a request for cost recovery to obstruct justice for the claimant. Furthermore, the document submitted to support this request was claimed to be fraudulent and did not comply with court orders regarding the production of documents.[5]

Regarding objections to the authenticity of the submitted documents, there may be apprehension on the part of the objector, who is essentially claiming fraud, which may sometimes deter them from filing an objection. This is because the allegation of fraudulent evidence increases the risk that the tribunal may choose to investigate the evidence submitted by the objector themselves. This implies that when one party alleges the other's evidence is fraudulent, the tribunal may decide to review the evidence from both sides, thereby increasing the likelihood that the authenticity of the objector's evidence will also be scrutinized. As a result, parties weigh whether the benefits of claiming fraud against the opposing party's evidence outweigh the risks of drawing attention to their own evidence (which may also be fraudulent).[6]

3.2. Claim of False Testimony (Allegation of Perjury)

One party may question the validity of the testimony provided by witnesses summoned by the opposing party before the tribunal. The validity of witness testimony refers to its truthfulness and factual accuracy. During the arbitration process, it may become evident that a witness has not told the truth or has provided misleading information to the court. The following cases illustrate instances where one party raises claims of false or misleading witness testimony.

In an ICSID arbitration case involving *Tradex Hellas SA* and *Republic of Albania*, the claimant asserted that the testimonies of two witnesses summoned by Albania were based on forged and fraudulent documents. Furthermore, the testimonies of these witnesses contradicted some documents submitted by the claimant. In return, the *Government of Albania* questioned the validity of the witnesses' testimony presented by Tradex, claiming that the testimony of some witnesses introduced by *Tradex* conflicted with their previous statements or the testimonies of other witnesses. Essentially, both parties believed that the witness testimonies in the case were biased and that the witnesses were affiliated with the party for whom they testified.[7]

1 Ibid. Para 147.

2 ACME Tel FZC vs. Alfa Enterprises (HK) Limited and the Hongkong and Shanghai Banking Corporation Limited, Decision of the Court of First Instance of the High Court of Hong Kong HCMP 3313/2014 - 2 July 2015, para. 33.

3 José Feris & Stephanie Torkomyan, Im*pact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration / Selected ICC Cases/ ICC Dispute Resolution* (2019) 60.

4 Due to the confidentiality and the non-public nature of arbitration, no further information is available regarding the details of this case.

5 *Technoservice Limited v. NOKIA Corporation*, Award on costs, june 2020, ICC Case No. 23513/FS, para. 199.

6 Cecily Rose, *Fraudulent evidence in international court of justice* (2016) 330.

7 Ibid.Para. 82.

In another case, the *Government of Ghana* objected to the witness testimony presented by the claimant, arguing that the testimony was tainted by falsehoods.[1]

The case of *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* also addresses the issue of claims of false witness testimony. In this case, allegations were made regarding the falsity of testimonies against witnesses introduced by Pakistan.[2] The claim involved a breach of a bilateral investment treaty between Australia and Pakistan, based on Pakistan's unlawful and arbitrary denial of a mining lease. The tribunal concurrently found that the testimonies of some witnesses regarding the bribery allegations presented by the respondent were false and misleading.

3.3. Allegation of Fraud in Expert Reports

Each party in a dispute may object to the expert report selected by the tribunal or by the opposing party. Such objections may include claims of conflicts of interest, the expert's qualifications, the method of selection, or any relationship between the expert and the party that appointed them. In cases of conflict of interest, the complainant may raise concerns about the expert's previous services or relationships with the party that appointed them.[3]

Objection to the reliability of an expert opinion does not, in itself, imply fraud in the expert's report. According to international arbitration practices, objections to expert opinions must be accompanied by claims of fraud in the expert's presentation.

For example, in case number 17818 at the ICC, the claimant deemed the expert report chosen by the respondent to be unreliable (the report involved evaluating the handwriting of the respondent compared to a guarantee signature presented by the claimant). The claimant argued that the expert had not reviewed the original guarantee document and had not compared the guarantee signature with the respondent's earlier signatures.[4] Furthermore, the claimant even questioned the reports of experts appointed by the tribunal, asserting that the report of the second expert should be rejected due to discrepancies and inaccuracies indicating a lack of impartiality. Additionally, the appointed expert had exceeded the scope of authority and limits set by the tribunal.[5]

In another ICC case concerning a hotel management and consultancy agreement, the claimant, the hotel owner, argued that the expert reports submitted by the respondent, which included financial forecasts related to the hotel's potential profitability, were fraudulent and requested the court to reject the expert opinion and appoint a new expert.[6]

In the case of *Stati v. the Republic of Kazakhstan*, the claimant submitted a request to annul the arbitration award to the Swedish court. The claimant's allegation was based on the discovery of evidence indicating the presence of fraudulent evidence in the arbitration process. One piece of this fraudulent evidence was expert reports concerning investment costs.[7]

1 *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana*, Award on Damages and Costs, 30 June 1990, (1994) 95 ILR 211.Para. 58.

2 *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, Decision on Respondent's Application to Dismiss the Claims (With Reasons), 10 November 2017, ICSID Case No ARB/12/1. para. 1821.

3 ICC Dispute Resolution Bulletin | 2021 Issue 2/ Issues for Arbitrators to Consider Regarding Experts An Updated Report of the ICC Commission on Arbitration and ADR. P. 67.

4 *National Bank of Xanadu v. Company ACME* (Turkey), ICC Final Award in case No 17818, Para. 147.

5 ICC Final Award in case No 17818, Ibid, Paras. 148-149

6 Feris & Torkomyan, Op. Cit. (2019) 60.

7 Decision of the Provisions Judge of the District Court of Amsterdam of 10 May 2012, *Kompas Overseas Inc. v. OAO Severnoe Rechnoe Parokhodstvo* (Northern River Shipping Company), No. 482043/KG RK 11-362.

4. Jurisdiction of the Arbitrator in the Face of Fraudulent Evidence

The issue of fraud in international arbitration is an inevitable concern. Disputes referred to arbitration tribunals arise from conflicts of interest between the parties involved. Consequently, there are always instances where one party may resort to fraudulent evidence to defend its position or obtain material and non-material benefits, ultimately tainting the arbitration process with corruption and fraud.

One of the primary responsibilities of arbitration tribunals is to maintain the integrity of the arbitration process and issue enforceable awards. On the other hand, the existence of fraud and fraudulent evidence can lead to the non-enforcement of awards in national courts.[1] Therefore, arbitrators must issue a fraud-free and enforceable award, which necessitates attention to all existing warnings.[2] Thus, it can be concluded that arbitrators must possess sufficient authority and jurisdiction to confront fraudulent evidence throughout the proceedings.[3] This is particularly important given that the public policies of many countries condemn corruption and fraud. In this context, the arbitrator must navigate a fine line between protecting the arbitration process and not exceeding their powers.[4]

Given the seriousness of fraud allegations, arbitration tribunals must employ more thorough investigations when faced with such claims. Consequently, if an arbitrator observes signs of fraud during the arbitration process, they may, at their discretion, initiate inquiries and even invite the parties to provide explanations if their doubts are serious and substantial.[5] If the objection to fraud is distinct from the substantive issues of the dispute or has the potential to conclude the dispute, the tribunal may divide the proceedings into two parts and address the objection as a preliminary matter.

We have examined how claims of fraudulent evidence can arise under various headings and topics, including claims of fraudulent documents, false witness testimony, and fraud in expert opinions. It should be noted that arbitration tribunals take appropriate actions in response to each of these situations.

4.1. Documents

The issue of the arbitrator's jurisdiction in examining the authenticity of documents in arbitration awards has been validated by various authors.[6] According to the practice of the ICC, all documents submitted by either party are deemed valid and complete, provided that their authenticity is not disputed by the other party. Some legal scholars believe that the objecting party in a dispute may sometimes seek to prove the authenticity of a piece of evidence, and since an arbitral award based on a forged document constitutes a violation of fair trial rights, arbitrators are required to take such allegations seriously.[7]

1 In the Iranian International Commercial Arbitration Rules, paragraph (h) of Article 33 enumerates one of the grounds for the annulment of an arbitral award as follows: "The arbitral award is based on a document whose fraudulent nature has been conclusively established by a final judgment."

2 "International Court of Arbitration Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process." ICC Dispute Resolution Bulletin | 2022 | Issue 2/ 59.

3 Margaret L Moses, *Inherent powers of Arbitration to Deal with Ethical Issues* (2014) 3.

4 Ibid, 9.

5 Lamm, Pham & Moloo, *Fraud and corruption in international arbitration* (2013) 10.

6 Preliminary Award in ICC arbitration dated 9 October 2008, ASA Bulletin 4/2011, sec. 87 et seqq.

7 Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (2012) 83.

The impact of claims regarding the fraudulent nature of documents on the arbitration process varies. The origin of this difference can be attributed to the circumstances of the dispute and the seriousness of the objections concerning the documents. When one party raises a claim of forgery regarding a document, the tribunal is not limited to the evidence presented by the parties and has the discretion to request document production, witness testimony, and expert opinions.[1] In some cases, the tribunal may itself appoint an expert to verify the authenticity of documents and materials; thus, the tribunal can utilize its investigative powers based on the parties' records to address allegations of forgery and gather further evidence.

When one party to a dispute challenges the authenticity of a document, the arbitrator must decide:

1. Whether the challenged document is significant and relevant to the outcome of the dispute and the final award.
2. Whether the objection to the document has been sufficiently substantiated.

If the arbitrator can affirmatively answer both questions, they are obliged to take steps regarding the authenticity of the contested document.[2] One such step is to examine the authenticity and validity of that document. The authenticity of documents can be confirmed both directly and indirectly.

Direct methods include:

- Admission of the existence of the document.
- Witness testimony from individuals who have knowledge of the document, affirming that it is indeed what it claims to be.
- An opinion from a non-expert regarding the signature and handwriting, based on prior familiarity with the handwriting in question.
- An expert opinion based on a comparison of the handwriting with a valid sample.[3]

Indirect methods include:

- Confirmation from the originator of a document containing distinctive oral statements or writings that only specific individuals would know the details of.[4]

According to arbitration practice, some documents do not require authentication and validate themselves. For example, sealed documents, certified copies of public records, signed commercial papers, and ancient documents are considered valid due to their physical condition, the time elapsed since their creation (usually over 20 years), and the fact that they have been properly maintained.[5]

In the case of *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the respondent

1 Utku, *Fraudulent Evidence: Investment Arbitration* (2020) 7.
2 Gabriel ,*"Challenged Documents"* , 828
3 Federal Rules of Evidence, Article IX. Rule 901. Authenticating of Identifying Evidence.
4 Michelle L. Querijero, Esq.A Practical Guide to evidence in Connecticut, Chapter 9, "*Documentary evidence*" Shipman & Goodwin LLP, Hartford, P9.
5 Ibid.
6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2.

challenged the authenticity of documents presented by the claimant. During the proceedings, the tribunal identified certain potential evidences suggesting the document's lack of authenticity and stated: a) the claimant was not in a position to provide the original versions of the documents;[1] b) no work reports pertinent to the transaction were available to the tribunal;[2] c) throughout the proceedings, the claimant failed to adequately refute the respondent's arguments.[3] The arbitrator acknowledged that it was not their duty to guess the facts; rather, it was the claimant's responsibility to prove forgery and fraud. Ultimately, due to insufficient evidence of forgery, the tribunal decided based on the documents provided by the claimant.

In a preliminary ruling from the ICC dated October 9, 2008, the arbitration tribunal carefully examined the conditions and circumstances presented, including expert opinions regarding the claim of forgery of the arbitration agreement. Based on the evidence, which appeared to contradict each other (e.g., an expert report affirming the document's authenticity while the document itself had numerous alterations), the tribunal concluded that while there was no strong evidence of the document's authenticity, there was also no substantial evidence indicating its forgery. Consequently, due to the lack of sufficient evidence to prove the document was forged, the tribunal relied on it.[4]

In the case of *EDF Services v. Government of Romania*, the arbitration tribunal appointed experts to assess the authenticity of the challenged documents and requested them to conduct an examination. The experts reported that the recorded file was incomplete, edited, and reformatted, which is considered illegal under Romanian law.

In cases brought before arbitration tribunals, once the existence of fraudulent or forged documents is established, the tribunal may adopt various approaches. For example, it may disregard that evidence, remove it from the existing case materials, or dismiss the entire case for reasons such as lack of jurisdiction, admissibility, or relevance. The legal consequences depend on the facts and circumstances of each case, such as the enforceability of the relevant treaty, the significance of the alleged forgery, the roles of the parties and third persons in the fraud, the connection between the fraud and the claims raised, and the timing of the fraudulent acts.[5]

Where the tribunal determines that the forged documents submitted by the claimant were intended to support the court's jurisdiction, the outcome of proving the forgery will result in the dismissal of the claim due to the tribunal's lack of jurisdiction. For instance, in the case of *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*,[6] the tribunal rejected its jurisdiction over the dispute. The rationale for this decision was that the outcome of proving the alleged fraud demonstrated the claimant's inability to establish that they were a qualified investor at that time under the disputed treaty.

In case number 17842 of the International Chamber of Commerce, the claimant alleged that a series of emails sent by the respondent were fraudulent. Accordingly, the claimant sought

1 Ibid, Sec152.
2 Ibid, Para. 154.
3 Ibid, Para. 166.
4 See Preliminary Award in ICC arbitration dated 9 October 2008, (FN 32), sec. 178 and 181.
5 *Churchill Mining Plc and Planet Mining Pty Limited vs Indonesia*. ICSID Case No. ARB/12/14 and ARB/12/40 Annulment Proceedings, Decision on Annulmet. Para. 494.
6 *Europe Cement Invesmtent & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2 (Award Date: August 13, 2009).

permission from the tribunal to appoint an expert to evaluate the authenticity of those documents and provide their opinion. The arbitration tribunal determined that the evidence presented by the claimant (including expert opinions and witness testimonies) raised a reasonable doubt regarding the authenticity of the emails. Consequently, the tribunal required the respondent to prove the validity of the new documents. Ultimately, the tribunal found that the respondent failed to establish the authenticity of the submitted documents and decided to exclude and eliminate the emails from the body of evidence in the dispute.[1]

The practices of international tribunals show that they act differently when confronted with fraudulent documents and evidence. In one arbitration conducted under Swiss law, when doubts arose regarding the authenticity of a document, the party presenting it failed to provide evidence supporting its authenticity. The tribunal ultimately disregarded the document entirely and issued a ruling based on other evidence.

Additionally, during the arbitration process of the ICC, it was claimed that a contract had expired, but no evidence was presented to substantiate that claim. As a result, the tribunal dismissed this objection.

Typically, copies of documents are presented instead of the original versions. The compliance of the copied documents with their originals is a significant issue concerning evidence. In legal systems, various methods are provided to verify the conformity of copies with originals. For instance, there are institutions in courts that certify the alignment of a copy with its original. The arbitration tribunal may offer such services to the parties when deemed appropriate.

Generally, the copies submitted must closely match the original document. The approach taken by arbitrators is that conformity refers to substantive compliance; therefore, minor or irrelevant discrepancies, such as marginal notes not present in the original document, should not impede the submission of a copied document as evidence. The Iran-United States Claims Tribunal (the IUSCT) in the case of *Gulf Associates Inc. v. The Islamic Republic of Iran* stated that errors and other discrepancies in document copies, indicating poor maintenance of the documents, do not prove the documents' invalidity or forgery.[2]

Forgery and fraud can be demonstrated by means other than the conformity of the original to the copy. For instance, contradictions in evidence can provide strong grounds for doubting the completeness or accuracy of a document, as this relates to the evidentiary value of the document rather than its appearance. Consequently, the tribunal may assign no evidentiary value to a document while also refraining from offering an opinion on its authenticity. As noted by the IUSCT in the case of *Reza Said Malek v. The Islamic Republic of Iran*, due to the ambiguities surrounding the true origin of the letter in question and the fact that even the claimant was unsure whether a genuine request for information had been sent to the notary public, the tribunal could not ascribe any evidentiary value to the document. Furthermore, in light of this decision, the tribunal found no need to address the arguments presented by the respondent in support of the letter's authenticity.[3]

Fraudulent documents can also affect the admissibility of a claim. For example, in the

1 Feris & Torkomyan, Op. Cit. (2019) 60.

2 *Gulf Associates Inc v. The Islamic Republic of Iran et al*. Award No. 594-385-2, para. 49.

3 *Reza Said Malek vs The Islamic Republic of Iran*, Final Award No. 534-193-3 of 11 August 1992, p 45.

Churchill case, all previous claims were deemed inadmissible on the grounds that widespread forgery and fraud had tainted the entire arbitration process.[1]

4.2. False Testimony and Expert Reports

Based on the practices of arbitration tribunals and international rules, it can be said that the conduct of arbitrators in addressing objections to witness testimony or expert reports is somewhat equivalent. This means that to assess the credibility and accuracy of the presented evidence, arbitrators hold a session to question witnesses and experts. Such sessions can be conducted independently for questioning either the witness or the expert, or both together.

For example, in the case of *Tradex Hellas SA v. Republic of Albania*, the tribunal held a hearing during which all witnesses and experts appointed by both parties were questioned.[2]

When assessing the credibility of witness statements, arbitrators must consider factors such as the character, independence, and interests of the witness. Witness testimony should be corroborated by additional evidence presented. To obtain truthful testimony, arbitrators may request witnesses to take an oath according to arbitration rules. According to Clause 5 of Article 38 of the English Arbitration Act (1996), the tribunal may ask the parties or their witnesses to take an oath or to be subjected to questioning; in this regard, the tribunal may enforce both the rules concerning oaths and the necessary questioning procedures. The reliability of witnesses can be easily established through direct examination by the tribunal or cross-examination by the opposing party.[3]

In the case of *Azpetrol International* against *the Republic of Azerbaijan*, registered companies from the Netherlands initiated arbitration, claiming expropriation by the host state (Azerbaijan) and violations of the Energy Charter Treaty. Witnesses in this case were summoned to the tribunal for questioning and were examined during hearings. Consequently, when the credibility of witness statements is challenged, courts possess the necessary tools to ascertain their accuracy. These tools include examination and questioning by both the tribunal and the opposing party.[4]

In the case of *EDF Services v. the Government of Romania*, the testimony of witnesses summoned by the claimant was deemed questionable, and for this reason, it was subjected to scrutiny and questioning by the tribunal.[5]

In international arbitration rules, such as those of the ICC, the right of parties to question experts is recognized. Clause 3 of Article 25 of the ICC rules states: "The arbitral tribunal may, after consulting the parties, appoint one or more experts, define their mission, and receive their reports. Upon the request of either party, the parties shall be given the opportunity to question such experts at a hearing."

Section 4 of Article 6 of the Prague Rules also states that experts may be summoned to a hearing at the request of one of the parties or at the discretion of the tribunal for examination.

1 *Churchill Mining Plc and Planet Mining Pty Limited v Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13, 12 January 2015, ICSID Case No ARB/12/14, ICSID Case No ARB/12/40.
2 Ibid, Para. 38.
3 Uluc,*Corruption in international arbitration* (2016) 218-219.
4 Ibid, 222.
5 *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) 223.

Similarly, Clause 5 of Article 29 of the UNCITRAL Arbitration Rules specifies that, upon the request of either party or under circumstances deemed appropriate by the arbitrator, appointed experts may be called to a hearing attended by the parties after submitting their written report for questioning.

Conclusion

The use of fraudulent evidence by one party to a dispute and the deception involved in presenting evidence before an arbitration tribunal is inevitable, as evidence can significantly influence the outcome of the arbitration award. Consequently, it is always possible for one party to engage in misconduct, such as using forged documents or providing incorrect information through witness testimony and expert reports, in order to divert the course of the arbitration.

We have found that the arbitrator's jurisdiction in uncovering fraudulent evidence depends on whether the role of the arbitrator in the evidence presentation process is viewed in terms of adversarial or inquisitorial systems of law. If the arbitrator is merely seen as a forum for resolving disputes, they may operate independently regarding the discovery of fraudulent evidence. This seems to be reflected in the practices of the International Chamber of Commerce as well. Conversely, when one party raises concerns regarding the authenticity of the evidence presented by the opposing party, they may request the arbitrator's intervention and examination of that evidence.

According to international arbitration practices, including those of the International Chamber of Commerce, when one party challenges the validity of the opposing party's evidence or alleges that it is fraudulent, the arbitration tribunal will take action in this regard.

The arbitrator's examination of objections and claims of fraud in the evidence presentation may vary based on the type of evidence presented and the nature of the objection raised. For instance, concerning submitted documents, the arbitrator may utilize their appointed experts or an expert designated by the objecting party. Additionally, if the opinions of experts or the testimonies of witnesses are challenged, the arbitrator may convene a separate session to question and interrogate the experts and witnesses.

References

Books

Born GB, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014).

Cosar U, 'Fraudulent Evidence: Investment Arbitration' (Max Planck Encyclopedias of International Law 2020).

Jafari Langeroodi MJ, *Legal Terminology* (Ganje Danesh Publication 2017). [In Persian]

Mafi H, *Commentary on the International Commercial Arbitration Law* (1st edn, Judicial Sciences and Administrative Services University Press 2016). [In Persian]

Moein M, *Moein Dictionary* Vol 5 (Ney Publication 2012). [In Persian]

O'Malley ND, *Rules of Evidence in International Arbitration: An Annotated Guide* (1st edn, Informa Law 2012).

Querijero ML, 'A Practical Guide to Evidence in Connecticut' in *Documentary Evidence* (2013) ch 9.

Shiravi AH, *International Commercial Arbitration* (15th edn, SAMT Publication 2023). [In Persian]

Articles

Boroumand B, Shahbazinia M and Arabiyaan A, 'Good Faith in Arbitration Procedures (A Comparative Study in Iranian and English Law)' (2020) 24 *Journal of Comparative Legal Studies* 1-24. [In Persian]

Feris J and Torkomyan S, 'Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration' (2019) ICC Dispute Resolution Bulletin 3.

Findley KA, 'Adversarial Inquisitions: Rethinking the Search for the Truth' (2011) 56 *New York Law School Law Review* 911-941.

Finkelstein R, 'The Adversarial System and the Search for Truth' (2011) 37 *Monash University Law Review* 135-144.

Gabriel S, 'Dealing with "Challenged Documents"' (2011) 29 *ASA Bulletin* 823-837.

Justice A, 'Comparative Analysis between Adversarial and Inquisitorial Legal Systems' (2017) Social Science Research Network https://ssrn.com/abstract=3077365 7-8.

Lamm CB, Pham HT and Moloo R, 'Fraud and Corruption in International Arbitration' (2013) 10 *Transnational Dispute Management*.

Mohebi M and Jafari Nadushan S, 'Inquisitorial and Accusatorial Systems in International Commercial Arbitration' (2015) *International Law Journal* No 52. [In Persian]

Moses ML, 'Inherent Powers of Arbitration to Deal with Ethical Issues' (2014) Loyola University Chicago School of Law, Public Law and Legal Theory Research Paper No 2014-2016.

Rose C, 'Fraudulent Evidence in the International Court of Justice' (2016) Inaugural Detlev F Vagts Roundtable on Transnational Law, ASIL Proceedings.

Samadi Maleh S and Mafi H, 'Discovery of Truth in International Commercial Arbitration with Emphasis on the Prague Rules (2018)' (2021) 8 *Scientific Journal of Comparative Law* 237-285. [In Persian]

Scherer M, 'Inherent Powers of Arbitrators' (2019) LLC ch 4.

Sezer ZD, 'The Impact of Fraud in International Arbitration: a Question of Admissibility, Jurisdiction or Merits?' (2019) LLM Paper, Faculty of Law and Criminology, Academic Year 2018-2019, Ghent University.

Uluc I, 'Corruption in International Arbitration' (2016) Thesis, The Pennsylvania State University School of Law.

Theses

Asgharzadeh M, *Access of the Arbitration Tribunal to Evidence in International Commercial Arbitration* (Master's Thesis, University of Mazandaran 2015). [In Persian]

Documents

Law on *International Commercial Arbitration* (LICA, Enacted 1997).

Rules

"Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005).

Chartered Institute of Arbitrators, *International Arbitration Practice Guideline about Using Party-Appointed and Tribunal-Appointed Experts* (2015).

Chartered Institute of Arbitrators, *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (September 2007).

Federal Rules of Evidence of the United States of America (2023).

ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (January 1, 2019).

International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010).

International Chamber of Commerce, *ICC Arbitration Rules* (2021).

Netherlands Arbitration Rules (in force as of March 1, 2024).

Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018).

United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules* (2021).

United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (1998).

Cases

Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and Government of Ghana, Ad Hoc Arbitration, Award on Damages and Costs (June 30, 1990).

ICC Final Award in case No 17818, *National Bank of Xanadu v Company ACME (Turkey)*.

ICC, *Technoservice Limited v NOKIA Corporation*, ICC Case No 23513/FS, Award on Costs (June 2020).

ICC, *The Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic International Sales Corporation*, Case No 7365/FMS.

ICC, 'Preliminary Award in Arbitration dated October 9, 2008' (2011) ASA Bulletin (Swiss Arbitration Association) 4/2011, sec 87.

ICSID, *Churchill Mining Plc and Planet Mining Pty Limited v Indonesia*, Procedural Order No 15: Claimants' Request for Reconsideration of Procedural Order No 13 (January 12, 2015) Case No ARB/12/14 and Case No ARB/12/40.

ICSID, *EDF (Services) Limited v Romania*, Case No ARB/05/13, Award (October 8, 2009).

ICSID, *Europe Cement Investment & Trade S.A. v Republic of Turkey*, Case No ARB(AF)/07/2, Award Date (August 13, 2009).