
ADVERSE INFERENCES IN INTERNATIONAL ARBITRATION: TOOTHLESS OR TERRIFYING?

ALEXANDER SEVAN BEDROSYAN*

ABSTRACT

An international arbitration tribunal may not employ the same tools as a national court may to convince a party before it to produce unfavorable evidence. For example, a tribunal may not hold a party in contempt, or (in all cases) impose monetary sanctions on a party. Lacking these coercive powers, tribunals increasingly rely on adverse inferences to incentivize a party to produce unfavorable evidence: in other words, tribunals threaten to infer that withheld evidence is unfavorable to the withholding party's case.

Adverse inferences are very effective in deterring a party from withholding evidence in litigation. This Comment analyzes whether they are as effective a deterrent in international arbitration proceedings. It does so by identifying the factors that contribute to the potency of adverse inferences in litigation, and investigating the extent to which these factors have been replicated in select international arbitration cases.

The results of the inquiry are that adverse inferences are not as effective a deterrent to nonproduction in international arbitration

* J.D. *cum laude*, 2016, University of Pennsylvania Law School. Executive Editor, Volume 164, *University of Pennsylvania Law Review*. Oralist, Jessup International Law Moot Court Competition Team of University of Pennsylvania Law School (2016 U.S. National Champion & World Runner-Up). I am deeply grateful to my colleagues Bethan Jones, Adria Moshe, Camilla Ihenetu, Leo Park, Tracy Corbett and Laura Harrison. I would also like to thank Adam Raviv and Kenneth Beale for their instruction on the topic of international commercial arbitration, and Elizabeth Rose Kenerson for her diligence during the editing process.

as they are in litigation. While juries often infer the worst on a given issue and even make inferences regarding the recalcitrant party's entire case, arbitrators confine their adverse inferences to the specific issue to which the withheld evidence pertained, and do not even infer the worst regarding this specific issue. While adverse inferences can lead to punitive damages against the withholding party in litigation, they rarely do in arbitration. Finally, a party who withholds evidence in litigation must convince both a jury and an appellate court that no adverse inference is warranted, while a withholding party in arbitration must convince only one arbitral tribunal.

Therefore, the qualitative analysis suggests that a party that withholds evidence is more likely to win in international arbitration than in litigation if an adverse inference is drawn against it. Thus, adverse inferences are less of a deterrent to nonproduction in international arbitration as they are in litigation.

TABLE OF CONTENTS

1.	Introduction.....	244
2.	Definition of Adverse Inferences.....	247
3.	Adverse Inferences As the Arbitrators' Main Tool	248
4.	Adverse Inferences in Litigation	251
	4.1. <i>Jury's Imagination</i>	252
	4.2. <i>Punitive Damages</i>	254
	4.3. <i>Reversibility</i>	256
	4.4. <i>Observations on Litigation and Arbitration</i>	257
5.	Adverse Inferences in International Arbitration.....	259
	5.1. <i>Factfinder: Arbitrators are not Jurors</i>	259
	5.1.1 <i>Arbitrators' Confined and Narrow Inferences</i>	259
	5.1.2 <i>The Necessity of Direct Evidence</i>	265
	5.1.3 <i>Familiarity with the Tribunal</i>	266
	5.2. <i>The Absence of Punishment</i>	269
	5.3. <i>Finality of Arbitration Awards</i>	271
6.	Conclusion	272

1. INTRODUCTION

Counsel for parties in international arbitration face market pressures to do what is necessary to help their clients win.¹ Moreover, arbitrators lack the coercive powers that national courts have to compel proper behavior and sanction misconduct by counsel and parties. These two realities create the risk that counsel may advise parties not to produce unfavorable documentary or testimonial evidence, even in the face of an order from the arbitral tribunal mandating such production. This risk poses a problem not only for the integrity of a particular international arbitration proceeding, but also for the reputation of international arbitration generally as a just means of resolving disputes.

To counter this risk and incentivize production by parties, arbitrators have in recent years frequently borrowed a technique from common law courts: the adverse inference.² In other words, arbitrators infer that evidence that is withheld without sufficient justification is unfavorable to the withholding party. This practice has been endorsed both by new institutional rules that explicitly authorize tribunals to draw adverse inferences,³ and by national

¹ See KATHERINE L. LYNCH, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* 112 n.166 (2003) ("International commercial arbitration is an extremely competitive market involving big business and 'mega-lawyering.'"); see also Edna Sussman, *The Arbitrator Survey—Practices, Preferences and Changes on the Horizon*, 26 AM. REV. INT'L ARB. 517, 517 (2015) ("Arbitration counsel want to win.").

² See IBA WORKING PARTY, *COMMENTARY ON THE NEW IBA RULES OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION*, 2 BUS. L. INT'L 16, 36 (2000) (noting how arbitral tribunals "routinely create such inferences in current practice").

³ See, e.g., IBA Guidelines on Party Representation in International Arbitration (2013) art. 26(b), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F> [<https://perma.cc/LV4X-YEBC>] ("If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may ... draw appropriate inferences in assessing the evidence relied upon ... the Party Representative ..."); see also IBA Rules on the Taking of Evidence in International Arbitration (2010) arts. 9(5), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=68336C49-4106-46BF-A1C6-A8F0880444DC> [<https://perma.cc/725W-HUWH>] ("If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party."). For an example of institutional rules that implicitly allow an arbitral tribunal to make adverse inferences, see ICSID Rules of Procedure for Arbitration Proceedings (2006) r. 34(3), <https://icsid.worldbank.org/ICSID/StaticFiles/>

courts that have confirmed⁴ or refused to set-aside⁵ awards made in proceedings in which arbitrators drew adverse inferences.⁶

This Comment investigates the extent to which adverse inferences actually deter parties from withholding unfavorable evidence in international arbitration proceedings. It does so by identifying the factors that have made adverse inferences a potent deterrent to nonproduction in litigation, and investigating whether these factors played a role in certain international arbitration cases where a party was faced with the choice either to produce evidence or have an adverse inference drawn against it.⁷

This inquiry fills gaps in the existing literature on adverse in-

basicdoc/CRR_English-final.pdf [https://perma.cc/78KV-EM75] (“The parties shall cooperate with the Tribunal in the production of the evidence The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.”). For an example of a non-binding source of authority, see UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ¶ 51, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> [https://perma.cc/RW3V-KJTC] (“The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.”).

⁴ See, e.g., Bundesgericht [BGer] [Federal Supreme Court] Mar. 28, 2007 II ENTSCHEIDUNGEN DES SCHWIEZERISCHEN BUNDESGERICHTS [BGE] 4A 2 (Switz.), http://www.polyreg.ch/bgeunpub/Jahr_2007/Entscheide_4A_2007/4A.2_2007.html [https://perma.cc/Q3JT-L5ZA].

⁵ See, e.g., *United Mexican States v. Karpa*, [2005] 193 O.A.C. 216 (Can. Ont. C.A.), <http://www.ontariocourts.ca/decisions/2005/january/C41169.htm> [https://perma.cc/W4ZC-2LT8].

⁶ Moreover, to the best of the author’s knowledge, no court has ever held that arbitrators violated due process or public policy when they drew adverse inferences. Indeed, no such cases can be found on the website that aggregates decisions regarding the enforcement of arbitral awards. See *Topic List of Court Decisions on the New York Convention Cases*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/court-decisions/list-of-topics-decisions-per-topic?508/0/0/0#508> (last visited Mar. 3, 2016) [https://perma.cc/59Z9-SHWW]. But see William Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 ARB. INT’L 409, 422 (2014) (“Adverse inferences remain theoretically possible, but pose a serious risk to award enforcement due to the possibility that they will appear to the recognition forum as a breach of due process.”).

⁷ The relevant cases are those where a tribunal ordered a party to produce evidence, because there is “[n]o duty to voluntarily disclose adverse evidence [in international arbitration].” NATHAN D O’MALLEY, *RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE* § 3.14 (2012). Indeed, “[f]ailure to voluntarily (eg, without an order from the tribunal) disclose evidence adverse to a party’s position is not a violation of ... generally accepted international arbitration procedure.” *Id.*

ferences. Existing scholarship on the topic has synthesized the procedural and substantive preconditions to an adverse inference,⁸ discussed the relationship between adverse inferences and the burden of proof,⁹ and investigated the willingness by tribunals to draw adverse inferences.¹⁰ But it has not analyzed the effect of (potential) adverse inferences on parties' production decisions. Indeed, critiquing tribunals' reluctance to draw adverse inferences,¹¹ such works have commented that

a very important aspect of adverse inferences is their deterrent effect. In order to ensure compliance with orders in general, parties should be made to feel genuinely concerned that if they do not produce relevant documents without a properly proved, plausible excuse, then the case could turn against them for that reason. *The benefit of this deterrent effect is seriously diluted if arbitrators are reputed to skirt around rather than deal head on with adverse inference issues.*¹²

This question—the extent, if any, of the deterrent effect of adverse inferences—is precisely the subject of this inquiry.

⁸ See, e.g., Jeremy K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, 22 ARB. INT'L 549 (2006). Sharpe extracts the following preconditions from an impressive survey of case-law of the Iran-United States Claims Tribunal:

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

the requested evidence must be accessible to the inference opponent;

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

the part seeking the adverse inference must produce *prima facie* evidence; and

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

Id. at 551.

⁹ See, e.g., Vera van Houtte, *Adverse Inferences in International Arbitration*, in WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION: NEW ISSUES AND TENDENCIES 195 (Alexis Mourre & Teresa Giovannini eds. 2009).

¹⁰ See Simon Greenberg & Felix Lautenschlager, *Adverse Inferences in International Arbitral Practice*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 179 (Stefan Michael Kröll, Loukas A. Mistelis et al. eds., 2011).

¹¹ *Id.*; see also GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2391-92 (2d ed. 2014) (suggesting that tribunals appear “hesitant, sometimes overly hesitant” to draw adverse inferences).

¹² Greenberg & Lautenschlager, *supra* note 10, at 205 (emphasis added).

The result of the inquiry is that adverse 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.

The argument proceeds as follows: Part 1 defines adverse inferences; Part 2 illustrates that adverse inferences are the main tools tribunals use to incentivize production by parties; Part 3 explains the strength of adverse inferences in litigation; and Part 4 analyzes international investor-state and commercial arbitrations where non-producing parties have been warned of the possibility of an adverse inference being drawn against them.

2. DEFINITION OF ADVERSE INFERENCES

Adverse inferences are an evidentiary rule allowing for the creation of indirect evidence.¹³ In making an adverse inference, the factfinder considers a party's non-production of evidence to be indirect evidence of a fact, for which the party refuses to produce direct evidence. 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).¹⁴

¹³ *Id.* at 187; see also van Houtte, *supra* note 9, at 195, 197–98.

¹⁴ See also *Adverse Inference*, BLACK'S LAW DICTIONARY 847 (9th ed. 2009) (defining adverse inference as “[a] detrimental conclusion drawn by the fact-finder from a party's failure to produce evidence that is within the party's control”). As

There are two important consequences flowing from the concept that adverse inferences are an evidentiary rule. First, an adverse inference is not preclusion. The factfinder does not automatically decide the issue against the non-producing party; rather, it weighs the indirect evidence of non-production against any other evidence on the issue. Second, indirect evidence may inherently carry “reduced evidential weight” compared to direct evidence.¹⁵ Thus, for example, if the claimant in the above hypothetical had made representations to its customers that the goods were of proper quality, this direct evidence may overcome the indirect evidence of the non-produced tests.

3. ADVERSE INFERENCES AS THE ARBITRATORS’ MAIN TOOL

“[A]rbitration is not a process of the State.”¹⁶ An arbitral tribunal is not part of the judiciary of a state; it obtains the authority to adjudicate a dispute not from a statute, but from an agreement between the disputing parties to grant it jurisdiction.¹⁷ Therefore, unlike national courts, arbitrators do not have at their disposal the coercive powers of a state that they can use in order to compel a recalcitrant party to produce evidence.¹⁸ In this way, an international arbitral tribunal is similarly hamstrung as other adjudicatory bod-

will be seen *infra*, a critical question is how broad a detrimental conclusion the factfinder will draw.

¹⁵ See van Houtte, *supra* note 9, at 198; see also *infra*, subsection IV(A)(2).

¹⁶ Geoffrey M. Beresford Hartwell, *Arbitration and the Sovereign Power*, 17 J. INT’L ARB. 11, 13 (2000).

¹⁷ See Gary V. McGowan, *Sanctions in US and International Arbitrations: Old Law in Modern Context*, KLUWER ARB. BLOG (Oct. 10, 2013), <http://kluwarbitrationblog.com/blog/2013/10/10/sanctions-in-us-and-international-arbitrations-old-law-in-modern-context/> [https://perma.cc/R23G-XEBV] (“An arbitrator’s procedural power derives from private contract, not public law.”).

¹⁸ See Sharpe, *supra* note 8, at 549 (noting that arbitrators lack “*imperium*”). Compare FED. R. CIV. P. 37(a)(1) (allowing parties litigating in a federal American court to move for an order compelling disclosure or discovery). However, jurisdictions that have adopted the UNCITRAL Model Law provide that courts may assist arbitral tribunals in collecting evidence. See UNCITRAL Model Law on International Commercial Arbitration (1985, rev’d 2006) art. 27, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf [https://perma.cc/3ZQX-U2V2] (“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”).

ies that are not part of a coercive national state apparatus, such as the International Court of Justice.¹⁹

Thus, arbitrators are left with three different measures they may take in order to deter a party from withholding evidence. They may (1) impose monetary sanctions on the party, (2) require the party to bear the costs of the arbitration and the other side's legal fees, and/or (3) draw an adverse inference against the party. The third option—the adverse inference—enjoys legal legitimacy and practical effectiveness that the first and second options respectively do not.

It is far from clear that arbitrators have authority to impose monetary sanctions. Neither institutional rules²⁰ nor the UNCITRAL Model Law²¹ explicitly grants them such power. Indeed, given the public character of such sanctions, leading treatises caution private arbitrators to “exercise particular care” in imposing them.²²

By contrast, the problem with an award of costs and legal fees lies not in its legal legitimacy, but in its practical effectiveness as a deterrent. Arbitrators are authorized under various institutional rules and national arbitration statutes to require a recalci-

¹⁹ The International Court of Justice is empowered to make “all arrangements connected with the taking of evidence.” Statute of the International Court of Justice art. 48, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. But such powers do not include the power to compel parties in a case before it to produce evidence. Rather, “the Court may, even before the hearing begins, *call upon* agents to produce any document or to supply any explanations. *Formal note* shall be taken of any refusal.” *Id.* at art. 49 (emphases added). See also Michael P. Scharf & Margaux Day, *The International Court of Justice’s Treatment of Circumstantial Evidence and Adverse Inferences*, 13 CHI. J. INT’L L. 123, 123 (2012) (“The ICJ, however, has limited ability to compel production of evidence and instead often relies either on a *compromis* containing agreed factual stipulations or on documentary dossiers submitted by each of the parties.”).

²⁰ Neither the ICSID, UNCITRAL, LCIA, ICDR nor ICC rules explicitly or implicitly grant tribunals the authority to impose monetary sanctions. However, other rules may be read as implicitly granting this power. See, e.g., IBA Guidelines on Party Representation, *supra* note 3, art. 26(d) (“If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may . . . (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.”).

²¹ See UNCITRAL Model Law on International Commercial Arbitration, *supra* note 18.

²² BORN, *supra* note 11, at 2315 n.1055; see also JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 879 (2012) (“Penal costs sanctions are not applied in international arbitration.”).

trant party to pay costs and legal fees.²³ Yet, 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.²⁴ Thus it is unlikely that the prospect of paying costs and fees would sufficiently deter a party from withholding unfavorable evidence.

Adverse inferences do not have either of these problems. As to legality, it is “unanimously recognized by scholars and case law” that tribunals have the power to draw them.²⁵ As to practical effectiveness, by inferring the fact for which a recalcitrant party

²³ See, e.g., LCIA Arbitration Rules (2014) art. 28.4, http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [<https://perma.cc/5MVW-22QN>] (“The Arbitral Tribunal shall make its decisions on both Arbitration Costs and Legal Costs on the general principle that costs should reflect the parties’ relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties’ conduct in the arbitration, including any co-operation in facilitating the proceedings as to time and cost and any non-co-operation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.”); see also IBA Guidelines on Party Representation in International Arbitration (2013) art. 26(c), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F> [<https://perma.cc/D92M-XE63>] (“If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may ... (c) consider the Party Representative’s Misconduct in apportioning the costs of the arbitration”); see also IBA Rules on the Taking of Evidence in International Arbitration (2010) arts. 9(7), <http://www.ibanet.org/Document/Default.aspx?DocumentUId=68336C49-4106-46BF-A1C6-A8F0880444DC> [<https://perma.cc/AZ36-AWEM>] (“If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.”); see also UNCITRAL Arbitration Rules (rev’d 2010) art. 42(1) (“The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”).

²⁴ See Greenberg & Lautenschlager, *supra* note 10, at 203 – 04.

²⁵ ALAIN HOSANG, OBSTRUCTIONIST BEHAVIOR IN INTERNATIONAL COMMERCIAL ARBITRATION: LEGAL ANALYSIS AND MEASURES AVAILABLE TO THE ARBITRAL TRIBUNAL 148 (2014). For institutional rules that authorize adverse inferences, see *supra* note 3. For an example of national arbitration statutes that explicitly authorize them, see Arbitration Act, 1996, c. 23, § 41(7)(b) (Eng.) (“If a party fails to comply with any other kind of peremptory order, then ... the tribunal may ... draw such adverse inferences from the act of non-compliance as the circumstances justify”).

withheld direct proof, an adverse inference seeks to put the parties in the position they would have been in had the recalcitrant party actually produced the withheld evidence,²⁶ thereby undoing any advantage the recalcitrant party may have gotten from withholding.²⁷ For this reason, tribunals²⁸ and scholars²⁹ consider adverse inferences to be the arbitrator's best available tool in incentivizing parties to comply with its production orders. Determining whether this tool is effective in practice is therefore critical to determining whether a tribunal will be able to obtain all relevant direct evidence in an arbitration.

4. ADVERSE INFERENCES IN LITIGATION

Adverse inferences are a particularly powerful deterrent to non-production in litigation because of three factors. First, they leave the non-producing party at the mercy of the jury's imagination. Second, they may cause the factfinder to consider the party's non-production to have been motivated by a culpable state of mind, which may lead to punitive damages. And third, the possibility that a reviewing court may draw an adverse inference, or invalidate the conclusions of the factfinder in the lower court that failed to draw one, reduce the likelihood that the non-producing

²⁶ See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 3d 598, 618 (S.D. Tex. 2010) ("A measure of the appropriateness of a sanction is whether it 'restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999))).

²⁷ See MARGARET KOESEL, DAVID A. BELL ET AL., *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* 36 (2000) (naming "remediation" as a goal, along with deterrence and punishment, of adverse inferences); Wm. Grayson Lambert, *Keeping the Inference in the Adverse Inference Instruction: Ensuring the Instruction is an Effective Sanction in Electronic Discovery Cases*, 64 S.C. L. Rev. 682, 686 (2013) ("The instruction serves three purposes: to punish, deter, and remedy.").

²⁸ See, e.g., *Waste Mgmt., Inc. v. Mex.*, ICSID Case No. ARB(AF)/00/3, Procedural Order Concerning Disclosure of Documents (Oct. 1, 2002) ¶ 6, <http://www.naftaclaims.com/disputes/mexico/Waste/WasteProceduralOrderDocProd1.pdf> [<https://perma.cc/CNT6-Q8TR>] ("The ultimate sanction for nondisclosure is the drawing of an adverse inference.").

²⁹ See, e.g., *DURWARD V. SANDIFER*, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 147 (1975) (deeming the threat of an adverse inference to be the "most effective sanction" tribunals have at their disposal).

party will ultimately profit from its non-production.

4.1 Jury's Imagination

In a landmark case on spoliation, Judge Scheindlin portrayed the damage a jury armed with an adverse inference instruction could inflict on a party that refused to produce evidence:

An adverse inference instruction often ends litigation. . . . 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.³⁰

Indeed, because of the essentially dispositive effect of adverse inference instructions, commentators have warned that courts should not issue them lightly.³¹

The reason for the potential damage of adverse inferences is twofold, both having to do with "jurors [and] their unfettered imaginations."³² First, jurors 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. Second, they may make inferences beyond the specific issue, regarding the non-producing party's entire case or culpability.³³

Adverse inference instructions historically have entitled juries to infer the worst about the specific issue to which the withheld evidence pertains. The first ever known adverse inference instruction was given in the famous English case *Armory v. Delamirie*, in which the defendant goldsmith removed stones from a stolen

³⁰ *Laura Zubulake v. UBS Warburg*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

³¹ See Lambert, *supra* note 27 (suggesting that courts should not issue an adverse inference instruction unless there has been a finding that the party who withheld or destroyed evidence did so in bad faith).

³² Peter D. Hardy & Matthew T. Newcomer, *Parallel Proceedings and the Perils of the Adverse Inference*, J. HEALTH & LIFE SCI. L., July 2009, at 241, 250.

³³ See Caitlin Haney, *Spoliation of Electronic Data Results in Severe Sanctions*, LITIG. NEWS (Nov. 5, 2013), https://apps.americanbar.org/litigation/litigationnews/top_stories/110513-spoliation-electronic-data.html [<https://perma.cc/HPZ8-5FUJ>] ("[An adverse inference instruction] leaves the jury free to judge the culpability of a person who destroyed documents in the middle of litigation. . . . [T]he jury is [also] given free rein to imagine which documents were destroyed.").

jewel that the plaintiff child had brought him.³⁴ After finding the defendant liable for trover,³⁵ the court instructed the jurors that, on the issue of compensation to the child, “unless the defendant did produce the jewel, and shew it not to be of the finest water, they should *presume the strongest against him*, and make the value of the best jewels the measure of their damages.”³⁶ Thus, even though the jewels may in reality have been only of medium quality, the jury could infer that they were of “best” quality.

Today, not much has changed in terms of the damaging inferences courts allow juries to draw. In the newsworthy *Apple, Inc. v. Samsung Electronics, Co.* patent infringement litigation, Samsung failed to ensure that its employees, including those who designed the allegedly infringing products, suspended their computers’ automatic bi-weekly deletion of emails.³⁷ The court instructed the jury to presume that relevant information favorable to Apple had been deleted as a result.³⁸ It then advised, “Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not at all determinative in reaching your verdict.”³⁹ Granted such wide discretion, the jury was free to make a “determinative” inference as to liability and make the most incriminating inference possible; for example, it could infer that the lost emails contained Samsung’s plans to copy Apple’s designs. Thus, adverse inference instructions allow juries to use their imaginations to infer the worst on a specific issue, whether damages as in *Armory*, or liability as in *Apple*.

Adverse inference instructions may also lead juries to make inferences beyond the issue to which the withheld evidence pertains. Juries may infer, for example, that the withholding party’s whole case is baseless. As warned by Wigmore, non-production may be

receivable against [the withholding party] as an indication of his *consciousness that his case is a weak or unfounded one*;

³⁴ (1722) 93 Eng. Rep. 664 (K.B.).

³⁵ Trover is defined as, “A common-law action for the recovery of damages for the conversion of personal property, the damages generally being measured by the property’s value.” *Trover*, BLACK’S LAW DICTIONARY 1647 (10th ed. 2014).

³⁶ *Armory*, *supra* note 34 at 664 (emphasis added).

³⁷ 881 F.Supp.2d 1132, 1138, 1145 (2012).

³⁸ *Id.* at 1150.

³⁹ *Id.* at 1153.

and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, *indefinitely though strongly, against the whole mass of alleged facts constituting his cause.*⁴⁰

Jurors may also make inferences about the negative character of the non-producing party; the risk then is that the jurors predispose themselves against the party because of their inferences about the party's character, rather than about the facts of the case. This risk is particularly great when individuals facing both criminal and civil proceedings invoke their Fifth Amendment right against self-incriminating testimony⁴¹ in the civil suit.⁴² This risk also exists in cases that do not involve any criminal elements. For example, if a plaintiff in a products liability case destroys or refuses to produce the allegedly defective product, jurors will likely respond to an adverse inference instruction "not by reference to what they think about ... the probability of defect ... but rather by reference to the immorality of plaintiff's behavior in destroying the evidence."⁴³ The jury may then harbor a desire to "impose swift punishment [on the immoral plaintiff], with a certain poetic justice, [without] concern over the niceties of proof."⁴⁴ Thus, a party in litigation that withholds evidence on one specific issue runs the risk that the jury will infer the worst not only about that specific issue, but also about the party's whole case and character. Such a party can reliably predict defeat.

4.2 Punitive Damages

Worse still, an adverse inference instruction may allow the jury to infer conduct or culpability on the part of the non-

⁴⁰ 2 JOHN H. WIGMORE, EVIDENCE IN TRIAL AT COMMON LAW § 278 (James H. Chadbourn ed., rev. ed. 1979) (emphases added).

⁴¹ See U.S. CONST. AMEND. V ("No person ... shall be compelled in any criminal case to be a witness against himself.").

⁴² See Hardy & Newcomer, *supra* note 32, at 244, 250-51 (suggesting that frequent invocations foster a perception that real misconduct has occurred).

⁴³ Dale A. Nance, *Adverse Inferences about Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1101 (2010).

⁴⁴ MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 273, at 661 (Edward W. Cleary ed., 2d ed. 1972).

producing party that could make the non-producing party liable for punitive damages. For example, in *Smith v. Slifer Smith & Frampton/Vail Associates Real Estate, LLC*,⁴⁵ forensic analysis revealed that the defendant had wiped clean its hard drives a few days before they were to be inspected by the plaintiff's lawyer.⁴⁶ The court granted an adverse inference instruction that the destroyed evidence would have been unfavorable to the defendant,⁴⁷ and also permitted the plaintiff to amend its complaint to add a claim for punitive damages "based on the adverse inference."⁴⁸ The plaintiff duly amended its claim to allege that the defendant's conduct⁴⁹ was "willful and wanton" and entitled the plaintiff to punitive damages.⁵⁰

Similarly, in *Coleman Holdings Inc. v. Morgan Stanley & Co.*, the defendant committed several discovery abuses. It failed to cease the automatic annual overwriting of its emails for four years;⁵¹ certified to the court that its document production was complete, mere weeks after finding nearly 1500 unprocessed backup tapes that contained over 8000 unreviewed emails;⁵² and then further failed to produce an additional 738 backup tapes it later discovered.⁵³ The court granted an adverse inference instruction that the missing emails would have shown the defendant's role in the allegedly fraudulent transaction that was the subject of the lawsuit, and permitted the plaintiff to "argue that [defendant's] concealment of its role in the transaction is evidence of its malice or evil intent, going to the issue of punitive damages."⁵⁴ The plaintiff took

⁴⁵ No. 06-cv-02206-JLK, 2009 WL 482603 (D. Colo. Feb. 25, 2009) (describing a "systemic effort to erase pertinent data").

⁴⁶ *Id.* at *8.

⁴⁷ *Id.* at *10.

⁴⁸ *Id.* at *11, *13.

⁴⁹ It is unclear whether the "conduct" referred to here was the underlying conduct of the defendant that was the subject of the lawsuit, or the conduct in wiping clean the hard drives.

⁵⁰ Complaint Amendment Regarding Claim for Punitive Damages at 1, *Smith v. Slifer Smith & Frampton/Vail Associates Real Estate, LLC*, No. 06-cv-02206-JLK (D. Colo. filed Mar. 9, 2009).

⁵¹ Amended Order on *Coleman (Parent) Holdings, Inc.'s Motion for Adverse Inference Instruction due to Morgan Stanley's Destruction of E-Mails and Morgan Stanley's Noncompliance with the Court's April 26, 2004 Agreed Order*, No. 502003CA005045XXOCAL, 2005 WL 674485 at *2 (Fla. Cir. Cit. Mar. 1, 2005).

⁵² *Id.* at *3.

⁵³ *Id.*

⁵⁴ *Id.* at *7 (internal citations omitted).

advantage of this opportunity, stressing in its closing argument to the jury, “Morgan Stanley hid evidence, Morgan Stanley destroyed evidence, Morgan Stanley filed false certifications, Morgan Stanley lied to the court and Morgan Stanley sought in every way possible to cover up its wrongdoing.”⁵⁵ This strategy worked—the jury returned a verdict for \$850 million in punitive damages.⁵⁶ Thus, an adverse inference instruction may allow the jury to infer conduct or culpability that subjects the party that withheld evidence to punitive damages.

4.3 Reversibility

Finally, even if a non-producing party prevails before a jury, its victory may be reversed or vacated on appeal. In *Residential Funding Corp. v. DeGeorge Fin. Corp.*, the plaintiff received a jury verdict of \$96.4 million, despite having failed to review 95% of emails from its backup tapes in time for trial.⁵⁷ The trial court had not instructed the jury on any adverse inference, ruling that the plaintiff’s “purposeful sluggishness,” or negligence, in reviewing its emails did not call for a finding of spoliation and attendant sanctions (including an adverse inference instruction).⁵⁸ The appellate court held that the district court misapplied the law on spoliation. It vacated the massive judgment, remanded the case for rehearing on the issue of spoliation, and instructed the district court to convene a new trial if it found that under the proper legal standard the plaintiff had spoliated.⁵⁹ Thus, in litigation a non-producing party has to persuade multiple judicial actors before it can fully benefit from its non-production.

⁵⁵ Jill Barton, *Jury Orders Firm to Pay Perelman \$1.4 Billion: Morgan Stanley Cited for Fraud in Coleman Sale*, WASH. POST, May 19, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051802207.html> [<https://perma.cc/EE9B-CFJ7>].

⁵⁶ *Id.*

⁵⁷ 306 F.3d 99, 105–06 (2d Cir. 2002).

⁵⁸ *Id.*

⁵⁹ *Id.* at 112. The author has not been able to find records of the remanded proceedings, assuming any are available.

4.4 Observations on Litigation and Arbitration

At a glance, it seems that none of the three factors explored above that explain the potency of adverse inferences in litigation would pertain in arbitration.

First, and most obviously, the judicial factfinder is not the arbitral factfinder—an arbitral tribunal is not a jury. It is composed, often, of lawyers⁶⁰ who are trained in rules of evidence and thus can avoid making overbroad or prejudicial inferences. Moreover, parties are more familiar with their arbitrators than they are with jurors, having interacted with the former throughout a multi-year proceeding, the latter during only a weeks-long trial. Thus, arbitrators represent less of a frightening “black box” than jurors do.

Second, international arbitral tribunals rarely award punitive damages, for a number of reasons.⁶¹ The parties to the arbitration may agree—or condition their consent to arbitrate on an agreement that—the tribunal may not award punitive damages.⁶² Indeed, the United States has conditioned its consent to arbitrate disputes with foreign investors on the investors’ agreeing to such a prohibition on punitive damages.⁶³ Moreover, the procedural law governing the arbitral proceedings may be from a civil law country, where “punitive damages are generally not available.”⁶⁴ Even if the law governing the arbitration provides for punitive damages, tribunals

⁶⁰ See James E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW. J. INT’L L. & BUS. 24, 26 (1991-92) (citing a study that found that 83% of those appointed to international commercial arbitral tribunals in 1989 were lawyers).

⁶¹ See Markus A. Petsche, *Punitive Damages in International Commercial Arbitration: Much Ado about Nothing?*, 29 ARB. INT’L 89, 89 (2013) (stating that punitive damages awards are “quasi-inexistent” in international commercial arbitration).

⁶² For example, investment treaties provide the substantive law governing disputes between foreign investors and host states, and simultaneously provide the host state’s consent to arbitrate such disputes. Some of these treaties explicitly prohibit tribunals constituted under the treaty from awarding punitive damages. See, e.g., North American Free Trade Agreement, Can.-Mex.-U.S. art. 1135(3), Dec. 17, 1992, 32 I.L.M. 612, 107 Stat. 2057, 289 (1993) (“A Tribunal [constituted under this treaty] may not order a Party to pay punitive damages.”); see also Treaty Concerning the Encouragement and Reciprocal Protection of Investment art. 34(3), Rwanda-U.S., Feb. 19, 2008, S. TREATY DOC. NO. 110-23 (2010) (“A tribunal [constituted under this treaty] may not award punitive damages.”).

⁶³ See 2012 U.S. Model Bilateral Investment Treaty, U.S. DEP’T OF STATE, <http://www.state.gov/documents/organization/188371.pdf> [<https://perma.cc/4KZ4-U6KR>] (last visited Mar. 3, 2016) (providing in article 34(3) that “A Tribunal [constituted under this treaty] may not award punitive damages.”).

⁶⁴ Petsche, *supra* note 61, at 94.

may be reluctant to award them, because punitive damages may be against the public policy⁶⁵ of civil law countries,⁶⁶ and tribunals may not want to render an award of punitive damages that would be unenforceable in these countries. For these reasons, treaties suggest that “arbitral tribunal should treat claims for punitive damages and other penalties with considerable caution.”⁶⁷

Third, as to reversibility, national courts may set aside⁶⁸ or refuse to enforce⁶⁹ arbitral awards for a very limited set of reasons. None of these reasons permit a substantive review of the merits of the dispute.⁷⁰ Thus, it seems unlikely that a court would set-aside or refuse to enforce an award on the grounds that the tribunal failed to draw an adverse inference during the arbitral proceedings.

Therefore, it may be hypothesized that the “in terrorem” effect of adverse inferences in litigation does not carry over to arbitration. The next Part tests this hypothesis, through an exploration of investor–state and commercial arbitration cases in which the tribunal warned a party that it may, or one of the parties asked the tribunal to, draw an adverse inference.⁷¹

⁶⁵ See New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), 21 U.S.T. 2517, 330 U.N.T.S. 38 (“Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”).

⁶⁶ For example, one Swiss-seated tribunal refused a claim for punitive damages, because punitive damages were against Swiss public policy. See ICC Case No. 5946 of 1990, 16 Y.B. COMM. ARB. 97 (1991) (ICC Int’l Ct. Arb.).

⁶⁷ NIGEL BLACKABY, ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 9.50 (6th ed. 2015).

⁶⁸ See, e.g., UNCITRAL Model Law on International Commercial Arbitration, *supra* note 18, art. 34(2) (listing an exhaustive set of reasons for which a national court may set aside an arbitral award).

⁶⁹ See New York Convention, *supra* note 65, art. V (listing an exhaustive set of reasons for which a national court may refuse to enforce an arbitral award, which largely mirror those in the UNCITRAL Model Law).

⁷⁰ See GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE § 17.04[E] (2nd ed. 2015) (“It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators’ decisions contained in foreign awards in recognition [or set-aside] proceedings.”).

⁷¹ The number of cases that meet this criteria – that included a request for, or warning of, an adverse inference – is admittedly low. However, this is the appropriate criteria, because parties in arbitration are not likely to produce damaging documents voluntarily. See O’MALLEY, *supra* note 7.

5. ADVERSE INFERENCES IN INTERNATIONAL ARBITRATION

The cases explored below validate the hypothesis. The differences between arbitration and litigation did indeed remove the potency of the tribunals' adverse inference warning in the cases studied. These differences are: (A) the type of factfinder; (B) the absence of punishment; and (C) the finality of awards.

5.1 Factfinder: Arbitrators are not Jurors

The factfinders in international arbitration – arbitrators – do not do as much damage with adverse inferences as the factfinders in litigation – juries – do. Arbitrators make confined and narrow inferences. Moreover, they recognize that indirect evidence is insufficient to decide certain issues in international arbitration. Finally, the parties' familiarity with their arbitrators allows the parties to reasonably estimate the probability and severity of a potential adverse inference, and decide accordingly whether or not to produce damaging evidence.

5.1.1 Arbitrators' Confined and Narrow Inferences

Arbitral tribunals do not draw the broad and potentially prejudicial inferences that juries draw. Tribunals confine their inferences to the specific issue to which the withheld evidence likely pertained, rather than inferring about the non-producing party's whole case or culpable character. Furthermore, even within the specific issue, arbitrators make narrow, rather than dispositive, inferences. Therefore, parties have refused to produce evidence, in breach of explicit orders from tribunals, and still gone on to win the arbitration.

Two commercial arbitrations suggest that arbitrators confine their inferences to the issue at hand, rather than inferring more broadly about the non-producing party's character or entire case. The first dispute, *Agility Public Warehousing Co. K.S.C. v. Supreme Foodservice GMBH*, involved two military contractors.⁷² Pursuant

⁷² See Declaration of Robert L. Begleiter at 25, *Agility Pub. Warehousing Co. K.S.C. v. Supreme Food Service GmbH*, 840 F. Supp. 2d 703, 2008 WL 8683417 (S.D.N.Y. 2008) (No. 1:11-cv-07375-VM), Ex. 1B [hereinafter *Agility Partial Final Award*].

to a contract concluded by the contractors, the claimant assisted the respondent to bid on, obtain, and perform a contract to supply food to American troops in Afghanistan.⁷³ In return, the respondent would pay the claimant a percentage of all net revenues it received from its government contract for the duration of that contract.⁷⁴ The parties' dispute initially centered on the definition of the term "net revenues."⁷⁵ However, during the proceedings the claimant was indicted for major fraud because it was found to have submitted false invoices with artificially low prices in its (successful) bids for contracts to supply American troops in Iraq.⁷⁶ The respondent then amended its pleadings to add a claim for rescission, alleging that the claimant had fraudulently induced it to enter into their agreement by making promises that it intended to fulfill by illegal means.⁷⁷

The claimant informed the tribunal that given the indictment, four of its executives would exercise their Fifth Amendment rights and refuse to testify in the arbitral hearings,⁷⁸ despite three separate warnings by the tribunal that failure to produce these witnesses may lead to adverse inferences being drawn against claimant.⁷⁹ The respondent proposed adverse inferences on both issues in dispute. First, "by failing to appear with witnesses to rebut the allegations in the Indictment, PWC and PCA have effectively admitted the truth of those allegations"; second, since the absent witnesses were involved in the negotiation of the parties' agreement, their absence "leaves unrebutted, and effectively admitted, [respondent's] testimony with regard to what the parties' [sic] intended by the phrase 'Net Revenues'."⁸⁰

The tribunal made these inferences, but only these inferences. Regarding rescission, the tribunal noted that even if it did infer that the allegations in the indictment were true, the fact that the claimant secured its Iraq contract with the American government by illegal means does not allow for the conclusion that it secured its

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 14.

⁷⁶ Criminal Indictment at 10-11, *United States v. Public Warehousing Company K.S.C. a/k/a Agility*, 2011 WL 1126333 (No. 1:09-cr-490).

⁷⁷ *Agility Partial Final Award*, *supra* note 72, at 15 - 16.

⁷⁸ *Id.*, Ex. 10.

⁷⁹ *Id.*, Ex. 9 at 12.

⁸⁰ *Id.* at 20.

Afghanistan agreement with the respondent by illegal means.⁸¹ The fact would connect to the conclusion only through a second inference, one about the claimant's character—that the claimant was deceptive in securing all of its transactions. The tribunal refused to make this character inference; it even cited, but did not formally apply, American evidentiary rules prohibiting such an inference.⁸² Regarding "net revenues," the tribunal did infer that the absence of the claimant's negotiators added support to the respondent's testimony, but still found for the claimant based on the "wealth of additional evidence" the claimant had presented, including from the respondent's own files.⁸³ Therefore, the tribunal limited its two inferences to the issues at hand; it did not make further inferences regarding the claimant's character or its entire claim.

The sole arbitrator in a Swiss-seated arbitration similarly refused to make broad inferences regarding a person's character or credibility based on the person's conduct in an unrelated proceeding.⁸⁴ In that case, the claimant accused the respondent of forging an amendment to their contract for the delivery of goods. A third country began a criminal investigation into the alleged forgery, and one of the respondent's witnesses ignored subpoenas from that country's authorities.⁸⁵ However, the arbitrator refused to draw an adverse inference, because "this arbitration is separate from the criminal proceedings in the [investigating] country. ... Claimant asked that [the witness] appear before me, and he did that. Claimant had full opportunity to examine [him], and so did I."⁸⁶ This reasoning parallels that in *Agility*: there, the tribunal decided that a party's conduct in an unrelated (Iraq) transaction did not bear upon its liability regarding the (Afghanistan) transaction at hand; here, the sole arbitrator decided that the witness's behavior in an unrelated ("separate") legal proceeding did not bear upon the witness's credibility in the proceeding at hand, which was to be determined by the witness's testimony and response to cross-examination. In both cases, the arbitrators respected the separation between different issues.

⁸¹ *Id.* at 23 – 24, 33.

⁸² *Id.* at 23 – 24 (citing FED. R. EVID. 404(b)(1)).

⁸³ *Id.* at 44.

⁸⁴ *X. Firm v. Y. Ltd.*, ICC, Preliminary Award (Oct. 9, 2008), 29 ASA BULL. 860 (2011).

⁸⁵ *Id.* ¶ 85.

⁸⁶ *Id.* ¶ 106 (emphasis added).

Moreover, even within a specific issue, arbitrators draw narrow inferences. In *United Postal Services (UPS) v. Canada*, for example, the American investor claimed that Canada had breached its NAFTA national treatment obligations.⁸⁷ It alleged that Canada had allowed domestic courier services access to the infrastructure of the national postal monopoly on preferential terms not available to foreign postal services, and that Canada provided the monopoly itself with subsidies, autonomy, and benefits that it did not provide to foreign postal services.⁸⁸ UPS requested documents regarding these allegations, and Canada objected to production on grounds of cabinet privilege⁸⁹ found in its domestic law.⁹⁰ The tribunal rejected Canada's privilege claims,⁹¹ and explicitly warned Canada that failure to disclose these documents may lead to the tribunal "drawing an adverse inference on the issue in question."⁹² It reiterated its warning in a subsequent order.⁹³ Canada did not produce the withheld documents, and even arguably relied on them in its counter-memorial.⁹⁴ The investor therefore asked the tribunal

⁸⁷ See generally *United Parcel Servs. of Am., Inc. v. Gov't of Can., Investor's Memorial* (Mar. 23, 2005), <http://investorstatelawguide.com/-documents/documents/UN-0027-75%20-%20UPS%20v.%20Canada%20-%20Claim%20Memorial%20on%20Merits.pdf> [<https://perma.cc/RHM9-DP4V>].

⁸⁸ *Id.* at 46 - 121.

⁸⁹ See *United Parcel Servs. of Am., Inc. v. Gov't of Can., Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege* (Oct. 8, 2004), [http://opil.oup.com/view/10.1093/law:iic/267-2004.case.1/IIC267\(2004\)D.pdf](http://opil.oup.com/view/10.1093/law:iic/267-2004.case.1/IIC267(2004)D.pdf) [<https://perma.cc/VQW5-PPZT>] ("In Canada there is a prohibition that does not allow the disclosure of documents that are considered to be Cabinet confidences, namely documents that contain evidence of Ministers' discussions and deliberative process.").

⁹⁰ See Canada Evidence Act, R.S.C., 1985, c. C-5, § 39(1) (1985) (amended on Aug. 1, 2015) ("Where a minister of the Crown . . . objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.").

⁹¹ See *Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege*, *supra* note 89, ¶ 13.

⁹² *Id.* ¶ 15.

⁹³ *United Parcel Servs. of Am., Inc. v. Gov't of Can., Investor's Memorial* (Merits Phase) (Mar. 23, 2005) ¶ 400 & n.464, <http://www.naftaclaims.com/disputes/canada/ups/ups-71.pdf> [<https://perma.cc/3UYC-5DQ4>] (citing Procedural Direction of Dec. 17, 2004, ¶ 4).

⁹⁴ *United Parcel Serv. of Am., Inc. v. Gov't Can., Investor's Reply* (Aug. 15, 2005) ¶ 374, <http://naftaclaims.com/disputes/canada/ups/ups-74.pdf> [<https://perma.cc/KAD2-L656>] (noting that Canada's " witnesses and experts repeatedly refer[red] to and rel[ied] upon such documents without attaching them

to infer essentially the truth of its allegations.⁹⁵

The tribunal made the adverse inferences, but still found for Canada, because the withheld documents allowed it to infer only that Canada treated the foreign investor differently than it treated its domestic courier services and postal monopoly.⁹⁶ However, differential treatment was only one required element of the investor's claim: the investor also had to show that the foreign and domestic investors were "in like circumstances."⁹⁷ The tribunal concluded that neither the investor's direct evidence, nor the indirect evidence of the withheld documents, could satisfy this requirement.⁹⁸ The tribunal pointed to "inherent distinctions" between postal services and courier services,⁹⁹ as well as between private postal companies and a national monopoly that has public service obligations.¹⁰⁰ Therefore, while the tribunal, as promised, made an adverse inference on "the issue in question" of national treatment, its inference narrowly targeted only one part of this issue.

The tribunal was similarly precise in *Glamis Gold v. United States of America*.¹⁰¹ There, a Canadian mining company claimed that two acts by the State of California breached the United States' obligation under NAFTA to provide fair and equitable treatment to investors.¹⁰² Specifically, California adopted an emergency administrative regulation that required mining companies to backfill completely their open-pit mines, and a subsequent law that formalized these regulations.¹⁰³ The investor alleged that these measures

as exhibits to their affidavits or filing them elsewhere in the record").

⁹⁵ *Id.* ¶¶ 379 – 98.

⁹⁶ *United Parcel Servs. of Am., Inc. v. Gov't of Can.*, Award, Separate Statement of Dean Ronald A. Cass (June 11, 2007), ¶ 186, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-00.pdf> [https://perma.cc/9QQU-VFLG].

⁹⁷ North American Free Trade Agreement, *supra* note 62, art. 1102(1).

⁹⁸ *United Parcel Servs. of Am., Inc. v. Gov't of Can.*, Award (May 24, 2007), ¶ 98, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/ups-00.pdf> [https://perma.cc/9QQU-VFLG].

⁹⁹ *Id.*

¹⁰⁰ *Id.* ¶ 138.

¹⁰¹ *See Glamis Gold, Ltd. v. U.S.*, Award (an arbitration under chapter 11 of the North American Free Trade Agreement, June 8, 2009), <http://www.state.gov/documents/organization/125798.pdf> [https://perma.cc/G3TE-YR4T] [hereinafter *Glamis Award*] (targeting hypothetical adverse inference only to one part of the issue at stake).

¹⁰² *See* North American Free Trade Agreement, *supra* note 62, art. 1105.

¹⁰³ *Glamis Award*, *supra* note 101, ¶¶ 166 – 78.

constituted unfair and inequitable treatment because they were “closely related acts with the same goal of halting [claimant’s] investment” in a politically controversial open-pit mine near a Native American site.¹⁰⁴ At the end of voluminous document disclosure, the tribunal ordered the United States to produce six California legislative documents, which allegedly contained “communications between high-level executive branch agencies and the Governor’s office.”¹⁰⁵ When the United States produced redacted versions of these documents, the claimant requested an adverse inference that the documents showed that the regulation and law were closely coordinated measures aiming to render its mine economically infeasible.¹⁰⁶

Skeptical that a smoking gun would exist within the “limited redactions” to the documents, the tribunal declined to draw an adverse inference.¹⁰⁷ However, its implicit discussion of the adverse inference it *would* have drawn is instructive. The tribunal said that even if the documents could show—in other words even if the tribunal had inferred—that the regulation and law were meant to “work[] together,” they could not show that they were meant to work together *for the specific purpose of halting claimant’s project*;¹⁰⁸ the tribunal had earlier concluded that the regulation did not intend to target claimant’s mine, because it was of general application and had already been applied to another mine.¹⁰⁹ Thus, just like in *UPS*, the tribunal disaggregated the various parts of the issue to which the withheld evidence pertained (here, the collective intent of California’s two acts), and targeted its hypothetical adverse inference only to one part of the issue.

Thus, arbitrators’ adverse inferences in the above four cases exhibited none of the terrifying aspects of the adverse inferences that juries draw. Rather than concerning the withholding party’s character or entire case, the adverse inferences drawn by arbitrators concerned a specific issue. And rather than disposing of this specific issue, they narrowly targeted a sub-issue within it. Such adverse inferences can hardly be said to “end arbitration” the

¹⁰⁴ *Id.* ¶ 24.

¹⁰⁵ *Glamis Gold, Ltd. v. U.S.*, Procedural Order No. 13, ¶ 13, 23(a) <http://www.state.gov/documents/organization/110307.pdf> [<https://perma.cc/9P8Q-9DLD>].

¹⁰⁶ *Glamis Award*, *supra* note 101, ¶ 252.

¹⁰⁷ *Id.* ¶ 822.

¹⁰⁸ *Id.* ¶ 820.

¹⁰⁹ *Id.*

same way they “end[] litigation”¹¹⁰; indeed, far from being deterred from future non-production, all four non-producing parties in the above cases won.

5.1.2 *The Necessity of Direct Evidence*

A withholding party may also reasonably foresee that tribunals will be reluctant to decide jurisdictional issues against it based on indirect evidence. Arbitrators derive jurisdiction only from the consent of the parties to the dispute.¹¹¹ They may not want to assume jurisdiction without direct evidence of the parties’ consent, especially in investor-state arbitration where an erroneous assumption of arbitral jurisdiction violates a country’s sovereignty.¹¹² For example, in *OPIC Karimun Corp. v. Venezuela*, the Panamanian claimant argued that Article 22 of Venezuela’s foreign investment law contained Venezuela’s consent to ICSID arbitration.¹¹³ That article provided that disputes “to which [is] applicable the [ICSID Convention], shall be submitted to international arbitration according to the terms of the respective treaty or agreement, *if it so provides....*”¹¹⁴ The claimant produced as a witness Venezuela’s former Permanent Representative to the UN Office and WTO, who had helped draft the law; he testified that the law was intended to establish consent to ICSID arbitration “even when there is no BIT in place,” and the “if it so provides” language was included only for drafting efficiency to avoid reproducing the language from arbitration clauses in treaties.¹¹⁵

Venezuela did not present any evidence to contradict the witness’s statement, despite several requests from the tribunal that

¹¹⁰ *Laura Zubulake v. UBS Warburg*, 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

¹¹¹ BORN, *supra* note 70, at 5; *see also* Convention on the Settlement of Disputes Between States and Nationals of Other States art. 25(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment . . . which the parties to the dispute consent in writing to submit to the Centre.” (emphasis added)).

¹¹² *See AMCO v. Indon.*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983), 1 ICSID Rep. 377, 393 (1993) (noting that a state derogates from its sovereignty when it agrees to arbitrate disputes with foreign investors).

¹¹³ *See* ICSID Case No. ARB/10/14, Award (May 28, 2013), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4552_En&caselId=C1101 [<https://perma.cc/84CD-HDBP>]. There was no bilateral investment treaty in force between Venezuela and Panama.

¹¹⁴ *Id.* ¶ 66 (emphasis added).

¹¹⁵ *Id.* ¶ 115.

it provide documents from the law's legislative history.¹¹⁶ In fact, the tribunal during hearings extensively questioned Venezuela's witness on whether Venezuelan law allowed the government to compel production of documents from former government employees, and why the government had not followed up with the former drafters of the law who refused to testify or provide documents.¹¹⁷ The tribunal made the adverse inference that the withheld documents "do not assist the Respondent in support of its arguments these proceedings,"¹¹⁸ but concluded that

such inferences, however, fall well short of the *direct evidence* that would be needed to establish intent in the face of the ambiguities of the Investment Law . . . [I]nferences alone, *absent direct evidence*, are not sufficient to establish that Article 22 reflects an intention on the part of Venezuela to consent to ICSID jurisdiction, as required by Art. 25 [of the] ICSID Convention.¹¹⁹

Thus, Venezuela ultimately profited from its disobedience of the tribunal's orders. It successfully exploited two facts: first, while the factfinding authority of jurors need not be established, the factfinding authority of arbitrators does; and second, this authority may not be established by proof that carries "reduced evidential weight," such as indirect evidence in the form of adverse inferences.¹²⁰

5.1.3 Familiarity with the Tribunal

A party's decision to obey the tribunal's orders may also be influenced by its degree of familiarity with the tribunal. While litigants do not get to know juries and thus have little sense as to how juries will exercise their discretion in drawing adverse inferences, parties to arbitration interact with the tribunal throughout the often multi-year arbitration. As such, they may be able to foresee whether a tribunal is predisposed to draw any adverse inference against them, and how severe any inference

¹¹⁶ *Id.* ¶ 124.

¹¹⁷ *Id.* ¶¶ 139 - 42.

¹¹⁸ *Id.* ¶ 145.

¹¹⁹ *Id.* ¶ 146 (emphases added).

¹²⁰ See Van Houtte, *supra* note 9.

would be.

A party that has prevailed in most of the tribunal's previous interlocutory decisions may have less to fear than one to whom a newly constituted tribunal remains unknown. For example, in *Clayton v. Canada*, the parties engaged in enormous document production and exchanged several privilege logs in a six-year long arbitration.¹²¹ The tribunal found for Canada in most of its evidentiary rulings: it found Canada's privilege logs to be of sufficient detail, both for solicitor-client privilege¹²² and for political and institutional sensitivity;¹²³ and it found that Canada had not waived its privilege through the inadvertent disclosure of forty-five documents.¹²⁴ Near the end of document production, it ordered Canada to produce within thirty days any known relevant documents that were created after the arbitration began.¹²⁵ Canada did not produce the documents, and the claimant asked for an adverse inference.¹²⁶ The tribunal declined to draw one.¹²⁷ Given the tribunal's past favorable evidentiary decisions and the voluminous discovery Canada had already produced, it is plausible that Canada foresaw this outcome and therefore decided not to produce.

By contrast, in *Biwater Gauff (Tanzania Ltd.) v. Tanzania*, the tribunal ruled on Tanzania's claims of "public interest immunity" only three months after it was constituted.¹²⁸ It rejected Tanzania's claims on two grounds: first, Article 54(5) of the Tanzanian Constitution, on which Tanzania based its immunity claims, did

¹²¹ See *Clayton v. Gov't of Can.*, UNCITRAL, Award on Jurisdiction and Liability, ¶¶ 52 - 83 (Mar. 17, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-12.pdf> [<https://perma.cc/9TZR-9FZV>].

¹²² See *Clayton v. Gov't of Can.*, Procedural Order No. 12, ¶ 33 (May 2, 2012), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-po-12.pdf> [<https://perma.cc/26R8-FQ2C>].

¹²³ See *Clayton v. Gov't of Can.*, Procedural Order No. 13, ¶ 34 (July 11, 2012), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-po-13.pdf> [<https://perma.cc/L5TC-MCSQ>].

¹²⁴ See Procedural Order No. 12, *supra* note 122, at ¶¶ 48 - 49.

¹²⁵ See *Clayton v. Gov't of Can.*, Procedural Order No. 14, ¶ 13(c) (Sept. 19, 2012), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-po-14.pdf> [<https://perma.cc/U7JV-GWVK>].

¹²⁶ *Clayton v. Gov't of Can.*, Award, *supra* note 121, ¶ 88.

¹²⁷ *Id.* ¶ 118.

¹²⁸ ICSID Case No. ARB/05/22, Award, ¶¶ 27, 44 (July 24, 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0095.pdf> [<https://perma.cc/QN4G-ZAQC>] [hereinafter *Tanzania Award*].

not apply to the arbitral tribunal, because the constitutional provision forbade the disclosure of cabinet advice to any "court";¹²⁹ second, even if Tanzania's domestic law did apply, it would be subordinated to Tanzania's bilateral investment treaty obligation to arbitrate investment disputes in good faith.¹³⁰ Tanzania then did comply with the tribunal's order to produce the documents for which it had unsuccessfully claimed immunity.¹³¹ It is plausible that Tanzania's compliance was motivated by its unfamiliarity with the arbitrators and their approach to evidentiary rulings and sanctions.

Of course, parties gamble with tribunals, even familiar ones, at their own peril. In a New York-seated commercial arbitration, the tribunal drew a dispositive adverse inference against the respondent, even though the respondent had, in the tribunal's words, demonstrated "competence, professionalism, courtesy and good humor during the arbitration."¹³² The dispute arose out of the parties' manufacturing agreement, according to which the respondent would manufacture product *x* for the claimant using the latter's technology. The respondent agreed not to disclose the claimant's technology to third parties or to use it for any purpose besides the agreed-upon manufacturing. However, after some time the respondent obtained European and American patents for product *x'*, which was very similar to product *x*. Since product *x'* very likely contained the claimant's technology, the claimant commenced arbitration, alleging breaches of the confidentiality clause in the manufacturing agreement.

The key issue in the dispute was *when* the respondent had started using the claimant's technology to make *x'*, because after a certain date, the claimant's technology became part of the public domain and was no longer protected by the manufacturing

¹²⁹ Constitution of the United Republic of Tanzania, 1977, art. 54(5) <http://www.judiciary.go.tz/downloads/constitution.pdf> [<https://perma.cc/ZV2C-DD8T>] ("The question whether any advice, and if so, what advice was given by the Cabinet to the President, shall not be inquired into [by] any court." (emphasis added))

¹³⁰ See *Biwater Gauffe (Tanz.) Ltd. v. Tanz.*, Procedural Order No. 2, at 8 (May 23, 2006), <http://www.italaw.com/sites/default/files/case-documents/ita0088.pdf> [<https://perma.cc/LG3E-YYR4>]; see also Vienna Convention on the Law of Treaties art. 27, Jan. 27, 1980, 155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justifications for its failure to perform a treaty.").

¹³¹ *Tanzania Award*, *supra* note 128, ¶¶ 52 - 54.

¹³² *X firm (Belg.) v. Y firm (USA)*, ICC Case No. 8694, Award (1996), 124 J. DE DROIT INT'L 1056, 1059 (1997).

agreement. However, the respondent refused to produce its work records or patent applications for *x'*. The tribunal warned the respondent that this evidence was “of [paramount] importance to the crucial question of this arbitration,” and that intentional failure to produce it could lead to an adverse inference against the respondent.¹³³ Once the respondent persisted in its refusal, the tribunal had “no hesitation” in inferring that the respondent began its work on *x'* before the claimant’s manufacturing secrets became part of the public domain.¹³⁴ Thus, while parties may feel less deterred from defying orders of a tribunal with which they are familiar and collegial, they do so at their own risk.

5.2 The Absence of Punishment

Two investor-state cases suggest that neither a party’s egregious non-production, nor an adverse inference that it engaged in egregious conduct, will expose the party to punitive damages. In *Pope Talbot v. Canada*, Canada’s non-production itself may have been punishable.¹³⁵ The claimant lumber company alleged that Canada breached its national treatment obligations under NAFTA, by allocating a higher quota of lumber to domestic than to foreign producers.¹³⁶ The tribunal requested documents from Canada regarding how Canada calculated its lumber quotas.¹³⁷ It denied Canada’s conclusory allegations that the requested documents were subject to a “cabinet confidence” privilege found in Section 39(1) of the Canada Evidence Act.¹³⁸ The tribunal based its denial on the same two arguments made by the *Biwater Gauff* tribunal,¹³⁹ but added a third important one: allowing Canada to rely on a law that allowed it (but not the investor) to withhold documents on

¹³³ *Id.* at 1058.

¹³⁴ *Id.*

¹³⁵ *Pope Talbot Inc. v. Gov’t of Can.*, Award on the Merits of Phase 2, (Apr. 10, 2001), 7 ICSID Rep. 102 (2005).

¹³⁶ *Id.* ¶¶ 33–104.

¹³⁷ *Pope & Talbot Inc. v. Gov’t of Can.*, Interim Award, ¶¶ 41 – 44 (June 26, 2000), 7 ICSID Rep. 69 (2005).

¹³⁸ *Pope & Talbot Inc. v. Gov’t of Can.*, Decision by Tribunal, ¶ 1.3 (Sept. 6, 2000), 7 ICSID Rep. 99 (2005).

¹³⁹ Namely, that the domestic law prohibited disclosure of documents to any “court,” but not necessarily to an arbitral tribunal, and that in any event this domestic law was subordinated to Canada’s international obligations under NAFTA to cooperate in the arbitration. See *supra* note 130.

mere assertions that they contain state secrets would violate the requirement that parties in arbitration be treated with equality.¹⁴⁰ The tribunal thus ordered Canada either to produce the documents or to submit a detailed privilege log, and explicitly warned it of the possible adverse inference that would result if Canada did not comply with this order.¹⁴¹ Canada ultimately did neither.¹⁴²

In its merits award, the tribunal found Canada in breach of its NAFTA obligation to provide fair and equitable treatment. The tribunal did not find a breach of the obligation for national treatment, the issue to which the withheld documents pertained. Yet because it was able to find for the investor on the investor's other claim, it concluded that Canada's refusal to produce the documents "did not appear prejudicial to the Investor."¹⁴³ It deemed Canada's conclusory reliance on its domestic law privilege to be "a derogation from the 'overriding principle'...that all Parties should be treated with equality."¹⁴⁴ Since it did not have the authority under NAFTA to impose punitive damages on Canada,¹⁴⁵ all the tribunal could do was "deplore[]" Canada's refusal to produce the evidence.¹⁴⁶ This reprimand evidently did not carry lasting reputational sting, as Canada's lead counsel in the case went on to become Secretary-General of ICSID.¹⁴⁷

Meanwhile, in *Europe Cement v. Turkey* the tribunal made an adverse inference that the claimant had engaged in arguably punishable conduct, but it did not punish claimant for this conduct.¹⁴⁸ Seeking \$3.8 billion in damages, the claimant alleged that Turkey expropriated the claimant's investment in a local electricity supplier when Turkey terminated its concession

¹⁴⁰ Decision by Tribunal, *supra* note 138, ¶ 1.5.

¹⁴¹ *Id.* at ¶ 1.8.

¹⁴² *Pope & Talbot Inc. v. Gov't of Can.*, UNCITRAL, Decision by Tribunal (II), ¶ 1 (Sept. 27, 2000), <http://www.italaw.com/sites/default/files/case-documents/ita0677.pdf> [<https://perma.cc/Q5RA-W65V>].

¹⁴³ Award on the Merits of Phase 2, *supra* note 136, ¶ 193.

¹⁴⁴ *Id.*

¹⁴⁵ North American Free Trade Agreement, *supra* note 62, art. 1135(3).

¹⁴⁶ *Id.*

¹⁴⁷ See Damon Vis-Dunbar, *Meg Kinnear elected as Secretary-General of ICSID*, INV. TREATY NEWS (Mar. 3, 2009), <https://www.iisd.org/itn/2009/03/03/meg-kinnear-elected-as-secretary-general-of-icsid/> [<https://perma.cc/D5A5-SEHY>].

¹⁴⁸ See ICSID Case No. ARB(AF)/07/2, Award (Aug. 13, 2009), <http://www.italaw.com/sites/default/files/case-documents/ita0311.pdf> [<https://perma.cc/ZZY9-JP5U>].

agreement with the supplier.¹⁴⁹ However, Turkey denied that the claimant had ever owned shares in the supplier, challenging the authenticity of the copies of share certificates that the claimant produced.¹⁵⁰ The tribunal ordered the claimant to produce original certificates for forensic analysis,¹⁵¹ and warned that if the claimant failed to comply with the order, Turkey could advise the tribunal on adverse inferences.¹⁵² The claimant stated that it could not produce the shares due to its predecessor's mismanagement of records, and asked the tribunal to dismiss its claim for lack of jurisdiction without prejudice.¹⁵³

Turkey also wanted the tribunal to dismiss the claim for lack of jurisdiction.¹⁵⁴ However, it first wanted the tribunal to draw an adverse inference that the claimant could not produce the share certificates not because it could not find them, but because it never owned shares at all; in other words, Turkey asked the tribunal to infer that the claimant's claim was fraudulent.¹⁵⁵ It also sought compensation for the "moral damage" caused by the claimant's abuse of process.¹⁵⁶ The tribunal did infer that the claim was fraudulent,¹⁵⁷ but did not order the claimant to pay any damages, compensatory or punitive.¹⁵⁸ Thus, while Morgan Stanley paid dearly for its fraudulent conduct in litigation,¹⁵⁹ Europe Cement did not similarly pay for its fraudulent conduct in arbitration.

5.3 Finality of Arbitration Awards

Finally, while in litigation a party must persuade both a trial and appellate court that its decision not to produce evidence was proper, in arbitration a party speaks only to an audience of one tribunal. Award debtors have been unsuccessful in persuading

¹⁴⁹ *Id.* ¶ 26.

¹⁵⁰ *Id.* ¶ 15.

¹⁵¹ *Id.* ¶ 32 (citing Procedural Order No. 3 of May 29, 2008).

¹⁵² *Id.* ¶ 53 (citing Procedural Order No. 7 of Nov. 14, 2008).

¹⁵³ *Id.* ¶ 57.

¹⁵⁴ *Id.* ¶¶ 92 – 93.

¹⁵⁵ *Id.* ¶ 103.

¹⁵⁶ *Id.* ¶ 177.

¹⁵⁷ *Id.* ¶ 167.

¹⁵⁸ *Id.* ¶ 181.

¹⁵⁹ *Supra* notes 51 – 54 and accompanying text.

courts to review a tribunal's failure to draw an adverse inference.¹⁶⁰ Even American courts, which were allowed under the "manifest disregard of the law" doctrine review a tribunal's legal conclusions,¹⁶¹ have deemed tribunals' decisions not to draw adverse inferences as unreviewable "factual conclusions."¹⁶² Therefore, a non-producing party is more likely to profit from its non-production in arbitration than it would be in litigation.

6. CONCLUSION

The three factors that help adverse inferences deter parties from withholding evidence in litigation do not exist to the same extent in arbitration. First, while a non-producing party in litigation runs the risk that a jury will infer the worst on a given issue or make inferences regarding the party's whole case or character, a non-producing party in arbitration does not run this risk. Arbitrators draw confined and narrow inferences, and are reluctant to decide certain jurisdictional issues based only on the indirect evidence of an adverse inference; moreover, parties can better predict whether their arbitrators will draw an adverse inference than whether their juries will, having interacted with the former over the course of an entire proceeding and the latter only during a trial at the end of litigation. Second, while an adverse inference could lead to punitive damages in litigation, it likely will not in arbitration. Third, a party's non-production may threaten the survival of its favorable court judgment, but not of its favorable arbitral award. These three differences have allowed parties to escape punishment and even liability in arbitration, despite having refused to aid the arbitral factfinding process.

Two compelling avenues for future study would further test the conclusions of this Comment empirically. The first avenue would collect all publicly available court cases in which a party

¹⁶⁰ See, e.g., *Dongwoo Mann + Hummel Co Ltd v. Mann + Hummel GmbH* [2008] 3 SLR(R) 871; [2008] SGHC 67 (Sing.) (2008) ("Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the tribunal to draw the adverse inference.").

¹⁶¹ See Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (2012) (allowing courts to vacate an arbitration award if the arbitrators "so imperfectly executed [their powers]"); see also *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) (interpreting the Federal Arbitration Act as allowing courts to vacate an arbitration award if the arbitrators "manifestly disregarded the law").

¹⁶² *Page Int'l Ltd. v. Adam Mar. Corp.*, 53 F.Supp.2d. 591, 596, 598 (1999).

was warned that a potential adverse inference would be drawn against it, and determine in what percentage of those cases the warned party then produced the requested evidence; similar data would be collected for arbitrations;¹⁶³ the two figures would then be compared to see if there was a statistically significant difference between them. The second avenue would collect first-hand testimony from arbitration practitioners. It would ask practitioners to share situations in which the threat of an adverse inference caused them to alter their production decisions. Strengthening the impact of adverse inferences is crucial to ensuring that arbitrators successfully deter parties from withholding evidence, and can therefore produce the most informed awards possible.

¹⁶³ Such a study would be subject to the limitation of the Priest-Klein effect: that is, such a study would not be representative of all litigations or arbitrations, because those judicial decisions or arbitral awards that are publicly available may differ systematically from those that are not (namely, those that are not known or that were settled). The Priest-Klein effect is particularly pronounced in empirical studies about international commercial arbitration, because international commercial arbitration awards typically are not publicly available. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).